Criminal Law

TENTH EDITION

JOEL SAMAHA

CRIMINAL LAW

Tenth Edition

Joel Samaha

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University of Minnesota

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***Criminal Law*, Tenth Edition**
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Cover Designer: Riezebos Holzbaur Design Group
Cover Image: © Scott Barrow, Inc./ SuperStock
Compositor: Integra

Library of Congress Control Number: 2009939519

ISBN-13: 978-0-495-81235-7

ISBN-10: 0-495-81235-8

Wadsworth
20 Davis Drive
Belmont, CA 94002
USA

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Printed in the United States of America
1 2 3 4 5 6 7 13 12 11 10 09

For my Students

About the Author

Professor Joel Samaha teaches Criminal Law, Criminal Procedure, Introduction to Criminal Justice, and The Constitution in Crisis Times at the University of Minnesota. He is both a lawyer and an historian whose primary interest is crime control in a constitutional democracy. He received his B.A., J.D., and Ph.D. from Northwestern University. Professor Samaha also studied under the late Sir Geoffrey Elton at Cambridge University, England. He was named the College of Liberal Arts Distinguished Teacher in 1974. In 2007 he was awarded the title of University of Minnesota Morse Alumni Distinguished Teaching Professor and inducted into the Academy of Distinguished Teachers.

Professor Samaha was admitted to the Illinois Bar in 1962 and practiced law briefly in Chicago. He taught at UCLA before going to the University of Minnesota in 1971. At the University of Minnesota, he served as Chair of the Department of Criminal Justice Studies from 1974 to 1978. He now teaches and writes full time. He has taught both television and radio courses in criminal justice and has co-taught a National Endowment for the Humanities seminar in legal and constitutional history. He was named Distinguished Teacher at the University of Minnesota in 1974.

In addition to *Law and Order in Historical Perspective* (1974), an analysis of law enforcement in pre-industrial English society, Professor Samaha has transcribed and written a scholarly introduction to a set of local criminal justice records from the reign of Elizabeth I. He has also written several articles on the history of criminal justice, published in the *Historical Journal, The American Journal of Legal History, Minnesota Law Review, William Mitchell Law Review,* and *Journal of Social History*. In addition to *Criminal Law*, he has written two other textbooks, *Criminal Procedure* in its seventh edition, and *Criminal Justice* in its seventh edition.

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Preface

Criminal Law was my favorite class as a first-year law student at Northwestern University Law School in 1958. I've loved it ever since, a love that has only grown from teaching it at least once a year at the University of Minnesota since 1971. I hope my love of the subject comes through in *Criminal Law*, which I've just finished for the tenth time. It's a great source of satisfaction that my modest innovation to the study of criminal law—the text-casebook—has endured and flourished. *Criminal Law*, the text-casebook, brings together the description, analysis, and critique of general principles with excerpts of cases edited for nonlawyers.

Like its predecessors, *Criminal Law*, Tenth Edition, stresses both the general principles that apply to all of criminal law and the specific elements of particular crimes that prosecutors have to prove beyond a reasonable doubt. Learning the principles of criminal law isn't just a good mental exercise, although it does stimulate students to use their minds. Understanding the general principles is an indispensable prerequisite for understanding the elements of specific crimes. The general principles have lasted for centuries. The definitions of the elements of specific crimes, on the other hand, differ from state to state and over time because they have to meet the varied and changing needs of new times and different places.

That the principles have stood the test of time testifies to their strength as a framework for explaining the elements of crimes defined in the fifty states and in the U.S. criminal codes. But there's more to their importance than durability; knowledge of the principles is also practical. The general principles are the bases both of the elements that prosecutors have to prove beyond a reasonable doubt to convict defendants and of the defenses that justify or excuse the guilt of defendants.

So, *Criminal Law*, Tenth Edition, rests on a solid foundation. But it can't stand still, any more than the subject of criminal law can remain frozen in time. The more I teach and write about criminal law, the more I learn and rethink what I've already learned; the more "good" cases I find that I didn't know were there; and the more I'm able to include cases that weren't decided and reported when the previous edition went to press.

Of course, it's my obligation to incorporate into the Tenth Edition these now-decided and reported cases, and this new learning, rethinking, and discovery. But obligation doesn't describe the pleasure that preparing now ten editions of *Criminal Law* brings me. Finding cases that illustrate a principle in terms students can understand while at the same time stimulating them to think critically about subjects worth thinking about is the most exciting part of teaching and writing and why I take such care in revising this book, edition after edition.

Organization/Approach

The chapters in the text organize the criminal law into a traditional scheme that is widely accepted and can embrace, with minor adjustments, the criminal law of any state and/or the federal government. The logic of the arrangement is first to cover the general part of the criminal law, namely principles and doctrines common to all or most crimes, and then the special part of criminal law, namely the application of the general principles to the elements of specific crimes.

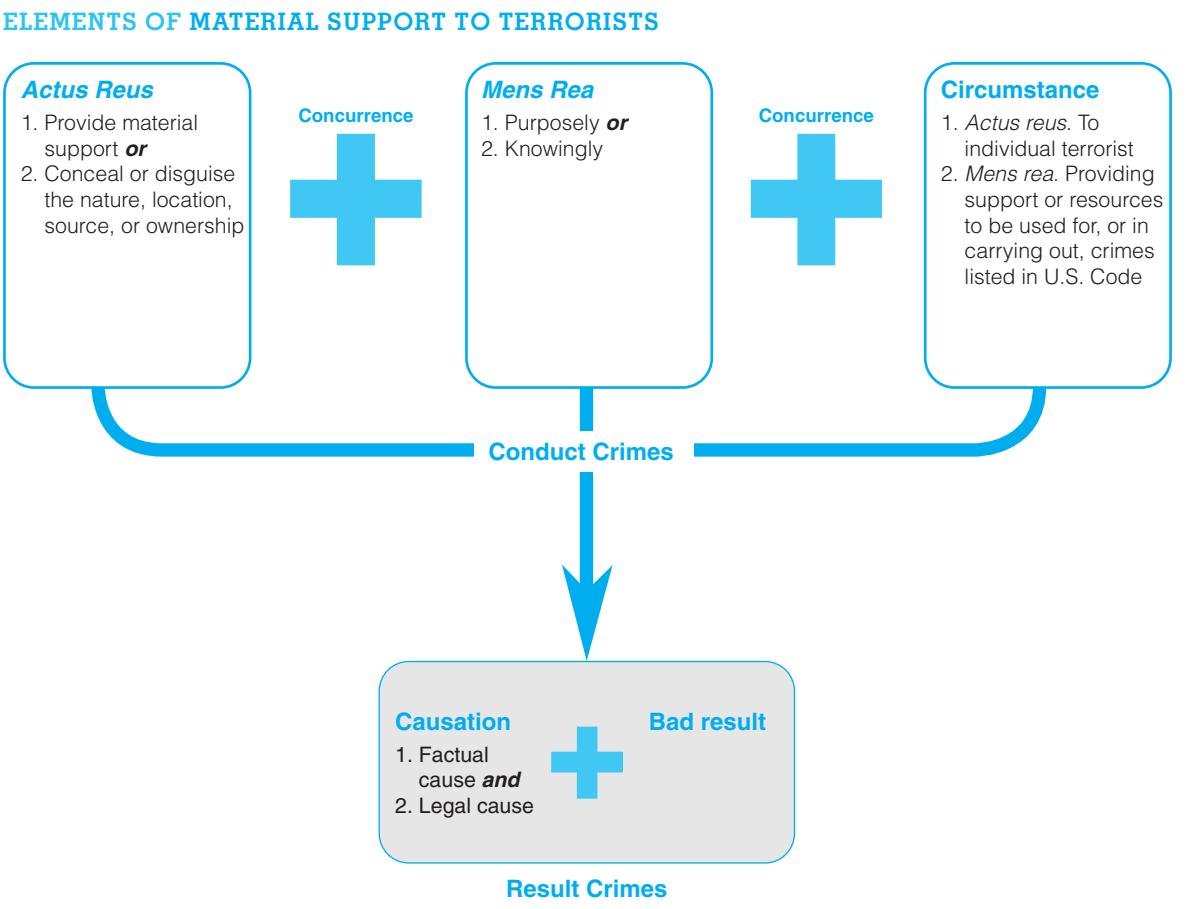
Chapters 1–8 cover the general part of criminal law: the nature, origins, structure, sources, and purposes of criminal law and criminal punishment; the constitutional limits on the criminal law; the general principles of criminal liability; the defenses of justification and excuse; parties to crime and vicarious liability; and incomplete crimes (attempt, conspiracy, and solicitation).

Chapters 9–13 cover the special part of the criminal law: the major crimes against persons; crimes against homes and property; crimes against public order and morals; and crimes against the state.

Criminal Law has always followed the three-step analysis of criminal liability (criminal conduct, justification, and excuse). *Criminal Law* brings this analysis into sharp focus in two ways. First, the chapter sequence: Chapters 3 and 4 cover the general principles of criminal conduct (criminal act, criminal intent, concurrence, and causation). Chapter 5 covers the defenses of justification, the second step in the analysis of criminal liability. Chapter 6 covers the defenses of excuse, the third step. So, the chapter sequence mirrors precisely the three-step analysis of criminal liability.

Criminal Law also sharpens the focus on the three-step analysis through the Elements of Crime art. The design is consistent throughout the chapters involving the special part of criminal law.

All three of these steps are included in each "Elements of Crime" graphic, but elements that are not required in certain crimes—like crimes that don't require a "bad" result—are grayed out. The new figures go right to the core of the three-step analysis of criminal liability, making it easier for students to master the essence of criminal law: applying general principles to specific individual crimes.



Changes to the Tenth Edition

In addition to incorporating the latest cases, research, and examples into every chapter of the text, this edition also features a major overhaul of white-collar and corporate crime in Chapter 7 and expanded coverage of punishment/sentencing in Chapter 2. The Tenth Edition is also the first to include chapter-opening learning objectives to provide students with a much-needed map to the chapter's key concepts, cases, and terms. To help ensure student mastery of these key concepts, I not only call out each learning objective in the chapter's margins as it is addressed, but also re-visit the objectives again in the new, bulleted end-of-chapter summary.

Next, I have added a new boxed feature to every chapter to spotlight ethical challenges faced by citizens and professionals. These unique "Ethical Dilemma" boxes touch on everything from computer games that target illegal immigrants, to whether doctor-assisted suicides should be treated as criminal homicides, to what to do with those who tried by false pretenses to collect scarce 9/11 victims' funds. The box topics are powerful and controversial and will, I hope, stimulate critical thinking and classroom discussion.

Finally, I have made the following key changes to each chapter of the text:

Chapter 1, Criminal Law and Criminal Punishment: An Overview

- **ALL NEW.** "Presumption of Innocence and Proving Criminal Liability" describes the rules and principles of the U.S. criminal procedure.

- "Burden of Proof of Criminal Conduct"
- "Proving the Defenses of Justification and Excuse"

- **ALL NEW.** "Discretionary Decision Making" focuses on the informal, often invisible dimensions of criminal law administration.

Chapter 2, Constitutional Limits on Criminal Law

- **ALL NEW.** "The 'Right to Bear Arms'" concentrates on history and recent developments in second amendment law.
- **ALL NEW.** "The Constitution and Criminal Sentencing" describes and analyzes the major types of sentencing.
- **ALL NEW.** "The Right to Trial by Jury" covers the major constitutional issues surrounding sentencing, particularly the Supreme Court rulings on federal and state sentencing guidelines and the Sixth Amendment.
- **New case excerpts:**
  - *Gall v. U.S.* (2007) The 5-member majority upheld the trial judge's sentence of Brian Michael Gall to 36 months' probation instead of a mandatory prison term. The charge was conspiracy to sell ecstasy to his fellow students at the University of Iowa.
  - *Kennedy v. Louisiana* (2008) Patrick Kennedy was convicted of the aggravated rape of his eight-year-old stepdaughter under a Louisiana statute that authorized capital punishment for the rape of a child under 12 years of age and was sentenced to death. The U.S. Supreme Court ruled that the death penalty for child rape was disproportionate and cruel and unusual punishment.

Chapter 3, The General Principles of Criminal Liability: *Actus Reus*

- **New case excerpt:**
  - *Porter v. State* (2003) Constructive possession of a loaded Ruger .357 revolver

Chapter 4, The General Principles of Criminal Liability: *Mens Rea*, Concurrence, Causation, and Ignorance and Mistake

- **New case excerpts:**
  - *Harris v. State* (1999) Carjacking is a general intent crime.
  - *State v. Sexton* (1999) Reasonable mistaken belief that gun fired at a friend was not loaded

Chapter 5, Defenses to Criminal Liability: Justifications

- **NEW SECTION.** "Domestic Violence" and the retreat rule in self-defense
- **NEW SECTION.** "The 'New Castle Laws': 'Right to Defend' or 'License to Kill'?"
- **New cases:**
  - *State v. Thomas* (1997) A "battered woman" has already retreated to the wall.
  - *Jacqueline Galas* (2006) Castle doctrine in Florida

- *Sarbrinder Pannu* (2008) Castle doctrine in Mississippi
- *State v. Harold Fish* (2009) Castle doctrine in Arizona
- *People v. John Gray et al.* (1991) Choice of evils defense. Blocking traffic is a lesser evil than polluting NYC air.

Chapter 6, Defenses to Criminal Liability: Excuse

- **New case excerpt:**
  - *U.S .v. Hinckley* (2007) Furlough John Hinckley found "not guilty by reason of insanity" for attempting to assassinate President Reagan.

Chapter 7, Parties to Crime and Vicarious Liability

- **NEW SECTIONS.** "Vicarious Liability" has been expanded.
  - The "Corporate Liability" section and its subsections are new. An accounting firm is liable for dealings with Enron.
- **New case excerpt:**
  - *U.S. v. Arthur Andersen, LLP* (2004) Corporate liability and enterprise vicarious liability

Chapter 8, Inchoate Crimes: Attempt, Conspiracy, and Solicitation

- All sections and cases have been edited for improved clarity, readability, and streamlining.

Chapter 9, Crimes Against Persons I: Murder and Manslaughter

- **NEW SECTION.** Doctor-Assisted Suicide
  - The chapter has been renamed, clarified, and streamlined.
  - "Unlawful Act Manslaughter" is now "Criminal Negligence/Vehicular/Firearms/Manslaughter."
- **New case excerpt:**
  - *People v. Hudson* (2006) Felony murder; gang murder

Chapter 10, Crimes Against Persons II: Criminal Sexual Conduct, Bodily Injury, and Personal Restraint

- **NEW SECTION.** "Domestic Violence Crimes" expands "bodily injury crimes" to include nonsexual assaults and batteries.
- **New case excerpt:**
  - *Hamilton v. Cameron* (1997) Domestic violence

Chapter 11, Crimes Against Property

- **EXPANDED SECTION AND MAJOR NEW SUBSECTIONS.**
  - "Theft by False Pretenses"

- "Federal Mail Fraud" (*Madoff* and *Coughlin*)
- "Federal Mail Fraud—Criminal and Civil Liability"

- **New case excerpts:**
  - *U.S. v. Madoff* (2009) Use of mail to operate Madoff's Ponzi scheme
  - *U.S. v. Coughlin* (2008)

Chapter 12, Crimes Against Public Order and Morals

- **NEW SECTION.** "Gang Activity"
- **NEW SUBSECTIONS.** "Criminal Law Responses to Gang Activity"
  - "Civil Law Responses"
  - "Review of Empirical Research on Gangs and Gang Activity"

- **New case excerpt:**
  - *City of Saint Paul v. East Side Boys and Selby Siders* (2009) Civil gang injunctions

Chapter 13, Crimes Against the State

- **New case excerpt:**
  - *Humanitarian Law Project v. Mukasey* (2009) Providing "material support or resources" to terrorists or terrorist organizations

Supplements

Wadsworth provides a number of supplements to help instructors use *Criminal Law*, Tenth Edition, in their courses and to aid students in preparing for exams. Supplements are available to qualified adopters. Please consult your local sales representative for details.

For the Instructor

- *Instructor's Edition* Designed just for instructors, the Instructor's Edition includes a visual walkthrough that illustrates the key pedagogical features of this text, as well as the media and supplements that accompany it. Use this handy tool to learn quickly about the many options this text provides to keep your class engaging and informative.
- *Instructor's Resource Manual with Test Bank* The manual includes learning objectives, a detailed chapter outline, a chapter summary, key terms, featured cases, suggested readings, media suggestions, and a test bank. Each chapter's test bank contains questions in multiple-choice, true false, fill-in-the-blank, and essay formats, with a full answer key. The test bank is coded to the learning objectives that appear in the main text and includes the page numbers in the main text where the answers can be found. Finally, each question in the test bank has been carefully reviewed by experienced criminal justice instructors for quality, accuracy, and content coverage. Our Instructor Approved seal, which appears on the front cover, is our assurance that you are working with an assessment and grading resource of the highest caliber.

- *ExamView® Computerized Testing* The comprehensive Instructor's Resource Manual described earlier is backed up by ExamView, a computerized test bank available for PC and Macintosh computers. With ExamView you can create, deliver, and customize tests and study guides (both print and online) in minutes. You can easily edit and import your own questions and graphics, change test layouts, and reorganize questions. And using ExamView's complete word-processing capabilities, you can enter an unlimited number of new questions or edit existing questions.
- *Lesson Plans* The instructor-created Lesson Plans bring accessible, masterful suggestions to every lesson. Lesson Plans includes a sample syllabus, learning objectives, lecture notes, discussion topics, in-class activities, a detailed lecture outline, and assignments. Lesson Plans are available on the instructor website or by e-mailing your local representative and asking for a download of the eBank files.
- *PowerPoints* These handy Microsoft PowerPoint slides, which outline the chapters of the main text in a classroom-ready presentation, will help you in making your lectures engaging and in reaching your visually oriented students. The presentations are available for download on the password-protected website and can also be obtained by e-mailing your local Cengage Learning representative.
- *Criminal Justice Media Library* This engaging resource provides students with more than 300 ways to investigate current topics, career choices, and critical concepts.
- *WebTutor™* Jumpstart your course with customizable, rich, text-specific content within your Course Management System. Whether you want to Web-enable your class or put an entire course online, WebTutor™ delivers. WebTutor™ offers a wide array of resources including media assets, a test bank, practice quizzes, and additional study aids. Visit webtutor.cengage.com to learn more.

For the Student

- *Study Guide* An extensive student guide has been developed for this edition. Because students learn in different ways, the guide includes a variety of pedagogical aids to help them. Each chapter is outlined and summarized, major terms and figures are defined, and self-tests are provided.
- *Companion Website* The book-specific website at www.cengage.com/criminaljustice/samaha offers students a variety of study tools and useful resources such as quizzes, Internet exercises, a glossary, flashcards, and more.
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- *Careers in Criminal Justice Website* Featuring plenty of self-exploration and profiling activities, the interactive Careers in Criminal Justice Website helps students investigate and focus on the criminal justice career choices that are right for them. Includes interest assessment, video testimonials from career professionals, resume and interview tips, and links for reference.

Acknowledgments

Criminal Law, Tenth Edition (like the other nine), didn't get here by my efforts alone; I had a lot of help. I am grateful for all those who have provided feedback over the years and as always, I'm particularly indebted to the reviewers for this edition (see p. xix). Many thanks also to Criminal Justice Editor Carolyn Henderson Meier who has helped me at every stage of the book. And thanks, as well, to my former Criminal Law student, and now my friend, Erik Pohlman, who provided major assistance on the Chapter Learning Objectives and Chapter Summaries. My instructions to him were: "Let your guide be what would help you if you were a student using the book." I believe current students will benefit from his efforts.

What would I do without Doug and Steve? Doug takes me there and gets me here and everywhere, day in and day out, days that now have stretched into years. And my old and dearest friend Steve, who from the days when he watched over my kids in the 1970s, to now decades later when he keeps the Irish Wolfhounds, the Siamese cat, the Standard Poodle, me, and a lot more around here in order. And they do it all while putting up with what my beloved mentor at Cambridge, the late Sir Geoffrey Elton, called "Joel's mercurial temperament." Only those who really know me can understand how I can try the patience of Job! Friends and associates like these have given *Criminal Law*, Tenth Edition, whatever success it enjoys. As for its faults, I own them all.

Joel Samaha
Minneapolis

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CRIMINAL LAW

1

LEARNING OBJECTIVES

1 To define and understand what behavior deserves criminal punishment.

2 To understand and appreciate the relationship between the general and special parts of criminal law.

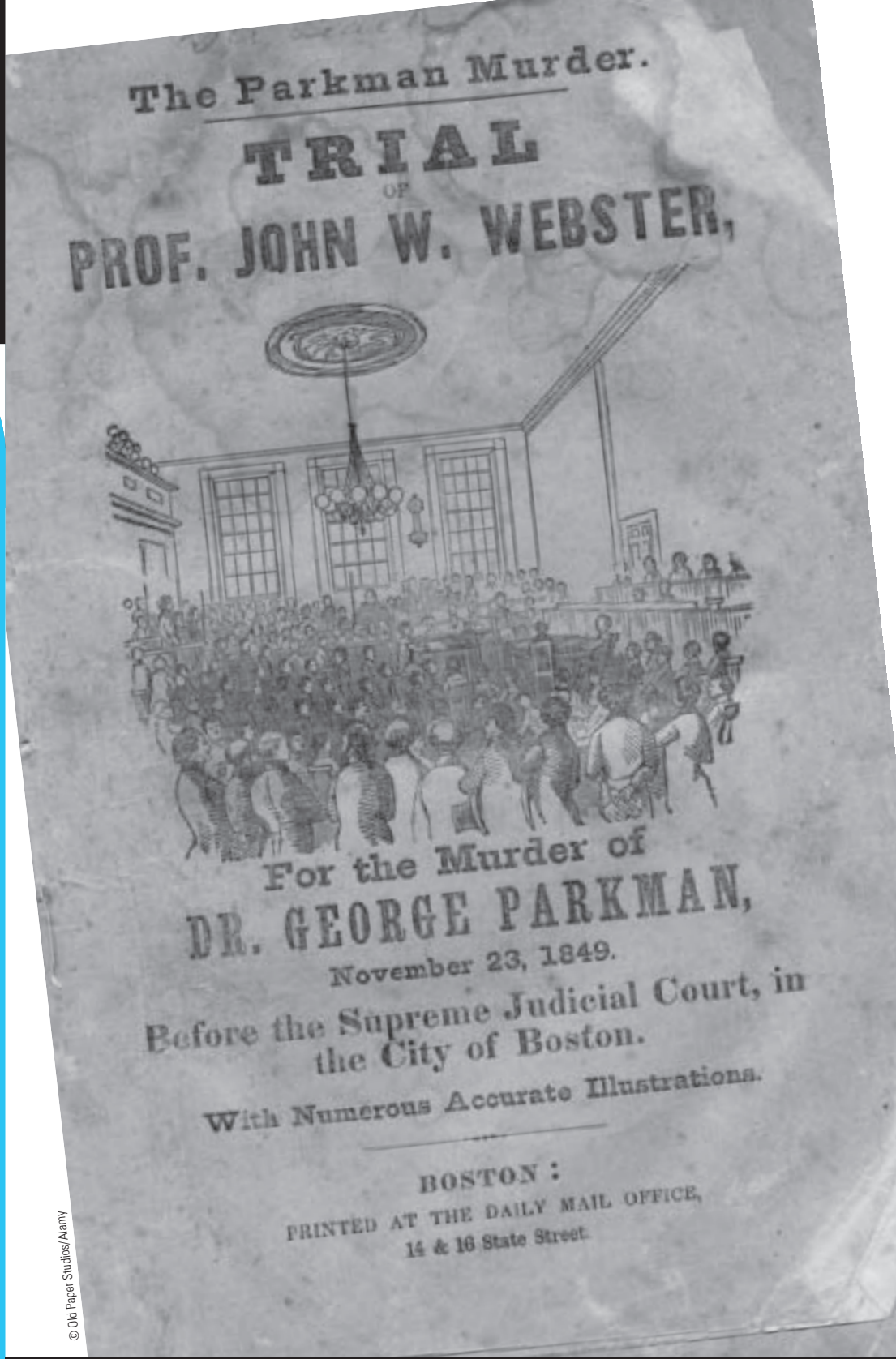
3 To identify, describe, and understand the main sources of criminal law.

4 To define criminal punishment, to know the difference between criminal and noncriminal sanctions, and to understand the purposes of each.

5 To define and appreciate the significance of the presumption of innocence and burden of proof as they relate to criminal liability.

6 To understand the role of informal discretion and appreciate its relationship to formal criminal law.

7 To understand the text-case method and how to apply it to the study of criminal law.



November 23, 1849, judicial proceedings of the trial of Professor John W. Webster, who was accused and found guilty of the murder of Dr. George Parkman in a building at the Harvard Medical School. This was an early celebrity trial of the high society that captured the imaginations of the city of Boston.

Criminal Law and Criminal Punishment

An Overview

CHAPTER OUTLINE

Jail Time for an Overdue Library Book?

A Burlington, Washington, man has been ordered to pay a library $150 and do community service after he was arrested for overdue library books. The arrest was for failure to appear before a judge to answer charges of "Detaining Property." The property was library books the man had checked out eight months earlier.

Jeremy Jones called Burlington police to his apartment recently to report an incidence of mail theft. Police ran a background check and told Jones and his girlfriend there was a warrant for Jones' arrest. They explained about the library books. Jones insists he tried to give his overdue library books to police. "They wouldn't even take them. That kind of irked me," he said. "I told them they are right on the table, take them. They said 'No, we have a warrant, we have to arrest you.'"

"They handcuffed him," said Jones' friend, Misty Colburn. "He didn't put up a fight or anything, but they handcuffed him and went away." Arrested for, among other things, having the book *Mysteries of the Unexplained: How Ordinary Men and Women Have Experienced the Strange, the Uncanny, and the Incredible*, Jones was released after spending an hour at the county jail.

At the Burlington Library, they insist this isn't strange. They tried over and over again to get their books back—letters and seven phone calls, they said. "After months of dealing with this, we sent a letter from the police chief giving them one last chance," said Librarian

Christine Perkins, "and warning if they do not respond they will be invited to talk to a judge about it." Perkins says Jones didn't show up for a court hearing and a warrant was issued. She said the library didn't send out the police; they just did a normal check for outstanding warrants.

"I'm sorry; they are books for crying out loud. If it was a computer part or a CD or something, I could understand," Colburn said. "You know, they are books; they are replaceable. I could see them revoking my library privileges, but having me arrested is a little bit extreme," Jones added.

The library insists no one wanted to arrest anyone, but the librarian suspects the arrest could have an upside. "Well, I'm interested to see if we get a lot of books turned in in the next week or so."

(Johnson 2005, March 3)

"Every known organized society has, and probably must have, some system by which it punishes those who violate its most important prohibitions" (Robinson 2008, 1). This book explores, and invites you to think critically about, the answers to the two questions implied in Professor Robinson's quote:

1. What behavior deserves criminal punishment?
2. What's the appropriate punishment for criminal behavior?

Criminal law, and most of what you'll read about it in this book, boils down to varying answers to these questions. To introduce you to the possible answers, read the following brief summaries from real cases that we'll examine deeper in the remaining chapters. After you read each summary, assign each case to one of the five following categories. Don't worry about whether you know enough about criminal law to decide which category they belong in. In fact, try to ignore what you already know; just choose the category you believe the summary belongs in.

1. *Crime* If you put the case into this category, then grade it as very serious, serious, or minor. The idea here is to stamp it with both the amount of disgrace (stigma) you believe a convicted "criminal" should suffer and roughly the kind and amount of punishment you believe the person deserves.
2. *Noncriminal wrong* This is a legal wrong that justifies suing someone and getting money, usually for some personal injury. In other words, name a price that the wrongdoer has to pay to another individual, but don't stamp it "criminal" (Coffee 1992, 1876–77).
3. *Regulation* Use government action—for example, a heavy cigarette tax to discourage smoking—to discourage the behavior (Harcourt 2005, 11–12). In other words, make the price high, but don't stamp it with the stigma of "crime."
4. *License* Charge a price for it—for example, a driver's license fee for the privilege to drive—but don't try to encourage or discourage it. Make the price affordable, and attach no stigma to it.
5. *Lawful* Let individual conscience and/or social disapproval condemn it, but create no *legal* consequences.

Here are the cases.

1. A young man beat a stranger on the street with a baseball bat for "kicks." The victim died.
2. A husband begged his wife, who had cheated on him for months, not to leave him. She replied, "No, I'm going to court, and you're going to have to give me all the furniture. You're going to have to get the hell out of here; you won't have nothing." Then, pointing to her crotch, she added, "You'll never touch this again, because I've got something bigger and better for it." Breaking into tears, he begged some more, "Why don't you try to save the marriage? I have nothing more to live for." "Never," she replied. "I'm never coming back to you." He "cracked," ran into the next room, got a gun, and shot her to death.
3. Two robbers met a drunk man in a bar displaying a wad of money. When the man asked them for a ride, they agreed, drove him out into the country, robbed him, forced him out of the car without his glasses, and drove off. A college student, driving at a reasonable speed, didn't see the man standing in the middle of the road waving him down, couldn't stop, and struck and killed him.
4. A young woman on a three-day "crack" cocaine binge propped up a bottle so her three-month-old baby could feed himself. The baby died of dehydration.
5. During the Korean War, a mother dreamed an enemy soldier was on top of her daughter. In her sleep, she got up, walked to a shed, got an ax, went to her daughter's room, and plunged the ax into her, believing she was killing the enemy soldier. The daughter died instantly; the mother was beside herself with grief.
6. A neighbor told an eight-year-old boy and his friend to come out from behind a building, and not to play there, because it was dangerous. The boy answered belligerently, "In a minute."

   Losing patience, the neighbor said, "No, not in a minute; get out of there now!"

   A few days later, he broke into her house, pulled a goldfish out of its bowl, chopped it into little pieces with a steak knife, and smeared it all over the counter. Then, he went into the bathroom, plugged in a curling iron, and clamped it onto a towel.
7. A young man lived in a ground-level apartment with a large window opening onto the building parking lot. At eight o'clock one morning, he stood naked in front of the window eating his cereal in full view of those getting in and out of their cars.
8. A husband watched his wife suffer from the agony of dying from an especially painful terminal cancer. He shot her with one of his hunting guns; she died instantly.
9. A man knew he was HIV positive. Despite doctors' instructions about safe sex and the need to tell his partners before having sex with them, he had sex numerous times with three different women without telling them. Most of the time, he used no protection, but, on a few occasions, he withdrew before ejaculating. He gave one of the women an anti-AIDS drug, "to slow down the AIDS." None of the women contracted the HIV virus.
10. A woman met a very drunk man in a bar. He got into her car, and she drove him to her house. He asked her for a spoon, which she knew he wanted to use to take drugs. She got it for him and waited in the living room while he went into the bathroom to "shoot up." He came back into the living room and collapsed; she went back to the bar. The next morning she found him "purple, with flies flying around him." Thinking he was dead, she told her daughter to call the police and left for work. He was dead.

11. A young man played the online video game "Border Patrol" on his home computer. The game showed immigrants running across the border where a sign reads, "Welcome to the U.S. Welfare office this way." There are three kinds of targets: Mexican nationalists, drug smugglers, and "breeders" (pregnant women with children). The game says, "Kill them at any cost." When you hit a "target," it explodes into bits with appropriate visual and audio effects. When the game ends, it gives a score using a derogatory term (Branson 2006).
12. A 22-year-old plumber's apprentice, while working on a sewer pipe in a 10-foot-deep trench, was buried alive under a rush of collapsing muck and mud. He didn't die easily. Clawing for the surface, sludge filled his throat. Thousands of pounds of dirt pressed on his chest, squeezing until he couldn't draw another breath. He worked for a plumbing company with a long record of safety violations. Only two weeks before, a federal safety investigator had caught men from the same company working unprotected in a 15-foot-deep trench, a clear violation of federal safety laws. On that day, the now-dead apprentice, when questioned by the investigator, described many unsafe work practices. The investigator knew the company well. Some years earlier, he'd investigated another death at the company. The circumstances were nearly identical: a deep trench, no box, and a man buried alive (Barstow 2003).

What Behavior Deserves Criminal Punishment?

LO 1

"Welcome to Bloomington, you're under arrest!" This is what a Bloomington, Minnesota, police officer, who was a student in my criminal justice class, told me that billboards at the city limits of this Minneapolis suburb should read. "Why," I asked? "Because everything in Bloomington is a crime," he laughingly replied. Although exaggerated, the officer spoke the truth. Murders, rapes, robberies, and other "street crimes" have always filled the news and stoked our fears. "White-collar crimes" have also received attention in these early years of the twenty-first century. And of course, since 9/11, crimes committed by terrorists have also attracted considerable attention. They'll also receive most of our attention in this book—at least until Chapter 12, when we turn to the "crimes against public order and morals," which in numbers dwarf all the others combined (see Table 1.1).

So, from now until Chapter 12, with some exceptions, everything you'll read applies to the roughly three million violent and property crimes in Table 1.1, not the 17.7 million misdemeanors. Let's look briefly at the American Law Institute (ALI) Model Penal Code (MPC) definition of behavior that deserves punishment. It's the framework we'll use to guide our analysis of **criminal liability** (namely behavior that deserves punishment). Criminal liability falls on "conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests" (1985, § 1.02(1)(a)). Here's a breakdown of the words and phrases in the definition.

- Conduct that
- Unjustifiably *and* inexcusably
- Inflicts or threatens *substantial* harm
- To individual or public interests

The importance of these few words and phrases can't be overstated. They are, in fact, the building blocks of our whole system of criminal law and punishment. We spend the

TABLE 1.1 Estimated Number of Arrests, United States, 2007

Violent Crime	
Murder and nonnegligent manslaughter	13,480
Forcible rape	23,307
Robbery	126,715
Aggravated assault	433,945
Total	**597,337**
Property Crimes	
Burglary	303,853
Larceny-theft	1,172,762
Motor vehicle theft	118,231
Arson	15,242
Forgery and counterfeiting	103,448
Fraud	252,873
Embezzlement	22,381
Stolen property; buying, receiving, possessing	122,061
Vandalism	291,575
Total Property	**2,402,426**
Misdemeanors	
Weapons; carrying, possessing, etc.	188,891
Misdemeanor assaults	1,305,693
Prostitution and commercialized vice	77,607
Sex offenses (except forcible rape and prostitution)	83,979
Drug abuse violations	1,841,182
Gambling	12,161
Misdemeanor nonviolent offenses against the family and children	122,812
Driving under the influence	1,427,494
Liquor laws	633,654
Drunkenness	589,402
Disorderly conduct	709,105
Vagrancy	33,666
All other offenses	3,931,965
Suspicion	2,176
Curfew and loitering law violations	143,002
Runaways	108,879
Total Minor Crimes	**17,743,000**

Source: Crime in the U.S. 2007 (U.S. Department of Justice: Washington DC, Table 29).

rest of the book exploring and applying them to a wide range of human behavior in an equally wide range of circumstances. But, first, let's examine some propositions that will help prepare you to follow and understand the later chapters. Let's begin by looking at the difference between criminal wrongs and other legal wrongs that aren't criminal.

Crimes and Noncriminal Wrongs

LO 1, LO 4

The opening case summaries demonstrate that criminal law is only *one* kind of social control, *one* form of responsibility for deviating from social norms. So in criminal law, the basic question, to be exact, boils down to "Who's *criminally* responsible for what

crime?" We won't often discuss the noncriminal kinds of responsibility in this book. But you should keep them in mind anyway, because in the real world criminal liability is the exceptional form of social control. The norm is the other four categories mentioned in the beginning of the chapter. And they should be, because the criminal liability response is the harshest and most expensive response.

In this section, we'll concentrate on the noncriminal wrongs called **torts**, private wrongs for which you can sue the party who wronged you and recover money. Crimes and torts represent two different ways our legal system responds to social and individual harm. Before we look at their differences, let's look at how they're similar. First, both are sets of rules telling us what we *can't* do ("Don't steal") and what we *must* do ("Pay your taxes"). Second, the rules apply to everybody in the community, and they speak on behalf of everybody, with the power and prestige of the whole community behind them. Third, the power of the law backs up the enforcement of the rules (Hart 1958, 403).

How are they different? Some believe that crimes injure the whole community, whereas torts harm only individuals. But that's not really true. Almost every crime is also a tort. Many crimes and torts even have the same name (there's a crime and a tort called "assault"). Other crimes are torts even though they don't have the same names; for example, the crime of murder is also the tort of wrongful death. In fact, the same killing sometimes is tried as murder and later as a civil wrongful death suit. One famous example is in the legal actions against the great football player O. J. Simpson. He was acquitted in the murder of his ex-wife and her friend in a criminal case but then lost in a tort case for their wrongful deaths. Also, torts don't just harm other individuals; they can also harm the whole community. For example, breaches of contract don't just hurt the parties to the contract. Much of what keeps daily life running depends on people keeping their word when they agree to buy, sell, perform services, and so on.

Are crimes just torts with different names? No. One difference is that criminal prosecutions are brought by the government against individuals; that's why criminal cases always have titles like *"U.S. v. Rasul," "People v. Menendez," "State v. Erickson,"* or *"Commonwealth v. Wong."* (The first name in the case title is what that government entity calls itself, and the second name, the defendant's, is the individual being prosecuted.) Nongovernment parties bring tort actions against other parties who may or may not be governments. A second difference is that injured plaintiffs (those who sue for wrongs in tort cases) get money (called damages) for the injuries they suffer.

These differences are important, but not the *most* important difference between torts and crimes. The most important is the conviction itself. The conviction "is the expression of the community's hatred, fear, or contempt for the convict . . ." (Hart 1958). Professor Henry M. Hart sums up the difference this way:

> [Crime] . . . is not simply anything which a legislature chooses to call a "crime." It is not simply antisocial conduct which public officers are given a responsibility to suppress. It is not simply any conduct to which the legislature chooses to attach a criminal penalty. It is conduct which . . . will incur a formal and solemn pronouncement of the moral condemnation of the community. (405)

But it's important for you to understand that words of condemnation by themselves don't make crimes different from torts. Not at all. When the legislature defines a crime, it's issuing a threat—"Don't steal, or else . . . ," "File your taxes, or else. . . ." The "or else" is the threat of punishment, a threat that will be carried out against anyone who commits a crime. In fact, so intimately connected are condemnation and criminal punishment that some of the most distinguished criminal law scholars say that punishment

has two indispensable components, condemnation *and* "hard treatment." According to Andrew von Hirsch, honorary professor of Penal Theory and Penal Law at the University of Cambridge, England, and prolific writer on the subject, and his distinguished colleague, Andrew Ashworth, the Vinerian Professor of Law at Oxford University:

> Punishment conveys censure, but it does not consist solely of it. The censure in punishment is expressed through the imposition of a deprivation ("hard treatment") on the offender. (Von Hirsch and Ashworth 2005, 21)

If the threat isn't carried out when a crime is committed, condemnation is meaningless, or worse—it sends a message that the victim's suffering is worthless. Punishment has to back up the condemnation. According to another respected authority on this point, Professor Dan Kahan (1996):

> When society deliberately forgoes answering the wrongdoer through punishment, it risks being perceived as endorsing his valuations; hence the complaint that unduly lenient punishment reveals that the victim is worthless in the eyes of the law. (598)

The case of *Chaney v. State* (1970) makes clear the need for punishment to make condemnation meaningful. Two young soldiers in the U.S. Army picked up a young woman in Anchorage, Alaska, brutally beat and raped her four times, and took her money. After a trial jury found one of them guilty of rape and robbery, the judge sentenced the defendant to two one-year prison sentences, to be served concurrently, and he suspended sentence for robbing her.

When he sentenced Chaney, the judge recommended that the defendant be confined in a minimum-security prison. He further remarked that he was "sorry that military regulations would not permit keeping Chaney in the service if he wanted to stay because it seems to me that is a better setup for everybody concerned than putting him in the penitentiary." At a later point in his remarks, the trial judge seemed to invite the parole board to, or even recommend that it, release him:

> I have sentenced you to a minimum on all 3 counts here but there will be no problem as far as I'm concerned for you to be paroled at the first day the Parole Board says that you're eligible for parole. . . . If the Parole Board should decide 10 days from now that you're eligible for parole and parole you, it's entirely satisfactory with the court. (445)

In a review of the sentence authorized under Alaska law, the Alaska Supreme Court ruled that the trial judge's "sentence was too lenient considering the circumstances surrounding the commission of these crimes."

> Forcible rape and robbery rank among the most serious crimes. Considering the violent circumstances surrounding the commission of these dangerous crimes, we have difficulty in understanding why one-year concurrent sentences were thought appropriate. Review of the sentencing proceedings leads to the impression that the trial judge was apologetic in regard to his decision to impose a sanction of incarceration. Much was made of Chaney's fine military record and his potential eligibility for early parole. Seemingly all but forgotten is the victim of appellee's rapes and robbery. [A military spokesman at the time of sentencing noted that] what happened "is very common and happens many times each night in Anchorage. Needless to say, Donald Chaney was the unlucky 'G.I.' that picked a young lady who told." (445–46)

> We think that the sentence imposed falls short of effectuating the goal of community condemnation, or the reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves. In short, knowledge of the calculated circumstances involved in the commission of these felonies and the sentence imposed could lead to the conclusion that forcible rape and robbery are not reflective of serious antisocial conduct. Thus, respect for society's condemnation of forcible rape and robbery is eroded and reaffirmation of these societal norms negated. . . . A sentence of imprisonment for a substantially longer period of imprisonment . . . would reaffirm society's condemnation of forcible rape and robbery. (447)

We'll come back to the subject of punishment later in this chapter, where we'll discuss the purposes of punishment more fully, and again in Chapter 2, where we'll discuss the constitutional ban on "cruel and unusual punishment." But here it's important to emphasize the intimate connection (often-overlooked) between punishment and the meaning of crime itself.

Nevertheless, even on this important point of expression of condemnation backed up by punishment, the line between torts and crime can get blurred. In tort cases involving violence and other especially "wicked" circumstances, plaintiffs can recover not only compensatory damages for their actual injuries but also substantial punitive damages to make an example of defendants and to "punish" them for their "evil behavior" (Black 1983, 204).

ETHICAL DILEMMA

"Border Patrol" Video Game: What, if Anything, Should Be Done with It?

There's a video game making its way around the Internet, and many who have come across it say it crosses a line. "Border Patrol" is a Flash-based game that lets players shoot at Mexican immigrants as they try to cross the border into the United States. "There's one simple rule," the game's opening screen states, "keep them out . . . at any cost!" "Border Patrol" upsets many immigrants' rights groups, as well as others. But the game is nothing new, as hate groups and those just looking to ruffle some feathers have long used Flash-based games to spread messages of hate. In "Border Patrol," players are told to target one of three immigrant groups portrayed in a negative, stereotypical way as the figures rush past a sign that reads "Welcome to the United States." The immigrants are caricatured as bandoleer-wearing "Mexican nationalists," tattoo-touting "drug smugglers" and pregnant "breeders" who sprint with children in tow.

Instructions

1. Play the video game "Border Patrol." (It's offensive, so if you prefer, read the description of it.
2. Go to the website www.cengage.com/criminaljustice/samaha and read the selections regarding the controversy over the game.
3. Write a few sentences about each selection, summarizing the main points that relate to the ethical public policy problem of hate crimes and the video game.

4. Write a paragraph based on what you read, answering the question that best describes what you would "do" about the video game?
   a. Ignore it?
   b. Protest against it?
   c. Join a group that's trying to ban it from the Internet?
   d. Join a group to make it a crime to play the game?

   Back up your answer with points from your paragraphs in number 3.

Now that you've got some idea of what criminal wrong means and how it's different from private wrongs, let's go inside criminal law to see how the law classifies crimes so we can make sense of the enormous range of behavior it covers.

Classifying Crimes

There are various ways to classify crimes, most of them with ancient roots. One classifies crimes into **crimes of moral turpitude** and those that are not. The moral turpitude crimes consist of criminal behavior that needs no law to tell us it's criminal because it's inherently wrong or evil, like murder and rape. Crimes without moral turpitude consist of behavior that's criminal only because a statute says it is, such as parking in a no parking zone and most other traffic violations. Why classify crimes into moral turpitude and nonmoral turpitude? Some examples are: excluding or deporting aliens; disbarring attorneys; revoking doctor's licenses; and impeaching witnesses (LaFave 2003a, 36–38).

The most widely used scheme for classifying crimes is according to the kind and quantity of punishment. **Felonies** are crimes punishable by death or confinement in the state's prison for one year to life without parole; **misdemeanors** are punishable by fine and/or confinement in the local jail for up to one year. Notice the word "punishable"; the classification depends on the *possible* punishment, not the *actual* punishment. For example, Viki Rhodes pled guilty to "Driving under the Influence of Intoxicants, fourth offense," a felony. The trial court sentenced her to 120 days of home confinement. When she later argued she was a misdemeanant because of the home confinement sentence, the appeals court ruled that "a person whose felony sentence is reduced does not become a misdemeanant by virtue of the reduction but remains a felon" (*Commonwealth v. Rhodes* 1996, 532).

Why should the label "felony" or "misdemeanor" matter? One reason is the difference between procedure for felonies and misdemeanors. For example, felony defendants have to be in court for their trials; misdemeanor defendants don't. Also, prior felony convictions make offenders eligible for longer sentences. Another reason is that the legal consequences of felony convictions last after punishment. In many states, former felons can't vote, can't serve in public office, can't be attorneys, and felony conviction can be a ground for divorce.

Now, let's turn from the classifications of crimes to the two divisions of criminal law: the general and special parts.

The General and Special Parts of Criminal Law

LO 2

Criminal law consists of two parts: a general part and a special part. The **general part of criminal law** consists of principles that apply to more than one crime. Most state criminal codes today include a general part. The **special part of criminal law** defines specific crimes and arranges them into groups according to subject matter. All states include the definitions of at least some specific crimes, and most group them according to subject matter.

The special part of criminal law is not just a classification scheme; it's also part of the larger organizational structure of the whole criminal law and the one followed in this book. So we'll discuss the classification scheme in the context of the general and special parts of the criminal law.

The General Part of Criminal Law

The general principles are broad propositions that apply to more than one crime. Some general principles (Chapters 3–8) apply to all crimes (for example, all crimes have to include a voluntary act); other principles (for example, criminal intent) apply to all felonies; still others apply only to some crimes (for example, the use of force is justified to prevent murder, manslaughter, assault, and battery).

In addition to the general principles of criminal law in the general part of criminal law, there are also two kinds of what we call "offenses of general applicability" (Dubber 2002, 142). The first is complicity, crimes that make one person criminally liable for someone else's conduct. There's no general crime of complicity; instead, there are the specific crimes of accomplice to murder; accomplice to robbery; or accomplice to any other crime for that matter (Chapter 7). Similarly, other crimes of general applicability are the crimes of attempt, conspiracy, and solicitation. Like complicity, there are no general crimes of attempt, conspiracy, and solicitation, but there are the specific crimes of attempting, conspiring, and soliciting to commit specific crimes—for example, attempted murder, conspiring to murder, and soliciting to murder (Chapter 9).

Finally, the general part of criminal law includes the principles of justification (Chapter 5, self-defense) and excuse (Chapter 6, insanity), the principles that govern most defenses to criminal liability.

The Special Part of Criminal Law

The special part of criminal law (Chapters 9–13) defines specific crimes, according to the principles set out in the general part. The definitions of crimes are divided into four groups: crimes against persons (such as murder and rape, discussed in Chapters 9–10); crimes against property (stealing and trespass, discussed in Chapter 11); crimes against public order and morals (aggressive panhandling and prostitution, discussed in Chapter 12); and crimes against the state (domestic and foreign terror, discussed in Chapter 13).

The definitions of specific crimes consist of the elements prosecutors have to prove beyond a reasonable doubt to convict defendants. From the standpoint of understanding how the general principles relate to specific crimes, every definition of a specific crime is an application of one or more general principles. To show you how this works, let's look

at an example from the Alabama criminal code. One section of the general part of the code reads, "A person is criminally liable for an offense [only] if it is committed by his own behavior" (Alabama Criminal Code 1975, ß 13A-2-20). This general principle of criminal liability (liability is the technical legal term for responsibility) is required in the definition of *all* crimes in Alabama.

According to Chapter 7 in the special part of the Alabama Criminal Code, "Offenses Involving Damage to and Intrusion upon Property," the crime of first-degree criminal trespass is defined as "A person is guilty of criminal trespass in the first degree if he . . . enters or remains unlawfully in a dwelling" (ß 13A-7-4). So the general principle of requiring behavior is satisfied by the acts of either entering or remaining.

Now, let's turn from the subject of classifying crimes to the sources of criminal law and where you're most likely to find them.

The Sources of Criminal Law

LO 3

Most criminal law is found in state criminal codes created by elected representatives in state legislatures and municipal codes created by city and town councils elected by the people. There's also a substantial body of criminal law in the U.S. criminal code created by Congress.

Sometimes, these elected bodies invite administrative agencies, whose members aren't elected by the people, to participate in creating criminal law. Legislatures weren't always the main source of criminal law making. Judges' court opinions were the original source of criminal law, and it remained that way for several centuries. By the 1600s, judges had created and defined the only crimes known to our law. Called **common law crimes**, they included everything from disturbing the peace to murder.

Let's look first at the common law crimes created by judges' opinions and then at the legislated criminal codes, including state and municipal codes, the Model Penal Code (MPC). Then, we'll look briefly at criminal law making by administrative agencies.

Common Law Crimes

Criminal codes didn't spring full-grown from legislatures. They evolved from a long history of ancient offenses called "common law crimes." These crimes were created before legislatures existed and when social order depended on obedience to unwritten rules (the *lex non scripta*) based on community customs and traditions. These traditions were passed on from generation to generation and modified from time to time to meet changed conditions. Eventually, they were incorporated into court decisions.

The common law felonies still have familiar names and have maintained similar meanings (murder, manslaughter, burglary, arson, robbery, stealing, rape, and sodomy). The common law misdemeanors do, too (assault, battery, false imprisonment, libel, perjury, corrupting morals, and disturbing the peace) (LaFave 2003a, 75).

Exactly how the common law began is a mystery, but like the traditions it incorporated, it grew and changed to meet new conditions. At first, its growth depended mainly on judicial decisions (Chapter 2). As legislatures became more established, they added crimes to the common law. They did so for a number of reasons: to clarify existing

common law; to fill in blanks left by the common law; and to adjust the common law to new conditions. Judicial decisions interpreting the statutes became part of the growing body of precedent making up the common law. Let's look further at common law crimes at both the state and federal levels.

State Common Law Crimes

The English colonists brought this common law with them to the New World and incorporated the common law crimes into their legal systems. Following the American Revolution, the 13 original states adopted the common law. Almost every state created after that enacted "reception statutes" that adopted the English common law. For example, the Florida reception statute reads: "The Common Law of England in relation to crimes shall be of full force in this state where there is no existing provision by statute on the subject" (*West's Florida Statutes Annotated* 2005, Title XLVI, § 775.01).

Most states have shed the common law crimes. But the common law is far from dead. Several states, including Florida, still recognize the common law of crimes. Even in code states (states that have abolished the common law), the codes frequently use the names of the common law crimes without defining them. So to decide cases, the courts have to go to the common law definitions and interpretations of the crimes against persons, property, and public order and morals (Chapters 9–12); the common law of parties to crime (Chapter 7) and attempt, conspiracy, and solicitation (Chapter 8); and the common law defenses, such as self-defense and insanity (Chapters 5–6).

California, a code jurisdiction, includes all of the common law felonies in its criminal code (*West's California Penal Code* 1988, § 187(a)). The California Supreme Court relied on the common law to determine the meaning of its murder statute in *Keeler v. Superior Court* (1970). Robert Keeler's wife Teresa was pregnant with another man's child. Robert kicked the pregnant Teresa in the stomach, causing her to abort the fetus. The California court had to decide whether fetuses were included in the murder statute. To do this, the court turned to the sixteenth-century common law, which defined a human being as "born alive." This excluded Teresa's fetus from the reach of the murder statute. (*Keeler v. Superior Court* 1970, discussed in the Chapter 9 "Beginning of Life" section)

Federal Common Law Crimes

In *U.S. v. Hudson and Goodwin* (1812), the U.S. Supreme Court said there are no federal common law crimes. During the War of 1812, Hudson and Goodwin published the lie that President Madison and Congress had secretly voted to give $2 million to Napoleon. They were indicted for criminal libel. But there was a catch; there was no federal criminal libel statute. The Court ruled that without a statute, libel can't be a federal crime. Why? According to the Court:

> The courts of [the U.S.] are [not] vested with jurisdiction over any particular act done by an individual in supposed violation of the peace and dignity of the sovereign power. The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence. Certain implied powers must necessarily result to our courts of justice from the nature of their institution. But jurisdiction of crimes against the state is not among those powers. (34)

The rule of *U.S. v. Hudson and Goodwin* seems perfectly clear: there's no federal criminal common law. But, like many other rules you'll learn in your study of criminal law, the reality is more complicated. It's more like:

> There is no federal criminal common law. But there is . . . The shibboleth that there is no federal criminal common law—that Congress, not the courts, creates crimes—is simply wrong. There are federal common law crimes. (Rosenberg 2002, 202)

Here's what Associate U.S. Supreme Court Justice Stevens had to say about federal criminal common law making:

> Statutes like the Sherman Act, the civil rights legislation, and the mail fraud statute were written in broad general language on the understanding that the courts would have wide latitude in construing them to achieve the remedial purposes that Congress had identified. The wide open spaces in statutes such as these are most appropriately interpreted as implicit delegations of authority to the courts to fill in the gaps in the common law tradition of case-by-case adjudication. (*McNally v. U.S.* 1987)

According to Professor Dan Kahan (1994), Congress has accepted the prominent role Justice Stevens ascribes to the federal courts in developing a "federal common law" in noncriminal subjects. Moreover, Kahan contends that Congress actually *prefers* "lawmaking collaboration" to a "lawmaking monopoly" (369). Judicial common criminal lawmaking *can* be a good thing when it punishes conduct "located not on the border but deep within the interior of what is socially undesirable" (400).

State Criminal Codes

From time to time in U.S. history, reformers have called for the abolition of the common law crimes and their replacement with criminal codes created and defined by elected legislatures. The first criminal codes appeared in 1648, the work of the New England Puritans. The Laws and Liberties of Massachusetts **codified** (put into writing) the colonies' criminal law, defining crimes and spelling out punishments. John Winthrop, the author of the code, stated the case for a code this way: "So soon as God had set up political government among his people Israel he gave them a body of laws for judgment in civil and criminal causes. . . . For a commonwealth without laws is like a ship without rigging and steerage" (Farrand 1929, A2).

Some of the codified offenses sound odd today (witchcraft, cursing parents, blasphemy, and idolatry), but others—for example, rape—don't:

> If any man shall ravish any maid or single woman, committing carnal copulation with her by force, against her own will, that is above ten years of age he shall be punished either with death or some other grievous punishment. (5)

Another familiar codified offense was murder:

> If any man shall commit any wilful murder, which is manslaughter, committed upon premeditate malice, hatred, or cruelty not in a man's necessary and just defense, nor by mere casualty against his will, he shall be put to death. (6)

Hostility to English institutions after the American Revolution spawned another call by reformers for written legislative codes to replace the English common law. The eighteenth-century Enlightenment, with its emphasis on reason and natural law, inspired

reformers to put aside the piecemeal "irrational" common law scattered throughout judicial decisions and to replace it with criminal codes based on a natural law of crimes. Despite anti-British feelings, reformers still embraced Blackstone's *Commentaries* (1769) and hoped to transform his complete and orderly outline of criminal law into criminal codes.

Reformers contended judge-made law was not just disorderly and incomplete; it was antidemocratic. They believed legislatures representing the popular will should make laws, not aloof judges out of touch with public opinion. Thomas Jefferson proposed such a penal code for Virginia (Bond 1950). The proposed code never passed the Virginia legislature, not because it codified the law but because it recommended too many drastic reductions in criminal punishments (Preyer 1983, 53–85).

There was also a strong codification movement during the nineteenth century. Of the many, but two codes stand out. The first, the most ambitious, and least successful, was Edward Livingston's draft code for Louisiana, completed in 1826. Livingston's goal was to rationalize into one integrated system: criminal law, criminal procedure, criminal evidence, and punishment. Livingston's draft never became law.

The second, David Dudley Field's code, was less ambitious but more successful. Field was a successful New York lawyer who wanted to make criminal law more accessible, particularly to lawyers. According to Professors Paul Robinson and Markus Dubber (2004):

> Field's codes were designed to simplify legal practice by sparing attorneys the tedium of having to sift through an ever rising mountain of common law. As a result, Field was more concerned with streamlining than he was with systematizing or even reforming New York penal law. (3)

Field's New York Penal Code was adopted in 1881 and remained in effect until 1967, when New York adopted most of the Model Penal Code (described later in "The Model Penal Code (MPC)" section).

The codification movement gathered renewed strength after the American Law Institute (ALI) decided to "tackle criminal law and procedure" (Dubber 2002, 8). ALI was founded by a group of distinguished jurists

> to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work. (8)

After its first look at criminal law and procedure in the United States, "It was so appalled by what it saw that it decided that . . . what was needed was a fresh start in the form of *model* codes (8).

The Model Penal Code (MPC)

The Great Depression and World War II stalled the development of a model penal code. But after World War II, led by reform-minded judges, lawyers, and professors, ALI was committed to replacing the common law. From the earliest of 13 drafts written during the 1950s to the final version in 1962, in the **Model Penal Code (MPC)**, ALI (1985) made good on its commitment to draft a code that abolished common law crimes. Section 1.05, the first of its core provisions, reads: "No conduct constitutes an offense unless it is a crime or violation under this Code or another statute of this State" ([1], § 1.01 to 2.13).

After its adoption in 1962, more than 40 states changed their criminal codes. None adopted the MPC completely; but criminal law in all states, not just states that rewrote their codes, felt its influence (Dubber 2002, 6). More than two thousand opinions from every state, the District of Columbia, and the federal courts have cited the MPC (7). Many of the case excerpts are from those two thousand. Moreover, this book follows the general structure and analysis of the MPC, because if you understand the MPC's structure and analysis, you'll understand criminal law itself. Although you'll encounter many variations of the MPC throughout the book, "If there is such a thing as a common denominator in American criminal law, it's the Model Penal Code" (Dubber 2002, 5). So let's look at the structure and analysis of the MPC.

The structure of the MPC follows closely the description of "The General and Special Parts of Criminal Law" section, so we won't repeat it here. Instead, we'll focus on the **analysis of criminal liability**, namely how to analyze statutes and cases to answer the question posed at the beginning of the chapter, "What behavior deserves criminal punishment?" and the MPC's definition of criminal liability: "conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests" (ALI 1985, MPC § 1.02(1)(a)). Now let's break down this definition into its three elements, which we can state as three main and two subsidiary questions:

1. Is the conduct a crime? (Chapters 3–4, 5–6, 9–13)
   a. Does the conduct inflict or threaten?
   b. Does the conduct inflict or threaten substantial harm to individual or public interests?
2. If the conduct is a crime, is it wrong? Or, under special circumstances, was the conduct justified, as in self-defense? In other words, the actor admits responsibility for the conduct but proves that under the special circumstances the conduct was right (Chapter 7).
3. If the conduct was unjustified, should we blame the actor for it? Or, under special circumstances, such as insanity, was the actor not responsible? In other words, the actors admit their conduct was wrong, but they maintain that under the special circumstances, they weren't responsible for their conduct (Chapter 8).

There you have, in a nutshell, the elements of criminal liability in states and the federal government that we'll elaborate on and apply to the definitions of individual crimes throughout the book.

Municipal Ordinances

City, town, and village governments enjoy broad powers to create criminal laws, a power local governments are enthusiastically using in today's atmosphere of "zero tolerance" for drugs, violence, public disorder, and other "quality of life" offenses that violate community standards of good manners in public (Chapter 12). Municipalities have a "chorus of advocates" among criminal law reformers who've helped cities write a "new generation" of their old vagrancy and loitering ordinances that "cleanse" them of prior objections that they're unconstitutional and discriminatory (Logan 2001, 1418).

Municipal criminal law making isn't new; neither is the enthusiasm for it. In his book *The People's Welfare* (1996), the historian William Novak convincingly documents

the "powerful government tradition devoted in theory and practice to the vision of a well-regulated society" from 1787 to 1877:

> At the heart of the well-regulated society was a plethora of bylaws, ordinances, statutes, and common law restrictions regulating nearly every aspect of early American economy and society. . . . These laws—the work of mayors, common councils, state legislators, town and county officers, and powerful state and local judges . . . taken together . . . demonstrate the pervasiveness of regulation in early American versions of the good society: regulations for *public safety* and security; . . . the policing of *public space* . . . ; all-important restraints on *public morals* (establishing the social and cultural conditions of public order). (1–2)

Here's a sample of current ordinances collected by Professor Wayne Logan (2001):

> Pick-pocketing; disturbing the peace; shoplifting; urinating in public; disorderly conduct; disorderly assembly; unlawful restraint; obstruction of public space; harassment over the telephone; resisting arrest; obscenity; nude dancing; lewdness, public indecency, and indecent exposure; prostitution, pimping, or the operation of "bawdy" houses; gambling; graffiti and the materials associated with its inscription; littering; aggressive begging and panhandling; vandalism; trespass; automobile "cruising"; animal control nuisances; excessive noise; sale or possession of drug paraphernalia; simple drug possession; possession of weapons other than firearms; possession of basic firearms and assault-style firearms; discharge of firearms; sleeping, lying, or camping in public places; driving under the influence of drugs or alcohol; carrying an open container of alcohol; underage drinking; and public drinking and intoxication; vagrancy and loitering; curfews for minors; criminal assault and battery. (1426–28)

Municipal ordinances often duplicate and overlap state criminal code provisions. When they conflict, state criminal code provisions are supposed to trump municipal ordinances. A number of technical rules control whether they're in conflict, and we don't need to get into the details of these rules, but their gist is that unless state criminal codes make it very clear they're preempting local ordinances, local ordinances remain in effect (*Chicago v. Roman* 1998).

In *Chicago v. Roman*, Edwin Roman attacked 60-year-old Anthony Pupius. He was convicted of the Chicago municipal offense of assault against the elderly and was sentenced to ten days of community service and one year of probation. However, the ordinance contained a mandatory minimum sentence of at least 90 days of incarceration. The city appealed, claiming the sentence violated the mandatory minimum required by the ordinance. The Illinois Supreme Court overruled the trial court's decision. According to the Court, the Illinois legislature can restrict Chicago's power to create crimes, but it has to pass a law *specifically* spelling out the limit. Because the legislature hadn't passed a law preempting the penalty for assaulting the elderly, Chicago's mandatory minimum had to stand.

The long list of ordinances Professor Logan found illustrates the broad power of municipalities to *create* local crimes. But, as the example of *Chicago v. Roman* indicates, the power of municipalities goes further than creating crimes; it includes the power to determine the punishment, too. They also have the power to enact forfeiture laws. Under New York City's alcohol and other drug-impaired driver's law, thousands of impaired drivers have forfeited their vehicles (Fries 2001, B2). Another example: an

Oakland, California, ordinance authorizes forfeiture of vehicles involved in "solicitation of prostitution or acquisition of controlled substances." The ordinance was passed after residents complained about individuals driving through their neighborhoods looking to buy drugs or hire prostitutes (*Horton v. City of Oakland* 2000, 372).

Don't get the idea from what you've just read that municipalities have *unlimited* powers to create crimes and prescribe punishments. They don't. We've already noted two limits—constitutional limits (which we'll discuss further in Chapters 2 and 12) and the power of states to preempt municipal criminal law making and punishment. Municipalities also can't create felonies, and they can't prescribe punishments greater than one year in jail.

Administrative Agency Crimes

Both federal and state legislatures frequently grant administrative agencies the authority to make rules. One example is familiar to anyone who has to file a tax return. The U.S. Internal Revenue Service income tax regulations are based on the rule-making authority that Congress delegates to the IRS. Another example, this one from the state level: state legislatures commonly authorize the state highway patrol agencies to make rules regarding vehicle safety inspections. We call violations of these federal and state agency rules "**administrative crimes**"; they're a rapidly growing source of criminal law.

Criminal Law in a Federal System

Until now, we've referred to criminal law in the singular. That's inaccurate, and you'll see this inaccuracy repeated often in the rest of the book because it's convenient. But let's clear up the inaccuracy. In our **federal system**, there are 52 criminal codes, one for each of the 50 states, one for the District of Columbia, and one for the U.S. criminal code. The U.S. government's power is limited to crimes specifically related to national interests, such as crimes committed on military bases and other national property; crimes against federal officers; and crimes that are difficult for one state to prosecute—for example, drug, weapons, organized and corporate crime, and crimes involving domestic and international terrorism (Chapter 13). The rest of criminal law, which is most of it, is left to the state codes. These are the crimes against persons, property, and public order and morals in the special part of the criminal law (Chapters 9–12).

So we have 52 criminal codes, each defining specific crimes and establishing general principles for the territory and people within it. And they don't, in practice, define specific crimes the same. For example, in some states, to commit a burglary, you have to actually break into and then enter a building. In other states, it's enough that you enter a building unlawfully, as in opening an unlocked door to a house the owners forgot to lock, intending to steal their HDTV inside. In still other states, all you have to do is stay inside a building you've entered lawfully—for example, hiding until after closing time in a store restroom during business hours, so you can steal stuff after the store closes (Chapter 11).

The defenses to crime also vary across state lines. In some states, insanity requires proof *both* that defendants didn't know what they were doing and that they didn't know it was wrong to do it. In other states, it's enough to prove *either* that defendants didn't know what they were doing or that they didn't know that it was wrong (Chapter 6). Some states permit individuals to use deadly force to protect their homes from intruders; others require proof that the occupants in the home were in danger of serious bodily harm or death before they can shoot intruders (Chapter 5).

Punishments also differ widely among the states. Several states prescribe death for some convicted murderers; others prescribe life imprisonment. Capital punishment states differ in how they execute murderers: by electrocution, lethal injection, the gas chamber, hanging, or even the firing squad. The death penalty is only the most dramatic example of different punishments. Less dramatic examples affect far more people. For example, some states lock up individuals who possess small quantities of marijuana for private use; in other states, it's not a crime at all.

This diversity among the criminal codes makes it clear there's no single U.S. criminal code. But this diversity shouldn't obscure the broad outline that's common to all criminal laws in the United States. They're all based on the general principles of liability that we touched on earlier in this chapter and that you'll learn more in depth about in Chapters 3 through 6. They also include the defenses of justification and excuse that you'll learn about in Chapters 5 and 6. The definitions of the crimes you'll learn about in Chapters 9 through 12 differ more, so there we'll take account of the major differences. But, even these definitions resemble one another more than they differ.

For example, "murder" means killing someone on purpose; criminal sexual assault includes sexual penetration by force; "robbery" means taking someone's property by force or threat of force; "theft" means taking, and intending to keep permanently, someone else's property. And, the crimes against the state (Chapter 13) and other crimes in the U.S. criminal code don't recognize state lines; they apply everywhere in the country.

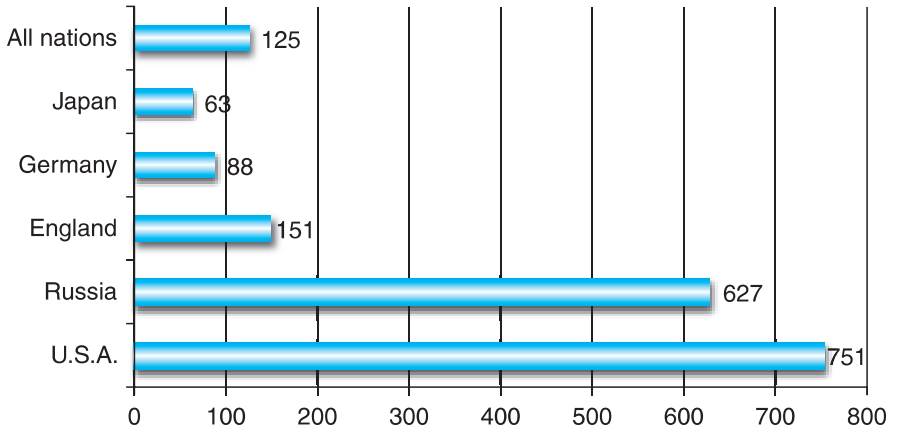
Now, let's turn to the other big question in the big picture of American criminal law, the law of punishment.

What's the Appropriate Punishment for Criminal Behavior?

> The United States has less than 5 percent of the world's population. But it has almost a quarter of the world's prisoners. Indeed, the United States leads the world in producing prisoners, a reflection of a relatively recent and now entirely distinctive American approach to crime and punishment. Americans are locked up for crimes—from writing bad checks to using drugs—that would rarely produce prison sentences in other countries. And in particular they are kept incarcerated far longer than prisoners in other countries. (Liptak 2008)

More meaningful than the raw numbers mentioned in the quote, are the **rates of imprisonment**, measured by the numbers of prisoners per 100,000 people in the general population. Here, too, the United States clearly leads the world (see Figure 1.1).

FIGURE 1.1 Imprisonment Rates, 2008



Source: Liptak 2008.

It's not just the numbers of prisoners and rates of imprisonment that stand out. Gender, age, race, and ethnicity are not equally represented in the prisoner population. Black men are imprisoned at the highest rate, 6.5 times higher than White men, and 2.5 times higher than Hispanic men. Similarly, the Black women imprisonment rate is nearly double the imprisonment rates for Hispanic women, and three times the rate for White women (West and Sabol 2009, 4). With all the attention imprisonment deservedly receives, you should keep in mind that there are millions more Americans on probation and parole, and other forms of "community corrections" than are locked up in prisons and jails. Also, a few convicted offenders are executed (Chapter 2).

These numbers tell us the *quantity* of punishment, which we should surely acknowledge—and accept that for good or ill—it's probably not going to change any time soon. But, the quantity of punishment doesn't tell us anything about three essential aspects of punishment. First, it doesn't define "punishment" as we use it in criminal law. Second, it doesn't explain the purposes of (also called justifications for) criminal punishment. Third, it doesn't tell us what the limits of criminal punishment are. (You'll learn about the limits of punishment in Chapter 2 in the section on the U.S. Constitution's Eighth Amendment ban on "cruel and unusual punishments," the Sixth Amendment's "right to trial by jury," and the due process requirement of proof beyond a reasonable doubt.) Let's turn now to the definition of, and the justifications for, "punishment."

The Definition of "Criminal Punishment"

LO 4

In everyday life, "**punishment**" means intentionally inflicting pain or other unpleasant consequences on another person. Punishment takes many forms in everyday life. A parent grounds a teenager; a club expels a member; a church excommunicates a parishioner; a friend rejects a companion; a school expels a student for cheating—all these are punishments in the sense that they intentionally inflict pain or other unpleasant consequences ("hard treatment") on the recipient. However, none of these

is **criminal punishment**. To qualify as criminal punishment, penalties have to meet four criteria:

1. They have to inflict pain or other unpleasant consequences.
2. They have to prescribe a punishment in the same law that defines the crime.
3. They have to be administered intentionally.
4. The state has to administer them.

The last three criteria don't need explanation; the first does. "Pain or other unpleasant consequences" is broad and vague. It doesn't tell us what kind of, or how much, pain. A violent mental patient confined indefinitely to a padded cell in a state security hospital suffers more pain than a person incarcerated for five days in the county jail for disorderly conduct. Nevertheless, only the jail sentence is criminal punishment. The difference lies in the purpose of the confinement. Hospitalization aims to treat and cure the mental patient; the pain is a necessary but an unwanted side effect, not the reason for the confinement. On the other hand, the pain of confinement in the jail is inflicted intentionally to punish the inmate's disorderly conduct.

This distinction between criminal punishment and treatment is rarely clear-cut. For example, the government may sentence certain convicted criminals to confinement in maximum-security hospitals; it may sentence others to prison for "treatment" and "cure." Furthermore, pain and pleasure don't always distinguish punishment from treatment. Shock treatment and padded cells inflict more pain than confinement in some minimum-security federal prisons with their "country club" atmospheres. When measured by pain, those who receive it may well prefer punishment to treatment. Some critics maintain that the major shortcoming of treatment is that "helping" a patient can lead to excessive measures, as it sometimes has, in such examples as massive surgery, castration, and lobotomy (Hart 1958, 403–05).

The Purposes of Criminal Punishment

LO 4

Thinking about the purposes for criminal punishment has divided roughly into two schools that have battled for five centuries, maybe even for millennia. On the **retribution** side of the divide, retributionists insist that only the pain of punishment can pay for offenders' past crimes. In other words, punishment justifies itself. On the **prevention** side of the divide, utilitarians insist with equal passion that the pain of punishment can—and should—be only a means to a greater good, usually the prevention or at least the reduction of future crime. Let's look at each of these schools.

Retribution

Striking out to hurt what hurts us is a basic human impulse. It's what makes us kick the table leg we stub our toe on. This impulse captures the idea of retribution, which appears in the texts of many religions. Here's the Old Testament version:

> Now a man, when he strikes down any human life, he is put to death, yes death! And a man, when he renders a defect in his fellow, as he has done, thus is to be done to him—break in place of break, eye in place of eye, tooth in place of tooth. (Fox 1995, translating Leviticus 24: 17, 19–20)

Of course, we don't practice this extreme form of payback in the United States, except for murder—and, even for murder, the death penalty is rarely imposed (Chapter 2).

In other cases, the Old Testament version of retribution is unacceptable to most retributionists and highly unrealistic: raping a rapist? robbing a robber? burning down an arsonist's house?

Retribution looks back to past crimes and punishes individuals for committing them, because it's right to hurt them. According to the great Victorian English judge and historian of the criminal law Sir James F. Stephen (1883), the wicked deserve to suffer for their evil deeds:

> The infliction of punishment by law gives definite expression and a solemn ratification and justification to the hatred, which is excited by the commission of the offense. The criminal law thus proceeds upon the principle that it is morally right to hate criminals, and it confirms and justifies that sentiment by inflicting on criminals punishments, which express it.
>
> I think it highly desirable that criminals should be hated, that the punishments inflicted upon them should be so contrived as to give expression to that hatred, and to justify it so far as the public provision of means for expressing and gratifying a healthy natural sentiment can justify and encourage it. The forms in which deliberate anger and righteous disapprobation are expressed, and the execution of criminal justice is the most emphatic of such forms, stand to the one set of passions in the same relation in which marriage stands to sexual passion. (81–82)

Retributionists contend that punishment benefits not only society, as Stephen emphasized, but also criminals. Just as society feels satisfied by "paying back" criminals, giving criminals their "just deserts," offenders benefit by putting right their evil. Society pays back criminals by retaliation; criminals pay back society by accepting responsibility through punishment. Both paybacks are at the heart of retribution.

Retribution is right only if offenders *choose* between committing and not committing crimes. In other words, we can blame criminals only if they had these choices and made the wrong choice. So in the popular "Do the crime, do the time," what we really mean is, "You *chose* to do the crime, so you *have to* do the time." Their wrong choice makes them blameworthy. *And* their blameworthiness (the criminal law calls it their "culpability") makes them responsible (the criminal law calls it "liable"). So as culpable, responsible individuals, they have to suffer the consequences of their irresponsible behavior.

Retribution has several appealing qualities. It assumes free will, thereby enhancing individual autonomy. Individuals who have the power to determine their own destinies aren't at the mercy of forces they can't control. Retribution also seems to accord with human nature. Hating and hurting wrongdoers—especially murderers, rapists, robbers, and other violent criminals—appear to be natural impulses (Gaylin 1982; Wilson and Herrnstein 1985, ch. 19).

Moreover, retribution has an ancient pedigree. From the Old Testament's philosophy of taking an eye for an eye, to the nineteenth-century Englishman's claim that it's right to hate and hurt criminals, to today's "three strikes and you're out" and "do the crime, do the time" sentences (Chapter 2), the desire for retribution has run strong and deep in both religion and criminal justice. Its sheer tenacity seems to validate retribution.

Retributionists, however, claim that retribution rests not only on long use but also on two firm philosophical foundations, namely culpability and justice. According to its proponents, retribution requires culpability. Only someone who intends to harm her victim deserves punishment; accidents don't qualify. So people who load, aim, and fire

guns into their enemies' chests deserve punishment; hunters who fire at what they think is a deer and hit their companions who they should know are in the line of fire, don't. Civil law can deal with careless people; the criminal law ought to punish only people who harm their victims "on purpose."

Retributionists also claim that justice is the only proper measure of punishment. Justice is a philosophical concept whose application depends on culpability. Culpability depends on blame; we can punish only those who we can blame; we can blame only those who freely choose, and intend, to harm their victims. Therefore, only those who deserve punishment can justly receive it; if they don't deserve it, it's unjust. Similarly, justice is the only criterion by which to determine the quality and quantity of punishment (Chapter 2, "Proportional Punishments").

Opponents find much to criticize in retribution. First, it's difficult to translate abstract justice into concrete penalties. What are a rapist's just deserts? Is castration for a convicted rapist justice? How many years in prison is a robbery worth? How much offender suffering will repay the pain of a maimed aggravated assault victim? Of course, it's impossible to match exactly the pain of punishment and the suffering caused by the crime.

Another criticism is that the urge to retaliate isn't part of human nature in a civilized society; it's the last remnant of barbarism. Retributionists can only assume that human nature cries out for vengeance; they can't prove it. So it's time for the law to reject retribution as a purpose for punishment.

Determinists, which include many criminologists, reject the free-will assumption underlying retribution (Mayer and Wheeler 1982; Wilson and Herrnstein 1985). They maintain that forces beyond human control determine individual behavior. Social scientists have shown the relationship between social conditions and crime. Psychiatrists point to subconscious forces beyond the conscious will's control that determine criminal conduct. A few biologists have linked violent crime to biological and biochemical abnormalities. Determinism undermines the theory of retribution because it rejects blame, and punishment without blame is unjust.

Probably the strongest argument against retribution is that the vast number of crimes don't require culpability to qualify for criminal punishment (Diamond 1996, 34). This includes almost all the crimes against public order and morals (discussed in Chapter 12). It includes some serious crimes, too—for example, statutory rape—where neither the consent of the victim nor an honest and reasonable mistake about the victim's age relieves statutory rapists from criminal liability (discussed in Chapter 10)—and several kinds of unintentional homicides (discussed in Chapters 4 and 9).

Prevention

Prevention looks forward and inflicts pain, not for its own sake, but to prevent (or at least reduce) future crimes. There are four kinds of prevention. **General deterrence** aims, by the threat of punishment, to prevent the general population who haven't committed crimes from doing so. **Special deterrence** aims, by punishing already convicted offenders, to prevent them from committing any more crimes in the future. **Incapacitation** prevents convicted criminals from committing future crimes by locking them up, or more rarely, by altering them surgically or executing them. **Rehabilitation** aims to prevent future crimes by changing individual offenders so they'll want to play by the rules and won't commit any more crimes in the future. As you can see, all four forms of prevention inflict pain, not for its own sake, but to secure the higher good of preventing future crimes. Let's look at each of these forms of prevention.

General and Special Deterrence

Jeremy Bentham, an eighteenth-century English law reformer, promoted deterrence. Bentham was part of the intellectual movement called "the Enlightenment." At the core of the movement was the notion that natural laws govern the physical universe and, by analogy, human society. One of these "laws," **hedonism**, is that human beings seek pleasure and avoid pain. A related law, **rationalism**, states that individuals can, and ordinarily do, act to maximize pleasure and minimize pain. Rationalism also permits human beings to apply natural laws mechanistically (according to rules) instead of discretion (according to the judgment of individual decision makers).

These ideas, oversimplified here, led Bentham to formulate classical **deterrence theory**. According to the theory, rational human beings won't commit crimes if they know that the pain of punishment outweighs the pleasure gained from committing crimes. Prospective criminals weigh the pleasure they hope to get from committing a crime now against the threat of pain they believe they'll get from future punishment. According to the natural law of hedonism, if prospective criminals fear future punishment more than they derive pleasure from present crime, they won't commit crimes. In short, they're deterred.

Supporters of deterrence argue that the **principle of utility**—permitting only the minimum amount of pain necessary to prevent the crime—limits criminal punishment more than retribution does. English playwright George Bernard Shaw, a strong deterrence supporter, put it this way: "Vengeance is mine saith the Lord; which means it is not the Lord Chief Justice's" (Morris 1974). According to this argument, only God, the angels, or some other divine being can measure just deserts. Social scientists, on the other hand, can determine how much pain, or threat of pain, deters crime. With this knowledge, the state can scientifically inflict the minimum pain needed to produce the maximum crime reduction.

Deterrence supporters concede that there are impediments to putting deterrence into operation. The emotionalism surrounding punishment impairs objectivity, and often, prescribed penalties rest more on faith than evidence. For example, the economist Isaac Ehrlich's (1975) sophisticated econometric study showed that every execution under capital punishment laws may have saved seven or eight lives by deterring potential murderers. His finding sparked a controversy having little to do with the study's empirical validity. Instead, the arguments turned to ethics—whether killing anyone is right, no matter what social benefits it produces. During the controversy over the study, one thoughtful state legislator told me that he didn't "believe" the findings, but if they were true, then "we'll just have to deep-six the study."

Critics find several faults with deterrence theory and its application to criminal punishment. According to the critics, the rational, free-will individual that deterrence supporters assumes exists is as far from reality as the eighteenth-century world that spawned the idea. Complex forces within the human organism and in the external environment, both of which are beyond individual control, strongly influence behavior (Wilson and Herrnstein 1985).

Furthermore, critics maintain that individuals and their behavior are too unpredictable to reduce to a mechanistic formula. For some people, the existence of criminal law is enough to deter them from committing crimes; others require more. Who these others are and what the "more" consists of hasn't been sufficiently determined to base punishment on deterrence. Besides, severity isn't the only influence on the effectiveness of punishment. Certainty and speed may have greater deterrent effects than severity (Andenæs 1983, 2:593).

Also, threats don't affect all crimes or potential criminals equally. Crimes of passion, such as murder and rape, are probably little affected by threats; speeding, drunk driving, and corporate crime are probably greatly affected by threats. The leading deterrence theorist, Johannes Andenæs (1983), sums up the state of our knowledge about deterrence this way:

> There is a long way to go before research can give quantitative forecasts. The long-term moral effects of the criminal law and law enforcement are especially hard to isolate and quantify. Some categories of crime are so intimately related to specific social situations that generalizations of a quantitative kind are impossible. An inescapable fact is that research will always lag behind actual developments. When new forms of crime come into existence, such as hijacking of aircraft or terrorist acts against officers of the law, there cannot possibly be a body of research ready as a basis for the decisions that have to be taken. Common sense and trial by error have to give the answers. (2:596)

Finally, critics maintain that even if we could obtain empirical support for criminal punishment, deterrence is unjust because it punishes for example's sake. Supreme Court Justice Oliver Wendell Holmes (Howe 1953) offered this analogy: If I were having a philosophical talk with a man I was going to have hanged (or electrocuted) I should say, "I don't doubt that your act was inevitable for you but to make it more avoidable by others we propose to sacrifice you to the common good. You may regard yourself as a soldier dying for your country if you like. But the law must keep its promises" (806).

Punishment shouldn't be a sacrifice to the common good; it's only just if it's administered for the redemption of particular individuals, say the retributionists. Punishment is personal and individual, not general and societal. Deterrence proponents respond that as long as offenders are in fact guilty, punishing them *is* personal; hence, it *is* just to use individual punishment for society's benefit.

Incapacitation

Incapacitation restrains convicted offenders from committing further crimes. At the extreme, incapacitation includes mutilation—castration, amputation, and lobotomy—or even death in capital punishment. Incapacitation in most cases means imprisonment. Incapacitation works: dead people can't commit crimes, and prisoners don't commit them—at least not outside prison walls. Incapacitation, then, has a lot to offer a society determined to repress crime. According to criminologist James Q. Wilson (1975):

> The chances of a persistent robber or burglar living out his life, or even going a year with no arrest, are quite small. Yet a large proportion of repeat offenders suffer little or no loss of freedom. Whether or not one believes that such penalties, if inflicted, would act as a deterrent, it is obvious that they could serve to incapacitate these offenders and, thus, for the period of the incapacitation, prevent them from committing additional crimes. (209)

Like deterrence and retribution, incapacitation has its share of critics. They argue that incapacitation merely shifts criminality from outside prisons to inside prisons. Sex offenders and other violent criminals can and do still find victims among other prisoners; property offenders trade contraband and other smuggled items. As you might imagine, this criticism finds little sympathy (at least among many of my students, who often answer this criticism with an emphatic, "Better them than me"). Of course, because almost all prisoners "come home," their incapacitation is always temporary.

Rehabilitation

In his widely acclaimed book *The Limits of the Criminal Sanction*, Herbert Packer (1968) succinctly summarized the aims of rehabilitation: "The most immediately appealing justification for punishment is the claim that it may be used to prevent crimes by so changing the personality of the offender that he will conform to the dictates of law; in a word, by reforming him" (50).

Rehabilitation borrows from the **"medical model" of criminal law**. In this model, crime is a "disease," and criminals are "sick." According to rehabilitationists, the purpose of punishment is to "cure" criminal patients by "treatment." The length of imprisonment depends on how long it takes to cure the patient. Supporters contend that treating offenders is more humane than punishing them.

Two assumptions underlie rehabilitation theory. The first is **determinism**; that is, forces beyond offenders' control cause them to commit crimes. Because offenders don't choose to commit crimes, we can't blame them for committing them. Second, therapy by experts can change *offenders* (not just their behavior) so that they won't *want* to commit any more crimes. After rehabilitation, former criminals will control their own destinies. To this extent, rehabilitationists adopt the idea of free will and its consequences: criminals can choose to change their life habits; so society can blame and punish them.

The view that criminals are sick has profoundly affected criminal law—and generated acrimonious debate. The reason isn't because reform and rehabilitation are new ideas; quite the contrary is true. Victorian Sir Francis Palgrave summed up a 700-year-old attitude when he stated the medieval church's position on punishment: it was not to be "thundered in vengeance for the satisfaction of the state, but imposed for the good of the offender; in order to afford the means of amendment and to lead the transgressor to repentance, and to mercy." Sixteenth-century Elizabethan pardon statutes were laced with the language of repentance and reform; the queen hoped to achieve a reduction in crime by mercy rather than by vengeance. Even Jeremy Bentham, most closely associated with deterrence, claimed that punishment would "contribute to the reformation of the offender, not only through fear of being punished again, but by a change in his character and habits" (Samaha 1978, 763).

Despite this long history, rehabilitation has suffered serious attacks. First, and most fundamental, critics maintain that rehabilitation is based on false, or at least unproven, assumptions. The causes of crime are so complex, and the wellsprings of human behavior as yet so undetermined, that sound policy can't depend on treatment. Second, it makes no sense to brand everyone who violates the criminal law as sick and needing treatment (Schwartz 1983, 1364–73).

Third, critics call rehabilitation inhumane because the cure justifies administering large doses of pain. British literary critic C. S. Lewis (1953) argued:

> My contention is that good men (not bad men) consistently acting upon that position would act as cruelly and unjustly as the greatest tyrants. They might in some respects act even worse. Of all tyrannies a tyranny sincerely exercised for the good of its victims may be the most oppressive. It may be better to live under robber barons than under omnipotent moral busybodies.
>
> The robber baron's cruelty may sometimes sleep, his cupidity may at some point be satiated; but those who torment us for our own good, will torment us without end for they do so with the approval of their own conscience. They may be more likely to go to Heaven yet at the same time likelier to make a Hell of earth.

Their very kindness stings with intolerable insult. To be "cured" against one's will and cured of states which we may not regard as disease is to be put on a level with those who have not yet reached the age of reason or those who never will; to be classed with infants, imbeciles, and domestic animals. But to be punished, however severely, because we have deserved it, because we "ought to have known better," is to be treated as a human person made in God's image. (224)

Trends in Punishment

Historically, societies have justified punishment on the grounds of retribution, deterrence, incapacitation, and rehabilitation. But the weight given to each has shifted over the centuries. Retribution and rehabilitation, for example, run deep in English criminal law from at least the year 1200. The church's emphasis on atoning for sins and rehabilitating sinners affected criminal law variously. Sometimes the aims of punishment and reformation conflict in practice.

In Elizabethan England, for example, the letter of the law was retributive: the penalty for all major crimes was death. Estimates show that in practice, however, most accused persons never suffered this extreme penalty. Although some escaped death because they were innocent, many were set free on the basis of their chances for rehabilitation. The law's technicalities, for example, made death a virtually impossible penalty for first-time property offenders. In addition, the queen's general pardon, issued almost annually, gave blanket clemency in the hope that criminals, by this act of mercy, would reform their erring ways (Samaha 1974, 1978).

Gradually, retribution came to dominate penal policy, until the eighteenth century, when deterrence and incapacitation were introduced to replace what contemporary humanitarian reformers considered ineffective, brutal, and barbaric punishment in the name of retribution. By 1900, humanitarian reformers had concluded that deterrence was neither effective nor humane. Rehabilitation replaced deterrence as the aim of criminal sanctions and remained the dominant form of criminal punishment until the 1960s. Most states enacted **indeterminate sentencing laws** that made prison release dependent on rehabilitation. Most prisons created treatment programs intended to reform criminals so they could become law-abiding citizens. Nevertheless, considerable evidence indicates that rehabilitation never really won the hearts of most criminal justice professionals, despite their strong public rhetoric to the contrary (Rothman 1980).

In the early 1970s, little evidence existed to show that rehabilitation programs reformed offenders. The "nothing works" theme dominated reform discussions, prompted by a highly touted, widely publicized, and largely negative study evaluating the effectiveness of treatment programs (Martinson 1974). At the same time that academics and policy makers were becoming disillusioned with rehabilitation, public opinion was hardening into demands for severe penalties in the face of steeply rising crime rates. The time was clearly ripe for retribution to return to the fore as a dominant aim of punishment.

In 1976, California, a rehabilitation pioneer in the early 1900s, reflected this shift in attitude. In its Uniform Determinate Sentencing Law, the California legislature abolished the indeterminate sentence, stating boldly that "the purpose of imprisonment is punishment," not treatment or rehabilitation. Called "just deserts," retribution was touted as "right" by conservatives who believed in punishment's morality and as "humane" by liberals convinced that rehabilitation was cruel and excessive. Public

opinion supported it, largely on the grounds that criminals deserve to be punished (Feeley 1983, 139). The new philosophy (actually the return to an old philosophy) replaced the indeterminate sentence with **fixed (determinate) sentences**, in which the sentence depends on the criminal harm suffered by the victim, not the rehabilitation of the offender.

Since the mid-1980s, reformers have heralded retribution and incapacitation as the primary purpose of criminal punishments. *The Model Penal Code* (described later in "The Model Penal Code (MPC)" section), clung to prevention, namely in the form of rehabilitation from its first version in 1961, when rehabilitation dominated penal policy. After thoroughly reviewing current research and debate, its reporters decided to retain rehabilitation, but to replace it as the primary form of punishment with incapacitation and deterrence (American Law Institute 2007). According to the tentative new provisions, the purpose of sentencing is retribution, namely to impose sentences "within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders. . . ."

And only "when reasonably feasible, to achieve offender rehabilitation, general deterrence, incapacitation of dangerous offenders, restoration of crime victims and communities, and reintegration of offenders into the law-abiding community, provided these goals are pursued within the boundaries of proportionality . . . (1).

Before the government can punish criminal behavior—however it's defined, classified, and whatever source it's derived from—the government has to prove that the defendant committed the crime. Let's turn now to providing you with some of the basics of proving defendants are guilty.

Presumption of Innocence and Proving Criminal Liability

LO 5

Under our legal system, criminal defendants enjoy the **presumption of innocence**, which practically speaking means that the prosecution has the **burden of proof** when it comes to proving the criminal act and intent. As you learned earlier in the chapter (p. 6), proving criminal conduct is necessary to impose criminal liability and punishment. But, it's not enough. The criminal conduct must be without justification or excuse. Here, the burden of proof can shift from the prosecution to the defense. Let's look at the burden of proof of criminal conduct, and the burden of proof in justification and excuse defenses.

Burden of Proof of Criminal Conduct

LO 5

According to the U.S. Supreme Court (*In re Winship* 1970), the government has to prove beyond a reasonable doubt, "every fact necessary to constitute the crime charged" (363). **Proof beyond a reasonable doubt** is the highest standard of proof known to the law. Notice that *highest* doesn't mean beyond all doubt or to the level of absolute certainty. **Reasonable doubt** consists of "the proof that prevents one from being convinced of the defendant's guilt, or the belief that there is a real possibility that the defendant is not guilty" (*Black's Law Dictionary* 2004, 1,293).

The great Victorian Judge Lemuel Shaw (1850), wrote this about trying to define reasonable doubt.

> Reasonable doubt is a term often used, probably pretty well understood, but not easily defined. It is not a mere possible doubt; because every thing relating to human affairs . . . is open to some possible or imaginary doubt. It is that state of the case, which after all the comparison and consideration of the evidence, leaves the minds of the jury in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. (320)

Judge Shaw refers to proving guilt to juries, whom we usually associate with trials. But not all trials are jury trials. In **bench trials**, in cases where the accused give up their right to a jury trial, prosecutors have to prove guilt to the trial judge.

We need to clear up an often-misunderstood and wrongly used term related to the proof of criminal behavior, namely "**corpus delicti**" (Latin "body of the crime"). The misunderstanding and misuse arises from mistaking the body of the crime with the body of the victim in homicides, where corpus delicti commonly appears. However, it also properly applies to the elements of criminal conduct (for example, stealing someone's property in theft) and bad result crimes (for example, criminal homicide) that you'll encounter in Chapters 3 and 4, and 9 through 13.

Proving the Defenses of Justification and Excuse

The defenses of justification (Chapter 5) and of excuse (Chapter 6) are called **affirmative defenses** because defendants have to present evidence. Affirmative defenses operate like this: Defendants have to "start matters off by putting in some evidence in support" of their justification or excuse (LaFave and Scott, 1986). We call this the **burden of production**. Why put this burden on defendants? Because "We can assume that those who commit crimes are sane, sober, conscious, and acting freely. It makes sense, therefore, to make defendants responsible for injecting these extraordinary circumstances into the proceedings" (52).

The amount of evidence required "is not great; some credible evidence" is enough. In some jurisdictions, if defendants meet the burden of production, they also have the **burden of persuasion**, meaning they have to prove their defenses by a **preponderance of the evidence**, defined as more than 50 percent. In other jurisdictions, once defendants meet the burden of production, the burden shifts to the government to prove defendants weren't justified or excused (Loewy 1987, 192–204).

All that you've learned up to now, valuable as it all is, neglects an entire dimension to criminal law and punishment—informal discretionary decision making hidden from view. Let's look briefly at this enormously important dimension.

Discretionary Decision Making

LO 6

Most of what you'll learn in this book focuses on decisions made according to *formal* law, namely rules written and published in the Constitution, laws, judicial opinions, and other written sources. But, you can't really understand what's happening in your journey through criminal law and punishment without understanding something about decision

making that's not visible in the written sources. This invisible informal **discretionary decision making**—consisting of judgments made by professionals, based on unwritten rules, their training, and their experience—is how the process works on a day-to-day basis.

Think of each step in the criminal process as a decision point. Each step presents a criminal justice professional with the opportunity to decide whether or not to start, continue, or end the criminal process. The police can investigate suspects, or not, and arrest them, or not—initiating the formal criminal process, or stopping it. Prosecutors can charge suspects and continue the criminal process, divert suspects to some social service agency, or take no further action—effectively terminating the criminal process. Defendants can plead guilty (usually on their lawyers' advice) and avoid trial. Judges can suspend sentences or sentence convicted offenders to the maximum allowable penalty—hence, either minimizing or maximizing the punishment the criminal law prescribes.

Justice, fairness, and predictability all require the certainty and the protection against abuses provided by written rules. These same goals also require discretion to soften the rigidity of written rules. The tension between formal law and informal discretion—a recurring theme in criminal procedure—is as old as law; arguments raged over it in Western civilization as early as the Middle Ages.

One example of the need for discretionary decision making comes up when laws are applied to behavior that "technically" violates a criminal statute but was never intended by the legislature to be criminalized. This happens because it's impossible for legislators to predict all the ramifications of the statutes they enact. For example, it's a misdemeanor to drink in public parks in many cities, including Minneapolis. Yet, when a gourmet group had a brunch in a city park, because they thought the park had just the right ambience in which to enjoy their salmon mousse and imported French white wine, not only did the police not arrest the group for drinking in the park, but the city's leading newspaper wrote it up as a perfectly respectable social event.

A young public defender wasn't pleased with the nonarrest. He pointed out that the police had arrested, and the prosecutor was at that moment prepared to prosecute, a Native American caught washing down a tuna fish sandwich with cheap red wine in another Minneapolis park. The public defender—a bit of a wag—noted that both the gourmet club and the Native American were consuming items from the same food groups.

This incident displays both the strengths and weaknesses of discretion. The legislature obviously didn't intend the statute to cover drinking of the type the gourmet club engaged in; arresting them would have been foolish. On the other hand, arresting and prosecuting the Native American might well have been discriminatory, a wholly unintended and unacceptable result of law enforcement that is discretionary and selective.

The Text-Case Method

LO 7

Now that you've got the big picture of criminal liability and punishment, the overarching principles that apply to all of criminal law, the sources of criminal law in a federal system, proving criminal conduct and the justifications and excuses to criminal liability, and the importance of discretionary decision making, it's time to take a closer look at the method this book uses to help you learn, understand, and think critically about criminal law.

It's called the "text-case method," and *Criminal Law 10* is called a "text-case book," meaning that it's part text and part excerpts from criminal law cases specially edited for

nonlawyers like you. The text part of the book explains the general principles of criminal law and the definitions of specific crimes. The case excerpts involve real-life crimes that apply the general information in the text to real-life situations.

The application of principles and definitions of crimes to the facts of specific cases serves two important purposes. First, it helps you understand the principles and the elements of specific crimes. Second, it stimulates you to think critically about the principles and their applications. I believe the combination of text and case excerpts is the best way to test whether you understand and can think about general concepts rather than just memorizing and writing them by rote. So, although you can learn a lot from the text without reading the case excerpts, you won't get the full benefit of what you've learned without applying and thinking about it by reading the case excerpts.

For most of my students (and from emails many of you send me), reading and discussing the case excerpts are their favorite part of the book. That's good. Cases bring criminal law to life by applying the abstract general principles, doctrines, and rules described in the text to real events in the lives of real people. But keep in mind that judges write the reports of the cases the excerpts are taken from. So don't be surprised to learn that they don't all write with college students or other nonlawyers in mind. Reading the excerpts may take some getting used to. This section is designed to help you get the most out of the cases.

The cases in this book are all excerpts, edited versions of the complete reports of the cases. In almost all the case excerpts, you'll read reports of the appeals of guilty verdicts, not transcripts of the criminal trial. A jury or trial court judge has already found a defendant guilty, or more likely the defendant has pleaded guilty in a trial court; the trial judge has entered a judgment of conviction; and the defendant has appealed the conviction.

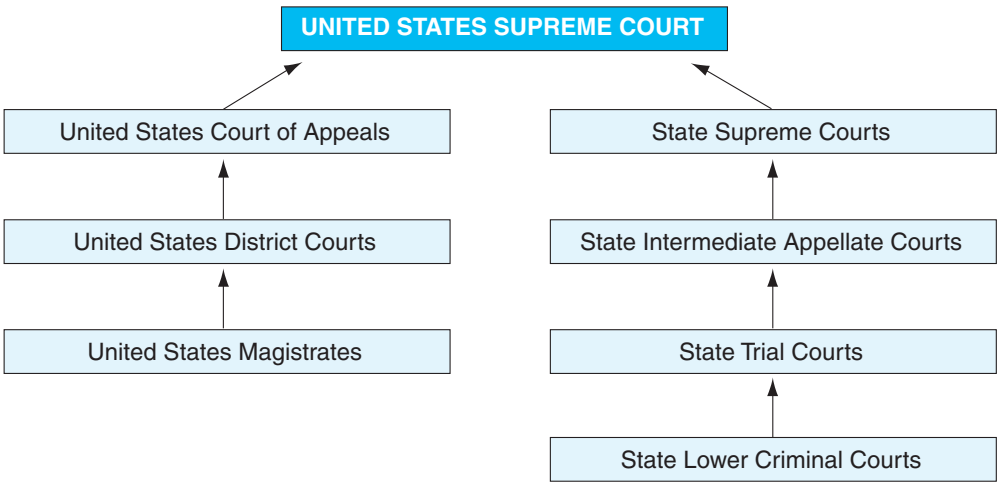
Incidentally, you'll never read the appeal of an acquittal. Why not? In the criminal law of the United States, a "not guilty" verdict is final and not subject to review. (There's an exception, sort of, to this rule, but we'll take it up in the first of the few case excerpts where the exception applies.)

Let's look at a few technical, but essential, points about the verdicts "not guilty" and "guilty." A "**not guilty" verdict** doesn't mean innocent; it means the government didn't prove its case beyond a reasonable doubt. Think of "not guilty" as "not *legally* guilty." A "**guilty" verdict** doesn't mean not innocent; it means the government proved its case beyond a reasonable doubt. Think of "guilty" as "*legally* guilty." These differences are not just technicalities. As you read the cases, remember that some of the *legally* guilty defendants you're reading about are *factually* innocent. The flip side is also true; some acquitted defendants are *factually* guilty. The number of factually guilty people who "got off" is probably less than many people believe ("Symposium: Wrongful Convictions and Systemic Reform" 2005).

Criminal cases start in trial courts. It's in the trial courts that the cases for the state and the defense are presented; where their witnesses and the physical evidence are introduced; and where the *fact finders* (juries in jury trials or judges in nonjury bench trials) decide what the "true" story is and whether the evidence all adds up to proof of guilt beyond a reasonable doubt). If there's reasonable doubt, the jury renders its "not guilty" verdict; the judge enters a judgment of acquittal; and, the case is over—for good. There's no appeal to an acquittal; the fact finders' not guilty verdict is always final.

If there's proof beyond a reasonable doubt, the fact finders render their "guilty" verdict; the judge enters a judgment of guilty—and the case *might* be over. Sometimes, defendants appeal judgments of guilt. These appeals go to appellate courts. (The case excerpts are drawn from the official reports of these courts' decisions.) Most states and

FIGURE 1.2 Criminal Court Structure



the federal government have two levels of appeals courts (see Figure 1.2): an intermediate court of appeals and a supreme court. The usual procedure is to appeal first to the intermediate court of appeals and then to the state supreme court. In a very few cases involving issues about the U.S. Constitution, the case may go to the U.S. Supreme Court. That's where the case excerpts in this book enter the picture. Let's look at the parts of the appellate cases you'll be reading excerpts from.

The Parts of the Case Excerpts

Don't worry if reading cases intimidates you at first. Like students before you, you'll get the hang of it before long. To help you get the most out of the case excerpts, I've outlined the main parts of each case: the (1) title, (2) citation, (3) procedural history, (4) judge, (5) facts, (6) judgment, and (7) opinion.

1. *Title* The case title consists of the names of the parties, either *appellants* (the party appealing the case) and *appellees* (party appealed against) or *petitioners* (parties bringing a case in habeas corpus or certiorari) and *respondents* (parties petitioned against in habeas corpus and certiorari).
2. *Citation* The citation is like the footnote or endnote in any text; it tells you where to find the case. (See "Finding Cases" section later.)
3. *Procedural history* The case history is a brief description of the steps and judgments (decisions) made by each court that has heard the case.
4. *Judge* The name of the judge is the judge who wrote the opinion and issued the court's judgment in the case.
5. *Facts* The facts of the case are the critical starting point in reading and analyzing cases. If you don't know the facts, you can't understand the principle the case is teaching. One of my favorite law professors, Professor Hill, frequently reminded us: "Cases are stories with a point. You can't get the point if you don't know the story." He also gave us some helpful advice: "Forget you're lawyers. Tell me the story as if you were telling it to your grandmother who doesn't know anything about the law."

6. *Judgment (Decision)* The court's **judgment** (sometimes called the court's "decision") is how the court disposes of the case. In the trial court, the judgments are almost always guilty or not guilty. In appeals courts, the judgments are affirmed, reversed, or reversed and remanded (sent back to the trial court). This is the most important *legal* action of the court, because it's what decides what happens to the defendant and the government.
7. *Opinion* For students wanting to learn criminal law, the court's opinion is more important than the judgment: it's "the point of the story." In the **opinion**, the court backs up its judgment by explaining how and why the court applied the law (general principles and the elements of crimes) to the facts of the case. The law in the case excerpts includes the constitutional principles in Chapter 2; the principles of criminal liability in Chapters 3 and 4; the defenses in Chapters 5 and 6; the law of parties to crime and incomplete offenses in Chapters 7 and 8; and the law of crimes against persons, property, public order, and the state in Chapters 9 through 13.

The opinion contains two essential ingredients:

1. The court's holding—the legal rule the court has decided to apply to the facts of the cases.
2. The court's reasoning—the reasons the court gives to support its holding. In some cases, the justices write majority and dissenting opinions.

A *majority opinion,* as its name indicates, is the opinion of the majority of the justices on the court who participated in the case. The majority opinion lays out the law of the case. Although the majority opinion represents the established law of the case, *dissenting opinions* present a plausible alternative to the majority opinion. Dissents of former times sometimes become the law of later times. For example, dissents in U.S. Supreme Court opinions of the 1930s became the law in the 1960s, and many of the dissents of the 1960s became law by the 1990s, and remain the law as you're reading this.

Mostly in U.S. Supreme Court cases, you'll also see a **concurring opinion**. In concurring opinions, justices agree with the conclusions of either the majority or the dissenting opinion, but they have different reasons for reaching the conclusion. Sometimes, enough justices agree with the *result* in the case to make up a majority decision, but not enough agree on the *reasoning* to make up a majority opinion. In these cases, there's a **plurality opinion**, an opinion that represents the reasoning of the greatest number (but less than a majority) of justices.

All of the differing perspectives in the opinions stimulate you to think about all the topics in criminal law. They also clearly demonstrate that there's more than one reasonable way to look at important questions.

Briefing the Case Excerpts

To get the most from your reading of the case excerpts, you should write out the answers to the following questions about each. This is what we call "briefing" a case.

1. *What are the facts?* State the facts in simple narrative form in chronological order. As Professor Hill said, "Tell me the story as if you were telling it to your grandmother." Then, select, sort, and arrange the facts into the following categories:
   a. *Actions of the defendant* List what the defendant did in chronological order. (Remember, there's no criminal case without a criminal act by the defendant.)

   b. *Intent of the defendant required, if any* If none is required, say "none."
   c. *Circumstances required by the statute defining the crime (such as age in statutory rape), if any* If none is required, answer "none."
   d. *Causing a harmful result, if one is required* If none is required, say "none."
   e. *Justification and excuse (defense), if any* If none, answer "none."
2. *What's the legal issue in the case?* State the principle and/or element of a specific crime raised by the facts of the case.
3. *What are the arguments in the court's opinion?* List the reasons the court gives for its decision. The court's opinion consists of how and why the court applies the principle, doctrine, and/or rule to the facts of the case.
4. *State the court's judgment (decision)* The most common judgments are
   a. *Affirmed* Upheld the judgment (decision) of the lower court
   b. *Reversed* Overturned the judgment (decision) of the lower court
   c. *Reversed and remanded* Overturned the judgment (decision) of the lower court and sent the case back for further proceedings in accord with the appellate court's decision

Summary of briefing cases: You can't answer all these questions in every case. First, the answers depend on the knowledge you'll accumulate as the text and your instructor introduce more principles, doctrines, and rules. Second, courts don't necessarily follow the same procedure in reviewing an appeal as the one outlined here. Third, not all of the questions come up in every case—except for one: What did the defendant do? That's because there's no criminal case without some action by the defendant (Chapter 3).

Developing the skills needed to sort out the elements of the case excerpts requires practice, but it's worth the effort. Answering the questions can challenge you to think not only about the basic principles, doctrines, and rules of criminal law but also about your own fundamental values regarding life, property, privacy, and morals.

Finding Cases

Knowing how to read and brief cases is important. So is knowing how to find cases. You may want to look up cases on your own, either in the library or in the rapidly expanding quantity of cases published on the Internet. These might include cases your instructor talks about in class, those discussed in the text, or the full versions of the case excerpts and the note cases following the excerpts. You may even want to look up a case you read or hear about outside of class.

The **case citation** consists of the numbers, letters, and punctuation that follow the title of a case in the excerpts or in the bibliography at the end of the book. These letters and numbers tell you where to locate the full case report. For example, in *State v. Metzger*, just after the title of the case, "State v. Metzger," you read "319 N.W. 2d 459 (Neb. 1982)." Here's how to interpret this citation:

319 = Volume 319

N.W.2d = Northwestern Reporter, Second Series

459 = page 459

(Neb. 1982) = Nebraska Supreme Court in the year 1982

So if you're looking for the full version of *State v. Metzger*, you'll find it in Volume 319 of the *Northwestern Reporter*, Second Series, page 459. The Northwestern Reporter, Second Series, is the second series of a multivolume set of law books that publishes reports of cases decided by the supreme courts and intermediate appellate courts in Nebraska and several other states in the region. There are comparable reporters for other regions, including the Northeast (N.E.), Southern (So.), Southwest (S.W.), and Pacific (P.).

Case citations always follow the same order. The volume number always comes before the title of a reporter and the page always comes immediately after the title. The abbreviation of the name of the court and the year the case was decided follow the page number in parentheses. You can tell if the court was the highest or an intermediate appellate court by the abbreviation. For example, in *Metzger*, the court is the Nebraska Supreme Court. (If the Nebraska intermediate appeals court had decided the case, you'd see "Neb. App.")

SUMMARY

LO 1, LO 4
- Define what behavior deserves criminal punishment. Crimes are acts deserving of the strongest sanction and stigma of a society. Criminal punishment is the least common and most drastic reaction to unwanted behavior.

LO 2
- Describe the relationship between the general and special parts of criminal law. General principles of criminal law apply to many or all crimes. General principles include the standard of voluntary action, criminal intent, complicity (crimes that make one person responsible for another's behavior), attempt, conspiracy, and solicitation. Specific crimes include crimes against persons, property, public order (or morals), and crimes against the state. The prosecution of crime involves application of one or more general and/or specific principles.

LO 3
- Identify and describe the main sources of criminal law. Criminal law is established by elected representatives (state legislatures, city and town councils, U.S. Congress), administrative agencies (IRS tax regulations, vehicle safety standards of the state highway patrol), and judges (common law).

LO 4
- Define "criminal punishment," "criminal and noncriminal sanctions," and the purposes of each. Criminal punishment is a special form of pain or other unpleasant consequence that goes beyond noncriminal sanctions (deserving of monetary award in a civil lawsuit), regulated behavior (laws formally discourage), licensed behavior (a price is charged), and lawful behavior (subject to individual conscience and social disapproval).

LO 5
- Define "presumption of innocence" and "burden of proof" as they relate to criminal liability. The most common and well-known burden of proof in prosecuting criminal conduct is proof beyond a reasonable doubt. Another standard, used for affirmative defenses such as justification and excuse, places the burden of production (evidence exists) or of persuasion (most of the evidence) on the defendant.

LO 6
- Describe the role of informal discretion and its relationship to formal criminal law. Discretionary decision making is decision making that's hidden from view. It includes the police decision to investigate or not, the prosecutor's decision to charge, judges suspending sentences, and more.

LO 7

- Describe the text-case method and how to apply it to the study of criminal law. The text part of the book describes principles of criminal law, while the case excerpts involve real-life crimes that apply them to real-life situations. This book is one example.

KEY TERMS

criminal liability, p. 6
torts, p. 8
crimes of moral turpitude, p. 11
felonies, p. 11
misdemeanors, p. 11
general part of criminal law, p. 12
special part of criminal law, p. 12
common law crimes, p. 13
codified (criminal law), p. 15
Model Penal Code (MPC), p. 16
analysis of criminal liability, p. 17
administrative crimes, p. 19
federal system, p. 19
rates of imprisonment, p. 20
punishment, p. 21
criminal punishment, p. 22
retribution (and criminal punishment), p. 22
prevention (and criminal punishment), p. 22
general deterrence (and criminal punishment), p. 24
special deterrence (and criminal punishment), p. 24
incapacitation (and criminal punishment), p. 24
rehabilitation (and criminal punishment), p. 24
hedonism (and criminal punishment), p. 25
rationalism (and criminal punishment), p. 25
deterrence theory, p. 25
principle of utility, p. 25
incapacitation, p. 26
"medical model" of criminal law, p. 27
determinism (and criminal punishment), p. 27
indeterminate sentencing laws, p. 28
fixed (determinate) sentences, p. 29
presumption of innocence, p. 29
burden of proof, p. 29
proof beyond a reasonable doubt, p. 29
reasonable doubt, p. 29
bench trial, p. 30
corpus delicti, p. 30
affirmative defenses, p. 30
burden of production, p. 30
burden of persuasion, p. 30
preponderance of the evidence, p. 30
discretionary decision making, p. 31
not guilty verdict, p. 32
guilty verdict, p. 32
judgment (in criminal cases), p. 34
opinion (in criminal cases), p. 34
concurring opinion (in criminal cases), p. 34
plurality opinion (in criminal cases), p. 34
case citation, p. 35

WEB RESOURCES

To prepare for exams, visit the *Criminal Law* companion website at www.cengage.com/criminaljustice/samaha, which features essential review and study tools such as flashcards, a glossary of terms, tutorial quizzes, and Supreme Court updates.

2

Dick Heller signs an autograph outside the Supreme Court in Washington, D.C., on Thursday, June 26, 2008, after the Court ruled that Americans have a constitutional right to keep guns in their homes for self-defense, the justices' first major pronouncement on gun control in U.S. history.

LEARNING OBJECTIVES

1 To understand and appreciate the reasons for the limits on criminal law and criminal punishment in the U.S. constitutional democracy.

2 To understand the principle of legality and the importance of its relationship to the limits of criminal law and punishment.

3 To appreciate the nature and importance of retroactive criminal law making.

4 To know the criteria for identifying vague laws, and to understand and appreciate their constitutional significance and the consequences.

5 To know and understand and appreciate the limits placed on the criminal law and criminal punishment by the specific provisions in the Bill of Rights.

6 To understand and appreciate the constitutional significance and consequences of principle of proportionality in criminal punishment.

7 To understand the importance of the right to trial by jury in the process of sentencing convicted offenders.

Constitutional Limits on Criminal Law

CHAPTER OUTLINE

The Death Penalty for Child Rape?

She could have been anyone's eight-year-old daughter. The image of the Harvey, Illinois, youngster sorting Girl Scout cookies in the family garage when two men grabbed her and dragged her to a vacant lot where she was raped was recounted repeatedly by the girl and her stepfather. Then the story fell apart. The stepfather was charged with the crime and then convicted by a Jefferson Parish jury that also decided he should pay the ultimate price for the crime: his life. The two-and-a-half-week-long trial reached a historic climax when the 38-year-old Harvey man became the first person in the nation in more than 25 years to be sentenced to death for rape.

(Darby 2003, 1)

The authors of the U.S. Constitution were suspicious of power, especially power in the hands of government officials. They were also devoted to the right of individuals to control their own destinies without government interference. But they were realists who knew that freedom depends on order, and order depends on social control. So they created a Constitution that balanced the power of government and the liberty of individuals. No one has expressed the kind of government the Constitution created better than James Madison (1787, 1961), one of its primary authors:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty is this: You must first enable the government to control the governed; and in the next place, oblige it to control itself. (349)

James Madison was describing the kind of democracy we live in—a ***constitutional* democracy**—not a *pure* democracy. In a pure democracy, the majority can have whatever it wants. In a constitutional democracy, the majority can't make a crime out of what the Constitution protects as a fundamental right. Even if all the people want to make it a crime to say, "The president is a war criminal," they can't. Why? Because the First Amendment to the U.S. Constitution guarantees the fundamental right of free speech.

LO 1

A central feature of criminal law in a constitutional democracy is the limits it places on the power of government to create crimes and punish offenders. In this chapter, we focus on the limits imposed by the U.S. and state constitutions. But the idea of limited government power in criminal law and punishment is older than the U.S. Constitution; it has deep roots in English and their American colonies' history. It begins more than 2,000 years ago with the ancient Greek philosopher and the idea of the **rule of law**. In 350 BC Aristotle wrote:

> He who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men. The law is reason unaffected by desire. (quoted in Allen 1993, 3)

Almost nine hundred years later, in 1215, in the Magna Carta, King John promised his barons the rule of law, when he agreed not to proceed with force against any free man, "except by the lawful judgment of his equals or by the law of the land." In 1240, the great English jurist Bracton (1968) wrote that even the king ruled "under God and the law," and "it is a saying worthy of the majesty of a ruler that the prince acknowledges himself bound by the laws" (2:305–06).

The Principle of Legality

LO 2, LO 3

In criminal law, and in criminal punishment, there's an ancient proposition based on the principle of legality: "No crime without law; no punishment without law." This means that no one can be convicted of, or punished for, a crime unless the law defined the crime and prescribed the punishment *before* she engaged in the behavior that was defined as a crime. It's called "the *first* principle of criminal law" (Packer 1968, 79); all other principles you'll learn about in this book are subordinate to it. And it applies even when following it allows morally blameworthy, dangerous people to go free without punishment (Dressler 2001, 39).

The case of Treva Hughes (*Hughes v. State* 1994) is an excellent example. Hughes, while driving drunk, ran into Reesa Poole's car and killed Poole's fetus; Poole was due to deliver in four days. The Appeals Court reversed her conviction because the law didn't give Hughes fair warning that it included the unborn in its homicide statute (731). The Court wrote:

> That Hughes will go largely unpunished for having taken the life of another is frustrating. There are, however, basic principles upon which this country is founded which compel the result we reach. . . . The retroactive application of criminal law . . . is so abhorrent that we must occasionally endure some frustration in order to preserve and protect the foundation of our system of law. (736)

Why is a retroactive criminal law so "abhorrent" that we don't punish people like Treva Hughes for killing Reesa Poole's ready-to-be-born baby? Because retroactive criminal laws undermine the "central values" of free societies (Allen 1993, 15). First, knowing what the law commands provides individuals with the opportunity to obey the law and avoid punishment. Second, providing individuals with this opportunity promotes the value of human autonomy and dignity. Third, the ban on retroactive criminal law making also prevents officials from punishing conduct they think is wrong but which no existing criminal law prohibits. To allow this would threaten the rule of law itself; it would become a rule of officials instead (Kahan 1997, 96).

The Ban on Ex Post Facto Laws

LO 3

So fundamental did the authors of the Constitution consider a ban on retroactive criminal law making that they raised it to constitutional status in Article I of the U.S. Constitution. Article I, Section 9 bans the U.S. Congress from enacting such laws; Article 1, Section 10 bans state legislatures from passing them. And, most state constitutions include their own ban on retroactive statutes (LaFave 2003b, 1:153).

An **ex post facto law** is a statute that does one of three things:

1. It criminalizes an act that was innocent when it was committed.
2. It increases the punishment for a crime after the crime was committed.
3. It takes away a defense that was available to a defendant when the crime was committed. (*Beazell v. Ohio* 1925, 169)

Statutes that criminalize innocent acts after they're committed are the clearest example of ex post facto laws; they're also the rarest, because in modern times, legislatures never try it. Equally clear, and equally rare, are statutes that change an element of a crime after it's committed—for example, raising the age of the victim in statutory rape from 16 to 21. Statutes that modify punishment occur more often. They're also more problematic because it's difficult to determine what exactly criminal punishment is, and what's "more" or "less" punishment (LaFave 2003b, 1:154).

The ex post facto ban has two major purposes. One is to protect private individuals by ensuring that legislatures give them fair warning about what's criminal and that they can rely on that requirement. The second purpose is directed at preventing legislators from passing arbitrary and vindictive laws. ("Arbitrary" means legislation is based on random choice or personal whim, not on reason and standards.)

The Void-for-Vagueness Doctrine

LO 4

The U.S. Supreme Court has ruled that vague laws violate the guarantees of two provisions in the U.S. Constitution. The Fifth Amendment to the U.S. Constitution guarantees that the *federal* government shall not deny any individual life, liberty, or property without due process of law. The Fourteenth Amendment provides that no *state* government shall deny any person life, liberty, or property without due process of law.

How do vague laws violate the due process guarantees? The reasoning behind the **void-for-vagueness doctrine** goes like this:

1. The Fifth and Fourteenth Amendments to the U.S. Constitution ban both federal and state governments from taking any person's "life, liberty, or property without due process of law."
2. Criminal punishment deprives individuals of life (capital punishment), liberty (imprisonment), or property (fines).
3. Failure to warn private persons of what the law forbids and/or allowing officials the chance to define arbitrarily what the law forbids denies individuals their life, liberty, and/or property without due process of law.

The Aims of the Void-for-Vagueness Doctrine

LO 4

The void-for-vagueness doctrine takes aim at two evils similar to those of the ban on ex post facto. First, void laws fail to give fair warning to individuals as to what the law prohibits. Second, they allow arbitrary and discriminatory criminal justice administration. A famous case from the 1930s gangster days, *Lanzetta v. New Jersey* (1939), still widely cited and relied on today is an excellent example of both the application of the doctrine and its purposes. The story begins with a challenge to this New Jersey statute:

> Any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime, in this or in any other State, is declared to be a gangster. . . . Every violation is punishable by fine not exceeding $10,000 or imprisonment not exceeding 20 years, or both. (452)

The challengers attacking the statute for vagueness were Ignatius Lanzetta, Michael Falcone, and Louie Del Rossi. On June 12, 16, 19, and 24, 1936, the four challengers, "not being engaged in any lawful occupation"; "known to be members of a gang, consisting of two or more persons"; and "having been convicted of a crime in the State of Pennsylvania" were "declared to be gangsters."

The trial court threw out their challenge that the law was void-for-vagueness; they were tried, convicted, and sentenced to prison for "not more than ten years and not less than five years, at hard labor." The New Jersey intermediate appellate court and the New Jersey Supreme Court also threw out their challenges. But they finally prevailed when a unanimous U.S. Supreme Court ruled that the New Jersey statute was void-for-vagueness. Why?

> No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids; and a statute which either forbids or requires the doing of an act in terms

> so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. (453)
>
> The phrase "consisting of two or more persons" is all that purports to define "gang." The meanings of that word indicated in dictionaries and in historical and sociological writings are numerous and varied. Nor is the meaning derivable from the common law, for neither in that field nor anywhere in the language of the law is there definition of the word. Our attention has not been called to, and we are unable to find, any other statute attempting to make it criminal to be a member of a "gang." (454–55)

Notice that the answer to the question, "What's fair notice?" isn't subjective; that is, it's not what a particular defendant actually knows about the law. For example, the Court didn't ask what Lanzetta and his cohorts knew about the gangster ordinance: Were they aware it existed? Did they get advice about what it meant? Did their life experiences inform them that their behavior was criminal (Batey 1997, 4)?

That's because, according to the courts, what's **fair notice** is an objective question; that is, "Would an ordinary, reasonable person know that what he was doing was criminal?" Perhaps the best definition of objective fair warning is U.S. Supreme Court Justice Byron White's blunt: "If any fool would know that a particular category of conduct would be within the reach of the statute, if there is an unmistakable core that a reasonable person would know is forbidden by the law, the enactment is not unconstitutional. . . . (*Kolender v. Lawson* 1983, 370–71).

Despite the importance of giving fair notice to individuals, in 1983, the Supreme Court decided that providing "minimal guidelines to govern law enforcement" trumps notice to private individuals as the primary aim of the void-for-vagueness doctrine (*Kolender v. Lawson* 1983, 357). According to the Court:

> Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections. (358)

And, quoting from an old case (*U.S. v. Reese* 1875), the Court in *Lawson* elaborated further on the choice to give priority to controlling arbitrary and discriminatory enforcement:

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government. (221)

Giving priority to controlling law enforcement is more realistic than giving fair notice to hypothetical reasonable, ordinary people. Police officers and prosecutors are more likely to read what's in the criminal statutes and know about the cases that interpret them. So it makes sense for courts to ask whether statutes clearly indicate to ordinary police officers and prosecutors what the law prohibits. Inquiries that seem "wrongheaded" when they're directed at guaranteeing fair notice to ordinary noncriminal justice experts become reasonable when they're examined to decide whether they're clear enough to limit arbitrary and discriminatory enforcement (Batey 1997, 6–7).

Defining Vagueness

LO 4

Whether the emphasis is on notice to individuals or control of officials, the void-for-vagueness doctrine can never cure the uncertainty in all laws. After all, laws are written in words, not numbers. U.S. Supreme Court Justice Thurgood Marshall

expressed this opinion when he wrote, "Condemned to the use of words, we can never expect mathematical certainty from our language" (*Grayned v. City of Rockford* 1972, 110). It's not just the natural uncertainty of words that creates problems. It's also because the variety of human behavior and the limits of human imagination make it impossible for law makers to predict all the variations that might arise under the provisions of statutes. So courts allow considerable leeway in the degree of certainty required to pass the two prongs of fair warning and avoidance of arbitrary law enforcement.

Still, the strong presumption of constitutionality (referred to earlier) requires challengers to prove the law is vague. The Ohio Supreme Court summarized the heavy burden of proof challengers have to carry:

> The challenger must show that upon examining the statute, an individual of ordinary intelligence would not understand what he is required to do under the law. Thus, to escape responsibility . . . [the challenger] must prove that he could not reasonably understand that . . . [the statute] prohibited the acts in which he engaged. . . . The party alleging that a statute is unconstitutional must prove this assertion beyond a reasonable doubt. (*State v. Anderson* 1991, 1226–27)

Our first case excerpt, *State v. Metzger* (1982), is a good example of how one court applied the void-for-vagueness doctrine. The Nebraska Supreme Court held that a Lincoln, Nebraska, city ordinance that made it a crime to "commit any indecent, immodest, or filthy act" was void-for-vagueness. (Please make sure you review the "The Text-Case Method" section in Chapter 1 before you read this first excerpt.)

Our first case excerpt, State v. Metzger (1982), is a good example of how one court applied the void-for-vagueness doctrine.

CASE Was His Act "Indecent, Immodest, or Filthy"?

State v. Metzger
319 N.W.2d 459 (Neb. 1982)

HISTORY

Douglas E. Metzger was convicted in the municipal court of the city of Lincoln, Nebraska, of violating § 9.52.100 of the Lincoln Municipal Code. The District Court, Lancaster County, affirmed the District Court judgment. Metzger appealed to the Nebraska Supreme Court. The Supreme Court reversed and dismissed the District Court's judgment.

KRIVOSHA, CJ.

FACTS

Metzger lived in a garden-level apartment located in Lincoln, Nebraska. A large window in the apartment faces a parking lot that is situated on the north side of the apartment building. At about 7:45 a.m. on April 30, 1981, another resident of the apartment, while parking his automobile in a space directly in front of Metzger's apartment window, observed Metzger standing naked with his arms at his sides in his apartment window for a period of five seconds. The resident testified that he saw Metzger's body from his thighs on up.

The resident called the police department and two officers arrived at the apartment at about 8:00 a.m. The officers testified that they observed Metzger standing in front of the window eating a bowl of cereal. They testified that Metzger was standing within a foot of the window, and his nude body, from the mid-thigh on up, was visible.

The pertinent portion of ß 9.52.100 of the Lincoln Municipal Code, under which Metzger was charged, provides as follows: "It shall be unlawful for any person within

the City of Lincoln . . . to commit any indecent, immodest or filthy act in the presence of any person, or in such a situation that persons passing might ordinarily see the same."

OPINION

The . . . issue presented to us by this appeal is whether the ordinance, as drafted, is so vague as to be unconstitutional. We believe that it is. Since the ordinance is criminal in nature, it is a fundamental requirement of due process of law that such criminal ordinance be reasonably clear and definite.

The dividing line between what is lawful and unlawful cannot be left to conjecture. A citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime and the elements constituting it must be so clearly expressed that the ordinary person can intelligently choose in advance what course it is lawful for him to pursue.

Penal statutes prohibiting the doing of certain things and providing a punishment for their violation should not admit of such a double meaning that the citizen may act upon one conception of its requirements and the courts upon another. A statute which forbids the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application violates the first essential elements of due process of law.

It is not permissible to enact a law which in effect spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrongdoers may also be caught.

The test to determine whether a statute defining an offense is void for uncertainty is whether the language may apply not only to a particular act about which there can be little or no difference of opinion, but equally to other acts about which there may be radical differences, thereby devolving on the court the exercise of arbitrary power of discriminating between the several classes of acts. The dividing line between what is lawful and what is unlawful cannot be left to conjecture.

In the case of *Papachristou v. City of Jacksonville,* 405 U.S. 156 (1972), the U.S. Supreme Court declared a vagrancy statute of the city of Jacksonville, Florida, invalid for vagueness, saying "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large."

The ordinance in question makes it unlawful for anyone to commit any "indecent, immodest or filthy act." We know of no way in which the standards required of a criminal act can be met in those broad, general terms. There may be those few who believe persons of opposite sex holding hands in public are immodest, and certainly more who might believe that kissing in public is immodest. Such acts cannot constitute a crime. Certainly one could find many who would conclude that today's swimming attire found on many beaches or beside many pools is immodest. Yet, the fact that it is immodest does not thereby make it illegal, absent some requirement related to the health, safety, or welfare of the community. The dividing line between what is lawful and what is unlawful in terms of "indecent," "immodest," or "filthy" is simply too broad to satisfy the constitutional requirements of due process. Both lawful and unlawful acts can be embraced within such broad definitions. That cannot be permitted. One is not able to determine in advance what is lawful and what is unlawful.

We do not attempt, in this opinion, to determine whether Metzger's actions in a particular case might not be made unlawful, nor do we intend to encourage such behavior. Indeed, it may be possible that a governmental subdivision using sufficiently definite language could make such an act as committed by Metzger unlawful. We simply do not decide that question at this time because of our determination that the ordinance in question is so vague as to be unconstitutional.

We therefore believe that § 9.52.100 of the Lincoln Municipal Code must be declared invalid. Because the ordinance is therefore declared invalid, the conviction cannot stand.

Reversed and dismissed.

DISSENT

BOSLAUGH, J., joined by CLINTON and HASTINGS, JJ.

The ordinance in question prohibits indecent acts, immodest acts, *or* filthy acts in the presence of any person. Although the ordinance may be too broad in some respects . . . the exhibition of his genitals under the circumstances of this case was, clearly, an indecent act. Statutes and ordinances prohibiting indecent exposure generally have been held valid. I do not subscribe to the view that it is only "possible" that such conduct may be prohibited by statute or ordinance.

QUESTIONS

1. **State the exact wording of the offense Douglas Metzger was convicted of.**
2. **List all of Metzger's acts and any other facts relevant to deciding whether he violated the ordinance.**
3. **State the test the court used to decide whether the ordinance was void-for-vagueness.**
4. **According to the majority, why was the ordinance vague?**
5. **According to the dissent, why was the ordinance clear enough to pass the void-for-vagueness test?**
6. **In your opinion, was the statute clear to a reasonable person? Back up your answer with the facts and arguments in the excerpt and information from the void-for-vagueness discussion in the text.**

Equal Protection of the Laws

In addition to the due process guarantee, the Fourteenth Amendment to the U.S. Constitution commands that "no state shall deny to any person within its jurisdiction the **equal protection of the laws**." Equal protection is far more frequently an issue in criminal procedure than it is in criminal law; we'll note briefly here the limits it puts on criminal law making and punishment.

First, equal protection doesn't require the government to treat everybody exactly alike. Statutes can, and often do, classify particular groups of people and types of conduct for special treatment. For example, almost every state ranks premeditated killings as more serious than negligent homicides. Several states punish habitual criminals more harshly than first-time offenders. Neither of these classifications violates the equal protection clause. Why? Because they make sense. Or, as the courts say, they have a "rational basis" (*Buck v. Bell* 1927, 208).

Classifications in criminal codes based on race are another matter. The U.S. Supreme Court subjects all racial classifications to "strict scrutiny." In practice, strict scrutiny means race-based classifications are never justified. According to the U.S. Supreme Court, any statute that "invidiously classifies similarly situated people on the basis of the immutable characteristics with which they were born . . . *always* (emphasis added) violates the Constitution, for the simple reason that, so far as the Constitution is concerned, people of different races are always similarly situated. Gender classifications stand somewhere between the strict scrutiny applied to race and the rational basis applied to most other classifications.

The U.S. Supreme Court has had difficulty deciding exactly how carefully to scrutinize gender classifications in criminal statutes. The plurality, but not a majority, of the justices in *Michael M. v. Superior Court of Sonoma County* (1981, 477) agreed that gender classifications deserve *heightened scrutiny*, meaning there has to be a "fair and substantial relationship" between classifications based on gender and "legitimate state ends."

Michael M., a 17-year-old male challenged on gender-based equal protection grounds California's statutory rape law, which defines unlawful sexual intercourse as "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years." The U.S. Supreme Court denied the equal protection challenge. "The question boils down to whether a State may attack the problem of sexual intercourse and teenage pregnancy directly by prohibiting a male from having sexual intercourse with a minor female. We hold that such a statute is sufficiently related to the State's objectives to pass constitutional muster" (473).

The Bill of Rights and the Criminal Law

LO 5

The ban on ex post facto laws, denial of due process, and equal protection of the laws are broad constitutional limits that cover all of criminal law. The Bill of Rights bans defining certain kinds of behavior as criminal. One is the ban on making a crime out of the First Amendment rights to speech, religion, and associations; the other is

criminalizing behavior protected by the right to privacy created by the U.S. Supreme Court. Let's look at criminal law and the right to free speech, and then at the right to privacy.

Free Speech

LO 5

"Congress shall make no law abridging the freedom of speech," the First Amendment commands. The U.S. Supreme Court has expanded the ban beyond this already sweeping scope. First, the Court has expanded the meaning of "speech" by holding that the protection of the amendment "does not end with the spoken or written word" (*Texas v. Johnson* 1989, 404). It also includes **expressive conduct**, meaning actions that communicate ideas and feelings. So free speech includes wearing black armbands to protest war; "sitting in" to protest racial segregation; and picketing to support all kinds of causes from abortion to animal rights. It even includes giving money to political candidates.

Second, although the amendment itself directs its prohibition only at the U.S. Congress, the Court has applied the prohibition to the states since 1925 (*Gitlow v. New York*). Third, the Court has ruled that free speech is a fundamental right, one that enjoys preferred status. This means that the government has to provide more than a *rational basis* for restricting speech and other forms of expression. It has the much higher burden of proving that a *compelling government interest* justifies the restrictions.

Despite these broad prohibitions and the heavy burden the government faces in justifying them, the First Amendment doesn't mean you can express yourself anywhere, anytime, on any subject, in any manner. According to the U.S. Supreme Court, there are five categories of expression not protected by the First Amendment:

1. *Obscenity* Material whose predominant appeal is to nudity, sexual activity, or excretion.
2. *Profanity* Irreverence toward sacred things, particularly the name of God.
3. *Libel and slander* Libels are damages to reputation expressed in print, writing, pictures, or signs; slander damages reputation by spoken words.
4. *Fighting words* Words that are likely to provoke the average person to retaliation and cause a "breach of the peace."
5. *Clear and present danger* Expression that creates a clear and present danger of an evil, which legislatures have the power to prohibit. (*Chaplinsky v. New Hampshire* 1942, 574)

Why doesn't the First Amendment protect these forms of expression? Because they're not an "essential element of any exposition of ideas, and are of such slight value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality" (*Gitlow v. New York* 1925, 572).

These exceptions create the opportunity for the government to make these kinds of expression a crime, depending on the manner, time, and place of expression. For example, under the clear and present danger doctrine, the government can punish words "that produce clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." So the First Amendment didn't save Walter Chaplinsky from conviction under a New Hampshire statute that made it a crime to call anyone an "offensive or derisive name" in public. Chaplinsky

had called the marshal of the city of Rochester, New Hampshire, "a God damned racketeer." In perhaps the most famous reference to the doctrine, U.S. Supreme Court Justice Oliver Wendell Holmes wrote, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic" (*Schenck v. U.S.* 1919, 52).

The most difficult problem in making a crime out of speech and expressive conduct is when laws reach so far they include not just expression the Constitution bans but also expression it protects. The **void-for-overbreadth doctrine** protects speech guaranteed by the first amendment by invalidating laws so broadly written that the fear of prosecution creates a "chilling effect" that discourages people from exercising that freedom. This "chilling effect" on the exercise of the fundamental right to freedom of expression violates the right to liberty guaranteed by the due process clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution.

The U.S. Supreme Court dealt with the chilling effect of a St. Paul, Minnesota, hate crime ordinance in *R.A.V. v. City of St. Paul* (1992). In this case, R.A.V., a juvenile, was alleged to have burned a crudely constructed wooden cross on a Black family's lawn. He was charged with violating St. Paul's Bias-Motivated Crime Ordinance. The ordinance provided that anyone who places a burning cross, Nazi swastika, or other symbol on private or public property knowing that the symbol would arouse "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor."

The Minnesota Supreme Court found that the ordinance was constitutional because it could be construed to ban only "fighting words," which aren't protected by the First Amendment (380). The U.S. Supreme Court, on the other hand, ruled that, even when a statute addresses speech that's not protected (in this case "fighting words"), states still can't discriminate on the basis of the content. The Court concluded that the St. Paul ordinance violated the First Amendment because it would allow the proponents of racial tolerance and equality to use fighting words to argue in favor of tolerance and equality but would prohibit similar use by those opposed to racial tolerance and equality:

> Although the phrase in the ordinance, "arouses anger, alarm or resentment in others," has been limited by the Minnesota Supreme Court's construction to reach only those symbols or displays that amount to "fighting words," the remaining, unmodified terms make clear that the ordinance applies only to "fighting words" that insult, or provoke violence, "on the basis of race, color, creed, religion or gender."
>
> Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use "fighting words" in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.
>
> In its practical operation, moreover, the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination. Displays containing some words—odious racial epithets, for example—would be prohibited to proponents of all views. But words "that do not themselves invoke race, color, creed, religion, or gender—aspersions upon a person's mother, for example—would seemingly be usable in the placards of those arguing *in favor* of racial, color, etc., tolerance and equality, but could not be used by those speakers' opponents. One could hold up a sign saying, for example, that all "anti-Catholic bigots" are misbegotten, but not that

all "papists" are, for that would insult and provoke violence "on the basis of religion." St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules. (391–92)

In our next case excerpt, *People v. Rokicki*, the Illinois Appellate Court ruled that Illinois' hate crime statute doesn't run afoul of the First Amendment, at least when a prosecution is based on "disorderly conduct."

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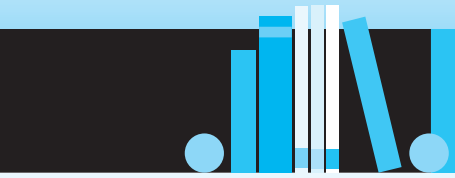

CASE Does the Hate Crime Statute Violate Free Speech?

People v. Rokicki
718 N.E.2d 333 (Ill.App. 1999)

HISTORY

Kenneth Rokicki was charged with a hate crime based on the predicate (underlying) offense of disorderly conduct. Before trial, Rokicki moved to dismiss the charges alleging, among other things, that the hate crime statute was unconstitutional. The trial court denied his motion. Rokicki waived his right to a jury, and the matter proceeded to a **bench trial** (trial without a jury). Rokicki was convicted, sentenced to two years' probation, and ordered to perform 100 hours of community service and to attend anger management counseling. He appealed, contending that the hate crime statute is unconstitutionally overly broad and chills expression protected by the First Amendment to the U.S. Constitution. Conviction and sentence affirmed.

HUTCHINSON, J.

FACTS

Donald Delaney, store manager of a Pizza Hut in South Elgin, testified that Rokicki entered the restaurant at approximately 1:30 p.m. The victim was a server there and took Rokicki's order. The victim requested payment, and Rokicki refused to tender payment to him. Donald Delaney, the store manager, who was nearby, stepped in and completed the sale. Rokicki told Delaney not to let "that faggot" touch his food. When Rokicki's pizza came out of the oven, Delaney was on the telephone, and the victim began to slice the pizza. Delaney saw Rokicki approaching the counter with an irritated expression and hung up the telephone. Before Delaney could intervene, Rokicki leaned over the counter and began yelling at the victim and pounding his fist on the counter. Rokicki directed a series of epithets at the victim including "Mary," "faggot," and "Molly Homemaker." Rokicki continued yelling for ten minutes and, when not pounding his fist, shook his finger at the victim. Delaney asked Rokicki to leave several times and threatened to call the police. However, Delaney did not call the police because he was standing between the victim and Rokicki and feared that Rokicki would physically attack the victim if Delaney moved. Eventually, Delaney returned Rokicki's money and Rokicki left the establishment.

The victim testified that he was working at the South Elgin Pizza Hut on October 20, 1995. Rokicki entered the restaurant and ordered a pizza. When Rokicki's pizza came out of the oven, the victim began to slice it. Rokicki then began yelling at the victim and pounding his fist on the counter. Rokicki appeared very angry and seemed very serious. The victim, who is much smaller than Rokicki, testified that he was terrified by Rokicki's outburst and remained frightened for several days thereafter. Eventually, the manager gave Rokicki a refund and Rokicki left the restaurant. The victim followed Rokicki into the parking lot, recorded the license number of his car, and called the police.

Christopher Merritt, a sergeant with the South Elgin Police Department, testified that, at 2:20 p.m. on October 20, 1995, Rokicki entered the police station and said he wished to report an incident at the Pizza Hut. Rokicki told Merritt that he was upset because a homosexual was working at the restaurant and he wanted someone "normal" to prepare his food. Rokicki stated that he became angry when the victim touched his food. He

called the victim a "Mary," pounded on the counter, and was subsequently kicked out of the restaurant. Merritt asked Rokicki what he meant by a "Mary," and Rokicki responded that a "Mary" was a homosexual. Merritt conducted only a brief interview of Rokicki because shortly after Rokicki arrived at the police station Merritt was dispatched to the Pizza Hut.

Deborah Hagedorn, an employee at the Pizza Hut in St. Charles, testified that in 1995 Rokicki came into the restaurant and asked for the address of the district manager for Pizza Hut. When asked why he wanted the address, Rokicki complained that he had been arrested at the South Elgin restaurant because he did not want a "f___g faggot" touching his food.

Rokicki testified that he was upset because the victim had placed his fingers in his mouth and had not washed his hands before cutting the pizza. Rokicki admitted calling the victim "Mary" but denied that he intended to suggest the victim was a homosexual. Rokicki stated that he used the term "Mary" because the victim would not stop talking and "it was like arguing with a woman." Rokicki denied yelling and denied directing other derogatory terms toward the victim. Rokicki admitted giving a statement to Merritt but denied telling him that he pounded his fist on the counter or used homosexual slurs. Rokicki testified that he went to the St. Charles Pizza Hut but that Hagedorn was not present during his conversation with the manager. Rokicki testified that he complained about the victim's hygiene but did not use any homosexual slurs.

The trial court found Rokicki guilty of a hate crime. In a post trial motion, Rokicki argued that the hate crime statute was unconstitutional. The trial court denied Rokicki's motion and sentenced him to two years' probation. As part of the probation, the trial court ordered Rokicki not to enter Pizza Hut restaurants, not to contact the victim, to perform 100 hours' community service, and to attend anger management counseling. Rokicki appealed.

OPINION

On appeal, Rokicki does not challenge the sufficiency of the evidence against him. Rokicki contends only that the hate crime statute is unconstitutional when the predicate offense is disturbing the peace. Rokicki argues that the statute is overly broad and impermissibly chills free speech.

The Illinois Hate Crime Statute reads in part as follows:

> A person commits a hate crime when, by reason of the actual or perceived race, color, creed, religion, ancestry, gender, sexual orientation, physical or mental disability, or national origin of another individual or group of individuals, [she or] he commits assault, battery, aggravated assault, misdemeanor theft, criminal trespass to residence, misdemeanor criminal damage to property, criminal trespass to vehicle, criminal trespass to real property, mob action or disorderly conduct. . . .

1. Infringement on Free Speech Rights

Rokicki's conviction was based on the predicate (underlying) offense of disorderly conduct. A person commits disorderly conduct when she or he knowingly "does any act in such an unreasonable manner as to alarm or disturb another and to provoke a breach of the peace." Disorderly conduct is punishable as a Class C misdemeanor. However, hate crime is punishable as a Class 4 felony for a first offense and a Class 2 felony for a second or subsequent offense. . . .

The overbreadth doctrine protects the freedom of speech guaranteed by the first amendment by invalidating laws so broadly written that the fear of prosecution would discourage people from exercising that freedom. A law regulating conduct is facially overly broad if it (1) criminalizes a substantial amount of protected behavior, relative to the law's plainly legitimate sweep, and (2) is not susceptible to a limiting construction that avoids constitutional problems. A statute should not be invalidated for being overly broad unless its overbreadth is both real and substantial.

Rokicki is not being punished merely because he holds an unpopular view on homosexuality or because he expressed those views loudly or in a passionate manner. Defendant was charged with a hate crime because he allowed those beliefs to motivate unreasonable conduct. Rokicki remains free to believe what he will regarding people who are homosexual, but he may not force his opinions on others by shouting, pounding on a counter, and disrupting a lawful business. Rokicki's conduct exceeded the bounds of spirited debate, and the first amendment does not give him the right to harass or terrorize anyone. Therefore, because the hate crime statute requires conduct beyond mere expression . . . , the Illinois Hate Crime Statute constitutionally regulates conduct without infringing upon free speech.

2. Content Discrimination

Rokicki cites *R.A.V. v. City of St. Paul* and argues that the hate crime statute is constitutionally impermissible because it discriminates based on the content of an offender's beliefs. Rokicki argues that the statute enhances disorderly conduct to hate crime when the conduct is motivated by, *e.g.*, an offender's views on race or sexual orientation but that it treats identical conduct differently if motivated, *e.g.*, by an offender's beliefs regarding abortion or animal rights. . . .

However, the portions of *R.A.V.* upon which defendant relies do not affect our analysis. In *R.A.V.*, the Court recognized several limitations to its content discrimination analysis, including statutes directed at conduct rather than speech, which sweep up a particular subset of proscribeable speech.

One year later, in *Wisconsin v. Mitchell*, the Court further examined this exception. . . . The *Mitchell* Court held that the State could act to redress the harm it perceived as associated with bias-motivated crimes by

punishing bias-motivated offenses more severely. . . . We too decide that the legislature was free to determine as a matter of sound public policy that bias-motivated crimes create greater harm than identical conduct not motivated by bias and should be punished more harshly. Consequently, we reject defendant's content discrimination argument.

3. Chilling Effect

Rokicki also argues that the hate crime statute chills free expression because individuals will be deterred from expressing unpopular views out of fear that such expression will later be used to justify a hate crime charge. We disagree. The overbreadth doctrine should be used sparingly and only when the constitutional infirmity is both real and substantial. The *Mitchell* Court rejected identical arguments and held that any possible chilling effects were too speculative to support an overbreadth claim. The first amendment does not prohibit the evidentiary use of speech to establish motive or intent. Similarly, we find Rokicki's argument speculative, and we cannot conclude that individuals will refrain from expressing controversial beliefs simply because they fear that their statements might be used as evidence of motive if they later commit an offense identified in the hate crime statute.

CONCLUSION

We hold that the hate crime statute is not facially unconstitutional when the predicate offense is disorderly conduct because (1) the statute reaches only conduct and does not punish speech itself; (2) the statute does not impermissibly discriminate based on content; and (3) the statute does not chill the exercise of first amendment rights.

Accordingly, we affirm defendant's conviction.

The judgment of the circuit court of Kane County is affirmed.

QUESTIONS

1. **State the elements of the Illinois Hate Crime Statute.**
2. **List all of the facts relevant to deciding whether Kenneth Rokicki violated the hate crime statute.**
3. **According to the Court, why doesn't the Illinois Hate Crime Statute violate Rokicki's right to free speech?**
4. **In your opinion, does the statute punish speech or nonexpressive conduct?**
5. **Do you think the purpose of this statute is to prevent disorderly conduct or expression?**
6. **Does Rokicki have a point when he argues that the statute prohibits only some kinds of hatred—race, ethnic, and sexual orientation—but not other kinds, for example, hatred for animal rights and abortion? Defend your answer.**

EXPLORING FURTHER

Free Speech

1. Is "Nude Dancing" Expressive Speech?

Barnes v. Glen Theatre, Inc. et al., 501 U.S. 560 (1991)

FACTS An Indiana statute prohibits nude dancing in public. Glen Theatre, a bar that featured nude dancing, sought an injunction against enforcing the law, arguing it violated the First Amendment. The law permitted erotic dancing, as long as the dancers wore "G-strings" and "pasties." It prohibited only totally nude dancing. The law argued that dancers can express themselves erotically without total nudity. Did the ordinance unduly restrict expressive conduct protected by the right to free speech?

DECISION No, said the U.S. Supreme Court. Chief Justice Rehnquist, writing for a plurality, admitted that nude dancing is expressive conduct, but he concluded that the public indecency statute is justified because it "furthers a substantial government interest in protecting order and morality." So the ban on public nudity was not related to the erotic message the dancers wanted to send.

2. Is Flag Burning Expressive Conduct?

Texas v. Johnson, 491 U.S. 397 (1989)

FACTS During the 1984 Republican National Convention in Dallas, Gregory Lee Johnson participated in a political demonstration called the "Republican War Chest Tour." The purpose of this event was to protest the policies of the Reagan administration and of certain Dallas-based corporations. The demonstrators marched through the Dallas streets, chanting political slogans and stopping at several corporate locations to stage "die-ins" intended to dramatize the consequences of nuclear war. On several occasions, they spray-painted the walls of buildings and overturned potted plants, but Johnson himself took no part in such activities. He did, however, accept an American flag handed to him by a fellow protestor who had taken it from a flagpole outside one of the targeted buildings.

The demonstration ended in front of Dallas City Hall, where Johnson unfurled the American flag, doused it with kerosene, and set it on fire. While the flag burned, the protestors chanted, "America, the red, white, and blue, we spit on you." After the demonstrators dispersed, a witness to the flag burning collected the flag's remains and buried them in his backyard. No one was physically injured or threatened with injury, though several witnesses testified that they had been seriously offended by the flag burning.

Johnson was charged and convicted under Texas's "desecration of a venerated object" statute, sentenced to one year in prison, and fined $2,000. Did the flag-burning statute violate Johnson's right to free speech?

DECISION Yes, said a divided U.S. Supreme Court:

> The First Amendment literally forbids the abridgment only of "speech," but we have long recognized that its protection does not end at the spoken or written word. While we have rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea, we have acknowledged that conduct may be sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments."

Texas claims that its interest in preventing breaches of the peace justifies Johnson's conviction for flag desecration. However, no disturbance of the peace actually occurred or threatened to occur because of Johnson's burning of the flag. Although the State stresses the disruptive behavior of the protestors during their march toward City Hall, it admits that "no actual breach of the peace occurred at the time of the flag burning or in response to the flag burning." . . .

Nor does Johnson's expressive conduct fall within that small class of "fighting words" that are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." No reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs.

We thus conclude that the State's interest in maintaining order is not implicated on these facts. The State need not worry that our holding will disable it from preserving the peace. We do not suggest that the First Amendment forbids a State to prevent "imminent lawless action."

If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. We have not recognized an exception to this principle even where our flag has been involved. Justice Jackson described one of our society's defining principles in words deserving of their frequent repetition: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." . . .

Although Justice Kennedy concurred, the flag burning obviously disturbed him. He wrote:

> The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases. The case here today forces recognition of the costs to which [our] . . . beliefs commit us. It is poignant but fundamental that the flag protects those who hold it in contempt. . . . So I agree with the court that he must go free.

Four justices dissented. Perhaps none of the justices felt more strongly than the World War II naval officer Justice Stevens, who wrote:

> The ideas of liberty and equality have been an irresistible force in motivating leaders like Patrick Henry, Susan B. Anthony, and Abraham Lincoln, schoolteachers like Nathan Hale and Booker T. Washington, the Philippine Scouts who fought at Bataan, and the soldiers who scaled the bluff at Omaha Beach. If those ideas are worth fighting for—and our history demonstrates that they are—it cannot be true that the flag that uniquely symbolizes their power is not itself worthy of protection from unnecessary desecration.
>
> I respectfully dissent.

The Right to Privacy

LO 5

Unlike the right to free speech, which is clearly spelled out in the First Amendment, you won't find the word *privacy* anywhere in the U.S. Constitution. Nevertheless, the U.S. Supreme Court has decided there is a constitutional right to privacy, a right that bans "all governmental invasions of the sanctity of a man's home and the privacies of life" (*Griswold v. Connecticut* 1965, 484). Not only is privacy a constitutional right, it's a *fundamental* right that requires the government to prove that a compelling interest justifies invading it.

According to the Court (*Griswold v. Connecticut* 1965), the **fundamental right to privacy** originates in six amendments to the U.S. Constitution:

- The First Amendment rights of free speech, religion, and association
- The Third Amendment ban on the quartering of soldiers in private homes

- The Fourth Amendment right to be secure in one's "person, house, papers, and effects" from "unreasonable searches"
- The Ninth Amendment provision that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"
- The Fifth and Fourteenth Amendments' due process right to liberty

This cluster of amendments sends the implied but strong message that we have the right to be let alone by the government. In the First Amendment, it's our beliefs and expression of them and our associations with other people that are protected from government interference. In the Third and Fourth Amendments, our homes are the object of protection. And, in the Fourth Amendment, it's not only our homes but our bodies, our private papers, and even our "stuff" that fall under its protection. The Ninth, or catchall, Amendment acknowledges we have rights not named in the Constitution. In other words, "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance" (484).

According to the Court, privacy is one of these rights. *Griswold* was the first U.S. Supreme Court case that specifically recognized the fundamental constitutional right to privacy when it struck down a Connecticut statute that made it a crime for married couples to use contraceptives.

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CASE Can a State Make It a Crime for Married Couples to Use Contraceptives?

Griswold v. Connecticut
381 U.S. 479 (1965)

HISTORY

Estelle Griswold and others were convicted in a Connecticut trial court. They appealed, and the intermediate appellate court affirmed their conviction. They appealed to the Connecticut Supreme Court of Errors, which affirmed the intermediate appellate court's judgment. They appealed to the U.S. Supreme Court. The Supreme Court reversed, holding that the Connecticut law forbidding use of contraceptives unconstitutionally intrudes upon the right of marital privacy.

DOUGLAS, J., joined by WARREN, CJ., and CLARK, HARLAN, BRENNAN, WHITE, and GOLDBERG, JJ.

FACTS

[The facts are taken, in part, from the Connecticut Supreme Court of Errors, 400 A2d 479, 480.] In November, 1961, The Planned Parenthood League of Connecticut occupied offices at 79 Trumbull Street in New Haven. For ten days during that month, the league operated a Planned Parenthood center in the same building. The defendant, Estelle T. Griswold, is the salaried executive director of the league and served as acting director of the center. The other defendant, C. Lee Buxton, a physician, who has specialized in the fields of gynecology and obstetrics, was the medical director of the center. The purpose of the center was to provide information, instruction, and medical advice to married persons concerning various means of preventing conception. In addition, patients were furnished with

various contraceptive devices, drugs, and materials. A fee, measured by ability to pay, was collected from the patient. At the trial, three married women from New Haven testified that they had visited the center, had received advice, instruction, and certain contraceptive devices and materials from either or both of the defendants and had used these devices and materials in subsequent marital relations with their husbands. Upon these facts, there is no doubt that, within the meaning of [the statute] . . . , the defendants did aid, abet, and counsel married women. . . .

The statutes whose constitutionality is involved in this appeal are Sections 53-32 and 54-196 of the General Statutes of Connecticut. The former provides:

> Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.

Section 54-196 provides:

> Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.

The appellants were found guilty as accessories and fined $100 each, against the claim that the accessory statute as so applied violated the Fourteenth Amendment. The Appellate Division of the Circuit Court affirmed. The Supreme Court of Errors affirmed that judgment.

OPINION

We are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. We do not sit as a superlegislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.

The association of people is not mentioned in the Constitution or in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights. We protected the "freedom to associate and privacy in one's associations," noting that freedom of association was a peripheral First Amendment right. In like context, we have protected forms of "association" that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members.

Those cases involved more than the "right of assembly"—a right that extends to all irrespective of their race or ideology. The right of "association," like the right of belief, is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment, its existence is necessary in making the express guarantees fully meaningful.

The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Reversed.

DISSENT

STEWART, J., joined by BLACK, J.

Since 1879 Connecticut has had on its books a law, which forbids the use of contraceptives by anyone. I think this is an uncommonly silly law. As a practical matter, the law is obviously unenforceable, except in the oblique context of the present case. As a philosophical matter, I believe the use of contraceptives in the relationship of marriage should be left to personal and private choice, based upon

each individual's moral, ethical, and religious beliefs. As a matter of social policy, I think professional counsel about methods of birth control should be available to all, so that each individual's choice can be meaningfully made.

But we are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates the United States Constitution. . . . And that I cannot do.

What provision of the Constitution makes this state law invalid? The Court says it is the right of privacy "created by several fundamental constitutional guarantees." With all deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court.

At the oral argument in this case we were told that the Connecticut law does not "conform to current community standards." But it is not the function of this Court to decide cases on the basis of community standards. We are here to decide cases agreeably to the Constitution and laws of the United States. It is the essence of judicial duty to subordinate our own personal views, our own ideas of what legislation is wise and what is not. If, as I should surely hope, the law before us does not reflect the standards of the people of Connecticut, the people of Connecticut can freely exercise their rights to persuade their elected representatives to repeal it. That is the constitutional way to take this law off the books.

QUESTIONS

1. **Summarize how Justice Douglas arrived at the conclusion that there is a "fundamental constitutional right to privacy" when the word *privacy* never appears in the Constitution or any of its amendments.**
2. **Summarize Justice Stewart's reasons for concluding there is no right to privacy in the U.S. Constitution.**
3. **Do you think the Connecticut law violates a fundamental right? Back up your answer with arguments from the case and the discussion of the right to privacy in the text preceding the case.**
4. **Do you think the Connecticut law is "uncommonly silly"? If you think it is, explain why. If not, how would you characterize it?**

EXPLORING FURTHER

The Right to Privacy

1. Does the Right to Privacy Protect Pornography?

Stanley v. Georgia, 394 U.S. 557 (1969)

FACTS Federal and state law enforcement agents, armed with a search warrant, searched Eli Stanley's home for evidence of his alleged book-making activities. They didn't find evidence of book making, but while they were searching his bedroom, they found three pornographic films. Stanley was charged, indicted, and convicted under a Georgia statute that made it a crime to "knowingly have(ing) possession of . . . obscene matter. . . . The Georgia Supreme Court affirmed the conviction. The U.S. Supreme Court reversed.

DECISION According to the Court:

> Georgia contends that since obscenity is not within the area of constitutionally protected speech or press, the States are free, subject to the limits of other provisions of the Constitution, to deal with it any way deemed necessary, just as they may deal with possession of other things thought to be detrimental to the welfare of their citizens. If the State can protect the body of a citizen, may it not, argues Georgia, protect his mind? . . .
>
> In the context of this case—a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home—is the . . . fundamental . . . right to be free . . . from unwanted governmental intrusions into one's privacy.
>
> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man [quoting *Olmstead v. U.S.* and citing *Griswold v. Connecticut*].

2. Is There a Constitutional Right to Engage in Adult Consensual Sodomy?

Lawrence v. Texas, 123 S.Ct. 2472 (2003)

FACTS Houston police answered an anonymous tip of a disturbance in an apartment. The police went to the apartment, entered it, and saw John Lawrence and Tyron Garner having anal sex. They arrested the two men. Lawrence and Garner were later convicted and fined $200 under a Texas statute making "deviate sexual intercourse" a crime. The Texas Court of Criminal Appeals affirmed their convictions and rejected their privacy and equal protection challenges to the Texas law. The U.S Supreme Court by a vote of 6–3 declared the law unconstitutional.

DECISION Justice Kennedy, writing for five members of the Court, concluded that consenting adults have a fundamental right to engage in private sexual activity. He wrote that the right is part of the right to "liberty" protected by the Fourteenth Amendment due process clause. In so doing, the Court overruled *Bowers v. Hardwick* (1986), which held that the U.S. Constitution "confers no fundamental right upon homosexuals to engage in sodomy. . . ."

So *Lawrence v. Texas* "invalidates the laws of the many States that still make such conduct illegal."

According to Justice Kennedy, the *Bowers* holding

> discloses the Court's own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. . . . When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

Justice O'Connor concurred in the judgment, but not with Justice Kennedy's reasoning. She wouldn't have overruled *Bowers*. Instead, she said the Texas law denied homosexual couples the right to equal protection of the laws because the law applied only to same-sex couples, whereas the Georgia law in *Bowers* applied both to opposite-sex and same-sex couples.

Justice Scalia, Chief Justice Rehnquist, and Justice Thomas dissented. They argued that states should be able to make the moral judgment that homosexual conduct is wrong and embody that judgment in criminal statutes.

Unlike the U.S. Constitution, several state constitutions contain specific provisions guaranteeing the right to privacy. For example, the Florida Declaration of Rights provides: "Every natural person has the right to be let alone and free from governmental intrusion into his private life" (Florida Constitution 1998). Other states have followed the example of the U.S. Supreme Court and implied a state constitutional right to privacy.

The "Right to Bear Arms"

LO 5

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.
>
> *U.S. Constitution, Amendment II*

> For most of our country's history, the Second Amendment was absent from the Supreme Court's agenda. When arguments based on the amendment reached the Court, they were ineffectual. (Cook, Ludwig, and Samaha 2009, 16)

But outside the Court, there was a lot of excitement, generated by heated debate between gun rights and gun control activists, and by a booming second amendment scholarship produced by a growing number of constitutional law professors and historians. Legislators became interested too. There were even "rumblings" among judges (Cook, Ludwig, and Samaha 2009, 16–17). Then, in 2001, the Fifth Circuit U.S. Court of Appeals declared in a handgun case that the Second Amendment

> protects the right of individuals, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearms, such as the pistol involved here, that are suitable as personal, individual weapons. (*U.S. v. Emerson* 2001, 260)

In 2008, the U.S. Supreme Court, in *District of Columbia v. Heller* (2008) became the "first successful **Second Amendment** challenge in the Court's history—a full 207 years after the Amendment was ratified" (Cook, Ludwig, and Samaha 2009, 17–18).

Dick Heller is a District of Columbia special police officer who's authorized to carry a handgun while he's on duty at the Federal Judicial Center in Washington, D.C. He applied to the D.C. government for a registration certificate for a handgun that he wished to keep at home, to have it operable, and to "carry it about his home in that condition only when necessary for self-defense" (Cook, Ludwig, and Samaha, 17–18).

The District of Columbia, not friendly to gun rights, as part of its gun control regime had several laws that stood in the way of Heller's application. Two are especially relevant.

One banned private citizens from possessing handguns with a few very narrow exceptions that don't apply to Heller (D.C. Gun Laws 2009, § 7-2502.01 (www.lcav.org/states/washingtondc.asp, visited August 8, 2009). A second provides that

> Except for law enforcement personnel . . . each registrant shall keep any firearm in his possession unloaded and disassembled or bound by a trigger lock or similar device unless such firearm is kept at his place of business, or while being used for lawful recreational purposes within the District of Columbia. D.C Gun Laws 2009, § 7-2507.02.

The District denied Heller's application. Heller filed suit in the Federal District Court for the District of Columbia seeking, on Second Amendment grounds, an order to stop enforcing the bar on the registration of handguns, the licensing requirement insofar as it prohibits the carrying of a firearm in the home without a license, and the trigger-lock requirement insofar as it prohibits the use of "functional firearms within the home."

The District Court dismissed Heller's complaint. The Court of Appeals for the District of Columbia Circuit, construing his complaint as seeking the right to render a firearm operable and carry it about his home in that condition only when necessary for self-defense, reversed. The Court of Appeals held that the Second Amendment protects an individual right to possess firearms and that the city's total ban on handguns, as well as its requirement that firearms in the home be kept nonfunctional even when necessary for self-defense, violated that right. The Court of Appeals directed the District Court to enter summary judgment for Heller. The District of Columbia appealed, and the U.S. Supreme granted certiorari.

Justice Scalia, joined by Chief Justice Roberts and Justices Kennedy and Alito, struck down both the D.C. code provision banning the possession of handguns and the one requiring that firearms in the home be kept nonfunctional even when necessary for self-defense. According to the majority, the core of the Second Amendment is "the right of law-abiding, responsible citizens to use arms in defense of hearth and home" (2821). And, the two D.C. gun control provisions stand in the way of exercising this right.

> The American people have considered the handgun to be the quintessential self-defense weapon. There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police. Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.
>
> We must also address the District's requirement that firearms in the home be rendered and kept inoperable at all times. This makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional. (2818)

After the decision, there was much ballyhooing about the triumph of the individual right to carry handguns. But it didn't take long for careful observers to point out how narrow the decision is. Here's one of those assessments:

> It is quite possible to read the majority opinion for very little. The justices didn't commit to restraining state or local firearms laws, which is where most of the regulatory action takes place. Furthermore, the plaintiff's position in *Heller* was relatively strong. The regulations under attack were fairly broad; the argument came down to a qualified right to handgun possession in the home, and the dissenting justices

> thought the amendment was not even implicated without a militia connection. Even under these circumstances, the gun rights position only narrowly prevailed.
>
> Perhaps, a slightly different case would fracture the majority coalition. After all, it does not take special courage to oppose flat handgun bans. One can at least imagine the 5-4 vote going the other way had the District permitted a law-abiding citizen to store one handgun in the home, but required handgun training, registration, and a trigger lock—except when and if self-defense became necessary. (Cook, Ludwig, and Samaha 2009, 18)

The majority opinion is mostly about the *limits* of the right. The identification of the four elements in the definition of the right reflect the emphasis on limits:

1. Law-abiding citizen
2. With a functional handgun
3. In her own home
4. For the purpose of defending it

The majority also suggests specific limits it may accept in gun control laws:

> Like most rights, the right secured by the Second Amendment is not unlimited. . . . The right [is] not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment. . . . Nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. (2816–17)

Despite all the talk about limits, *Heller* is an important decision. Most important is the irrelevance of the first clause of the Second Amendment: "A well regulated Militia, being necessary to the security of a free State . . ." This clause is central to gun control supporters. We can't know what the future will bring—different circumstances in cases decided by different justices—but we do know that the opinion is a "litigation magnet" (Cook, Ludwig, and Samaha 2009, 22).

Cases are already in the courts, testing the many gun control regulations throughout the country. One case, filed the same day the Court decided *Heller*, challenges Chicago's handgun ban, which is less restrictive than Washington, D.C.'s. In another case, gun show owners are challenging Alameda County, California's ban on guns on county property. Even criminal defendants are filing suits, like those objecting to the federal machine-gun ban and the felon in possession of weapons ban (22).

The Constitution and Criminal Sentencing

LO 5, LO 6

The Eighth Amendment to the U.S. Constitution commands that "cruel and unusual punishments" shall not be "inflicted." According to the U.S. Supreme Court, there are two kinds of cruel and unusual punishments: "barbaric" punishments and punishments that are disproportionate to the crime committed (*Solem v. Helm* 1983, 284). Let's look at each.

ETHICAL DILEMMA

Is Shaming "Right"?

1. Assume you're an advisor to the Criminal Law Committee in your state's legislature, which is considering legislation adopting "shaming" punishments for selected crimes. You're asked to write a memorandum for the committee that answers the following questions and then recommends what, if any, legislation the committee should draft.
   a. Do shaming punishments violate the Eighth Amendment ban on "cruel and unusual punishments"?
   b. Assuming they do not, are they wise public policy? According to the dissent in *U.S. v. Gementera* (2004), "A fair measure of a civilized society is how its institutions behave in the space between what it may have the power to do and what it should do."
   c. Which is the harsher and/or more "humiliating"? Six months in jail or a DUI offender ordered to perform 48 hours of community service dressed in clothes that say "This is my punishment for a DUI conviction."
   d. Recommend what, if any, legislation the committee should enact.
2. To prepare the memorandum, read the following:
   a. *U.S. v. Gementara* (2004)
   b. Jonathan Turley, *Shame on You: Enough with Humiliating Punishments (2005)*
   c. Garvey, *Can Shaming Punishments Educate? (1998)*

Barbaric Punishments

Barbaric punishments are punishments that are considered no longer acceptable to civilized society. At the time the amendment was adopted, these included burning at the stake, crucifixion, breaking on the wheel, torturing or lingering death (*In re Kemmler* 1890, 446); drawing and quartering, the rack and screw (*Chambers v. Florida* 1940, 227); and extreme forms of solitary confinement (*In re Medley* 1890, 160).

For more than a hundred years after the adoption of the Bill of Rights, no "cruel and unusual" punishment cases reached the U.S. Supreme Court because these medieval forms of execution weren't used in the United States. But, in 1885, the governor of the state of New York, in his annual message to the legislature, questioned the use of hanging as a method of execution:

> The present mode of executing criminals by hanging has come down to us from the dark ages, and it may well be questioned whether the science of the present day cannot provide a means for taking . . . life . . . in a less barbarous manner. (*In re Kemmler* 1890, 444)

The legislature appointed a commission to study the matter. The commission reported that electrocution was "the most humane and practical method [of execution] known to modern science (*In re Kemmler* 1890, 444)." In 1888, the legislature replaced the hangman's noose with the electric chair.

Shortly thereafter, William Kemmler, convicted of murdering his wife, and sentenced to die in the electric chair, argued that electrocution was "**cruel and unusual punishment**." The U.S. Supreme Court disagreed. The Court said that electrocution was certainly unusual but not cruel. For the first time, the Court defined what "cruel" means in the Eighth Amendment. According to the Court, punishment by death isn't cruel as long as it isn't "something more than the mere extinguishment of life." The Court spelled out what it meant by this phrase: First, death has to be both instantaneous and painless. Second, it can't involve unnecessary mutilation of the body. So, according to the Court, beheading is cruel because it mutilates the body. Crucifixion is doubly cruel because it inflicts a "lingering" death *and* mutilates the body (*In re Kemmler* 1890, 446–47).

Disproportionate Punishments

LO 6

The **principle of proportionality**—namely, that punishment should fit the crime—has an ancient history (Chapter 1). The U.S. Supreme Court first applied proportionality as a principle required by the Eighth Amendment in *Weems v. U.S.* (1910). Paul Weems was convicted of falsifying a public document. The trial court first sentenced him to 15 years in prison at hard labor in chains and then took away all of his civil rights for the rest of his life. The Court ruled that the punishment was "cruel and unusual" because it was disproportionate to his crime. *Weems* banned disproportionate punishments in *federal* criminal justice.

In extending the cruel and unusual punishment ban to *state* criminal justice in the 1960s, the Court in *Robinson v. California* (1962) reaffirmed its commitment to the proportionality principle. The Court majority ruled that a 90-day sentence for drug addiction was disproportionate because addiction is an illness, and it's cruel and unusual to punish persons for being sick. "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold," wrote Justice Marshall for the Court majority (Chapter 3).

Let's look at the issues surrounding whether many modern forms of punishment are proportional punishments.

The Death Penalty: "Death Is Different"

A majority of the U.S. Supreme Court has consistently agreed that the proportionality principle applies to death penalty cases; as the Court puts it, "death is different." There are numerous capital crimes where no one is killed; they include treason, espionage, kidnapping, aircraft hijacking, large-scale drug trafficking, train wrecking, and perjury that leads to someone's execution (Liptak 2003).

In practice, no one's actually sentenced to death for them, so it's difficult to tell whether the Court would rule that death is disproportionate to a crime where no one gets killed. With one exception—rape. In 1977, the Court heard *Coker v. Georgia*; it decided that death was disproportionate punishment for raping an *adult* woman. In fact, it looked as if a majority of the Court was committed to the proposition that death is always disproportionate, except in some aggravated murders. That proposition held, but barely, in a bitterly contested case that reached the Court in 2008. In that case, our next case excerpt, the Court decided (5–4) that executing Patrick Kennedy was "cruel and unusual punishment" because it was disproportionate to his rape of his eight-year-old stepdaughter.

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CASE Is the Death Penalty for Child Rape Cruel and Unusual?

Kennedy v. Louisiana
554 U.S. ___ (2008)

HISTORY

Patrick Kennedy was convicted of the aggravated rape of his eight-year-old stepdaughter under a Louisiana statute that authorized capital punishment for the rape of a child under 12 years of age and was sentenced to death. On his appeal, the Supreme Court of Louisiana affirmed. Kennedy petitioned for certiorari, which was granted. The U.S. Supreme Court reversed and remanded.

KENNEDY. J., joined by STEVENS, SOUTER, GINSBURG, and BREYER, JJ.

FACTS

At 9:18 a.m. on March 2, 1998, Patrick Kennedy called 911 to report that his stepdaughter, L. H., had been raped. When police arrived at Kennedy's home between 9:20 and 9:30 a.m., they found L. H. on her bed, wearing a T-shirt and wrapped in a bloody blanket. She was bleeding profusely from the vaginal area. Kennedy told police he had carried her from the yard to the bathtub and then to the bed. Once in the bedroom, Kennedy had used a basin of water and a cloth to wipe blood from the victim.

L. H. was transported to the Children's Hospital. An expert in pediatric forensic medicine testified that L. H.'s injuries were the most severe he had seen from a sexual assault in his four years of practice. A laceration to the left wall of the vagina had separated her cervix from the back of her vagina, causing her rectum to protrude into the vaginal structure. Her entire perineum was torn from the posterior fourchette to the anus. The injuries required emergency surgery.

At the scene of the crime, at the hospital, and in the first weeks that followed, both L. H. and Kennedy maintained in their accounts to investigators that L. H. had been raped by two neighborhood boys. L. H. was interviewed several days after the rape by a psychologist. She told the psychologist that she had been playing in the garage when a boy came over and asked her about Girl Scout cookies she was selling; then that the boy "pulled her by the legs to the backyard," where he placed his hand over her mouth, "pulled down her shorts," and raped her.

Eight days after the crime, and despite L. H.'s insistence that Kennedy was not the offender, Kennedy was arrested for the rape. The state's investigation had drawn the accuracy of Kennedy and L. H.'s story into question. Police found that Kennedy made two telephone calls on the morning of the rape. Sometime before 6:15 a.m., Kennedy called his employer and left a message that he was unavailable to work that day. Kennedy called back between 6:30 and 7:30 a.m. to ask a colleague how to get blood out of a white carpet because his daughter had "just become a young lady." At 7:37 a.m., Kennedy called B & B Carpet Cleaning and requested urgent assistance in removing bloodstains from a carpet. Kennedy did not call 911 until about an hour and a half later.

About a month after Kennedy's arrest, L. H. was removed from the custody of her mother, who had maintained until that point that Kennedy was not involved in the rape. On June 22, 1998, L. H. was returned home and told her mother for the first time that Kennedy had raped her. And on December 16, 1999, about 21 months after the rape, L. H. recorded her accusation in a videotaped interview with the Child Advocacy Center.

The state charged Kennedy with aggravated rape of a child under La. Stat. Ann. § 14:42 (West 1997 and Supp. 1998) and sought the death penalty.*

The trial began in August 2003. L. H. was then 13 years old. She testified that she "woke up one morning and Patrick was on top of her." She remembered Kennedy bringing her "a cup of orange juice and pills chopped up in it" after the rape and overhearing him on the telephone saying she had become a "young lady." L. H. acknowledged that she had accused two neighborhood boys but testified Kennedy told her to say this and that it was untrue.

*According to the statute, "aggravated" applies to anal or vaginal rape without the consent of the victim—when it's committed under any of 10 aggravating circumstances, one of which is when the victim was under 12 years of age at the time of the rape. The penalty for aggravated rape is life in prison at hard labor without parole, probation, or suspension of sentence. But, if the victim is under 12, the prosecutor asks for the death penalty: "The offender shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence, in accordance with the determination of the jury."

After the jury found Kennedy guilty of aggravated rape, the penalty phase ensued. The jury unanimously determined that Kennedy should be sentenced to death. The Louisiana Supreme Court affirmed. We granted certiorari.

OPINION

The Eighth Amendment's protection against excessive or cruel and unusual punishments flows from the basic precept of justice that punishment for a crime should be graduated and proportioned to the offense. Whether this requirement has been fulfilled is determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791 but by the norms that currently prevail. The Amendment draws its meaning from the evolving standards of decency that mark the progress of a maturing society.

Capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution. In these cases the Court has been guided by objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions. Whether the death penalty is disproportionate to the crime committed depends as well upon the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose.

The evidence of a national consensus with respect to the death penalty for child rapists, as with respect to juveniles, mentally retarded offenders, and vicarious felony murderers, shows divided opinion but, on balance, an opinion against it. Thirty-seven jurisdictions—36 States plus the Federal Government—have the death penalty. Only six of those jurisdictions authorize the death penalty for rape of a child. Though our review of national consensus is not confined to tallying the number of States with applicable death penalty legislation, it is of significance that, in 45 jurisdictions, Kennedy could not be executed for child rape of any kind.

There are measures of consensus other than legislation. Statistics about the number of executions may inform the consideration whether capital punishment for the crime of child rape is regarded as unacceptable in our society. These statistics confirm our determination from our review of state statutes that there is a social consensus against the death penalty for the crime of child rape. Louisiana is the only State since 1964 that has sentenced an individual to death for the crime of child rape; and Kennedy and Richard Davis, who was convicted and sentenced to death for the aggravated rape of a 5-year-old child by a Louisiana jury in December 2007, are the only two individuals now on death row in the United States for a nonhomicide offense. After reviewing the authorities informed by contemporary norms, including the history of the death penalty for this and other nonhomicide crimes, current state statutes and new enactments, and the number of executions since 1964, we conclude there is a national consensus against capital punishment for the crime of child rape.

Objective evidence of contemporary values as it relates to punishment for child rape is entitled to great weight, but it does not end our inquiry. It is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty. We turn, then, to the resolution of the question before us, which is informed by our precedents and our own understanding of the Constitution and the rights it secures.

It must be acknowledged that there are moral grounds to question a rule barring capital punishment for a crime against an individual that did not result in death. These facts illustrate the point. Here the victim's fright, the sense of betrayal, and the nature of her injuries caused more prolonged physical and mental suffering than, say, a sudden killing by an unseen assassin. The attack was not just on her but on her childhood. Rape has a permanent psychological, emotional, and sometimes physical impact on the child. We cannot dismiss the years of long anguish that must be endured by the victim of child rape.

It does not follow, though, that capital punishment is a proportionate penalty for the crime. The constitutional prohibition against excessive or cruel and unusual punishments mandates that the State's power to punish be exercised within the limits of civilized standards. Evolving standards of decency that mark the progress of a maturing society counsel us to be most hesitant before interpreting the Eighth Amendment to allow the extension of the death penalty, a hesitation that has special force where no life was taken in the commission of the crime.

It is an established principle that decency, in its essence, presumes respect for the individual and thus moderation or restraint in the application of capital punishment. We do not discount the seriousness of rape as a crime. It is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim. Short of homicide, it is the ultimate violation of self. But the murderer kills; the rapist, if no more than that, does not. We have the abiding conviction that the death penalty, which is unique in its severity and irrevocability, is an excessive penalty for the rapist who, as such, does not take human life.

Consistent with evolving standards of decency and the teachings of our precedents we conclude that, in determining whether the death penalty is excessive, there is a distinction between intentional first-degree murder on the one hand and nonhomicide crimes against individual persons, even including child rape, on the other. The latter crimes may be devastating in their harm, as here, but in terms of moral depravity and of the injury to the person and to the public, they cannot be compared to murder in their severity and irrevocability.

The judgment of the Supreme Court of Louisiana upholding the capital sentence is reversed. This case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

DISSENT

ALITO, J., joined by ROBERTS, CJ., SCALIA and THOMAS JJ.

The Court today holds that the Eighth Amendment categorically prohibits the imposition of the death penalty for the crime of raping a child. This is so, according to the Court, no matter how young the child, no matter how many times the child is raped, no matter how many children the perpetrator rapes, no matter how sadistic the crime, no matter how much physical or psychological trauma is inflicted, and no matter how heinous the perpetrator's prior criminal record may be. The Court provides two reasons for this sweeping conclusion: First, the Court claims to have identified "a national consensus" that the death penalty is never acceptable for the rape of a child; second, the Court concludes, based on its "independent judgment," that imposing the death penalty for child rape is inconsistent with "the evolving standards of decency that mark the progress of a maturing society." Because neither of these justifications is sound, I respectfully dissent.

I turn first to the Court's claim that there is "a national consensus" that it is never acceptable to impose the death penalty for the rape of a child. I believe that the "objective indicia" of our society's "evolving standards of decency" can be fairly summarized as follows. Neither Congress nor juries have done anything that can plausibly be interpreted as evidencing the "national consensus" that the Court perceives. State legislatures, for more than 30 years, have operated under the ominous shadow of the *Coker* [cruel and unusual punishment to execute a man for raping an adult woman] and thus have not been free to express their own understanding of our society's standards of decency. And in the months following our grant of certiorari in this case, state legislatures have had an additional reason to pause. Yet despite the inhibiting legal atmosphere that has prevailed since 1977, six States have recently enacted new, targeted child-rape laws.

The Court is willing to block the potential emergence of a national consensus in favor of permitting the death penalty for child rape because, in the end, what matters is the Court's "own judgment" regarding "the acceptability of the death penalty." The Court's final—and, it appears, principal—justification for its holding is that murder, the only crime for which defendants have been executed since this Court's 1976 death penalty decisions, is unique in its moral depravity and in the severity of the injury that it inflicts on the victim and the public. Is it really true that every person who is convicted of capital murder and sentenced to death is more morally depraved than every child rapist? Consider the following two cases. In the first, a defendant robs a convenience store and watches as his accomplice shoots the store owner. The defendant acts recklessly, but was not the triggerman and did not intend the killing. In the second case, a previously convicted child rapist kidnaps, repeatedly rapes, and tortures multiple child victims. Is it clear that the first defendant is more morally depraved than the second?

I have little doubt that, in the eyes of ordinary Americans, the very worst child rapists—predators who seek out and inflict serious physical and emotional injury on defenseless young children—are the epitome of moral depravity.

With respect to the question of the harm caused by the rape of child in relation to the harm caused by murder, it is certainly true that the loss of human life represents a unique harm, but that does not explain why other grievous harms are insufficient to permit a death sentence. The rape of any victim inflicts great injury, and some victims are so grievously injured physically or psychologically that life *is* beyond repair. The immaturity and vulnerability of a child, both physically and psychologically, adds a devastating dimension to rape that is not present when an adult is raped. Long-term studies show that sexual abuse is grossly intrusive in the lives of children and is harmful to their normal psychological, emotional and sexual development in ways which no just or humane society can tolerate.

The harm that is caused to the victims and to society at large by the worst child rapists is grave. It is the judgment of the Louisiana lawmakers and those in an increasing number of other States that these harms justify the death penalty. The Court provides no cogent explanation why this legislative judgment should be overridden. Conclusory references to "decency," "moderation," "restraint," "full progress," and "moral judgment" are not enough.

The party attacking the constitutionality of a state statute bears the "heavy burden" of establishing that the law is unconstitutional. That burden has not been discharged here, and I would therefore affirm the decision of the Louisiana Supreme Court.

QUESTIONS

1. **According to the Court, why is death a proportionate penalty for child rape? Do you agree? Explain your reasons.**
2. **Who should make the decision as to what is the appropriate penalty for crimes? Courts? Legislatures? Juries? Defend your answer.**
3. **In deciding whether the death penalty for child rape is cruel and unusual, is it relevant that Louisiana is the only state that punishes child rape with death?**
4. **According to the Court, some crimes are worse than death. Do you agree? Is child rape one of them? Why? Why not?**

The death penalty is disproportionate even for some murders. Let's look at two kinds: mentally retarded persons and juveniles who murder.

The Death Penalty for Mentally Retarded Murderers

Thirty-five mentally retarded persons were executed between 1976 when the death penalty was reinstated and 2001 (Human Rights Watch 2002). The American Association on Mental Retardation (AAMR) includes three elements in its definition of mental retardation:

1. The person has substantial intellectual impairment.
2. That impairment impacts the everyday life of the mentally retarded individual.
3. Retardation is present at birth or during childhood. (*Atkins v. Virginia* 2002, 308)

In *Atkins v. Virginia* (2002), the U.S. Supreme Court ruled that executing anyone who proved the three elements in the AAMR definition applied to them violated the ban on cruel and unusual punishment. The decision grew out of a grisly case. On August 16, 1996, Daryl Atkins and William Jones were drinking alcohol and smoking "pot." At about midnight, they drove to a convenience store to rob a customer. They picked Eric Nesbitt, an airman from Langley Air Force Base, abducted him, took him in their pickup truck to an ATM machine, and forced him to withdraw $200. Then, they drove him to a deserted area. Ignoring his pleas not to hurt him, they ordered Nesbitt to get out of the car. Nesbitt took only a few steps when (according to Jones, who made a deal with prosecutors to testify against Atkins in exchange for a life instead of a death sentence), Atkins fired eight shots into Nesbitt's thorax, chest, abdomen, arms, and legs (338).

The jury convicted Atkins of capital murder. At the penalty phase of Atkins' trial, the jury heard evidence about his 16 prior felony convictions, including robbery, attempted robbery, abduction, use of a firearm, and maiming. He hit one victim over the head with a beer bottle; "slapped a gun across another victim's face, clubbed her in the head with it, knocked her to the ground, and then helped her up, only to shoot her in the stomach" (339).

The jury also heard evidence about Atkins' mental retardation. After interviewing people who knew Atkins, reviewing school and court records, and administering a standard intelligence test, which revealed Atkins had an IQ of 59, Dr. Evan Nelson, a forensic psychologist concluded that Atkins was "mildly mentally retarded." According to Nelson, mental retardation is rare (about 1 percent of the population); it would automatically qualify Atkins for Social Security disability income; and that "of the over 40 capital defendants that he had evaluated, Atkins was only the second" who "met the criteria for mental retardation." Nelson also testified that "in his opinion, Atkins' limited intellect had been a consistent feature throughout his life, and that his IQ score of 59 is not an 'aberration, malingered result, or invalid test score'" (309).

In reversing the death sentence, the U.S. Supreme Court based its decision on a change in public opinion since its 1989 decision that it's not cruel and unusual punishment to execute retarded offenders (*Penry v. Lynaugh* 1989). How did the Court measure this change in public opinion? First, since 1989, 19 states and the federal government had passed statutes banning the execution of mentally retarded offenders (*Atkins v. Virginia* 2002, 314). Second, it's not just the number of bans that's significant, it's "the consistency of the direction of the change":

> Given the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.
>
> The evidence carries even greater force when it is noted that the legislatures that have addressed the issue have voted overwhelmingly in favor of the prohibition.
>
> Moreover, even in those States that allow the execution of mentally retarded offenders, the practice is uncommon. Some states, for example New Hampshire and New Jersey, continue to authorize executions, but none have been carried out in decades. Thus there is little need to pursue legislation barring the execution of the mentally retarded in those States.
>
> And it appears that even among those States that regularly execute offenders and that have no prohibition with regard to the mentally retarded, only five have executed offenders possessing a known IQ less than 70 since we decided Penry. The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it. (315–16)

Third, executing retarded offenders doesn't serve the main purposes for having death sentences: retribution and deterrence. Mentally retarded offenders aren't as blameworthy or as subject to deterrence as people with normal intelligence because of their "diminished capacity to understand and process information, to learn from experience, to engage in logical reasoning, or to control their impulses" (319–20).

The Death Penalty for Juvenile Murderers

The execution of juveniles began in 1642, when Plymouth Colony hanged 16-year-old Thomas Graunger for bestiality with a cow and a horse (Rimer and Bonner 2000). It continued at a rate of about one a year until Oklahoma executed Scott Hain on April 3, 2003, after the U.S. Supreme Court refused to hear his appeal. Hain and a 21-year-old acquaintance killed two people in the course of a carjacking and robbery. He was a "deeply troubled" 17-year-old kid who dropped out of the seventh grade after repeating the sixth grade three times. As a teenager, Scott's father got him a job in a warehouse so he could steal stuff and give it to his father, who sold it. At the time of the carjacking murders, Scott was living on the street in Tulsa, drinking, and using other drugs daily, but he'd never committed a violent crime (Greenhouse 2003, A18).

Just a few months before the U.S. Supreme Court refused to hear Scott Hain's case, four Supreme Court justices (John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer) had called the death penalty for juveniles a "shameful practice," adding that "the practice of executing such offenders is a relic of the past and is inconsistent with the evolving standards of decency in a civilized society" (Greenhouse 2003, A18).

In *Trop v. Dulles* (1958), the Court first adopted the "evolving standards" test to decide whether sentences run afoul of the Eighth Amendment ban on "cruel and unusual punishments." In 1944, U.S. Army private Albert Trop escaped from a military stockade at Casablanca, Morocco, following his confinement for a disciplinary violation. The next day, Trop willingly surrendered. A general court martial convicted Trop of desertion and sentenced him to three years at hard labor, loss of all pay and allowances,

and a dishonorable discharge. In 1952, Trop applied for a passport. His application was rejected on the ground that he had lost his citizenship due to his conviction and dishonorable discharge for wartime desertion. The Court decided the punishment was "cruel and unusual." Why? Because "the words of the Amendment are not precise, and their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society" (100–01).

The Court applied the "evolving standards of decency" approach in *Thompson v. Oklahoma* (1988) to ban the execution of juveniles under 16. But the next year, in *Stanford v. Kentucky* (1989), the Court ruled that executing juveniles between 16 and 18 didn't offend "evolving standards of decency." (After serving 14 years on death row, Stanford was granted clemency in 2003 and is now serving a life sentence.)

In 2005, the Court decided whether standards of decency had evolved enough since 1989 to be offended by executing Christopher Simmons for a carjacking murder he committed when he was 17 (*Roper v. Simmons* 2005). By a vote of 5–4, the U.S. Supreme Court held that the Eighth and Fourteenth Amendments forbid the execution of offenders who were under the age of 18 when they committed their crimes. According to Justice Kennedy:

> When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity. (554)

The Court relied on "the evolving standards of decency that mark the progress of a maturing society" (561) to determine which punishments are so disproportionate as to be cruel and unusual. The Court argued that the majority of states' rejection of the death penalty for juveniles; its infrequent use in the states that retain the penalty; and the trend toward its abolition show that there's a national consensus against it. The Court determined that today our society views juveniles as categorically less culpable than the average criminal.

Justice Stevens, joined by Justice Ginsburg, wrote in a concurring opinion, that "if the meaning of . . . [the Eighth] Amendment had been frozen when it was originally drafted, it would impose no impediment to the execution of 7-year-old children today" (587).

Justice Scalia, joined by Justice Thomas and Chief Justice Rehnquist, dissented. Justice Scalia maintained that the Court improperly substituted its own judgment for the state legislature's. He criticized the majority for counting non–death penalty states toward a national consensus against juvenile executions. Scalia also objected to the Court's use of international law to support its opinion, claiming that "Acknowledgement of foreign approval has no place in the legal opinion of this Court . . ." (628).

Sentences of Imprisonment

The consensus that the ban on cruel and unusual punishment includes a proportionality requirement in capital punishment does *not* extend to prison sentences. The important case of *Solem v. Helm* (1983) revealed that the U.S. Supreme Court was deeply divided over whether the principle of proportionality applied to sentences of imprisonment. The case involved Jerry Helm, whom South Dakota had convicted of

six nonviolent felonies by 1975. The crimes included three third-degree burglaries, one in 1964, one in 1966, and one in 1969; obtaining money under false pretenses in 1972; committing grand larceny in 1973; and "third-offense driving while intoxicated" in 1975. A bare majority of five in the U.S. Supreme Court held that "a criminal sentence must be proportionate to the crime for which the defendant has been convicted" (290).

The split over the constitutional status of proportionality in prison sentences was revealed again when the constitutionality of **three-strikes-and-you're-out laws** reached the Court in 2003. Before we look at the Court's division, let's put three-strikes laws in some perspective. Three-strikes laws are supposed to make sure that offenders who are convicted of a third felony get locked up for a very long time (sometimes for life). The laws are controversial, and they generate passions on both sides. Supporters claim that the laws "help restore the credibility of the criminal justice system and will deter crime." Opponents believe the harsh penalties won't have much effect on crime, and they'll cost states more than they can afford to pay (Turner et al. 1995, 75).

Despite controversy, three-strikes laws are popular and widespread. Twenty-four states have passed three-strikes laws (Shepherd 2002). California's law, the toughest in the nation, includes a 25-year-to-life sentence if you're "out" on a third strike. The law passed in 1994, after the kidnapping, brutal sexual assault, and murder of 12-year-old Polly Klaas in 1993 (Ainsworth 2004, 1; Shepherd 2002, 161). A bearded stranger broke into Polly Klaas's home in Petaluma, California, and kidnapped her. He left behind two other girls bound and gagged. Polly's mother was asleep in the next room. Nine weeks later, after a fruitless search by hundreds of police officers and volunteers, a repeat offender, Richard Allen Davis, was arrested, and, in 1996, convicted and sentenced to death.

Liberals and conservatives, Democrats and Republicans, and the public all jumped on the three-strikes bandwagon, taking it for granted these laws were a good idea. Why were they popular? Here are three reasons:

1. They addressed the public's dissatisfaction with the criminal justice system.
2. They promised a simple solution to a complex problem—the "panacea phenomenon."
3. The use of the catchy phrase "three strikes and you're out" was appealing; it put old habitual offender statute ideas into the language of modern baseball. (Benekos and Merlo 1995, 3; Turner et al. 1995)

What effects have three-strikes laws had? Everybody agrees that they *incapacitate* second- and third-strikers while they're locked up. But incapacitate them from doing what? Some critics argue that most strikers are already past the age of high offending. Most of the debate centers on deterrence: Do the laws prevent criminals from committing further crimes? The conclusions, based on empirical research, are decidedly mixed: three-strikes laws deter crime; three-strikes laws have no effect on crime; three-strikes laws *increase* crime.

Whatever the effectiveness of three-strikes laws may be, the U.S. Supreme Court has ruled they're constitutional, even if the justices can't agree on the reasons. This is clear from the Court's 5–4 decision in *Ewing v. California*, upholding the constitutionality of California's three-strikes law.

In Ewing v. California, the Court upheld the constitutionality of California's three-strikes law.

CASE Is 25 Years to Life in Prison Disproportionate to Grand Theft?

Ewing v. California
538 U.S. 11 (2003)

HISTORY

Gary Ewing was convicted in a California trial court of felony grand theft and sentenced to 25 years to life under that state's three-strikes law. The California Court of Appeal, Second Appellate District, affirmed the sentence, and the State Supreme Court denied review. Certiorari was granted. The Supreme Court held that the sentence did not violate the Eighth Amendment's prohibition against cruel and unusual punishment.

O'CONNOR, J., joined by REHNQUIST, CJ., and SCALIA, KENNEDY, and THOMAS, JJ.

FACTS

On parole from a nine-year prison term, petitioner Gary Ewing walked into the pro shop of the El Segundo Golf Course, in Los Angeles County, on March 12, 2000. He walked out with three golf clubs, priced at $399 apiece, concealed in his pants leg. A shop employee, whose suspicions were aroused when he observed Ewing limp out of the pro shop, telephoned the police. The police apprehended Ewing in the parking lot.

Ewing is no stranger to the criminal justice system. In 1984, at the age of 22, he pleaded guilty to theft. The court sentenced him to six months in jail (suspended), three years' probation, and a $300 fine. In 1988, he was convicted of felony grand theft auto and sentenced to one year in jail and three years' probation. After Ewing completed probation, however, the sentencing court reduced the crime to a misdemeanor, permitted Ewing to withdraw his guilty plea, and dismissed the case.

In 1990, he was convicted of petty theft with a prior and sentenced to 60 days in the county jail and three years' probation. In 1992, Ewing was convicted of battery and sentenced to 30 days in the county jail and two years' summary probation. One month later, he was convicted of theft and sentenced to ten days in the county jail and 12 months' probation. In January 1993, Ewing was convicted of burglary and sentenced to 60 days in the county jail and one year's summary probation. In February 1993, he was convicted of possessing drug paraphernalia and sentenced to six months in the county jail and three years' probation. In July 1993, he was convicted of appropriating lost property and sentenced to ten days in the county jail and two years' summary probation. In September 1993, he was convicted of unlawfully possessing a firearm and trespassing and sentenced to 30 days in the county jail and one year's probation.

In October and November 1993, Ewing committed three burglaries and one robbery at a Long Beach, California, apartment complex over a five-week period. He awakened one of his victims, asleep on her living room sofa, as he tried to disconnect her video cassette recorder from the television in that room. When she screamed, Ewing ran out the front door. On another occasion, Ewing accosted a victim in the mailroom of the apartment complex. Ewing claimed to have a gun and ordered the victim to hand over his wallet. When the victim resisted, Ewing produced a knife and forced the victim back to the apartment itself. While Ewing rifled through the bedroom, the victim fled the apartment screaming for help. Ewing absconded with the victim's money and credit cards.

On December 9, 1993, Ewing was arrested on the premises of the apartment complex for trespassing and lying to a police officer. The knife used in the robbery and a glass cocaine pipe were later found in the back seat of the patrol car used to transport Ewing to the police station. A jury convicted Ewing of first-degree robbery and three counts of residential burglary. Sentenced to nine years and eight months in prison, Ewing was paroled in 1999.

Only ten months later, Ewing stole the golf clubs at issue in this case. He was charged with, and ultimately convicted of, one count of felony grand theft of personal property in excess of $400. As required by the three-strikes law, the prosecutor formally alleged, and the trial court later found, that Ewing had been convicted previously of four serious or violent felonies for the three burglaries and the robbery in the Long Beach apartment complex.

As a newly convicted felon with two or more "serious" or "violent" felony convictions in his past, Ewing was sentenced under the three-strikes law to 25 years to life.

OPINION

When the California Legislature enacted the three-strikes law, it made a judgment that protecting the public safety requires incapacitating criminals who have already been convicted of at least one serious or violent crime. Nothing in the Eighth Amendment prohibits California from making that choice. To be sure, California's three-strikes law has sparked controversy. Critics have doubted the

law's wisdom, cost-efficiency, and effectiveness in reaching its goals.

This criticism is appropriately directed at the legislature, which has primary responsibility for making the difficult policy choices that underlie any criminal sentencing scheme. We do not sit as a "superlegislature" to second-guess these policy choices. It is enough that the State of California has a reasonable basis for believing that dramatically enhanced sentences for habitual felons advances the goals of its criminal justice system in any substantial way.

Against this backdrop, we consider Ewing's claim that his three strikes sentence of 25 years to life is unconstitutionally disproportionate to his offense of shoplifting three golf clubs. Ewing's sentence is justified by the State's public-safety interest in incapacitating and deterring recidivist felons, and amply supported by his own long, serious criminal record. To be sure, Ewing's sentence is a long one. But it reflects a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated. The State of California was entitled to place upon Ewing the onus of one who is simply unable to bring his conduct within the social norms prescribed by the criminal law of the State.

We hold that Ewing's sentence of 25 years to life in prison, imposed for the offense of felony grand theft under the three-strikes law, is not grossly disproportionate and therefore does not violate the Eighth Amendment's prohibition on cruel and unusual punishments. The judgment of the California Court of Appeal is affirmed.

It is so ordered.

CONCURRING OPINION

SCALIA, J. concurring in the judgment.

The Eighth Amendment's prohibition of cruel and unusual punishments was aimed at excluding only certain *modes* of punishment, and was not a guarantee against disproportionate sentences. Because I agree that petitioner's sentence does not violate the Eighth Amendment's prohibition against cruel and unusual punishments, I concur in the judgment.

CONCURRING OPINION

THOMAS, J. concurring in the judgment.

In my view, the Cruel and Unusual Punishments Clause of the Eighth Amendment contains no proportionality principle. Because the plurality concludes that petitioner's sentence does not violate the Eighth Amendment's prohibition on cruel and unusual punishments, I concur in the judgment.

DISSENT

BREYER, J., joined by STEVENS, SOUTER, AND GINSBURG, JJ.

A comparison of Ewing's sentence with other sentences requires answers to two questions. First, how would other jurisdictions (or California at other times, i.e., without the three-strikes penalty) punish the same offense conduct? Second, upon what other conduct would other jurisdictions (or California) impose the same prison term? Moreover, since hypothetical punishment is beside the point, the relevant prison time, for comparative purposes, is real prison time, i.e., the time that an offender must actually serve. Sentencing statutes often shed little light upon real prison time. That is because sentencing laws normally set maximum sentences, giving the sentencing judge discretion to choose an actual sentence within a broad range, and because many States provide good-time credits and parole, often permitting release after, say, one-third of the sentence has been served. Nonetheless, Ewing's sentence, comparatively speaking, is extreme.

As to California itself, we know the following: First, between the end of World War II and 1994 (when California enacted the three-strikes law), no one like Ewing could have served more than ten years in prison. We know that for certain because the maximum sentence for Ewing's crime of conviction, grand theft, was for most of that period ten years. From 1976 to 1994 (and currently, absent application of the three-strikes penalty), a Ewing-type offender would have received a maximum sentence of four years. And we know that California's "habitual offender" laws did not apply to grand theft. We also know that the time that any offender actually served was likely far less than ten years. This is because statistical data show that the median time actually served for grand theft (other than auto theft) was about two years, and 90 percent of all those convicted of that crime served less than three or four years.

Second, statistics suggest that recidivists of all sorts convicted during that same time period in California served a small fraction of Ewing's real-time sentence. On average, recidivists served three to four additional (recidivist-related) years in prison, with 90 percent serving less than an additional real seven to eight years.

Third, we know that California has reserved, and still reserves, Ewing-type prison time, i.e., at least 25 real years in prison, for criminals convicted of crimes far worse than was Ewing's. Statistics for the years 1945 to 1981, for example, indicate that typical (nonrecidivist) male first-degree murderers served between 10 and 15 real years in prison, with 90 percent of all such murderers serving less than 20 real years. Moreover, California, which has moved toward a real-time sentencing system (where the statutory punishment approximates the time served), still punishes far less harshly those who have engaged in far more serious conduct. It imposes, for example, upon nonrecidivists guilty of arson causing great bodily injury a maximum sentence of 9 years in prison; it imposes upon those guilty of voluntary manslaughter a maximum sentence of 11 years. It reserves the sentence that it here imposes upon (former-burglar-now-golf-club-thief) Ewing for nonrecidivist, first-degree murderers.

As to other jurisdictions, we know the following: The United States, bound by the federal Sentencing Guidelines, would impose upon a recidivist, such as Ewing, a sentence that, in any ordinary case, would not exceed 18 months in prison. The Guidelines reserve a Ewing-type sentence for Ewing-type recidivists who currently commit murder, robbery (involving the discharge of a firearm, serious bodily injury, and about $1 million), drug offenses involving more than, for example, 20 pounds of heroin, aggravated theft of more than $100 million, and other similar offenses. The Guidelines reserve 10 years of real prison time (with good time)—less than 40 percent of Ewing's sentence—for Ewing-type recidivists who go on to commit, for instance, voluntary manslaughter, aggravated assault with a firearm (causing serious bodily injury and motivated by money), kidnapping, residential burglary involving more than $5 million, drug offenses involving at least one pound of cocaine, and other similar offenses. Ewing also would not have been subject to the federal three-strikes law, for which grand theft is not a triggering offense.

Justice SCALIA and Justice THOMAS argue that we should not review for gross disproportionality a sentence to a term of years. Otherwise, we make it too difficult for legislators and sentencing judges to determine just when their sentencing laws and practices pass constitutional muster. I concede that a bright-line rule would give legislators and sentencing judges more guidance. But application of the Eighth Amendment to a sentence of a term of years requires a case-by-case approach. And, in my view, like that of the plurality, meaningful enforcement of the Eighth Amendment demands that application—even if only at sentencing's outer bounds.

A case-by-case approach can nonetheless offer guidance through example. Ewing's sentence is, at a minimum, two to three times the length of sentences that other jurisdictions would impose in similar circumstances. That sentence itself is sufficiently long to require a typical offender to spend virtually all the remainder of his active life in prison. These and the other factors that I have discussed, along with the questions that I have asked along the way, should help to identify "gross disproportionality" in a fairly objective way—at the outer bounds of sentencing.

In sum, even if I accept for present purposes the plurality's analytical framework, Ewing's sentence (life imprisonment with a minimum term of 25 years) is grossly disproportionate to the triggering offense conduct—stealing three golf clubs—Ewing's recidivism notwithstanding.

For these reasons, I dissent.

QUESTIONS

1. **List Gary Ewing's crimes, and match them to the three-strikes law.**
2. **Define "proportionality" as the plurality opinion defines it. Summarize how the majority applies proportionality to Ewing's sentence. How does Justice Scalia define "proportionality," and how does his application of it to the facts differ from the majority's? Summarize how the dissent applies the principle of proportionality to the facts of the case.**
3. **In your opinion, was Ewing's punishment proportional to the crime? Back up your answer with the facts of the case and the arguments in the opinions.**
4. **If Justice Thomas is right that the Eighth Amendment contains no proportionality principle, what is cruel and unusual punishment?**

Three-strikes laws are an example of one kind of sentencing scheme in the United States—**mandatory minimum sentences**. Mandatory minimum sentencing laws require judges to impose a nondiscretionary minimum amount of prison time that all offenders have to serve. Mandatory minimum sentences promise offenders that "If you do the crime, you *will* do the time." Mandatory minimum sentences are old, and the list of them is long (the U.S. Code includes at least 100). By 1991, 46 states and the federal government had enacted mandatory minimum sentences. But the main targets are drug offenses, violent crimes, and crimes committed with weapons (Wallace 1993).

Mandatory minimum sentences are the more rigid form of the broad scheme of **fixed (determinate) sentences** (Chapter 1). This scheme, which fixes or determines sentence length according to the seriousness of the crime, places sentencing authority in legislatures. The less extreme form of fixed sentencing is **sentencing guidelines**. In sentencing guidelines, a commission establishes a narrow range of penalties, and judges are supposed to choose a specific sentence within that range. The guideline sentence depends on a combination of the seriousness of the crime and the prior criminal record of the offender. If the judge sentences above or below the range, she has to back up her reasons (from a list prescribed in the guidelines) for the "departure" in writing.

The Right to Trial by Jury

LO 6, LO 7

Until 2000, the guidelines and mandatory forms of fixed sentencing created only possible cruel and unusual punishment problems. Beyond that, the U.S. Supreme Court took a hands-off approach to sentencing procedures, leaving it up to state legislatures and judges to share sentencing authority and administration without interference from the Court. Then came *Apprendi v. New Jersey* (2000), called by two authorities (Dressler and Michaels 2006) "the first in a series of constitutional explosions that have rocked the world of criminal sentencing and caused fundamental alterations" in federal and state sentencing systems (366). (See Table 2.1 for some of the leading cases.)

Charles C. Apprendi Jr. fired several .22-caliber bullets into a Black family's home; the family had recently moved into a previously all-White neighborhood in Vineland, New Jersey. Apprendi was promptly arrested and admitted that he was the shooter. Later, he made a statement—which he soon after retracted—that "even though he did not know the occupants of the house personally, 'because they are black in color he does not want them in the neighborhood'" (469).

Apprendi was convicted of possessing a firearm with an unlawful purpose, a felony in New Jersey, punishable by five to ten years in prison. New Jersey also has a hate crime statute providing for an extended punishment of 10 to 20 years if the judge finds by a preponderance of the evidence that the defendant committed the crime with a "purpose

TABLE 2.1 Major U.S. Supreme Court Trial by Jury Rights Cases

Case	Court Decision
1. *Apprendi v. New Jersey* (2000) 5–4	1. Struck down New Jersey statute authorizing judges to increase *maximum* sentence based on facts judge found to be true by a preponderance of the evidence, but not proof beyond a reasonable doubt 2. Affirmed judge's authority to increase maximum based on prior convictions, or crimes defendants confess to, without jury finding there were prior convictions or defendants, or that prior crimes defendants confessed to
2. *Blakely v. Washington* (2004) 5–4	Struck down Washington state statute that authorized judge to *increase* the length of prison time beyond the "standard range" in the Washington sentencing guidelines based on facts not proved beyond a reasonable doubt
3. *U.S. v. Booker* (2005) 5–4	1. Struck down provisions in the U.S. sentencing guidelines, which allowed judges to *increase* individual sentences beyond the "standard range" based on facts not proved beyond a reasonable doubt to the jury 2. Guidelines are advisory only, but enjoy "a presumption of reasonableness"
4. *Gall v. U.S.* (2007) 7–2	1. Upheld a sentence of 36 months' probation imposed on a man who pleaded guilty to conspiracy to distribute ecstasy in the face of a recommended sentence of 30 to 37 months in prison 2. Federal Appeals Courts may not presume that a sentence falling outside the range recommended by the Federal Sentencing Guidelines is unreasonable

to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity" (469).

Apprendi argued that "racial purpose" was an element of the crime that the state had to prove beyond a reasonable doubt. New Jersey argued that the legislature had chosen to make "racial purpose" a sentencing factor. The U.S. Supreme Court (5–4) brought the Sixth Amendment right to trial by jury into the heart of criminal sentencing procedures with a sweeping rule:

> Other than the fact of prior conviction, any fact that *increases* the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. (490, emphasis added)

Between 2000 and 2005, the Supreme Court extended the ***Apprendi* rule**. In a series of 5–4 decisions made up of shifting member majority and dissenting justices, the Court stirred up uncertainty and anxiety about the effect of the rule on state and federal proceedings, particularly on the by now firmly established U.S. and state sentencing guidelines. In *Blakely v. Washington* (2004) 5–4, the Court struck down a Washington state statute that allowed judges to *increase* the length of prison time beyond the "standard range" prescribed in the Washington sentencing guidelines based on facts not proven to a jury beyond a reasonable doubt. In that case, after Ralph Blakely's wife Yolanda filed for divorce, he abducted her from their orchard home, binding her with duct tape and forcing her at knifepoint into a wooden box in the bed of his pickup truck (300).

When the couple's 13-year-old son Ralphy returned home from school, Blakely ordered him to follow in another car, threatening to harm Yolanda with a shotgun if Ralphy didn't do it. Ralphy escaped and sought help when they stopped at a gas station; Blakely continued on with Yolanda to a friend's house in Montana. He was finally arrested after the friend called the police (300).

The state charged Blakely with first-degree kidnapping, in a plea agreement, then reduced the charge to second-degree kidnapping involving domestic violence and use of a firearm. Blakely pleaded guilty, admitting the elements of second-degree kidnapping and the domestic-violence and firearm allegations, but no other relevant facts.

In Washington, second-degree kidnapping is punishable by up to ten years in prison. Washington's sentencing guidelines specify "standard range" of 49 to 53 months for second-degree kidnapping with a firearm. A judge may impose a sentence above the standard range if she finds "substantial and compelling reasons justifying an exceptional sentence." In a plea agreement, the state recommended a sentence within the standard range of 49 to 53 months. After hearing Yolanda's description of the kidnapping, the judge rejected the state's recommendation and imposed an exceptional sentence of 90 months—37 months beyond the standard maximum. He justified the sentence on the ground that petitioner had acted with "deliberate cruelty."

Faced with an unexpected increase of more than three years in his sentence, Blakely objected. The judge accordingly conducted a three-day bench hearing featuring testimony from Yolanda, Ralphy, a police officer, and medical experts. He concluded that

> Blakely used stealth and surprise, and took advantage of the victim's isolation. He immediately employed physical violence, restrained the victim with tape, and threatened her with injury and death to herself and others. He immediately coerced the victim into providing information by the threatening application of a knife. He violated a subsisting restraining order. (301)

The judge adhered to his initial determination of deliberate cruelty. Blakely appealed, arguing that this sentencing procedure deprived him of his federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence.

In *U.S. v. Booker* (2005), the Court applied the *Apprendi* rule to the U.S. sentencing guidelines. In Justice Stevens' words, writing for the five-member majority, "there is no distinction of constitutional significance" between the federal sentencing guidelines and the Washington sentencing guidelines in *Blakely*. Therefore, the Court held, judges can't increase defendants' sentence without proving beyond a reasonable doubt to a jury facts justifying the increase.

That raised a second question: What should be done instead? Four of the five justice majority would have continued sentencing according to the guidelines, except for cases that *increased* sentence lengths. In those cases, the government would have to "prove any fact that is required to increase a defendant's sentence under the Guidelines beyond a reasonable doubt" (284–85).

But, that's not what happened. Justice Ginsburg, one of the five-member majority, broke with the majority on the remedy to join with the dissent to give them the majority on the remedy. What remedy? It had two parts:

1. Sentencing guidelines would operate as they did before, but they're now *advisory*, not mandatory as they were before *Booker*. In the remedy majority's words, the new rule "requires judges to *consider* the Guidelines" but they don't have to *follow* them (259).
2. Sentences are still subject to review by the U.S. Courts of Appeal. When they do, they have to consider whether the sentence is "unreasonable" in light of the guidelines and the general purposes of sentencing under federal law (261).

There was—and still is—much hand-wringing over where the Court is going with the jury right in sentencing procedures and what implications it has for sentencing guidelines under state and federal law. But it's important not to exaggerate the impact of the *Apprendi* rule and its impact after *Blakely* and *Booker*. Remember, the rule applies only to cases in which judges *increase* sentences. According to a U.S. Sentencing Commission special report on the impact of *Booker* (2006):

> The majority of federal cases continue to be sentenced in conformance with the sentencing guidelines. National data show that when within-range sentences and government-sponsored, below-range sentences are combined, the rate of sentencing in conformance with the sentencing guidelines is 85.9 percent. This conformance rate remained stable throughout the year that followed *Booker*. (vi)

Nevertheless, there's still great concern and uncertainty about what "advisory" and "unreasonable" mean in the remedy elements of *Booker.* The Court didn't seem to clear up very much in our next case excerpt *Gall v. United States* (2007), the first case applying the *Booker* rule. In *Gall*, the 5-member majority upheld the trial judge's sentence of Brian Michael Gall to 36 months' probation instead of a mandatory prison term. The charge was conspiracy to sell ecstasy to his fellow students at the University of Iowa. The majority found that the U.S. District Court properly fulfilled its obligation to consider seriously the "advisory" role of the guidelines, before departing from them, and that the Eighth Circuit Court of Appeals acted "unreasonably" when it remanded the case to the District Court for resentencing. The dissent disagreed and wondered why the Sixth Amendment right to trial by jury was oddly absent from the majority's opinion.

The next case, Gall v. United States (2007), was the first case to apply the Booker rule.

CASE Did the Probation Sentence Abuse the Trial Judge's Discretion?

Gall v. U.S.
552 U.S. ___ (2007)

HISTORY

Brian Michael Gall (hereafter "Petitioner") was convicted, on his guilty plea, in the U.S. District Court for the Southern District of Iowa, of conspiracy to distribute ecstasy and was sentenced to 36 months of probation. The government appealed, challenging the sentence. The Eighth Circuit Court of Appeals remanded for resentencing. Certiorari was granted.

STEVENS, J., joined by ROBERTS, CJ., and SCALIA, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ.

FACTS

In February or March 2000, petitioner Brian Gall, a second-year college student at the University of Iowa, was invited by Luke Rinderknecht to join an ongoing enterprise distributing a controlled substance popularly known as "ecstasy." (Ecstasy is sometimes called "MDMA" because its scientific name is "methylenedioxymethamphetamine.") Gall—who was then a user of ecstasy, cocaine, and marijuana—accepted the invitation. During the ensuing seven months, Gall delivered ecstasy pills, which he received from Rinderknecht, to other conspirators, who then sold them to consumers. He netted more than $30,000.

A month or two after joining the conspiracy, Gall stopped using ecstasy. A few months after that, in September 2000, he advised Rinderknecht and other co-conspirators that he was withdrawing from the conspiracy. He has not sold illegal drugs of any kind since. He has, in the words of the District Court, "self-rehabilitated." He graduated from the University of Iowa in 2002, and moved first to Arizona, where he obtained a job in the construction industry, and later to Colorado, where he earned $18 per hour as a master carpenter. He has not used any illegal drugs since graduating from college.

After Gall moved to Arizona, he was approached by federal law enforcement agents who questioned him about his involvement in the ecstasy distribution conspiracy. Gall admitted his limited participation in the distribution of ecstasy, and the agents took no further action at that time. On April 28, 2004—approximately a year and a half after this initial interview, and three and a half years after Gall withdrew from the conspiracy—an indictment was returned in the Southern District of Iowa charging him and seven other defendants with participating in a conspiracy to distribute ecstasy, cocaine, and marijuana that began in or about May 1996 and continued through October 30, 2002.

The government has never questioned the truthfulness of any of Gall's earlier statements or contended that he played any role in, or had any knowledge of, other aspects of the conspiracy described in the indictment. When he received notice of the indictment, Gall moved back to Iowa and surrendered to the authorities. While free on his own recognizance, Gall started his own business in the construction industry, primarily engaged in subcontracting for the installation of windows and doors. In his first year, his profits were more than $2,000 per month.

Gall entered into a plea agreement with the government, stipulating that he was "responsible for, but did not necessarily distribute himself, at least 2,500 grams of [ecstasy], or the equivalent of at least 87.5 kilograms of marijuana." In the agreement, the government acknowledged that by "on or about September of 2000," Gall had communicated his intent to stop distributing ecstasy to Rinderknecht and other members of the conspiracy. The agreement further provided that recent changes in the guidelines that enhanced the recommended punishment for distributing ecstasy were not applicable to Gall because he had withdrawn from the conspiracy prior to the effective date of those changes.

In her presentence report, the probation officer concluded that Gall had no significant criminal history; that he was not an organizer, leader, or manager; and that his offense did not involve the use of any weapons. The report stated that Gall had truthfully provided the government with all of the evidence he had concerning the alleged offenses, but that his evidence was not useful because he provided no new information to the agents. The report also described Gall's substantial use of drugs prior to his offense and the absence of any such use in recent years. The report recommended a sentencing range of 30 to 37 months of imprisonment.

The record of the sentencing hearing held on May 27, 2005, includes a "small flood" of letters from Gall's parents and other relatives, his fiancé, neighbors, and representatives of firms doing business with him, all uniformly praising his character and work ethic. The transcript includes the testimony of several witnesses and the District judge's colloquy with the Assistant U.S. Attorney (AUSA) and with Gall. The AUSA did not contest any of

the evidence concerning Gall's law-abiding life during the preceding five years but urged that "the Guidelines are appropriate and should be followed," and requested that the court impose a prison sentence within the guidelines range. He mentioned that two of Gall's co-conspirators had been sentenced to 30 and 35 months, respectively, but upon further questioning by the District Court, he acknowledged that neither of them had voluntarily withdrawn from the conspiracy.

The District judge sentenced Gall to probation for a term of 36 months. In addition to making a lengthy statement on the record, the judge filed a detailed sentencing memorandum explaining his decision, and provided the following statement of reasons in his written judgment:

> The Court determined that, considering all the factors under 18 U.S.C. 3553(a), the Defendant's explicit withdrawal from the conspiracy almost four years before the filing of the Indictment, the Defendant's post-offense conduct, especially obtaining a college degree and the start of his own successful business, the support of family and friends, lack of criminal history, and his age at the time of the offense conduct, all warrant the sentence imposed, which was sufficient, but not greater than necessary to serve the purposes of sentencing.

At the end of both the sentencing hearing and the sentencing memorandum, the District judge reminded Gall that probation, rather than "an act of leniency," is a "substantial restriction of freedom." In the memorandum, he emphasized:

> [Gall] will have to comply with strict reporting conditions along with a three-year regime of alcohol and drug testing. He will not be able to change or make decisions about significant circumstances in his life, such as where to live or work, which are prized liberty interests, without first seeking authorization from his Probation Officer or, perhaps, even the Court. Of course, the Defendant always faces the harsh consequences that await if he violates the conditions of his probationary term.

Finally, the District judge explained why he had concluded that the sentence of probation reflected the seriousness of Gall's offense and that no term of imprisonment was necessary:

> Any term of imprisonment in this case would be counter effective by depriving society of the contributions of the Defendant who, the Court has found, understands the consequences of his criminal conduct and is doing everything in his power to forge a new life. The Defendant's post-offense conduct indicates neither that he will return to criminal behavior nor that the Defendant is a danger to society. In fact, the Defendant's post-offense conduct was not motivated by a desire to please the Court or any other governmental agency, but was the pre-Indictment product of the Defendant's own desire to lead a better life.

The Court of Appeals reversed and remanded for resentencing. It held that a sentence outside of the guidelines range must be supported by a justification that "is proportional to the extent of the difference between the advisory range and the sentence imposed." Characterizing the difference between a sentence of probation and the bottom of Gall's advisory guidelines range of 30 months as "extraordinary" because it amounted to "a 100% downward variance," the Court of Appeals held that such a variance must be—and here was not—supported by extraordinary circumstances.

Rather than making an attempt to quantify the value of the justifications provided by the District judge, the Court of Appeals identified what it regarded as five separate errors in the District judge's reasoning: (1) He gave "too much weight to Gall's withdrawal from the conspiracy"; (2) given that Gall was 21 at the time of his offense, the District judge erroneously gave "significant weight" to studies showing impetuous behavior by persons under the age of 18; (3) he did not "properly weigh" the seriousness of Gall's offense; (4) he failed to consider whether a sentence of probation would result in "unwarranted" disparities; and (5) he placed "too much emphasis on Gall's post-offense rehabilitation.

As we shall explain, we are not persuaded that these factors, whether viewed separately or in the aggregate, are sufficient to support the conclusion that the District judge abused his discretion. As a preface to our discussion of these particulars, however, we shall explain why the Court of Appeals' rule requiring "proportional" justifications for departures from the guidelines range is not consistent with our remedial opinion in *United States v. Booker*, 543 U.S. 220 (2005).

OPINION

While the extent of the difference between a particular sentence and the recommended Guidelines range is relevant, courts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential **abuse-of-discretion standard** "failure to exercise sound, reasonable, and legal decision-making; an appellate court's standard for reviewing a decision that is asserted to be grossly unsound, unreasonable, illegal, or unsupported by the evidence" (Garner 2004, 11).

Because the Guidelines are now advisory, appellate review of sentencing decisions is limited to determining whether they are "reasonable" (*United States v. Booker*, 543 U.S. 220 (2005)), and an abuse-of-discretion standard applies to appellate review of sentencing decisions. A district judge must consider the extent of any departure from the Guidelines and must explain the appropriateness of an unusually lenient or harsh sentence with sufficient justifications.

An appellate court may take the degree of variance into account and consider the extent of a deviation from the Guidelines, but it may not require "extraordinary"

circumstances or employ a rigid mathematical formula using a departure's percentage as the standard for determining the strength of the justification required for a specific sentence. Such approaches come too close to creating an impermissible unreasonableness presumption for sentences outside the Guidelines range.

The mathematical approach also suffers from infirmities of application. And both approaches reflect a practice of applying a heightened standard of review to sentences outside the Guidelines range, which is inconsistent with the rule that the abuse-of-discretion standard applies to appellate review of all sentencing decisions—whether inside or outside that range.

A district court should begin by correctly calculating the applicable Guidelines range. The Guidelines are the starting point and initial benchmark but are not the only consideration. After permitting both parties to argue for a particular sentence, the judge should consider all of 18 U.S.C. § 3553(a)'s factors to determine whether they support either party's proposal. The factors include

(a) The court, in determining the particular sentence to be imposed, shall consider—
  (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
  (2) the need for the sentence imposed—
    (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
    (B) to afford adequate deterrence to criminal conduct;
    (C) to protect the public from further crimes of the defendant; and
    (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
  (3) the kinds of sentences available;
  (4) the kinds of sentence and the sentencing range established for—
    (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
      (i) issued by the Sentencing Commission pursuant to section 994 (a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994 (p) of title 28); and
      (ii) that, except as provided in section 3742 (g), are in effect on the date the defendant is sentenced; or
    (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission
  (5) any pertinent policy statement issued by the Sentencing
  (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
  (7) the need to provide restitution to any victims of the offense.

He may not presume that the Guidelines range is reasonable but must make an individualized assessment based on the facts presented. If he decides on an outside-the-Guidelines sentence, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of variation. He must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing. In reviewing the sentence, the appellate court must first ensure that the district court made no significant procedural errors and then consider the sentence's substantive reasonableness under an abuse-of-discretion standard, taking into account the totality of the circumstances, including the extent of a variance from the Guidelines range, but must give due deference to the district court's decision that the § 3553(a) factors justify the variance. That the appellate court might have reasonably reached a different conclusion does not justify reversal.

On abuse-of-discretion review, the Eighth Circuit gave virtually no deference to the district court's decision that the variance was justified. The Circuit clearly disagreed with the district court's decision, but it was not for the Circuit to decide **de novo** ("a court's nondiscretionary review of a lower court's factual or legal findings," Garner 2004, 865) whether the justification for a variance is sufficient or the sentence reasonable. On abuse-of-discretion review, the Court of Appeals should have given due deference to the district court's reasoned and reasonable decision that the § 3553(a) factors, on the whole, justified the sentence. Accordingly, the judgment of the Court of Appeals is reversed.

It is so ordered.

CONCURRING OPINION

SCALIA, J.

I join the opinion of the Court. The highly deferential standard adopted by the Court today will result in far fewer unconstitutional sentences than the proportionality standard employed by the Eighth Circuit. The door therefore remains open for a defendant to demonstrate that his sentence, whether inside or outside the advisory Guidelines range, would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury.

SOUTER, J.

After Booker's remedial holding, I continue to think that the best resolution of the tension between substantial consistency throughout the system and the right of jury trial would be a new Act of Congress: reestablishing a statutory system of mandatory sentencing guidelines, but providing for jury findings of all facts necessary to set the upper range of sentencing discretion.

DISSENT

THOMAS, J.

I would affirm the judgment of the Court of Appeals because the District Court committed statutory error when it departed below the applicable Guidelines range.

ALITO, J.

In reading the Booker opinion, we should not forget the decision's constitutional underpinnings. Booker and its antecedents are based on the Sixth Amendment right to trial by jury. The Court has held that (at least under a mandatory guidelines system) a defendant has the right to have a jury, not a judge, find facts that increase the defendant's authorized sentence (*Blakely v. Washington*, 542 U.S. 296 (2004)). It is telling that the rules set out in the Court's opinion in the present case have nothing to do with juries or fact-finding and, indeed, that not one of the facts that bears on petitioner's sentence is disputed. What is at issue, instead, is the allocation of the authority to decide issues of substantive sentencing policy, an issue on which the Sixth Amendment says absolutely nothing. The yawning gap between the Sixth Amendment and the Court's opinion should be enough to show that the *Blakely-Booker* line of cases has gone astray.

A sentencing system that gives trial judges the discretion to sentence within a specified range not only permits judicial fact-finding that may increase a sentence, such a system also gives individual judges discretion to implement their own sentencing policies. This latter feature, whether wise or unwise, has nothing to do with the concerns of the Sixth Amendment, and a principal objective of the Sentencing Reform Act was to take this power out of the hands of individual district judges.

The *Booker* remedy, however, undid this congressional choice. In curing the Sentencing Reform Act's perceived defect regarding judicial fact-finding, Booker restored to the district courts at least a measure of the policymaking authority that the Sentencing Reform Act had taken away. (How much of this authority was given back is, of course, the issue here.)

I recognize that the Court is committed to the *Blakely-Booker* line of cases, but we are not required to continue along a path that will take us further and further off course. Because the *Booker* remedial opinion may be read to require sentencing judges to give weight to the Guidelines, I would adopt that interpretation and thus minimize the gap between what the Sixth Amendment requires and what our cases have held.

Read fairly, the opinion of the Court of Appeals holds that the District Court did not properly exercise its sentencing discretion because it did not give sufficient weight to the policy decisions reflected in the Guidelines. Petitioner was convicted of a serious crime, conspiracy to distribute "ecstasy." He distributed thousands of pills and made between $30,000 and $40,000 in profit. Although he eventually left the conspiracy, he did so because he was worried about apprehension. The Sentencing Guidelines called for a term of imprisonment of 30 to 37 months, but the District Court imposed a term of probation.

If the question before us was whether a reasonable jurist could conclude that a sentence of probation was sufficient in this case to serve the purposes of punishment set out in 18 U.S.C. § 3553(a)(2), the District Court's decision could not be disturbed. But because I believe that sentencing judges must still give some significant weight to the Guidelines sentencing range, the Commission's policy statements, and the need to avoid unwarranted sentencing disparities, I agree with the Eighth Circuit that the District Court did not properly exercise its discretion.

The court listed five considerations as justification for a sentence of probation: (1) petitioner's "voluntary and explicit withdrawal from the conspiracy," (2) his "exemplary behavior while on bond," (3) "the support manifested by family and friends," (4) "the lack of criminal history, especially a complete lack of any violent criminal history," (5) and his age at the time of the offense.

Two of the considerations that the District Court cited—the support manifested by family and friends and his age—amounted to a direct rejection of the Sentencing Commission's authority to decide the most basic issues of sentencing policy. In response to Congress's direction to establish uniform national sentencing policies regarding these common sentencing factors, the Sentencing Commission issued policy statements concluding that "age," "family ties," and "community ties" are relevant to sentencing only in unusual cases. The District Court in this case did not claim that there was anything particularly unusual about petitioner's family or community ties or his age, but the Court cited these factors as justifications for a sentence of probation. Although the District Court was obligated to take into account the Commission's policy statements and the need to avoid sentencing disparities, the District Court rejected Commission policy statements that are critical to the effort to reduce such disparities.

The District Court relied on petitioner's lack of criminal history, but criminal history (or the lack thereof) is a central factor in the calculation of the Guidelines range. Petitioner was given credit for his lack of criminal history in the calculation of his Guidelines sentence. Consequently, giving petitioner additional credit for this factor was nothing more than an expression of

disagreement with the policy determination reflected in the Guidelines range.

The District Court mentioned petitioner's "exemplary behavior while on bond," but this surely cannot be regarded as a weighty factor.

Finally, the District Court was plainly impressed by petitioner's "voluntary and explicit withdrawal from the conspiracy." As the Government argues, the legitimate strength of this factor is diminished by petitioner's motivation in withdrawing. He did not leave the conspiracy for reasons of conscience, and he made no effort to stop the others in the ring. He withdrew because he had become afraid of apprehension.

Because I believe that the Eighth Circuit correctly interpreted and applied the standards set out in the Booker remedial opinion, I must respectfully dissent.

QUESTIONS

1. **Summarize the facts of the case.**
2. **Summarize the arguments of the majority opinion applying the Sixth Amendment right to trial by jury.**
3. **Summarize the arguments of the concurring and dissenting opinion applying the Sixth Amendment right to trial by jury.**
4. **Should the right to trial by jury apply to sentencing? Back up your answer with details from the facts and opinions of the Court.**
5. **In your opinion, what is the "fair" punishment Gall deserves? Back up your answer with details from the facts and opinions of the Court.**

SUMMARY

LO 1
- The constitution balances the power of government with the liberty of individuals. The rule of law ensures criminality is not subject to the passions of rulers, democratic or otherwise.

LO 2
- The principle of legality establishes: "No crime without law, no punishment without law."

LO 3
- Because of the principle of legality and its sanction against retroactive criminal law making, no one can be punished for a law that didn't exist at the time of the behavior.

LO 4
- Vague laws fail to give fair warning to individuals and to law enforcement. The First Amendment ensures people are not criminally punished for expressive behavior.

LO 5
- The Second Amendment protects against the government's restriction on the individual right to use handguns to protect us in our homes.

LO 5
- Collectively, the Bill of Rights implies a right to privacy, and this right has been confirmed by the Supreme Court.

LO 6
- The Eighth Amendment ensures people are not subject to excessive punishment and codifies the principle that "punishment should fit the crime." Many special considerations of proportionality are made when the penalty is death.

LO 7
- The U.S. Supreme Court has ruled that the right to a jury trial guarantees that no increase in sentencing can occur without the finding of all relevant facts by a jury.

KEY TERMS

constitutional democracy, p. 40
rule of law, p. 40
ex post facto law, p. 41
void-for-vagueness doctrine, p. 42
fair notice (in void-for-vagueness doctrine), p. 43

equal protection of the laws, p. 46
expressive conduct (in First Amendment), p. 47
void-for-overbreadth doctrine, p. 48
bench trial, p. 49
fundamental right to privacy, p. 52
Second Amendment, p. 56
barbaric punishments, p. 59
cruel and unusual punishment, p. 60
principle of proportionality, p. 60
three-strikes-and-you're-out laws, p. 67
mandatory minimum sentences, p. 70
fixed (determinate) sentences, p. 70
sentencing guidelines, p. 70
Apprendi rule, p. 72
abuse-of-discretion standard, p. 75

WEB RESOURCES

To prepare for exams, visit the *Criminal Law* companion website at www.cengage.com/criminaljustice/samaha, which features essential review and study tools such as flashcards, a glossary of terms, tutorial quizzes, and Supreme Court updates.

3

LEARNING OBJECTIVES

1 To be able to identify the elements of, and to explain why, the voluntary act is the first principle of criminal liability.

2 To be able to define, distinguish between, and understand the importance of the elements of criminal conduct and criminal liability and therefore punishment.

3 To understand and appreciate the importance of the requirement of a voluntary act.

4 To identify the circumstances when, and to be able to explain why, status is treated, sometimes, as an affirmative act.

5 To be able to understand how the general principle of *actus reus* includes a voluntary act and how it is viewed by the Constitution.

6 To identify the circumstances when, and to be able to explain why, failures to act are treated as affirmative acts.

7 To understand and identify the circumstances when, and to be able to explain why, omissions and possession are treated as acts.

Dale and Leilani Neumann are seen Wednesday, April 30, 2008, at the Marathon County Courthouse in Wausau, Wisconsin, where they made their initial court appearance before Judge Vincent Howard on a charge of second-degree reckless homicide in the death of their daughter, Kara, on March 23. The Neumanns were freed on $200,000 signature bonds each and a combined $50,000 property bond on their home.

The General Principles of Criminal Liability

Actus Reus

CHAPTER OUTLINE

Did Mrs. Cogdon Voluntarily Kill Pat?

Mrs. Cogdon went to sleep. She dreamed that "the war was all around the house," that soldiers were in her daughter Pat's room, and that one soldier was on the bed attacking Pat. Mrs. Cogdon, still asleep, got up, left her bed, got an ax from a woodpile outside the house, entered Pat's room, and struck her with two accurate forceful blows on the head with the blade of the ax, thus killing her.

(Morris 1951, 29)

> No one should be punished except for something she does. She shouldn't be punished for what wasn't done at all; she shouldn't be punished for what someone else does; she shouldn't be punished for being the sort of person she is, unless it is up to her whether or not she is a person of that sort. She shouldn't be punished for being blond or short, for example, because it isn't up to her whether she is blond or short. Our conduct is what justifies punishing us. One way of expressing this point is to say that there is a voluntary act requirement in the criminal law. (Corrado 1994, 1529)

The voluntary act requirement is called the *first* principle of criminal liability. You'll learn why in this chapter. But, before we get to that, refresh your memory about how the voluntary act requirement fits into the analytic framework of criminal liability introduced in Chapter 1. Recall the definition of **criminal conduct**: "Conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests" (MPC § 1.02(1)(a), Chapter 1, p. 6). And the three elements of criminal conduct consist of:

1. Conduct that is
2. Without justification *and*
3. Without excuse

"Criminal liability," which we define as criminal conduct that qualifies for criminal punishment, falls only on those whose cases proceed through all the following analytic steps. We express them here as questions:

1. Is there criminal conduct? (This chapter, the criminal act; see Chapter 4, criminal intent, and causation.) If there's no criminal conduct, there's no criminal liability. If there is, there *might* be criminal liability. To determine if there is, we proceed to the second question,
2. Is the conduct justified? (See Chapter 5, the defenses of justification.) If it is, then there's no criminal liability. If it isn't justified there *might* be criminal liability. To determine if there is, we proceed to the third question,
3. Is the conduct excused? (See Chapter 6, the defenses of excuse.) If it is, then there's no criminal liability.

This scheme applies to almost everything you'll learn not just in the rest of this chapter, and Chapters 4 through 6. It applies to the crimes covered in Chapters 7 through 13. Furthermore, the scheme applies whether you're learning about criminal liability under the federal government or the government of the state, city, or town you live, or are going to school in; or whether it's the common law, a criminal code, or the MPC being analyzed. (The "Elements of Crime" boxes that you'll find throughout the book reflect the scheme.)

The Elements of Criminal Liability

The drafters of criminal codes have four building blocks at their disposal when they write the definitions of the thousands of crimes and defenses that make up their criminal codes. These building blocks are the **elements of a crime** that the prosecution has to prove beyond a reasonable doubt to convict individual defendants of the crimes they're charged with committing:

1. Criminal act *(actus reus)*
2. Criminal intent *(mens rea)*
3. Concurrence
4. Attendant circumstances
5. Bad result (causing a criminal harm)

LO 1

All crimes have to include, at a minimum, a criminal act (***actus reus*** or "evil act"). That's why it's the *first* principle of criminal liability. The vast majority of minor crimes against public order and morals (the subject of Chapter 12) don't include either criminal intent (***mens rea***) or causing a bad result. But it's a rare crime that includes only a criminal act. This is partly because without something more than an act, a criminal statute would almost certainly fail to pass the test of constitutionality (Chapter 2).

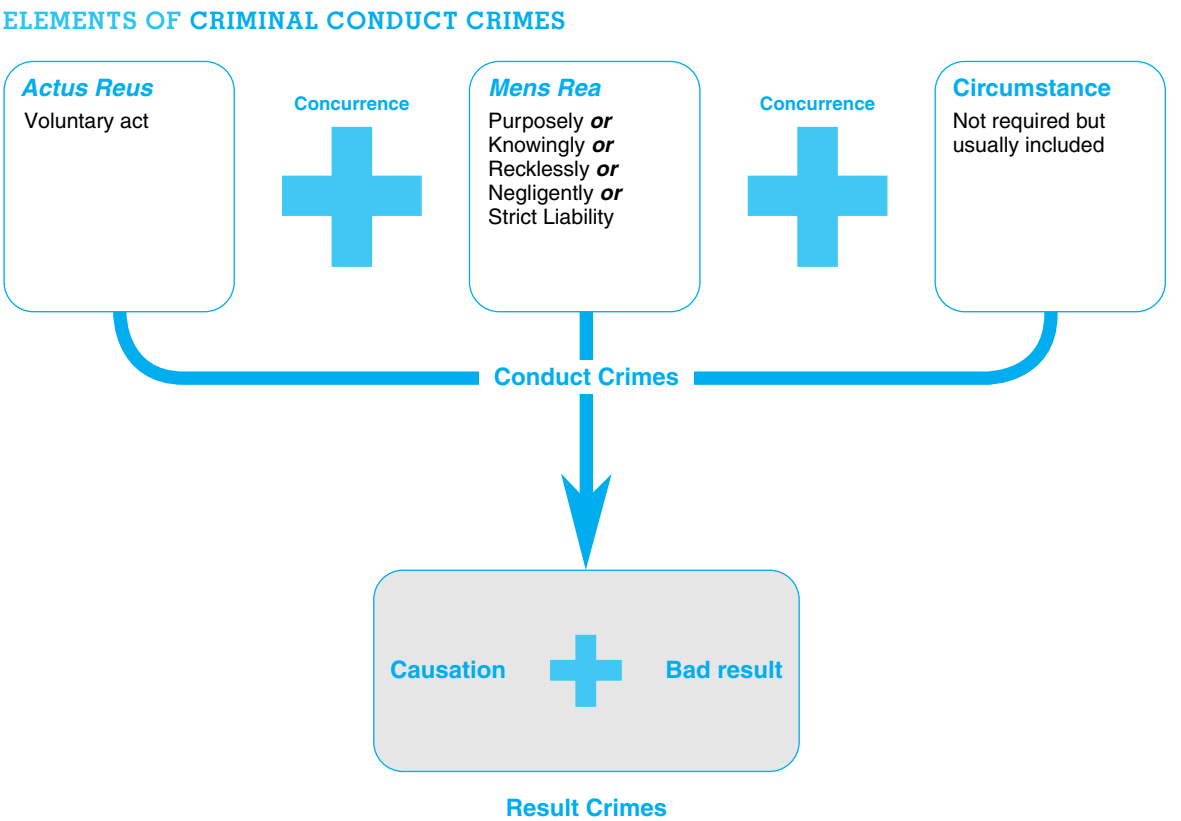
For example, a criminal statute that made the simple act of "driving a car" a crime surely would be void for vagueness or for overbreadth; a ban on "driving while

TABLE 3.1 Useful Definitions

Criminal act (also called *actus reus*)	The physical element of a crime; a bodily movement, muscular contraction
Criminal conduct	Criminal act + criminal intent (also called *mens rea*)
Criminal liability	Criminal conduct that qualifies for criminal punishment

intoxicated" just as surely would pass the constitutional test (Dubber 2002, 44). That's why most of the offenses that don't require a *mens rea* do include what we call an **attendant circumstances element**. This element isn't an act, an intention, or a result; rather, it's a "circumstance" connected to an act, an intent, and/or a result. In our driving example, "while intoxicated" is the circumstantial element.

Serious crimes, such as murder (Chapter 9), sexual assault (Chapter 10), robbery (Chapter 11), and burglary (Chapter 11), include both a criminal act and a second element, the mental attitudes included in *mens rea* ("evil mind;" You'll learn about *mens rea* in Chapter 4 and apply it to specific crimes in Chapters 7 through 13.) Crimes consisting of a criminal act *and* a *mens rea* include a third element, **concurrence**, which means that a criminal intent has to trigger the criminal act. Although concurrence is a critical element that you have to know exists, you won't read much about it as an element in crimes because it's practically never a problem to prove it in real cases. (See Table 3.1 for some useful definitions.)



This is a good time to review also what you learned in Chapter 1 about proving criminal behavior, especially proving the pesky commonly misunderstood and misused ***corpus delicti*** (Latin "body of the crime"). The misunderstanding arises from applying "body of the crime" *only* with the body of the victim in homicides, where the use of *corpus delicti* most often appears. However, it also properly applies to the elements of criminal conduct crimes (like stealing someone's property in theft) and bad result crimes (like burning a house in arson) that you're encountering here, and will again in Chapters 4 and 9 through 13.

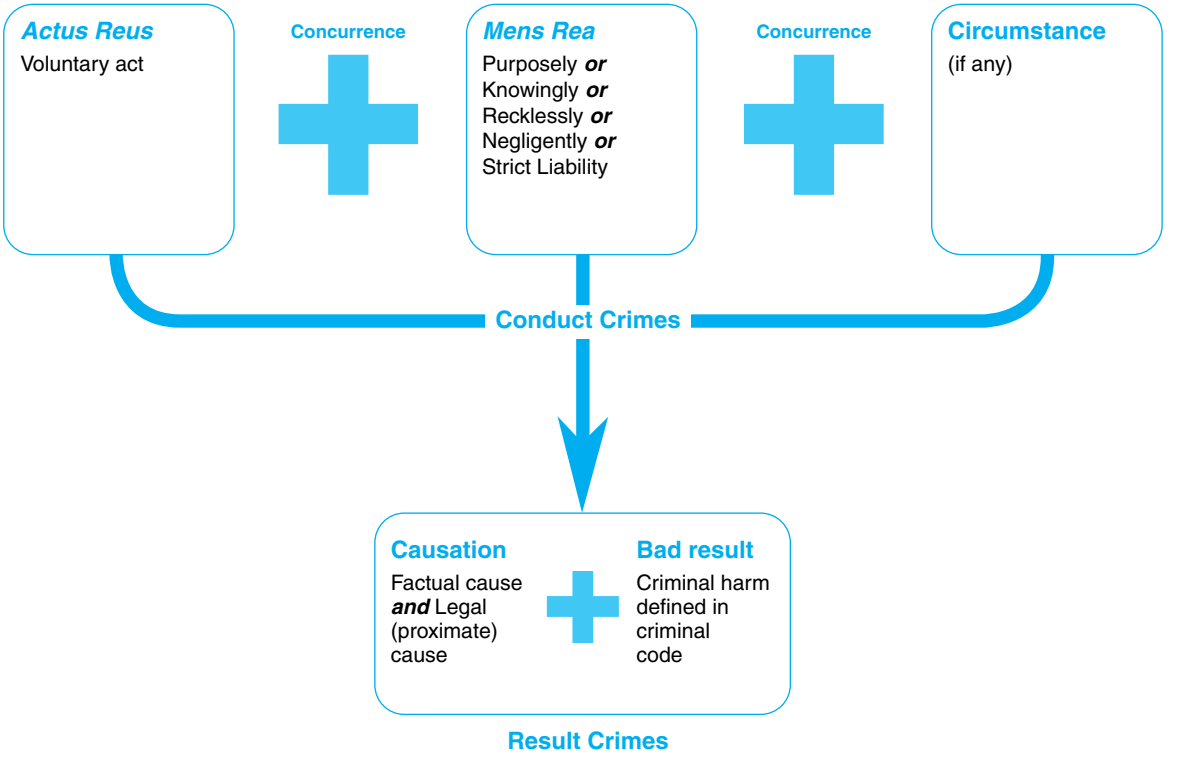
We call crimes requiring a criminal act triggered by criminal intent "**conduct crimes**." Let's look at burglary as an example of a criminal conduct crime. It consists of the act of breaking and entering a house, triggered by the *mens rea* of, say, intending to steal an iPod once inside the house. The crime of burglary is complete whether or not the burglar actually steals the iPod. So the crime of burglary is criminal conduct *whether or not it causes any harm beyond the conduct itself*.

LO 2

Don't confuse criminal *act* with criminal *conduct* as we use these terms. **Criminal acts** are voluntary bodily movements (Holmes 1963, 45–47); criminal conduct is the criminal act triggered by a *mens rea*.

Some serious crimes include all five elements; in addition to (1) a voluntary act, (2) the mental element, and (3) circumstantial elements, they include (4) causation and (5) criminal harm. We call these crimes **bad result crimes** (we'll usually refer to them simply as **result crimes**). There are a number of result crimes (LaFave 2003b, 1:464–65), but the most prominent, and the one most discussed in this and most criminal law books, is criminal homicide—conduct that causes another person's death (Chapter 9).

ELEMENTS OF BAD RESULT CRIMES



For example, murder consists of (1) a criminal act (it can be any act—shooting, stabbing, running down with a car, beating with a baseball bat), (2) triggered by (3) the intent to kill, (4) which causes (5) someone's death.

Now, at last, let's turn to the main topic of the chapter: the requirement of a criminal act (*actus reus*).

The Criminal Act (*Actus Reus*): The *First* Principle of Liability

LO 1, LO 4

We punish people for what they *do*, not for who they *are*. This idea is phrased variously, such as "we punish acts not status" or "we punish actions not intentions." However expressed, the phrase must capture the idea of the first principle of criminal liability. So it's not a crime to *wish* your cheating boyfriend would die; to *fantasize* about nonconsensual sex with the person sitting next to you in your criminal law class; or to *think about* taking your roommate's wallet when he's not looking. "Thoughts are free," a medieval English judge, borrowing from Cicero, famously remarked.

Imagine a statute that makes it a crime merely to intend to kill another person. Why does such a statute strike us as absurd? Here are three reasons: First, it's impossible to prove a mental attitude by itself. In the words of a medieval judge, "The thought of man is not triable, for the devil himself knoweth not the thought of man." Second, a mental attitude by itself doesn't hurt anybody. Although the moral law may condemn you if you think about committing crimes, and some branches of Christianity may call thoughts "sins" ("I have sinned exceedingly in thought, word, and deed"), the criminal law demands conduct—a mental attitude that turns into action. So punishing the mere intent to kill (even if we could prove it) misses the harm of the statute's target—another's death (Morris 1976, ch. 1).

A third problem with punishing a state of mind is that it's terribly hard to separate daydreaming and fantasy from intent. The angry thought "I'll kill you for that!" rarely turns into actual killing (or for that matter even an attempt to kill; discussed in Chapter 8), because it's almost always just a spur of the moment way of saying, "I'm really angry." Punishment has to wait for enough action to prove the speaker really intends to commit a crime (Chapter 8).

Punishing thoughts stretches the reach of the criminal law too far when it brings within its grasp a "mental state that the accused might be too irresolute even to begin to translate into action." The bottom line: we don't punish thoughts because it's impractical, inequitable, and unjust (Williams 1961, 1–2). Now you know why the first principle of criminal liability is the requirement of an act. This requirement is as old as our law. Long before there was a principle of *mens rea*, there was the requirement of a criminal act.

The requirement that attitudes have to turn into deeds is called **manifest criminality**. Manifest criminality leaves no doubt about the criminal nature of the act. The modern phrase "caught red-handed" comes from the ancient idea of manifest criminality. Then it meant catching murderers with the blood still on their hands; now, it means catching someone in the act of wrongdoing. For example, if bank customers see several people enter the bank, draw guns, threaten to shoot if the tellers don't hand over money, take the money the tellers give them, and leave the bank with the money, their criminality—the *actus reus* and the *mens rea* of robbery—is manifest (Fletcher 1978, 115–16).

The *actus reus* requirement serves several purposes. First, acts help to prove intent. We can't observe states of mind; we can only infer them from actions. Second, it reserves the harsh sanction of the criminal law for cases of actual danger. Third, it protects the privacy of individuals. The law doesn't have to pry into the thoughts of individuals unless the thinker crosses "the threshold of manifest criminality." Many axioms illustrate the *actus reus* principle: "Thoughts are free." "We're punished for what we do, not for who we are." "Criminal punishment depends on conduct, not status." We're punished for what we've done, not for what we might do." Although simple to state as a general rule, much in the principle of *actus reus* complicates its apparent simplicity (Fletcher 1978, 117). We'll examine four of these: the requirement that the act be voluntary; status or condition and the Constitution; criminal omissions; and criminal possession.

The "Voluntary" Act Requirement

LO 3

Only *voluntary* acts qualify as criminal *actus reus*. In the words of the great justice and legal philosopher Oliver Wendell Holmes, "An act is a muscular contraction, and something more. The contraction of muscles must be willed" (Holmes 1963, 46–47). The prestigious American Law Institute's Model Penal Code's (MPC) widely adopted definition of "criminal act" provides: "A person is not guilty of an offense unless his liability is based on conduct that *includes* a *voluntary* act . . ." (emphasis added) (ALI 1985, § 2.01).

Why do only voluntary acts qualify as criminal acts? The rationale goes like this:

1. Criminal law punishes people.
2. We can only punish people we can blame.
3. We can only blame people who are responsible for their acts.
4. People are responsible only for their voluntary acts.

The MPC, and many state criminal codes, define "voluntary" by naming involuntary acts. Most commonly, the list includes reflexes or convulsions; movements during sleep (sleepwalking) or unconsciousness (automatism); and actions under hypnosis. The MPC adds a fourth catchall category that (sort of) defines voluntary acts: "a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual" (ALI 1985 § 2.01(2)).

Notice that according to the MPC, not all "bodily movements" have to be voluntary; conduct only has to "*include* a voluntary act." So as long as there's one voluntary act, other acts surrounding the crime may be involuntary. For example, a person who's subject to frequent fainting spells voluntarily drives a car; he faints while he's driving, loses control of the car, and hits a pedestrian. The driver's voluntary act is the one that counts, so the fainting spell doesn't relieve the driver of criminal liability (*Brown v. State* 1997, 284). Most statutes follow the MPC's **one-voluntary-act-is-enough** definition.

But, what if after a defendant's voluntary act, someone else's act triggers an involuntary act of that defendant? There was some evidence of that in *Brown v. State* (the case excerpt included here). Aaron Brown pulled a gun, which he admitted was a voluntary act. Then, his friend, Ryan Coleman, bumped into Brown; the gun fired and killed Joseph Caraballo. The majority of the Court found there was enough evidence to require the trial judge to give a voluntary act instruction. The dissent disagreed.

Was there enough evidence in the following case to require the trial judge to give a voluntary act instruction?

CASE Was the Shooting Accidental?

Brown v. State
955 S.W.2d 276 (Tex. 1997)

HISTORY

Alfred Brown, the defendant, was convicted in the 268th Judicial District Court, Fort Bend County, of murder. The defendant appealed. The Houston Court of Appeals reversed and remanded. State petitioned for discretionary review. The Court of Criminal Appeals, Overstreet, J., held that the defendant was entitled to jury charge on voluntariness of his acts. Decision of Court of Appeals affirmed.

OVERSTREET, J.

FACTS

On the evening of July 17, 1992, Alfred Brown (appellant) was drinking beer and talking with friends in the parking lot of an apartment complex. Brown was involved in an altercation with James McLean, an individual with whom he had an encounter the week before in which McLean and some other individuals had beaten Brown. Brown testified that following the altercation on the day in question, he obtained a .25-caliber handgun in order to protect himself and his friends from McLean and his associates, who were known to possess and discharge firearms in the vicinity of the apartment complex.

Brown, who is right-handed, testified that he held the handgun in his left hand because of a debilitating injury to his right hand. Brown testified that during the course of the events in question, the handgun accidentally fired when he was bumped from behind by another person, Coleman, while raising the handgun.

Coleman testified that he bumped Brown and the handgun fired. Brown testified that the shot that fatally wounded the victim, Joseph Caraballo, an acquaintance and associate of Brown, was fired accidentally. The victim was not one of the persons Brown was at odds with, but a person aligned with Brown.

OPINION

Jury Instruction: Evidentiary Sufficiency

Appellant testified at trial that the handgun in his possession accidentally discharged after he was bumped from behind by Ryan Coleman. Coleman also testified at trial that his bumping appellant precipitated the discharge of the gun and that idiosyncrasies of the handgun may have also allowed its discharge.

Section 6.01(a) of the Texas Penal Code states that a person commits an offense only if he engages in voluntary conduct, including an act, an omission, or possession. Only if the evidence raises reasonable doubt that the defendant voluntarily engaged in the conduct charged should the jury be instructed to acquit. "Voluntariness," within the meaning of section 6.01(a), refers only to one's physical bodily movements. While the defense of accident is no longer present in the penal code, this Court has long held that homicide that is not the result of voluntary conduct is not to be criminally punished.

We hold that if the admitted evidence raises the issue of the conduct of the actor not being voluntary, then the jury shall be charged, when requested, on the issue of voluntariness. The trial court did not grant appellant's request and the court of appeals correctly reversed the trial court. We hereby affirm the decision of the court of appeals.

DISSENT

PRICE, J.

For conduct to support criminal responsibility, the conduct must "include a voluntary act so that, for example, a drunk driver charged with involuntary manslaughter may not successfully defend with the argument he fell asleep before the collision since his conduct included the voluntary act of starting up and driving the car." Interestingly, these comments suggest that one voluntary act—regardless of subsequent acts—may form a basis for criminal responsibility.

Although a voluntary act is an absolute requirement for criminal liability, it does not follow that every act up to the moment that the harm is caused must be voluntary. This concept is best demonstrated by an example: *A* who is subject to frequent fainting spells voluntarily drives a car; while driving he faints, loses control of the vehicle, and injures a pedestrian; *A* would be criminally responsible. Here, *A*'s voluntary act consists of driving the car, and if the necessary mental state can be established as of the time he entered the car, it is enough to find *A* guilty of a crime.

Section 6.01(a) functions as a statutory failsafe. Due process guarantees that criminal liability be predicated

on at least one voluntary act. In all criminal prosecutions the State must prove that the defendant committed at least one voluntary act—voluntary conduct is an implied element of every crime. Because it is an implied element, the State is not required to allege it in the charging instrument. For most offenses, proof of a voluntary act, although a separate component, is achieved by proving the other elements of the offense.

I believe the trial court properly denied appellant's request for an affirmative submission on voluntary conduct. I would reverse the court of appeals and affirm the trial court. Because the majority does not, I must dissent.

QUESTIONS

1. **State the facts relevant to deciding whether Aaron Brown "voluntarily" shot Joseph Caraballo.**
2. **State the majority's definition of "voluntary act."**
3. **Summarize the majority's reasons for holding that the trial judge was required to instruct the jury on voluntary act.**
4. **Summarize the dissent's reasons for dissenting.**
5. **Which decision do you agree with? Back up your answer.**

EXPLORING FURTHER

Voluntary Acts

1. Was Killing Her Daughter a Voluntary Act?

King v. Cogdon (Morris 1951, 29)

FACTS Mrs. Cogdon worried unduly about her daughter Pat. She told how, on the night before her daughter's death, she had dreamed that their house was full of spiders and that these spiders were crawling all over Pat. In her sleep, Mrs. Cogdon left the bed she shared with her husband, went into Pat's room, and awakened to find herself violently brushing at Pat's face, presumably to remove the spiders. This woke Pat. Mrs. Cogdon told her she was just tucking her in. At the trial, she testified that she still believed, as she had been told, that the occupants of a nearby house bred spiders as a hobby, preparing nests for them behind the pictures on their walls. It was these spiders which in her dreams had invaded their home and attacked Pat.

There had also been a previous dream in which ghosts had sat at the end of Mrs. Cogdon's bed and she had said to them, "Well, you have come to take Pattie." It does not seem fanciful to accept the psychological explanation of these spiders and ghosts as the projections of Mrs. Cogdon's subconscious hostility toward her daughter; a hostility which was itself rooted in Mrs. Cogdon's own early life and marital relationship.

The morning after the spider dream, she told her doctor of it. He gave her a sedative and, because of the dream and certain previous difficulties she had reported, discussed the possibility of psychiatric treatment.

That evening, while Pat was having a bath before going to bed, Mrs. Cogdon went into her room, put a hot water bottle in the bed, turned back the bedclothes, and placed a glass of hot milk beside the bed ready for Pat. She then went to bed herself. There was some desultory conversation between them about the war in Korea, and just before she put out her light, Pat called out to her mother, "Mum, don't be so silly worrying there about the war, it's not on our front doorstep yet."

Mrs. Cogdon went to sleep. She dreamed that "the war was all around the house," that soldiers were in Pat's room, and that one soldier was on the bed attacking Pat. This was all of the dream she could later recapture. Her first "waking" memory was of running from Pat's room, out of the house, to the home of her sister who lived next door. When her sister opened the front door, Mrs. Cogdon fell into her arms, crying "I think I've hurt Pattie." In fact, Mrs. Cogdon had, in her somnambulistic state, left her bed, fetched an ax from the woodheap, entered Pat's room, and struck her with two accurate, forceful blows on the head with the blade of the ax, thus killing her.

At Mrs. Cogdon's trial for murder, Mr. Cogdon testified, "I don't think a mother could have thought any more of her daughter. I think she absolutely adored her." On the conscious level, at least, there was no reason to doubt Mrs. Cogdon's deep attachment to her daughter. Mrs. Cogdon pleaded not guilty.

Was she guilty? No, said the appeals court.

DECISION Mrs. Cogdon's story was supported by the evidence of her physician, a psychiatrist, and a psychologist. The jury believed Mrs. Cogdon. The jury concluded that Mrs. Cogdon's account of her mental state at the time of the killing, and the unanimous support given to it by the medical and psychological evidence, completely rebutted the presumption that Mrs. Cogdon intended the natural consequences of her acts. [She didn't plead the insanity defense "because the experts agreed that Mrs. Cogdon was not psychotic.] (See the Insanity section in Chapter 6.) The jury acquitted her because "the act of killing itself was not, in law, regarded as her act at all."

2. Were His Acts Committed During an Epileptic Seizure Voluntary?

People v. Decina, 138 N.E.2d 799 (N.Y. 1956)

FACTS Emil Decina suffered an epileptic seizure while driving his car. During the seizure, his car ran up over the curb and killed four children walking on the sidewalk. Was the killing an "involuntary act" because it occurred during the seizure?

Were his acts during the seizure voluntary. No, said the appeals court.

DECISION This defendant knew he was subject to epileptic attacks at any time. He also knew that a moving vehicle uncontrolled on a public highway is a highly dangerous instrumentality capable of unrestrained destruction. With this knowledge, and without anyone accompanying him, he deliberately took a chance by making a conscious choice of a course of action, in disregard of the consequences which he knew might follow from his conscious act, which in this case did ensue.

3. Were His Acts Following Exposure to Agent Orange Voluntary?

State v. Jerrett, 307 S.E.2d 339 (1983)

FACTS Bruce Jerrett terrorized Dallas and Edith Parsons—he robbed them, killed Dallas, and kidnapped Edith. At trial, Jerrett testified that he could remember nothing of what happened until he was arrested and that he had suffered previous blackouts following exposure to Agent Orange during military service in Vietnam. The trial judge refused to instruct the jury on the defense of automatism.

Did he act voluntarily? It's up to the jury said the appeals court.

DECISION The North Carolina Supreme Court reversed and ordered a new trial.

> Where a person commits an act without being conscious thereof, the act is not a criminal act even though it would be a crime if it had been committed by a person who was conscious.
>
> In this case, there was corroborating evidence tending to support the defense of unconsciousness. Defendant's very peculiar actions in permitting the kidnapped victim to repeatedly ignore his commands and finally lead him docilely into the presence and custody of a police officer lends credence to his defense of unconsciousness. We therefore hold that the trial judge should have instructed the jury on the defense of unconsciousness.

4. Are Any of the Following Voluntary Acts?

a. Drowsy drivers who fall asleep while they're driving and hit and kill someone while they're asleep.
b. Drunk drivers who are so intoxicated they're not in control when they hit and kill someone.
c. Drivers with dangerously high blood pressure who suffer strokes while they're driving and kill someone while the stroke has incapacitated them.

Examples 4a–c are examples of what we might call voluntarily induced involuntary acts. In all three examples, the drivers voluntarily drove their cars, creating a risk they could injure or kill someone. In all three examples, involuntary acts followed that killed someone. Should we stretch the meaning of "voluntary" to include them within the grasp of the voluntary act requirement using the MPC's "conduct including a voluntary act" definition? Why should we punish them? Because they deserve it? Because it might deter people with these risky conditions from driving? Because it will incapacitate them?

Status as a Criminal Act

LO 4

"Action" refers to what we *do*; **status** (or condition) denotes who we *are*. Most statuses or conditions don't qualify as *actus reus*. Status can arise in two ways. Sometimes, it results from prior voluntary acts—methamphetamine addicts voluntarily used methamphetamine the first time and alcoholics voluntarily took their first drink. Other conditions result from no act at all. The most obvious examples are the characteristics we're born with: sex, age, sexual orientation, race, and ethnicity.

Actus Reus and the U.S. Constitution

LO 5

It's clear that, according to the general principle of *actus reus*, every crime has to include at least one voluntary act, but is the principle of *actus reus* a constitutional command? Twice during the 1960s, the U.S. Supreme Court considered this question. In the first case, *Robinson v. California* (1962), Lawrence Robinson was convicted and sentenced to a mandatory 90 days in jail for violating a California statute making it a misdemeanor "to be addicted to" narcotics. Five justices agreed that punishing Robinson solely for his addiction to heroin was cruel and unusual punishment (Chapter 2). The Court expressed

the ban on status crimes in various ways: The California statute created a *crime of personal condition*, punishing Robinson for who he was (heroin addict), not for what he did. The statute punished the *sickness* of heroin addiction—"even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold"; the statute punished a condition that may be "contracted innocently and involuntarily" (667).

The decision that legislatures can't make status or personal condition by itself a crime brought into question the constitutionality of many old status crimes, such as being a prostitute, a drunkard, or a disorderly person. But, what if these statutes include the requirement of some act in addition to the condition? That's where *Powell v. Texas* (1968) comes in. On December 19, 1966, Leroy Powell was arrested and charged under a Texas statute, which provided:

> Whoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars. (517)

Powell was tried, found guilty, and fined $50. Powell appealed to the U.S. Supreme Court. Powell's argument to Court was that "the disease of chronic alcoholism" destroyed "his will power to resist drinking and appearing drunk in public." In other words, there was no voluntary act. So the statute, which "criminally punishes an ill person for conduct" he can't control, violates the ban on cruel and unusual punishment (*Powell v. Texas* 1968, Brief for Appellant, 6). In its argument to the Court, Texas relied on Powell's own witness, a nationally recognized psychiatrist, author, and lecturer on alcoholism, to make its own case that Powell's being drunk in public was a voluntary act. From this and other expert testimony, Texas argued that although it's very tough, chronic alcoholics can become "chronic abstainers, although perhaps not moderate drinkers." In other words, with a lot of effort, they can stop themselves from taking the first, but not the second, drink of a "drinking bout." You might want to think about it this way: "barely" voluntary is good enough (*Powell v. Texas* 1968, Brief for Appellee, 8).

The U.S. Supreme Court's opinions reflected contrasting views on the critical question of how far the U.S. Constitution goes into the principle of *actus reus*. A plurality of four justices answered firmly, not one bit further than *Robinson v. California* took the principle. After making clear that the Constitution bans only pure status as a basis for criminal liability, the plurality concluded:

> *Robinson* brings this Court but a very small way into the substantive criminal law. And unless *Robinson* is so viewed, it is difficult to see any limiting principle that would serve to prevent this Court from becoming, under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country. (533)

Finally, the plurality invoked federalism to support its hands-off position regarding the principles of criminal liability:

> *Actus reus, mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States. (535–36)

Justice White wrote a separate opinion concurring in the plurality's judgment, because "Powell showed nothing more than that he was to some degree compelled to

drink and that he was drunk at the time of his arrest. He made no showing that he was unable to stay off the streets on the night in question" (553–54).

Four dissenting justices were eager to bring the Court, by means of the U.S. Constitution, fully into the business of supervising the general principles of criminal liability. Writing for the dissent, Justice Fortas wrote:

> Powell is charged with a crime composed of two elements—being intoxicated and being found in a public place while in that condition. Powell was powerless to avoid drinking; that having taken his first drink, he had "an uncontrollable compulsion to drink" to the point of intoxication; and that, once intoxicated, he could not prevent himself from appearing in public places. (567–68)

Most criminal law books, and I'm sure most criminal law classes, spend lots of time and space on the Constitution and the general principles of criminal liability. At the time the cases were decided, there was great hope, and great fear (depending on your point of view), that an "activist" Supreme Court would use the "cruel and unusual punishment" ban and other provisions in the U.S. Constitution to write a constitutional doctrine of criminal liability and responsibility. It never happened. Real cases in real courts since *Powell* haven't tried to bring the Constitution further into the principles of criminal liability than *Robinson* brought it in 1962. It's left in the hands of legislatures to adopt general principles of liability and elements of specific crimes in criminal codes; and, it's left in the hands of courts to interpret and apply the code's provisions in decisions involving individual defendants.

Omissions as Criminal Acts

LO 6

We support punishment for people who rape, murder, and rob because their actions caused harm. But what about people who stand by and do nothing while bad things are happening around them? As Professor George Fletcher describes these people, "They get caught in a situation in which they falter. Someone needs help and they cannot bring themselves to render it." Can these failures to act satisfy the *actus reus* requirement? Yes, but only when it's outrageous to fail to do something to help someone in danger can **criminal omissions** satisfy the voluntary act requirement.

There are two kinds of criminal omission. One is the simple failure to act, usually the **failure to report** something required by law, such as reporting an accident or child abuse, filing an income tax return, registering a firearm, or notifying sexual partners of positive HIV status. The other type of omission is the **failure to intervene** to prevent injuries and death to persons or the damage and destruction of property.

Both omissions—failures to report and failure to intervene—are *criminal* omissions only if defendants had a ***legal* duty** (a duty enforced by law), not just a *moral* duty, to act. Legal duty is an attendant circumstance element that the prosecution has to prove beyond a reasonable doubt.

Legal duties are created in three ways:

1. Statutes
2. Contracts
3. Special relationships

Statutes are the basis for legal duties to report—for example, the duty to file income tax returns, report accidents and child abuse, and register firearms. Individuals can also contract to perform duties; for example, law enforcement officers agree to "protect and serve." Failure to perform those duties can create criminal liability. The main special relationships are the parent-child relationship, the doctor-patient relationship, the employer-employee relationship, the carrier-passenger relationship, and, in some states, the husband-wife relationship.

Failure to perform moral duties (enforced by conscience, religion, and social norms) doesn't qualify as a criminal omission. According to Professor Wayne LaFave (2003a):

> Generally one has no legal duty to aid another person in peril, even when that aid can be rendered without danger or inconvenience to himself. He need not shout a warning to a blind man headed for a precipice or to an absent-minded one walking into a gunpowder room with a lighted candle in hand. He need not pull a neighbor's baby out of a pool of water or rescue an unconscious person stretched across the railroad tracks, though the baby is drowning or the whistle of the approaching train is heard in the distance. A doctor is not legally bound to answer a desperate call from the frantic parents of a sick child, at least if it is not one of his regular patients. A moral duty to take affirmative action is not enough to impose a legal duty to do so. But there are situations which do give rise to legal duties. (311)

ETHICAL DILEMMA

Should It Be a Crime to Stand By and Do Nothing While "Bad" Things Happen?

In 1997, 17-year-old Jeremy Strohmeyer entered a Las Vegas casino restroom holding the hand of 7-year-old Sherrice Iverson. He apparently raped and murdered the little girl in a restroom stall. While these horrendous crimes were being committed, Strohmeyer's high school buddy, David Cash, entered the restroom and discovered the crimes in progress. Cash reportedly entered the restroom a few minutes after Strohmeyer went in, peered over the wall of a bathroom stall, and observed his friend with his hand over Sherrice Iverson's mouth, muffling her cries for help. Cash left the restroom but failed to report the ongoing incident to a security guard or to the police. Cash's inaction was awful enough, but then he spoke to reporters and gave listeners a chance to look into his mind, heart, and soul:

> It's a very tragic event, okay? But the simple fact remains I do not know this little girl. I do not know starving children in Panama. I do not know people that die of disease in Egypt. The only person I knew in this event was Jeremy Strohmeyer, and I know as his best friend that he had potential. . . . I'm sad that I lost a best friend. . . . I'm not going to lose sleep over somebody else's problem.

Even read today, Cash's cold, remorseless words are shocking and infuriating. We are understandably affronted by his self-centeredness, and his narrow and skewed view of his moral duties to his "fellow man." Cash told a reporter that he did not report his friend's actions because, in a touching display of compassion, he "didn't want to be the person who takes away Strohmeyer's last day, his last night of freedom." Cash, it seems, believes he does not owe anything to anybody except (perhaps) loyalty to his high school buddy who "only" committed crimes upon a young "stranger."

Instructions

1. Go to the website www.cengage.com/criminaljustice/samaha and read the selections regarding the controversy over the Good Samaritan Law.
2. Write a paragraph summarizing the arguments for and against the ethics and legality of Good Samaritan laws and their application to David Cash.
3. Study Vermont's Bad Samaritan Law reprinted on the website. Write a paragraph answering the question: Is Vermont's statute "ethical" public policy regarding people who watch bad things happen and stand by doing nothing? Back up your answer with details from the selections and from the Omissions as Criminal Acts section of the chapter.

There are two approaches to defining a legal duty to rescue strangers or call for help. One is the **"Good Samaritan" doctrine**, which imposes a legal duty to help or call for help for imperiled strangers. Only a few jurisdictions follow the Good Samaritan approach. Nearly all follow the approach of the **American bystander rule** (*State v. Kuntz* 2000, 951). According to the bystander rule, there's no legal duty to rescue or summon help for someone who's in danger, even if the bystander risks nothing by helping. So, although it might be a revolting breach of the moral law for an Olympic swimmer to stand by and watch a child drown, without so much as even placing a 911 call on her cell phone, the criminal law demands nothing from her.

Limiting criminal omissions to the failure to perform legal duties is based on three assumptions: First, individual conscience, peer pressure, and other informal mechanisms condemn and prevent behavior more effectively than criminal prosecution. Second, prosecuting omissions puts too heavy of a burden on an already overburdened criminal justice system. Third, criminal law can't force "Good Samaritans" to help people in need. The Pennsylvania Superior Court upheld a conviction for failure to act in *Commonwealth v. Pestinakas.*

***The Pennsylvania Superior Court upheld a conviction for failure to act in* Commonwealth v. Pestinakas.**

CASE Did They Owe Mr. Kly a Legal Duty?

Commonwealth v. Pestinakas
617 A.2d 1339 (1992, Pa.Sup.)

HISTORY

Walter and Helen Pestinakas were convicted of third-degree murder in the Court of Common Pleas, Criminal Division, Lackawanna County. Each was sentenced to serve not less than five years or more than ten years in prison. Defendants appealed. The Superior Court, Nos. 375 and 395 Philadelphia 1989, affirmed.

WIEAND, J.

FACTS

Joseph Kly met Walter and Helen Pestinakas in the latter part of 1981 when Kly consulted them about pre-arranging his funeral. In March 1982, Kly, who had been living with a stepson, was hospitalized and diagnosed as suffering from Zenker's diverticulum, a weakness in the walls of the esophagus, which caused him to have trouble swallowing food. In the hospital, Kly was given food, which he was able to swallow and, as a result, regained some of the weight that he had lost. When he was about to be discharged, he expressed a desire not to return to his stepson's

home and sent word to the Pestinakases that he wanted to speak with them. As a consequence, arrangements were made for the Pestinakases to care for Kly in their home on Main Street in Scranton, Lackawanna County.

Kly was discharged from the hospital on April 12, 1982. When the Pestinakases came for him on that day they were instructed by medical personnel regarding the care that was required for Kly and were given a prescription to have filled for him. Arrangements were also made for a visiting nurse to come to the Pestinakases' home to administer vitamin B-12 supplements to Kly. The Pestinakases agreed orally to follow the medical instructions and to supply Kly with food, shelter, care, and the medicine he required.

The prescription was never filled, and the Pestinakases told the visiting nurse that Kly did not want the vitamin supplement shots and that her services, therefore, were not required. Instead of giving Kly a room in their home, the Pestinakases removed him to a rural part of Lackawanna County, where they placed him in the enclosed porch of a building, which they owned, known as the Stage Coach Inn. This porch was approximately 9 feet by 30 feet, with no insulation, no refrigeration, no bathroom, no sink, and no telephone. The walls contained cracks that exposed the room to outside weather conditions.

Kly's predicament was compounded by the Pestinakases' affirmative efforts to conceal his whereabouts. Thus, they gave misleading information in response to inquiries, telling members of Kly's family that they did not know where he had gone and others that he was living in their home.

After Kly was discharged from the hospital, the Pestinakases took Kly to the bank and had their names added to his savings account. Later, Kly's money was transferred into an account in the names of Kly or Helen Pestinakas, pursuant to which moneys could be withdrawn without Kly's signature. Bank records reveal that from May 1982, to July 1983, the Pestinakases withdrew amounts roughly consistent with the $300 per month Kly had agreed to pay for his care.

Beginning in August 1983, and continuing until Kly's death in November 1984, however, the Pestinakases withdrew much larger sums so that when Kly died, a balance of only $55 remained. In the interim, the Pestinakases had withdrawn in excess of $30,000.

On the afternoon of November 15, 1984, when police and an ambulance crew arrived in response to a call by the Pestinakases, Kly's dead body appeared emaciated, with his ribs and sternum greatly pronounced. Mrs. Pestinakas told police that she and her husband had taken care of Kly for $300 per month and that she had given him cookies and orange juice at 11:30 a.m. on the morning of his death. A subsequent autopsy, however, revealed that Kly had been dead at that time and may have been dead for as many as 39 hours before his body was found. The cause of death was determined to be starvation and dehydration. Expert testimony opined that Kly would have experienced pain and suffering over a long period of time before he died.

At trial, the Commonwealth contended that after contracting orally to provide food, shelter, care, and necessary medicine for Kly, the Pestinakases engaged in a course of conduct calculated to deprive Kly of those things necessary to maintain life and thereby cause his death.

The trial court instructed the jury that the Pestinakases could not be found guilty of a malicious killing for failing to provide food, shelter, and necessary medicines to Kly unless a duty to do so had been imposed upon them by contract. The Court instructed the jury, inter alia, as follows:

> In order for you to convict the defendants on any of the homicide charges or the criminal conspiracy or recklessly endangering charges, you must first find beyond a reasonable doubt that the defendants had a legal duty of care to Joseph Kly.
>
> There are but two situations in which Pennsylvania law imposes criminal liability for the failure to perform an act. One of these is where the express language of the law defining the offense provides for criminal [liability] based upon such a failure. The other is where the law otherwise imposes a duty to act.
>
> Unless you find beyond a reasonable doubt that an oral contract imposed a duty to act upon Walter and Helen Pestinakas, you must acquit the defendants.

OPINION

The Pestinakases contend that this instruction was error. The applicable law appears at 18 Pa.C.S. § 301(a) and (b) as follows:

> (a) General rule. A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable.
>
> (b) Omission as basis of liability. Liability for the commission of an offense may not be based on an omission unaccompanied by action unless:
>
> (1) the omission is expressly made sufficient by the law defining the offense; or
>
> (2) a duty to perform the omitted act is otherwise imposed by law.

Unless the omission is expressly made sufficient by the law defining the offense, a duty to perform the omitted act must have been otherwise imposed by law for the omission to have the same standing as a voluntary act for purposes of liability. It should, of course, suffice, as the courts now hold, that the duty arises under some branch of the civil law. If it does, this minimal requirement is satisfied, though whether the omission constitutes an offense depends as well on many other factors.

Consistent with this legal thinking, we hold that when the statute provides that an omission to do an act can be the basis for criminal liability if a duty to perform the omitted act has been imposed by law, the legislature

intended to distinguish between a legal duty to act and merely a moral duty to act.

A duty to act imposed by contract is legally enforceable and, therefore, creates a legal duty. It follows that a failure to perform a duty imposed by contract may be the basis for a charge of criminal homicide if such failure causes the death of another person and all other elements of the offense are present. Because there was evidence in the instant case that Kly's death had been caused by the Pestinakases' failure to provide the food and medical care which they had agreed by oral contract to provide for him, their omission to act was sufficient to support a conviction for criminal homicide.

The Pestinakases argue that, in any event, the Commonwealth failed to prove an enforceable contract requiring them to provide Kly with food and medical attention. It is their position that their contract with Kly required them to provide only a place for Kly to live and a funeral upon his death. This obligation, they contend, was fulfilled. Although we have not been provided with a full and complete record of the trial, it seems readily apparent from the partial record before us that the evidence was sufficient to create an issue of fact for the jury to resolve. The issue was submitted to the jury on careful instructions by the learned trial judge and does not present a basis entitling the Pestinakases to post-trial relief.

The judgments of sentence must be, as they are, AFFIRMED.

DISSENT

McEWEN, J.

The theory of the Commonwealth at trial was that the failure of the Pestinakases to fulfill the alleged civil contract to provide food, shelter, personal, and medical care to Mr. Kly was alone sufficient to support a finding of first and/or third degree murder.

Section 301(b)(2) of the Crimes Code provides, in relevant part:

> Liability for the commission of any offense may not be based on an *omission unaccompanied by action* unless a duty to perform the omitted act is otherwise imposed by law. (emphasis added) 18 Pa.C.S. § 301(b)(2)

The precise issue thus becomes whether the legislature intended that a "contractual duty" constitutes a "duty imposed by law" for purposes of ascertaining whether conduct is criminal. While I share the desire of the prosecutor and the jury that the Pestinakases must not escape responsibility for their horribly inhuman and criminally culpable conduct, I cling to the view that an appellate court is not free to reshape the intention or revise the language of the Crimes Code. Rather, our constitutional obligation is to implement the intent and comply with the direction of the legislature.

It is true that this Court has upheld convictions for endangering the welfare of children. However, all of the cases where liability is based upon a failure to act involved the parent-child relationship and the statutory imposition of duties upon the parents of minors. In the instant case, where there was no "status of relationship between the parties" except landlord/tenant, a failure to perform a civil contract cannot alone sustain a conviction for third degree murder.

Thus, it is that I dissent.

QUESTIONS

1. **List all the facts relevant to deciding whether the Pestinakases had a legal duty to Joseph Kly.**
2. **List all of the failures to act and voluntary acts that are relevant to deciding whether the Pestinakases failed to perform a legal duty to Mr. Kly.**
3. **Summarize the arguments regarding criminal omission of both the majority and dissenting opinions.**
4. **In your opinion, did the Pestinakases have a legal duty to Joseph Kly? Assuming they did have a legal duty, did they reasonably perform their duty? Back up your answer with facts and arguments in the case excerpt.**

EXPLORING FURTHER

Omissions

1. Did She Have a Special Relationship with the Man in Her House?

People v. Oliver, 258 Cal.Rptr. 138 (1989)

FACTS Carol Ann Oliver met Carlos Cornejo in the afternoon when she was with her boyfriend at a bar. She and her boyfriend purchased jewelry from Cornejo. In the late afternoon, when Oliver was leaving the bar to return home, Cornejo got into the car with her, and she drove him home with her. At the time, he appeared to be extremely drunk. At her house, he asked her for a spoon and went into the bathroom. She went to the kitchen, got a spoon, and brought it to him. She knew he wanted the spoon to take drugs. She remained in the living room while Cornejo "shot up" in the bathroom. He then came out and collapsed onto the floor in the living room. She tried but was unable to rouse him. Oliver then called the bartender at the bar where she had met Cornejo. The bartender advised her to leave him and come back to the bar, which Oliver did.

Oliver's daughter returned home at about 5:00 p.m. that day with two girlfriends. They found Cornejo unconscious on the living room floor. When the girls were unable to wake him, they searched his pockets and found $8. They did not find any wallet or identification.

The daughter then called Oliver on the telephone. Oliver told her to drag Cornejo outside in case he woke up and became violent. The girls dragged Cornejo outside

and put him behind a shed so that he would not be in the view of the neighbors. He was snoring when the girls left him there. About a half hour later, Oliver returned home with her boyfriend. She, the boyfriend, and the girls went outside to look at Cornejo. Oliver told the girls that she had watched him "shoot up" with drugs and then pass out.

The girls went out to eat and then returned to check on Cornejo later that evening. He had a pulse and was snoring. In the morning, one of the girls heard Oliver tell her daughter that Cornejo might be dead. Cornejo was purple and had flies around him. Oliver called the bartender at about 6:00 a.m. and told her she thought Cornejo had died in her backyard. Oliver then told the girls to call the police and she left for work. The police were called.

Oliver was convicted of involuntary manslaughter and appealed.

Did Oliver have a "special relationship" with Cornejo that created a legal duty?

"Yes," said the appeals court.

DECISION We conclude that the evidence of the combination of events which occurred between the time appellant left the bar with Cornejo through the time he fell to the floor unconscious established as a matter of law a relationship which imposed upon appellant a duty to seek medical aid. At the time appellant left the bar with Cornejo, she observed that he was extremely drunk, and drove him to her home. In so doing, she took him from a public place where others might have taken care to prevent him from injuring himself, to a private place—her home—where she alone could provide care.

2. Did He Have a Legal Duty to His Girlfriend's Baby?

State v. Miranda, 715 A.2d 680 (1998)

FACTS Santos Miranda started living with his girlfriend and her two children in an apartment in September 1992. On January 27, 1993, Miranda was 21 years old, his girlfriend was 16, her son was 2, and her daughter, the victim in this case, born on September 21, 1992, was 4 months old. Although he was not the biological father of either child, Miranda took care of them and considered himself to be their stepfather.

He represented himself as such to the people at Meriden Veteran's Memorial Hospital where, on January 27, 1993, the victim was taken for treatment of her injuries following a 911 call by Miranda that the child was choking on milk. Upon examination at the hospital, it was determined that the victim had multiple rib fractures that were approximately two to three weeks old, two skull fractures that were approximately seven to ten days old, a brachial plexus injury to her left arm, a rectal tear that was actively "oozing blood," and nasal hemorrhages.

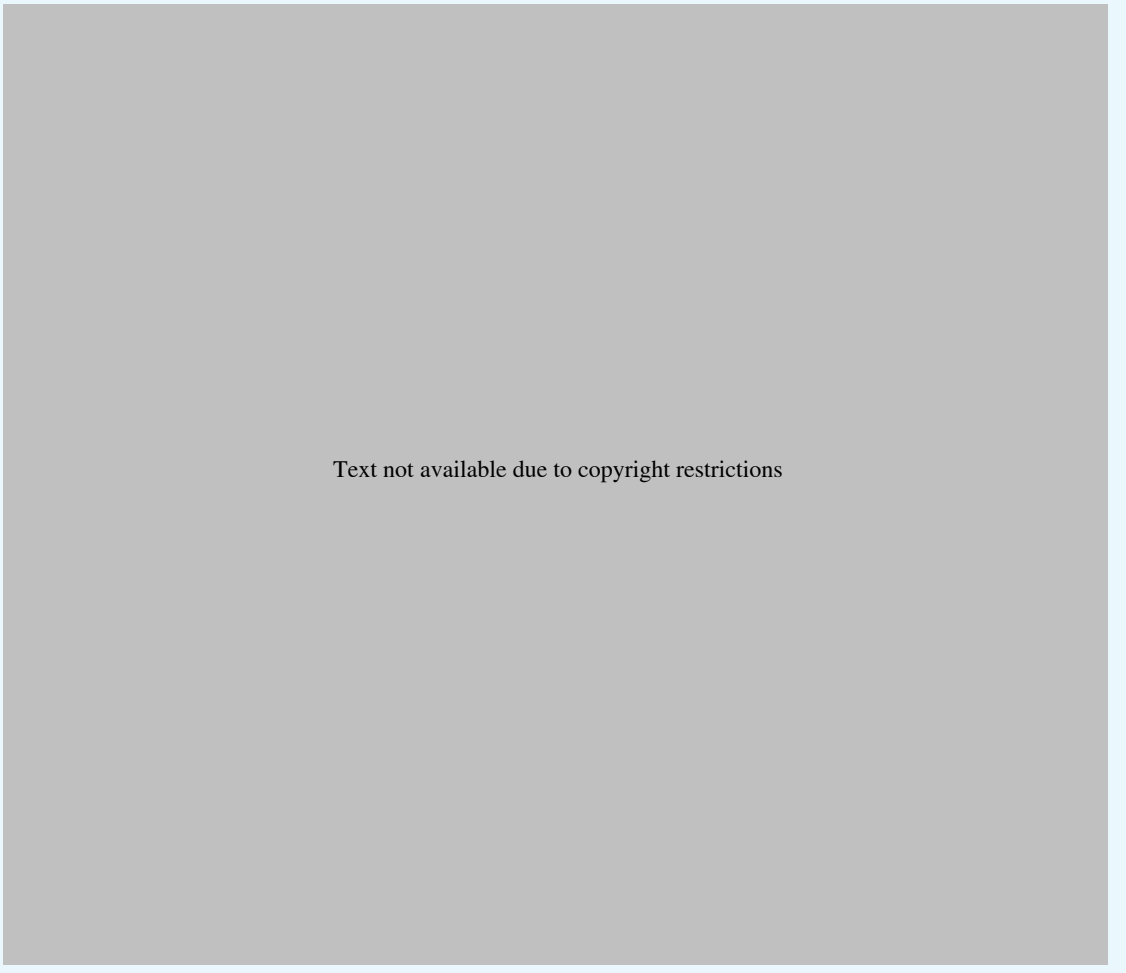
The court determined that anyone who saw the child would have had to notice these injuries, the consequent deformities, and her reactions. Indeed, the trial court found that Miranda had been aware of the various bruises on her right cheek and the nasal hemorrhages, as well as the swelling of the child's head; that he knew she had suffered a rectal tear, as well as rib fractures posteriorly on the left and right sides; and that he was aware that there existed a substantial and unjustifiable risk that the child was exposed to conduct that created a risk of death.

The trial court concluded that despite this knowledge, the defendant "failed to act to help or aid the child by promptly notifying authorities of her injuries, taking her for medical care, removing her from her circumstances and guarding her from future abuses. As a result of his failure to help her, the child was exposed to conduct which created a risk of death to her, and the child suffered subsequent serious physical injuries."

Did Santos Miranda have a legal duty to "protect health and well-being" of the baby?

Yes, said the Connecticut Supreme Court.

DECISION We conclude that, based upon the trial court's findings that the defendant had established a familial relationship with the victim's mother and her two children, had assumed responsibility for the welfare of the children, and had taken care of them as though he were their father, the defendant had a legal duty to protect the victim from abuse.



Possession as a Criminal Act

LO 7

Let's start by making clear that possession is *not* action; it's a passive condition (Dubber and Kelman 2009, 252). It's only by means of a **legal fiction** (pretending something is a fact when it's not, if there's a "good" reason for pretending) that the principle of *actus reus* includes possession. According to Professor Markus Dubber (2001):

> Possession offenses have not attracted much attention. Yet, they are everywhere in American criminal law, on the books and in action. They fill our statute books, our arrest statistics, and eventually, our prisons. By last count, New York law recognized no fewer than 153 possession offenses; one in every five prison or jail sentences handed out by New York courts in 1998 was imposed for a possession offense. That same year, possession offenses accounted for over 100,000 arrests in New York State, while drug offenses alone resulted in over 1.2 million nationwide. (834–35)

TABLE 3.2 Criminal Possession Statutes

1. Air pistols and rifles	20. Graffiti instruments
2. Weapons (including dangerous weapons, instruments, appliances, or substances)	21. Instruments of crime
3. Ammunition	22. Noxious materials
4. Anti-security items	23. Obscene material
5. Body vests	24. Obscene sexual performances by a child
6. Burglary tools	25. "Premises which [one] knows are being used for prostitution purposes"
7. Computer-related material	26. Prison contraband
8. Counterfeit trademarks	27. Public benefit cards
9. Drug paraphernalia	28. Slugs
10. Drug precursors	29. Spearfishing equipment
11. Drugs	30. Stolen property
12. Eavesdropping devices	31. Taximeter accelerating devices
13. Embossing machines (to forge credit cards)	32. Tear gas
14. Firearms	33. Toy guns
15. Fireworks	34. Unauthorized recordings of a performance
16. Forged instruments	35. Undersized catfish (in Louisiana)
17. Forgery devices	36. Usurious loan records
18. Gambling devices	37. Vehicle identification numbers
19. Gambling records	38. Vehicle titles without complete assignment

Source: Dubber 2001, 856–57.

In his detailed and powerful criticism of the expansion of possession crimes, Professor Dubber (2001, 856–57) lists 38 (Table 3.2), "and the list could go on and on." According to Dubber, "millions of people commit one of its variants every day." … "Operating below the radars of policy pundits and academic commentators, as well as under the Constitution, possession does the crime war's dirty work."

The most common of the many criminal possession crimes include possession of weapons, illegal drugs, and drug paraphernalia. The "good reason" for pretending possession is an act is the powerful pull of the idea that "an ounce of prevention is worth a pound of cure." Better to nip the bud of possession before it grows into an act of doing drugs or shooting someone. Also, most people get possession by their voluntary acts—for example, buying marijuana and putting it in their pocket. So their active acquisition brings about passive. But not always. Maybe a student who got a bad grade "planted" marijuana in my briefcase when I wasn't looking. Or, maybe you put your roommate's ecstasy in your pocket to take it to the police station and turn it in.

There are two kinds of possession: actual and constructive. **Actual possession** means physical control of banned stuff; it's "on me" (for example, marijuana is in my pocket). **Constructive possession** means I control banned stuff, but it's not on me (it's in my car, my apartment, or other places I control) (American Law Institute 1985, I:2, 24).

Possession, whether actual or constructive, can be either "knowing" or "mere." **Knowing possession** means possessors are aware of what they possess. So, if you buy crystal meth and know it's crystal meth, you have knowing possession. (Knowing doesn't mean you have to know it's a crime to possess crystal meth, only that you know it's crystal meth.) **Mere possession** means you don't know what you possess. So, if you agree to carry your friend's briefcase that you don't know is filled with stolen money, you've got mere possession of the money. All but two states (except for North Dakota and Washington) require knowing possession. Also, almost all the cases in the court reports are constructive possession cases, and they're almost all drug and/or weapons cases. Our next case excerpt is a case of the constructive knowing possession of a loaded Ruger .357 revolver, *Porter v. State* (2003).

Our next case excerpt is a case of the constructive knowing possession of a loaded Ruger .357 revolver, Porter v. State (2003).

CASE Did He Possess a Loaded Ruger .357 Revolver?

Porter v. State
WL 1919477 (Ark. App. 2003)

HISTORY

Appellant Jermaine Porter was adjudicated delinquent for being a minor in possession of a handgun and was committed to the Department of Youth Services. On appeal, Porter challenges the sufficiency of the evidence supporting the trial court's decision. We affirm.

LAYTON ROAF, J.

FACTS

Little Rock Police Officer Beth McNair testified that she stopped a vehicle with no license plate on the evening of May 23, 2002. Porter was a passenger in the vehicle and was sitting in the back seat on the passenger side. Porter's cousin was the driver of the vehicle, and his uncle was in the front passenger seat. As McNair approached the vehicle, she testified that she observed Porter reaching toward the floor with his left hand. McNair told Porter to keep his left hand where she could see it. As McNair shined her flashlight into the vehicle, she testified that she saw a handgun on Porter's left shoe and that the barrel of the gun was pointing toward her. McNair drew her weapon and alerted her assisting officer that there was a gun.

Officer Robert Ball testified that he assisted McNair with the traffic stop. Ball stated that he was standing near the trunk on the driver's side of the vehicle when he heard McNair yell "Gun." Ball drew his weapon and came to the passenger side of the vehicle, where he saw that Porter had his hand near his shin and that there was a gun lying on top of Porter's foot. Porter was then taken into custody. McNair testified that the gun was a Ruger .357 revolver, which was loaded. Another weapon was found in plain view in the floorboard of the front passenger seat.

Porter testified that his cousin and his uncle had picked him up at a hotel and that they were taking him to his sister's house. Porter stated that he had only been in the car for approximately five minutes when it was stopped, that he did not know that there were any guns inside the vehicle, and that the gun found near his foot was not his. He also denied that he bent over and reached toward the floor, and he testified that there was nothing touching his foot. Porter admitted that the gun may have been found near his foot but explained that it probably "slid back there" from underneath the seat when they were driving up some steep hills.

OPINION

Porter contends that the State failed to prove that he possessed the gun because the vehicle was also occupied by two other persons. It is not necessary for the State to prove actual physical possession of a firearm; a showing of constructive possession is sufficient. To prove constructive possession, the State must establish beyond a reasonable doubt that the defendant exercised care, control, and management over the contraband and that the defendant knew the matter possessed was contraband.

Although constructive possession can be implied when the contraband is in the joint control of the accused and another, joint occupancy of a vehicle, standing alone,

is not sufficient to establish possession. In a joint-occupancy situation, the State must prove some additional factor, which links the accused to the contraband and demonstrates the accused's knowledge and control of the contraband, such as:

(1) whether the contraband was in plain view;

(2) whether the contraband was found on the accused's person or with his personal effects;

(3) whether it was found on the same side of the car seat as the accused was sitting or in near proximity to it;

(4) whether the accused is the owner of the vehicle or exercises dominion or control over it;

(5) and whether the accused acted suspiciously before or during the arrest.

In making its finding that Porter had possession of the handgun found in the back seat of the vehicle, the trial court stated that almost all of the above factors were present except that Porter was not the owner or driver of the vehicle. Porter, however, contends that all of these factors must be shown to prove that he had constructive possession. Because the trial court did not find there to be any exercise of dominion and control over the vehicle, Porter argues that it was not proven that he exercised dominion and control over the handgun.

Contrary to Porter's argument, it is not necessary that all of the above stated factors be shown in order to find a person in constructive possession of contraband in a case of joint occupancy; rather, there must be "some additional factor linking the accused" to the contraband.

There is substantial evidence in this case supporting the trial court's finding that Porter had possession of the handgun. According to the police officers' testimonies, the handgun was found in plain view on the floorboard of the back seat of the vehicle, the gun was lying on Porter's left foot, it was on the same side of the vehicle as Porter was sitting, and Porter acted suspiciously prior to his arrest by reaching toward the floor with his left hand. The presence of these factors is sufficient to show Porter's knowledge and control of the handgun. Although Porter testified that the gun was not his, that he did not know that there were guns in the vehicle, and that the gun must have "slid back" near his foot when the vehicle went up a steep hill, the trial court specifically stated that it credited the testimony of the State's witnesses.

We defer to the trial court in matters of credibility of witnesses, and the trial court is not required to believe the testimony of the accused, as he is the person most interested in the outcome of the trial. Thus, we affirm.

Affirmed.

QUESTIONS

1. **Identify the two elements of constructive possession discussed by the court.**
2. **List the five factors the court identifies that can prove possession in joint occupancy cases.**
3. **Match the facts of the case to the five factors you listed in (2).**
4. **Assume you're the prosecutor. Argue that Porter actually and constructively possessed the handgun. Back up your arguments with facts in the case.**
5. **Assume you're the defense attorney. Argue that Porter did not actually or constructively possess the gun.**

EXPLORING FURTHER

Possession

Was the Temporary, Innocent Possession a Defense to Illegal Drug Possession?

People v. E.C., 761 N.Y.C.2d 443 (Supreme Court, Queens County, N.Y., 2003)

FACTS E.C. (defendant) was employed by Primo Security to work as a bouncer at a bar, was told to confiscate illegal contraband before anyone was allowed inside, and that their policy was that if anything was confiscated, he should contact Primo who would turn in the contraband to the police. On the night in question, the defendant confiscated 14 packets of cocaine from a patron on his way into the bar. Prior to his having an opportunity to contact Primo, the police responded to noise outside the bar at which time the defendant gave the police the 14 packets of cocaine. E.C. was charged with fourth-degree criminal possession of a controlled substance. He sought a jury instruction on defense of temporary and lawful possession.

Was the temporary lawful (innocent) possession of illegal drugs a defense to the charge of fourth-degree possession? Yes, said the N.Y. Supreme Court, Queens County, New York.

DECISION The People do not dispute the existence of this defense with respect to weapons, rather they argue against applying it to other possessory crimes such as criminal possession of a controlled substance. The People seem to be taking an absolutist position to the temporary and innocent possession of a controlled substance. This position makes little sense in real life and runs contrary to public policy considerations. It also allows for certain factual situations to be criminalized where it is clear that the state would not want to punish people doing the right thing. While many real life situations come to mind, three intriguing ones came up in oral argument.

First, if a parent discovers illegal drugs in their child's bedroom and decide to confront the child with these drugs—just like we see on the public service announcements on television—the parent would be guilty of a degree of criminal possession of a controlled substance under the People's absolutist position.

Second, if a teacher, dean, guidance counselor, or principal in a school came into possession of a controlled substance by either taking it from a student or finding it in a desk, open locker, the hall, or any other part of the school, the teacher, dean, guidance counselor, or principal would be guilty of a degree of criminal possession of a controlled substance under the People's absolutist position.

The third example might be the most intriguing especially in drug cases. During the trial, like other drugs cases, after the People entered into evidence the 14 packets of cocaine, they published them to the jury. The jurors, one-by-one, took the cocaine into their hands and looked at it, and then passed them to the next juror. The last juror returned the 14 packets to the court. Under this situation, each juror would be guilty of a degree of criminal possession of a controlled substance under the People's absolutist position.

The same policy considerations for weapons are equally valid for controlled substances. We want people, not just law enforcement, to confiscate illegal drugs from their children and students and turn them in to the proper authorities. We want people who find drugs on the street to pick them up and turn them in to the proper authorities. We want jurors to be able to examine evidence without fear of prosecution. It makes no sense whatsoever to criminalize this type of behavior. It runs contrary to public policy.

SUMMARY

LO 1
- Criminal conduct is conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests (MPC).

LO 2
- There might be criminal conduct without criminal liability; however, there is never criminal liability without criminal conduct.

LO 2
- Criminal conduct can qualify for criminal punishment only after it proceeds through all the following analytic steps: (1) Is there criminal conduct? (2) Is the conduct justified? (3) Is the conduct excused?

LO 2
- The last two elements of criminal liability are causation and criminal harm. Crimes that include all five elements are known as bad result crimes (or simply as result crimes).

LO 3
- All crimes include, at a minimum, a criminal act *(actus reus)*. Most serious crimes also require criminal intent.

LO 3
- Crimes consisting of the first and second elements include a third element, concurrence: a criminal intent has to trigger the criminal act.

LO 3
- The importance of the voluntary act requirement is that the law punishes people only for their act(s). However, all acts need not be voluntary to satisfy the requirement; conduct has to include only *one* voluntary act.

LO 4
- Status can arise in two ways: (1) it can result from prior voluntary act (2) or status can result from no act at all, such as sex, age, sexual orientation, race, and ethnicity.

LO 5, LO 6
- Failures to act, or criminal omissions, consist of two types: (1) the failure to report and (2) the failure to intervene to prevent injuries and death to persons or the damage and destruction of property. Omissions are criminal omissions only if defendants had a legal duty, not just a moral duty, to act.

LO 7
- Possession is not an act; it's a passive condition. Most people charged with possession have acquired possession by the voluntary act of acquisition.

KEY TERMS

criminal conduct, p. 81
criminal liability, p. 82
elements of a crime, p. 82
actus reus, p. 82
mens rea, p. 82
attendant circumstances element, p. 83
concurrence, p. 83
corpus delicti, p. 84
conduct crimes, p. 84
criminal acts, p. 84
bad result crimes (result crimes), p. 84
manifest criminality, p. 85
one-voluntary-act-is-enough, p. 86
status, p. 89
criminal omissions, p. 91
failure to report, p. 91
failure to intervene, p. 91
legal duty, p. 91
"Good Samaritan" doctrine, p. 93
American bystander rule, p. 93
legal fiction, p. 97
actual possession, p. 98
constructive possession, p. 98
knowing possession, p. 99
mere possession, p. 99

WEB RESOURCES

To prepare for exams, visit the *Criminal Law* companion website at www.cengage.com/criminaljustice/samaha, which features essential review and study tools such as flashcards, a glossary of terms, tutorial quizzes, and Supreme Court updates.

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A family photo shows Diane and Danny Schuler with their children Bryan, left, and Erin. Danny Schuler, the husband of the suburban New York mother who caused a car crash that killed her and seven others, said that his wife didn't have a drinking problem. He suggested that diabetes and other health problems were to blame.

LEARNING OBJECTIVES

1 To understand and appreciate that most *serious* crimes require criminal intent *and* a criminal act.

2 To understand the difference between general and specific intent.

3 To understand and appreciate the differences in culpability among the Model Penal Code's (MPC) four mental states: purposely, knowingly, recklessly, and negligently.

4 To understand that criminal liability is sometimes imposed without fault.

5 To understand that the element of causation applies only to "bad result" crimes.

6 To understand that ignorance of facts and law can create a reasonable doubt that the prosecution has proved the element of criminal intent.

The General Principles of Criminal Liability

Mens Rea, Concurrence, Causation, and Ignorance and Mistake

CHAPTER OUTLINE

Was He Guilty?

Police officers stopped Steven Loge for speeding. During a routine search of his automobile, the officers found a nearly empty bottle of beer in a brown paper bag underneath the front passenger seat. Loge was charged with keeping an open bottle containing intoxicating liquor in an automobile. At trial, Loge testified that the car he was driving belonged to his father and that the open bottle did not belong to him and that he did not know it was in the car.

(State v. Loge 2000)

LO 1

"I didn't mean to" captures a basic idea about criminal liability: a criminal act *(actus reus)* is necessary, but it's not enough for criminal liability, at least not liability for most serious crimes. They also include a mental element *(mens rea)*. Why? Because it's fair and just to punish only people we can blame. We call this **culpability** or **blameworthiness**. Justice Holmes (1963, 4) put it this way: "Even a dog distinguishes between being stumbled over and being kicked."

Mens rea translated means "evil state of mind," in the singular. In fact, as you'll learn in this chapter, there are several states of mind that can qualify as the mental element. The majority of states and the federal system apply a framework that began with the English common law (Chapter 1), and which now is included in statutes that include a range of mental states that fall into the categories of general intent, specific intent, and strict liability. A substantial minority of states adopt the Model Penal Code (MPC) structure that consists of four states of mind, ranked according to the degree of their blameworthiness: purposely, knowingly, recklessly, and negligently. This book follows mainly (but not exclusively) the MPC structure.

In addition to the mental attitude(s), we add two more elements essential to criminal liability: concurrence and causation. Finally, we examine how ignorance and mistakes can create a reasonable doubt that the prosecution has proved criminal intent. **Concurrence** refers to the requirement that a criminal intent has to trigger a criminal act in criminal conduct crimes and that criminal conduct has to cause a bad result in bad result crimes. The element of causation consists of two parts, both of which the prosecution has to prove beyond a reasonable doubt. **Cause in fact** consists of the *objective* determination that the defendant's act triggered a chain of events that ended as the harmful result, such as death in homicide. Factual cause is necessary but not enough to satisfy the causation requirement; that requires legal cause. **Legal cause** consists of the *subjective* judgment that it's fair and just to blame the defendant for the bad result.

Proving *mens rea*, and in bad result crimes, causation, isn't always enough to prove criminal liability. Sometimes, mistakes negate the *mens rea*. Let's turn first to the principle of *mens rea*, then to causation, and finally to mistakes that negate *mens rea*.

Mens Rea

Mens rea ("mental element," also called "mental attitude," "state of mind," or "criminal intent") is an ancient idea. "For hundreds of years the books have repeated with unbroken cadence that "An act doesn't make the actor guilty, unless his mind is guilty" *(Actus non facit reum nisi mens sit rea)* (Sayre 1932, 974). According to the great medieval jurist Bracton, writing in 1256:

> He who kills without intent to kill should be acquitted, because a crime is not committed unless the intent to injure intervene; and the desire and purpose distinguish evildoing. (quoted in Sayre 1932, 985)

Six hundred years later, the distinguished U.S. criminal law scholar Joel Bishop echoed Bracton: "There can be no crime, large or small, without an evil mind" (Sayre 1932, 974). And, in a 2001 case where *mens rea* was an issue, senior U.S. District Court Judge and scholar Jack Weinstein called the "*actus non facit* . . . maxim the criminal law's 'mantra'" and noted that "Western civilized nations have long looked to the wrongdoer's mind to determine both the propriety and the grading of punishment" *(U.S. v. Cordoba-Hincapie* 1993, 489).

Mens rea isn't just ancient; it's complex. "No problem of criminal law . . . has proved more baffling through the centuries than the determination of the precise mental element necessary to convict of any crime" (Sayre 1932, 974). Several reasons account for this bafflement. First, whatever it means, *mens rea* is difficult to discover and then prove in court. Second, courts and legislatures have used so many vague and incomplete definitions of the mental element.

According to the "Commentary on *mens rea*" accompanying the Alabama Criminal Code:

> It would be impossible to review, much less reconcile and make clear and uniform, the myriad of Alabama statutes and cases that have employed or discussed some term of mental culpability. Such mental terms and concepts, while necessarily difficult to articulate, sometimes have been vaguely or only partly defined, or otherwise seem

TABLE 4.1 Mental Attitudes Used in the Alabama Code

"Intentionally"	"Negligently"
"Willfully"	"With culpable negligence"
"Purposely"	"With gross negligence"
"Designedly"	"With criminal negligence"
"Knowingly"	"Without due caution"
"Deliberately"	"Wickedly"
"Maliciously"	"Unlawfully"
"With premeditation"	"Wrongfully"
"Recklessly"	

> imprecise or inconclusive, unclear or ambiguous, even confusing or contradictory, or over refined with technical, obscure and often subtle, if not dubious, distinctions. (*Burnett v. State* 1999, 575)

Table 4.1 includes a partial list of terms in the Alabama Code before it was reformed along the lines of the states of mind in the MPC. After listing 17, the summary ends, resignedly adding "and scores of others" (575).

Third, *mens rea* consists of several mental attitudes that range across a broad spectrum, stretching all the way from purposely committing a crime you're totally aware is criminal (stealing an iPod from Circuit City) to merely creating risks of criminal conduct or causing criminal harms—risks you're not the slightest bit aware you're creating (driving someone else's car with an open beer bottle you don't even know is in the car). We'll discuss these mental attitudes later in the chapter and in Chapters 9 through 13. For now, it's very important that you understand that intent in criminal law goes way beyond the dictionary definition of "intent," which refers to acting on purpose or deliberately.

Fourth, a different mental attitude might apply to each of the elements of a crime. So it's possible for one attitude to apply to *actus reus*, another to causation, another to the harm defined in the statute, and still another to attendant circumstance elements (ALI 1985 I:2, 229–33).

As you learn about the *mens rea*, you'll probably be confused by the multiple mental attitudes it includes; by the complexity and uncertainty surrounding the definitions of the multiple attitudes it encompasses; and by the practical problems of matching the attitudes to elements of the offense and then proving each one beyond a reasonable doubt. Maybe you can take some comfort in knowing that courts don't always get the definitions of mental states right, either.

We need to note one more complexity in *mens rea*, namely the relationship between mental attitude and **motive**. Experts have disagreed over the difference between motive and intent. Probably for this reason, they clarify the difference with an example: if a man murders his wife for her money—his intent was to kill; his motive was to get her money. It's often said that motive is irrelevant to criminal liability; good motive is no defense to criminal conduct, and a bad motive can't make legal conduct criminal. So if a wife poisons her husband because he's suffering from the unbearable pain of a terminal bone cancer, she's still guilty of murder. And if she wants him dead because she hates him, and accidentally shoots him while they're deer hunting, she's not guilty even though she wanted him dead, and she's glad he's out of the way.

Unfortunately, the relationship between motive and criminal liability is not so simple. The truth is that sometimes motive is relevant and sometimes it's not. Greed, hate, and jealously are always relevant to proving the intent to kill. Compassion may well affect discretionary decisions, such as police decisions to arrest, prosecutors to charge, and judges to sentence, say, mercy killers.

Juries have sometimes refused to convict mercy killers of first-degree murder even though the intent to kill was clearly there (Chapter 9). The murder conviction of Robert Latimer is a good example of this. Latimer could no longer stand the constant pain his 12-year-old daughter, Tracy, was suffering because of her severe and incurable cerebral palsy. She wore diapers, weighed only 38 pounds, and couldn't walk, talk, or feed herself.

So he put Tracy into the cab of his pickup truck on the family farm and pumped exhaust into the cab of the truck. He told the police that he stood by, ready to stop if Tracy started to cry, but that she simply went quietly "to sleep. My priority was to put her out of her pain." He pleaded not guilty to first-degree murder, but the jury found him guilty of second-degree murder. Despite the verdict of guilty on the lesser charge, many people in the town agreed with an 18-year-old high school student who said Latimer "did what he had to do for his daughter's sake. And that's the way a lot of people in town are feeling" (Farnsworth 1994, A6).

Motive is also important in some defenses. For example, it's a defense to the crime of escaping from prison if a prisoner breaks out to save her life from a rapidly spreading fire (the defense of necessity, Chapter 5). Finally, motive is sometimes an element of a crime itself. For example, one of the attendant circumstances of burglary accompanying the act of breaking and entering someone else's property is "the purpose of committing a crime" once inside (the elements of burglary, Chapter 11).

Let's look more closely at proving the *mens rea*, defining it, and classifying it, and the difficulties and complexities in doing all of these.

Proving "State of Mind"

You can't see a state of mind. Not even the finest instruments of modern technology can find or measure your attitude (Hall 1960, 106). Electroencephalograms can record brain waves, and x-rays can photograph brain tissue, but Chief Justice Brian's words are as true today as they were when he wrote them in 1477: "The thought of man is not triable, for the devil himself knoweth not the thought of man" (Williams 1961, 1). Three hundred years later, Sir William Blackstone put it simply: "A tribunal can't punish what it can't know" (Blackstone 1769, 21).

Confessions are the only direct evidence of mental attitude. Unfortunately, defendants rarely confess their true intentions, so proof of their state of mind usually depends on indirect (circumstantial) evidence. Acts and attendant circumstances are the overwhelming kind of circumstantial evidence. In everyday experience, we rely on what people do to tell us what they intend. For example, if I break into a stranger's house at night, it's reasonable to infer I'm up to no good. So by observing directly what I do, you can indirectly determine what I intend.

Criminal Intent

The long list of terms used to define the mental element(s) in the pre-reformed Alabama Criminal Code (Table 4.1, p. 107) can be reduced to two kinds of fault that satisfy the mental element in criminal liability. One is **subjective fault**, or fault that requires a "bad mind" in the actor. For example, suppose in your state, it's a crime to

"receive property you know is stolen." You buy an iPod from another student who you know stole it. The bad state of mind is "knowingly," which is more culpable than "recklessly" and less culpable than "purposely."

Subjective fault is linked frequently with immorality. You can see this connection in expressions in cases and statutes, such as "depravity of will," "diabolic malignity," "abandoned heart," "bad heart," "heart regardless of social duty and fatally bent on mischief," "wicked heart," "mind grievously depraved," or "mischievous vindictive spirit" (Dubber 2002, 50–51). Although these terms were typical of old laws and opinions, they're still in use in non-MPC jurisdictions, as you'll see in some of the case excerpts throughout the book.

The second kind of fault is **objective fault**, which requires no purposeful or conscious bad mind in the actor. For example, suppose it's a crime to "receive property you have reason to believe is stolen." You buy a new iPod in its original package for $10 that you honestly, but naively, don't know is stolen. You should know it was stolen; a reasonable person would know it was stolen, and in fact it was stolen. So, even though you had no "bad" mind, you're held accountable because you didn't live up to the norm of the average person.

The third kind of criminal liability isn't on the Alabama list; criminal liability without subjective or objective fault (called **strict liability**). Suppose a statute reads, "whoever receives stolen property" commits a crime. You buy an iPod for $45 that looks used, but you honestly and reasonably believe it wasn't stolen. It doesn't matter; under this statute, you're liable without either subjective or objective fault.

It's easy enough to define and give examples of these three types of liability. It's also easy to rank them according to the degree of their culpability. Subjective "bad mind" fault is most blameworthy. Objective unreasonable risk creation is less blameworthy; some maintain it shouldn't even qualify as a criminal state of mind. No-fault liability requires the least culpability; it holds people accountable for their actions without regard to fault.

We'll have more to say about mental fault and no fault shortly (and also in the remaining chapters of the book). But now, we have to examine two terms (used by many courts and some statutes) that are the source of uncertainty over what criminal intent means: general intent and specific intent (LaFave 2003b, 1:352–55).

General and Specific Intent

LO 2

General intent is used most commonly in the cases to mean the intent to commit the criminal act as defined in a statute. In that sense, general intent is general because it states the minimum requirement of all crimes—namely, that they have to include an intentional/voluntary act, omission, or possession (Chapter 3). It would be easy and obvious if all courts defined general intent as the intent to commit the criminal act. But they don't, and that causes confusion. For example, some courts define general intent as a "synonym for *mens rea*," so it includes all levels of both subjective and objective fault. Another definition is the intent to commit a crime at an undetermined time and place with no specific victim in mind. For example, Clifford Hobbs threw a bag of burglar's tools out of his car during a high-speed chase by Des Moines police. He was found guilty of "possession of burglary tools" (*State v. Hobbs* 1961, 239). Hobbs argued that at the time the police apprehended him, he "had no intention of breaking into any place" and appealed his conviction (239). The Iowa Supreme Court disagreed:

> Evidence of the general intent or purpose for which the accused kept and used the tools is enough, not of present specific intent. It is sufficient to show that defendant had a general intent to use tools or implements for a burglarious purpose, and the intention as to any particular time or place of using the same is not material. (240)

Some courts limit **specific intent** to the attitudes represented by subjective fault, where there's a "bad" mind or will that triggers the act (LaFave 2003b, 1:353–55). It's captured in these adjectives found in most ordinary dictionaries: "deliberate," "calculated," "conscious," "intended," "planned," "meant," "studied," "knowing," "willful," "purposeful," "purposive," "done on purpose," "premeditated," "preplanned," "preconceived." We'll have occasion, later in this and the remaining chapters, to define, apply, and grade the degree of blameworthiness of most of these variations of subjective fault.

The most common definition of specific intent is what we'll call **general intent "plus,"** where "general intent" refers to the intent to commit the *actus reus* of the crime, and "plus" refers to some "special mental element" in addition to the intent to commit the criminal act (LaFave 2003b, 1:354). For example, household burglary is a specific intent crime, because in addition to the intent to commit the household burglary *actus reus*—namely, breaking and entering someone else's house—there's the special mental element, the intent to commit a crime once inside the house (Chapter 11). Similarly, theft is a specific intent crime, because it requires the intent to commit the acts of taking and carrying away someone else's property plus the intention to deprive the owner of it permanently (Chapter 11). Sexual assault is not a specific intent crime, because it requires the intent to commit whatever acts of sexual contact or penetration are included in the *actus reus* element of the law.

Our first case excerpt, *Harris v. State*, adopted and applied the general intent plus definition. The Maryland Court of Appeals held that carjacking is a general intent crime, because it required only that Timothy Harris intend to commit the act of carjacking and not the further intent to deprive the owner of the car's possession. The case is important not only for helping you to understand and apply the concepts of general and special intent, but also to illustrate the practical importance of the distinction. The defense of voluntary intoxication (Chapter 8) is available only in specific intent crimes. Because the court ruled that carjacking is a general intent crime, Tim Harris couldn't use the defense that he was too drunk to form the intent to commit the crime of carjacking.

Our first case excerpt, Harris v. State, adopted and applied the general intent plus definition.

CASE Did He Specifically Intend to Carjack His Friend's Car?

Harris v. State
728 A.2d 180 (1999 MDApp.)

HISTORY

Timothy Harris (the defendant/appellant) was indicted by the Grand Jury for Prince George's County with the crimes of carjacking in violation of Art. 27, § 348A, unlawful taking of a motor vehicle in violation of Art. 27, § 342A, and second-degree assault in violation of Art. 27, § 12A. At trial, Harris's defense was voluntary intoxication. He testified that he had consumed alcohol and smoked marijuana throughout the evening, and that he "blacked out" after leaving the get-together. He was convicted in the Circuit Court, Prince George's County, of carjacking. Defendant

appealed. The Court of Appeals held that carjacking is not a specific intent crime and affirmed the trial court's conviction.

FACTS

On November 26, 1996, Timothy Harris, Jack Tipton, and several other friends were playing cards and drinking alcohol at a friend's house. Tipton offered to drive Harris home. Tipton testified that Harris became angry when Tipton refused to go to the District of Columbia, and that Harris forcibly removed Tipton from the car and drove away. Tipton reported the car as stolen.

OPINION

Maryland's carjacking statute, Art. 27, § 348A reads in pertinent part:

> . . . (b) *Elements of offense.* (1) An individual commits the offense of carjacking when the individual obtains unauthorized possession or control of a motor vehicle from another individual in actual possession by force or violence, or by putting that individual in fear through intimidation or threat of force or violence.
>
> (c) *Penalty—In general.* An individual convicted of carjacking . . . is guilty of a felony and shall be sentenced to imprisonment for not more than 30 years.
>
> (d) *Same—Additional to other offenses.* The sentence imposed under this section may be imposed separate from and consecutive to a sentence for any other offense arising from the conduct underlying the offenses of carjacking or armed carjacking.
>
> (e) *Defenses.* It is not a defense to the offense of carjacking or armed carjacking that the defendant did not intend to permanently deprive the owner of the motor vehicle.

Generally, there are two aspects of every crime—the *actus reus* or guilty act and the *mens rea* or the culpable mental state accompanying the forbidden act. Maryland continues to observe the distinction between general and specific intent crimes. The distinction is particularly significant when a defendant claims that his voluntary intoxication prevents him from forming the requisite intent to commit a crime. (See Chapter 8.) It has long been the law in Maryland that while voluntary intoxication is a defense to a specific intent crime, it is not a defense to a general intent crime. . . . (The part of the opinion dealing with Harris' defense of intoxication is omitted from this case excerpt.)

A specific intent is not simply the intent to do the immediate act but embraces the requirement that the mind be conscious of a more remote purpose or design which shall eventuate from the doing of the immediate act. Though assault implies only the general intent to strike the blow, assault with intent to murder, rob, rape, or maim requires a fully formed and conscious purpose that those further consequences shall flow from the doing of the immediate act. To break and enter requires a mere general intent but to commit burglary requires the additional specific intent of committing a felony after the entry has been made. A trespassory taking requires a mere general intent but larceny (or robbery) requires the specific or deliberate purpose of depriving the owner permanently of the stolen goods.

It is clear that the broad aim of the statute was to enhance the penalties applicable to individuals who use force or threat of force or intimidation to obtain possession or control of a motor vehicle and to make it easier for prosecutors to obtain convictions for carjacking. By looking at the statute as a whole, including the enhanced penalties applicable to carjackers over and above those penalties for the underlying conduct, as well as the explicit rejection of the specific intent to permanently deprive, it is clear that the Legislature did not intend to require a specific intent to achieve some additional consequence beyond the immediate act of taking the vehicle.

Finally, we find no support in the nature of carjacking itself to indicate that it is a specific intent crime. Carjacking requires the general intent to commit the act of obtaining unauthorized possession or control of a motor vehicle from another individual in actual possession by force or violence, or by putting that individual in fear through intimidation or threat of force or violence. The temporary deprivation of the property is substantially certain to result, regardless of the desire of the actor. The General Assembly gave no indication that "the mind [of the perpetrator] be conscious of a more remote purpose or design which shall eventuate from the doing of the immediate act." The Legislature's clear intent was that, without any additional deliberate and conscious purpose or design of accomplishing a very specific and more remote result, the offense is committed. Simply stated, the *mens rea* . . . is implicit in the intentional doing of the act.

We hold that the intent element of carjacking is satisfied by proof that the defendant possessed the general criminal intent to commit the act, *i.e.*, general intent to obtain unauthorized possession or control from a person in actual possession by force, intimidation, or threat of force.

Affirmed. Costs to be paid by the appellant.

QUESTIONS

1. **How does the Court define "general intent"?**
2. **How does the Court define "specific intent"?**
3. **Summarize the Court's arguments that support its conclusion that Maryland's carjacking statute is a general intent crime?**
4. **Do you agree that the legislature's intent is clear that carjacking consists of the general intent to commit the act and not the intent to deprive Tipton of possession even for a brief period of time? Explain your answer.**
5. **Which is the better policy? Making carjacking a general or specific intent crime? Defend your answer.**

The Model Penal Code's (MPC's) Mental Attitudes

LO 3

The multiple mental states, confusing terms, and varied meanings of criminal intent lay behind the Model Penal Code's (MPC) provisions to make sense out of the confusing state of the law regarding criminal intent. According to Ronald L. Gainer (1988), former deputy attorney general of the United States:

> The Code's provisions concerning culpable mental states introduced both reason and structure to a previously amorphous area of American law. For centuries, the approach to mental components of crimes had been a quagmire of legal refuse, obscured by a thin surface of general terminology denoting wrongfulness. The archaic verbiage suggesting evil and wickedness was replaced by the drafters with concepts of purpose, knowledge, recklessness, and negligence, and the concepts were structured to apply separately to actions, circumstances in which actions took place, and results. (575)

The MPC's culpability provisions were arrived at only after enormous effort and heated debate among some of the leading legal minds of judges, prosecutors, defense attorneys, and professors. As we look at the MPC's four mental attitudes, we'll discuss how they're ranked according to their degree of culpability and how they're constructed to apply to the elements of act, mental attitude, attendant circumstances, and causing a "bad" result. From most to least blameworthy, the MPC's four mental states are:

1. Purposely
2. Knowingly
3. Recklessly
4. Negligently

The MPC specifies that all crimes requiring a mental element (most minor crimes and a few felonies don't) have to include one of these degrees of culpability. (Recklessness is the default degree of culpability where codes fail to identify a level of culpability.) The following section from the MPC defines the degrees of culpability:

LO 3

MPC § 2.02. General Requirements of Culpability.

1. *Minimum Requirements of Culpability*. . . . [A] person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently . . . with respect to each material element of the offense.
2. *Kinds of Culpability Defined*
   a. **Purpose**. 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;
      ii. [omitted]
   b. **Knowledge**. 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.

c. **Recklessness**. 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.

d. **Negligence**. A person acts negligently with respect to a material element of an offense when he should be aware of 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. (ALI 1985 1:2, 229)

Purpose

Purposely, the most blameworthy mental state, means what we mean by the everyday expression, "You did it on purpose." In the words of MPC, "purpose" means having the "conscious object" to commit crimes. For example, in the criminal conduct crime, common-law burglary, the burglar has to break into and enter a house for the very purpose (with the conscious object) of committing a crime after the burglar gets inside. In the bad result crime of murder, the murderer's purpose (conscious object) has to be to cause the victim's death. The Washington State Court of Appeals in *State v. Stark* (1992) affirmed Calvin Stark's conviction because he purposely exposed his sexual partners to HIV.

The Washington State Court of Appeals in State v. Stark (1992) affirmed Calvin Stark's conviction because he purposely exposed his sexual partners to HIV.

CASE Did He Expose His Victims to HIV on Purpose?

State v. Stark
832 P.2d 109 (Wash.App. 1992)

HISTORY

Calvin Stark was convicted in the Superior Court, Clallam County, Washington, of two counts of second-degree assault for intentionally exposing his sexual partners to the human immunodeficiency virus (HIV), and he appealed. The Washington Court of Appeals affirmed, and remanded the case for resentencing.

PETRICH, CJ.

FACTS

On March 25, 1988, Calvin Stark tested positive for HIV, which was confirmed by further tests on June 25 and on June 30, 1988. From June 30, 1988, to October 3, 1989, the staff of the Clallam County Health Department had five meetings with Stark during which Stark went through extensive counseling about his infection. He was taught about "safe sex," the risk of spreading the infection, and the necessity of informing his partners before engaging in sexual activity with them.

On October 3, 1989, Dr. Locke, the Clallam County Health Officer, after learning that Stark had disregarded

this advice and was engaging in unprotected sexual activity, issued a cease and desist order as authorized by a Washington State statute. Stark did not cease and desist, and, consequently, on March 1, 1990, Dr. Locke went to the county prosecutor's office. . . . The prosecutor . . . had Dr. Locke complete a police report. The state then charged Stark with three counts of assault in the second degree under RCW 9A.36.021(1)(e), which provides:

> (1) A person is guilty of assault in the second degree if he or she . . . :
>
> (e) With intent to inflict bodily harm, exposes or transmits human immunodeficiency virus. . . .

Each count involved a different victim.

Count One. The victim and Stark engaged in sexual intercourse on October 27 and October 29, 1989. On both occasions, Stark withdrew his penis from the victim prior to ejaculation. The victim, who could not become pregnant because she had previously had her fallopian tubes tied, asked Stark on the second occasion why he withdrew. He then told her that he was HIV positive.

Count Two. The victim and Stark had sexual relations on at least six occasions between October 1989, and February 1990. Stark wore a condom on two or three occasions, but on the others, he ejaculated outside of her body. On each occasion, they had vaginal intercourse. On one occasion Stark tried to force her to have anal intercourse. They also engaged in oral sex. When she told Stark that she had heard rumors that he was HIV positive, he admitted that he was and then gave the victim an AZT pill "to slow down the process of the AIDS."

Count Three. The victim and Stark had sexual relations throughout their brief relationship. It was "almost nonstop with him," "almost every night" during August 1989. Stark never wore a condom and never informed the victim he was HIV positive. When pressed, Stark denied rumors about his HIV status. The victim broke off the relationship because of Stark's drinking, after which Stark told her that he carried HIV and explained that if he had told her, she would not have had anything to do with him.

At the jury trial, the victim in count one testified to her contacts with Stark and the jury received Dr. Locke's deposition testimony regarding the Health Department's contacts with Stark. Stark did not testify. In the bench trial [trial without a jury], Dr. Locke testified. There the state also presented the testimony of one of Stark's neighborhood friends. She testified that one night Stark came to her apartment after drinking and told her and her daughter that he was HIV positive. When she asked him if he knew that he had to protect himself and everybody else, he replied, "I don't care. If I'm going to die, everybody's going to die." The jury found Stark guilty on count one.

A second trial judge found Stark guilty of the second and third counts at a bench trial. On count one, Stark was given an exceptional sentence of 120 months based on his future danger to the community. The standard range for that offense was 13 to 17 months. On counts two and three, Stark was given the low end of the standard range, 43 months each, to be served concurrently, but consecutively to count one.

OPINION

Stark contends that there is insufficient evidence to prove he "exposed" anyone to HIV or that he acted with intent to inflict bodily harm. Since Stark is undisputedly HIV positive, he necessarily exposed his sexual partners to the virus by engaging in unprotected sexual intercourse. The testimony of the three victims supports this conclusion.

The testimony supporting the element of intent to inflict bodily harm includes Dr. Locke's statements detailing his counseling sessions with Stark. With regard to the first victim, we know that Stark knew he was HIV positive, that he had been counseled to use "safe sex" methods, and that it had been explained to Stark that coitus interruptus will not prevent the spread of the virus. While there is evidence to support Stark's position, all the evidence viewed in a light most favorable to the State supports a finding of intent beyond a reasonable doubt. The existence of noncriminal explanations does not preclude a finding that a defendant intended to harm his sexual partners.

With regard to the later victims, we have, in addition to this same evidence, Stark's neighbor's testimony that Stark, when confronted about his sexual practices, said, "I don't care. If I'm going to die, everybody's going to die." We also have the testimony of the victim in count two that Stark attempted to have anal intercourse with her and did have oral sex, both methods the counselors told Stark he needed to avoid.

We affirm the convictions.

QUESTIONS

1. **Identify all of the facts relevant to determining Stark's mental attitude regarding each of the elements in the assault statute.**
2. **Using the common-law definition of "specific intent" and the Model Penal Code definitions of "purposely," "knowingly," "recklessly," and "negligently," and relying on the relevant facts, identify Stark's intention with respect to his acts.**
3. **Is motive important in this case? Should it be?**

ETHICAL DILEMMA

Which Court's Decision Established the Most Ethical Public Policy Regarding the Control of HIV?

The Trial Court

Dwight Ralph Smallwood was convicted of assault with intent to murder, reckless endangerment, and attempted murder. The trial court sentenced Smallwood to concurrent sentences of life imprisonment for attempted rape, 20 years' imprisonment for robbery with a deadly weapon, 30 years' imprisonment for assault with intent to murder, and 5 years' imprisonment for reckless endangerment. The Court also imposed a concurrent 30-year sentence for each of the three counts of attempted second-degree murder. The conviction was based on evidence that Smallwood knew he had Human Immunodeficiency Virus (HIV) when he raped three women.

The Court of Appeals

Smallwood appealed to Maryland's highest court, the Court of Appeals. The Court held that the evidence that Smallwood knew he had Human Immunodeficiency Virus (HIV) when he raped three women was insufficient to prove that he had the intent to kill. According to the Court,

> We have no trouble concluding that Smallwood intentionally exposed his victims to the risk of HIV-infection. The problem before us, however, is whether knowingly exposing someone to a risk of HIV-infection is by itself sufficient to infer that Smallwood possessed an intent to kill. . . .
>
> The State in this case would allow the trier of fact to infer an intent to kill based solely upon the fact that Smallwood exposed his victims to the risk that they might contract HIV. Without evidence showing that such a result is sufficiently probable to support this inference, we conclude that Smallwood's convictions for attempted murder and assault with intent to murder must be reversed. (*Smallwood v. State* (1996), 680 A.2d 512 (Maryland)

Instructions

1. Go to the website www.cengage.com/criminaljustice/samaha.
2. Read the court's opinion.
3. Write a paragraph for each opinion, summarizing their arguments regarding the facts required to prove the intent to kill by spreading HIV.
4. Did Smallwood intend to kill his victims, or to spread the virus? Does your answer depend at all on your position as to which interpretation of the law supports the most ethical public policy? Write a page backing up your answers.

Knowing

In the mental state of "knowing," the watchword is "awareness" (Dubber 2002, 65). In conduct crimes, awareness is clear—I'm aware I'm taking an iPhone 3G; therefore I'm taking it knowingly. It's a little different in bad result crimes. Here, the MPC says it's enough that I'm aware that it's "practically certain" that my conduct will cause the bad result.

It's important for you to understand that knowledge is not the same as purpose or conscious objective. So a surgeon who removes a cancerous uterus to save a pregnant woman's life *knowingly* kills the fetus in her womb, but killing the fetus wasn't the purpose (conscious object) of the removal. Rather, the death of the fetus is an unavoidable side effect of removing the cancerous uterus.

Similarly, treason, the only crime defined in the U.S. Constitution, requires that traitors provide aid and comfort to enemies, not just knowingly but for the purpose of overthrowing the government. Actors may provide aid and comfort to enemies of the United States knowing their actions are practically certain to contribute to overthrowing the government. But that isn't enough; they have to provide them for the purpose of overthrowing the U.S. government. If their conscious object was to get rich, then they haven't committed treason (*Haupt v. U.S.* 1947).

The purpose requirement in treason led to the enactment of other statutes to fill the void—for example, making it a crime to provide secrets to the enemy, an offense that requires only that defendants purposely provide such secrets. We'll explore these crimes in Chapter 13.

In our next case excerpt, *State v. Jantzi* (1982), the Oregon Court of Appeals concluded that Pete Jantzi didn't knowingly assault Rex Anderson. The case excerpt will show you just how complicated the application of "knowingly" to the facts of specific cases can get.

In our next case excerpt, State v. Jantzi (1982), the Oregon Court of Appeals concluded that Pete Jantzi didn't knowingly assault Rex Anderson.

CASE Did He "Knowingly" Assault with a Knife?

State v. Jantzi
641 P.2d 62 (1982 Or.App.)

HISTORY

Pete Jantzi was convicted in the Circuit Court, Klamath County, of assault in the second degree, and he appealed. The Court of Appeals held that the defendant knew he had a dangerous weapon and that a confrontation was going to occur, but that he did not intend to stab the victim. Thus, the defendant acted "recklessly," not "knowingly," and, should be convicted of assault in the third degree rather than assault in the second degree. Affirmed as modified; remanded for resentencing.

GILLETTE, J.

FACTS

Pete Jantzi, the defendant, testified and the trial court judge believed that he was asked to accompany Diane Anderson, who shared a house with the defendant and several other people, to the home of her estranged husband, Rex. While Diane was in the house talking with Rex, the defendant was using the blade of his knife to let the air out of the tires on Rex's van. Another person put sugar in the gas tank of the van.

While the Andersons were arguing, Diane apparently threatened damage to Rex's van and indicated that someone might be tampering with the van at that moment. Rex's roommate ran out of the house and saw two men beside the van. He shouted and began to run toward the men. Rex ran from the house and began to chase the defendant, who ran down a bicycle path. The defendant, still holding his open knife, jumped into the bushes beside the path and landed in the weeds. He crouched there, hoping that Rex would not see him and would pass by. Rex, however, jumped on top of the defendant and grabbed his shirt. They rolled over and Rex was stabbed in the abdomen by the defendant's knife. The defendant could not remember making a thrusting or swinging motion with the knife; he did not intend to stab Rex.

OPINION

The indictment charged that defendant "did unlawfully and knowingly cause physical injury to Rex Anderson by means of a deadly weapon, to-wit: knife, by stabbing the said Rex Anderson with said knife." ORS 163.175 provides that:

> (1) A person commits the crime of assault in the second degree if he:
>
> (b) Intentionally or knowingly causes physical injury to another by means of a deadly or dangerous weapon; . . .
>
> "Knowingly" is defined in ORS 161.085(8):
>
> "Knowingly" or "with knowledge" when used with respect to conduct or to a circumstance described by a statute defining an offense means that a person acts with an awareness that [his] conduct is of a nature so described or that a circumstance so described exists.

[According to the commentary to the New York Criminal Code that the Oregon Criminal Code was based on:]

> Under the formulations of the Model Penal Code (§ 2.02(2bii)) and the Illinois Criminal Code (§ 4–5(b)), "knowingly" is, in one phase, almost synonymous with "intentionally" in that a person achieves a given result "knowingly" when he "is practically certain" that his conduct will cause that result. This distinction between "knowingly" and "intentionally" in that context appears highly technical or semantic, and the [New York] Revised Penal Law does not employ the word "knowingly" in defining result offenses. Murder of the common law variety, for example, is committed intentionally or not at all. (Commentary § 15.05, New York Revised Penal Law)

[The trial court continued:]

> Basically, the facts of this case are: that Defendant was letting air out of the tires and he has an open knife. He was aware of what his knife is like. He is aware that it is a dangerous weapon. He runs up the bicycle path. He has a very firm grip on the knife, by his own admission, and he knows the knife is dangerous. It is not necessary for the state to prove that he thrust it or anything else. Quite frankly, this could have all been avoided if he had gotten rid of the knife, so he 'knowingly caused physical injury to Rex Anderson.' And, therefore, I find him guilty of that particular charge.

Although the trial judge found the defendant guilty of "knowingly" causing physical injury to Anderson, what he described in his findings is recklessness. The court found that defendant knew he had a dangerous weapon and that a confrontation was going to occur. The court believed that the defendant did not intend to stab Anderson. The court's conclusion seems to be based on the reasoning that because the defendant knew it was possible that an injury would occur, he acted "knowingly." However, a person who "is aware of and consciously disregards a substantial and unjustifiable risk" that an injury will occur acts "recklessly," not "knowingly."

We have authority, pursuant to . . . the Oregon Constitution, to enter the judgment that should have been entered in the court below. Assault in the third degree is a lesser included offense of the crime of assault in the second degree charged in the accusatory instrument in this case. We modify defendant's conviction to a conviction for the crime of assault in the third degree.

Conviction affirmed as modified; remanded for resentencing.

QUESTIONS

1. **List all of the facts relevant to determining Pete Jantzi's state of mind.**
2. **State the Oregon statute's mental element for assault.**
3. **State how, and explain why, Oregon modified the MPC definition of "knowingly."**
4. **In your opinion, did Jantzi knowingly assault Rex Anderson? Back up your answer with the facts of the case and the trial and appellate court's opinions.**

Reckless

"Awareness" is the watchword for recklessness, just as it is for knowledge. But there's a critical difference; in recklessness, it's awareness of the *risk* of causing a criminal result, whereas in "knowingly" it's awareness of causing the result itself. Notice that recklessness doesn't apply to conduct crimes for the obvious reason that you have to be aware you're committing a voluntary act (Chapter 3). It can refer to attendant circumstances; for instance, you can be aware that a woman you're about to have sex with is under the legal age.

Reckless people know they're creating risks of harm but they don't intend, or at least they don't expect, to cause harm itself. Recklessness (conscious risk creation) isn't

as blameworthy as acting purposely or knowingly because reckless defendants don't act for the very purpose of doing harm; they don't even act knowing harm is practically certain to follow. But, reckless defendants do know they're creating risks of harm.

Criminal recklessness requires more than awareness of ordinary risks; it requires awareness of "substantial and unjustifiable risks." The MPC proposes that fact finders determine recklessness according to a two-pronged test:

1. Was the defendant aware of how substantial and unjustifiable the risks that they disregarded were? Under this prong, notice that even a substantial risk isn't by itself reckless. For example, a doctor who performs life-saving surgery has created a substantial risk. But the risk is justifiable because the doctor took it to save the life of the patient. This prong doesn't answer the important questions of *how* substantial and *how* unjustifiable the risk has to be to amount to recklessness. So the second prong gives guidance to juries.
2. Does the defendant's disregard of risk amount to so "gross a deviation from the standard" that a law-abiding person would observe in that situation? This prong requires juries to make the judgment whether the risk is substantial and unjustifiable enough to deserve condemnation in the form of criminal liability.

This test has both a subjective and an objective component. The first prong of the test is subjective; it focuses on a defendant's actual awareness. The second prong is objective; it measures conduct according to how it deviates from what reasonable people do.

It should be clear to you by now that actual harm isn't the conscious object of reckless wrongdoers. In fact, most reckless actors probably hope they don't hurt anyone. Or, at most, they don't care if they hurt anyone. But the heart of their culpability is that even with the full knowledge of the risks, they act anyway. For example, in one case, a large drug company knew that a medication it sold to control high blood pressure had caused severe liver damage and even death in some patients; it sold the drug anyway. The company's officers, who made the decision to sell the drug, didn't want to hurt anyone (indeed, they hoped no one would die or suffer liver damage). They sought only profit for the company, but they were prepared to risk the deaths of their customers to make a profit (Shenon 1985, A1).

Negligent

Like recklessness, negligence is about risk creation. But recklessness is about *consciously* creating risks; negligence is about *unconsciously* (unreasonably) creating risks. Here's an example of a negligent wrongdoer: "Okay, so you didn't mean to hurt him, and you didn't even know the odds were very high you could hurt him, but you *should* have known the odds were high, and you did hurt him." The test for negligence is totally objective, namely that the actors should have known, even though in fact they didn't know, they were creating risks. Put another way, a reasonable person would've known she was creating the risk.

For example, a reasonable person would know that driving 50 miles an hour down a crowded street creates a risk of harm. The driver who should know what a reasonable person would know, but doesn't, is negligent. The driver who knows it but drives too fast anyway is reckless.

Negligent defendants, like reckless defendants, have to create "substantial and unjustifiable risks"—risks that grossly deviate from the ordinary standards of behavior. In *Koppersmith v. State* (1999), the Alabama Court of Appeals wrestled with the difficulty of drawing the line between recklessness and negligence.

In Koppersmith v. State *(1999), the Alabama Court of Appeals wrestled with the difficulty of drawing the line between recklessness and negligence.*

CASE Did He Kill His Wife Recklessly or Negligently?

Koppersmith v. State
742 So.2d 206 (Ala.App. 1999)

HISTORY

Gregory Koppersmith, the appellant, was charged with the murder of his wife, Cynthia ("Cindy") Michel Koppersmith. He was convicted of reckless manslaughter, a violation of § 13A-6-3(a)(1), Ala.Code 1975, and the trial court sentenced him to 20 years in prison. The Alabama Court of Appeals reversed and remanded.

BASCHAB, J.

FACTS

Gregory Koppersmith (appellant) and his wife were arguing in the yard outside of their residence. Cindy tried to enter the house to end the argument, but Greg prevented her from going inside. A physical confrontation ensued, and Cindy fell off of a porch into the yard. She died as a result of a skull fracture to the back of her head.

In a statement he made to law enforcement officials after the incident, the appellant gave the following summary of the events leading up to Cindy's death. He and Cindy had been arguing and were on a porch outside of their residence. Cindy had wanted to go inside the house, but he had wanted to resolve the argument first. As she tried to go inside, he stepped in front of her and pushed her back. Cindy punched at him, and he grabbed her.

When Cindy tried to go inside again, he wrapped his arms around her from behind to stop her. Cindy bit him on the arm, and he "slung" her to the ground. He then jumped down and straddled her, stating that he "had her by the head" and indicating that he moved her head up and down, as if slamming it into the ground. When Cindy stopped struggling, he rolled her over and found a brick covered with blood under her head. The appellant stated that, although Cindy fell near a flowerbed, he did not know there were bricks in the grass.

At trial, Greg testified that Cindy had tried to go into the house two or three times, but he had stopped her from doing so. During that time, she punched at him and he pushed her away from him. At one point, he put his arms around her from behind to restrain her, and she turned her head and bit him. When she bit him, he pulled her by her sweater and she tripped. He then "slung" her off of him, and she tripped and fell three to four feet to the ground. He jumped off of the porch and straddled her, grabbing her by the shoulders and telling her to calm down. When he realized she was not moving, he lifted her head and noticed blood all over his hands.

Greg testified that, when he grabbed Cindy from behind, he did not intend to harm her. He also testified that, when he "slung" her away from him off of the porch, he was not trying to hurt her and did not intend to throw her onto a brick. Rather, he stated that he simply reacted after she bit his arm. He also testified that he did not know there were bricks in the yard, that he had not attempted to throw her in a particular direction, and that he was not aware of any risk or harm his actions might cause.

Greg further testified that, when he grabbed and shook her after she fell, he did not intend to harm her, he did not know there was a brick under her head, and he did not intend to hit her head on a brick or anything else. Instead, he testified that he was trying to get her to calm down.

The medical examiner, Dr. Gregory Wanger, testified that the pattern on the injury to the victim's skull matched the pattern on one of the bricks found at the scene. He stated that, based on the position of the skull fracture and the bruising to the victim's brain, the victim's head was moving when it sustained the injury. He testified that her injuries could have been caused by her falling off of the porch and hitting her head on a brick or from her head being slammed into a brick.

The indictment in this case alleged that the appellant "did, with the intent to cause the death of Cynthia Michel Koppersmith, cause the death of Cynthia Michel Koppersmith, by striking her head against a brick, in violation of § 13A-6-2 of the Code of Alabama (C.R.11)." Koppersmith requested that the trial court instruct the jury on criminally negligent homicide as a lesser included offense of murder. However, the trial court denied that request, and it instructed the jury only on the offense of reckless manslaughter.

OPINION

Section 13A-6-3(a), Ala.Code 1975, provides that a person commits the crime of manslaughter if he recklessly causes the death of another person. A person acts recklessly with respect to a result or to a circumstance described

by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

"A person commits the crime of criminally negligent homicide if he causes the death of another person by criminal negligence" § 13A-6-4(a), Ala.Code 1975. A person acts with criminal negligence with respect to a result or to a circumstance which is defined by statute as an offense when he fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation. A court or jury may consider statutes or ordinances regulating the defendant's conduct as bearing upon the question of criminal negligence.

The only difference between manslaughter under Section 13A-6-3(a)(1) and criminally negligent homicide is the difference between recklessness and criminal negligence. The reckless offender is aware of the risk and "consciously disregards" it. On the other hand, the criminally negligent offender is not aware of the risk created ("fails to perceive") and, therefore, cannot be guilty of consciously disregarding it. The difference between the terms "recklessly" and "negligently" is one of kind, rather than degree. Each actor creates a risk or harm. The reckless actor is aware of the risk and disregards it; the negligent actor is not aware of the risk but should have been aware of it.

Thus, we must determine whether there was any evidence before the jury from which it could have concluded that the appellant did not perceive that his wife might die as a result of his actions. We conclude that there was evidence from which the jury could have reasonably believed that his conduct that caused her to fall was unintentional and that he was not aware he was creating a risk to his wife. He testified that, after she bit him, his reaction—which caused her to fall to the ground—was simply reflexive.

He also testified that he did not know there were bricks in the yard. Even in his statement to the police in which he said he was slamming her head against the ground, Koppersmith said he did not know at that time that there was a brick under her head.

Finally, he stated that he did not intend to throw her onto a brick or harm her in any way when he "slung" her, and that he did not intend to hit her head on a brick or otherwise harm her when he grabbed and shook her after she had fallen.

Because there was a reasonable theory from the evidence that would have supported giving a jury instruction on criminally negligent homicide, the trial court erred in refusing to instruct the jury on criminally negligent homicide. Thus, we must reverse the trial court's judgment and remand this case for a new trial.

REVERSED AND REMANDED.

QUESTIONS

1. **List all of the facts relevant to determining Koppersmith's mental state with respect both to his acts and the results of his actions.**
2. **In your opinion, was Koppersmith reckless or negligent? Support your answer with relevant facts.**
3. **Is it possible to argue that Koppersmith knowingly or even purposely killed his wife? What facts, if any, support these two states of mind?**

LO 4

Liability without Fault (Strict Liability)

You've learned that criminal liability depends on at least some degree of blameworthiness, at least that's true when we're talking about serious crimes like the cases in the previous culpability sections. But there are enormous numbers of minor crimes where there's liability without either subjective or objective fault. We call this liability without fault strict liability, meaning it's based on voluntary action alone. Let's be blunt: strict liability makes accidental injuries a crime. In strict liability cases, the prosecution has to prove only that defendants committed a voluntary criminal act that caused harm. The U.S. Supreme Court has upheld the power of legislatures to create strict liability offenses to protect the "public health and safety," as long as they make clear they're imposing liability without fault (Chapter 3).

Supporters of strict liability make two main arguments. First, there's a strong public interest in protecting public health and safety. Strict liability arose during the industrial revolution when manufacturing, mining, and commerce exposed large numbers of the public to death, mutilation, and disease from poisonous fumes, unsafe railroads, workplaces, and adulterated foods, and other products.

Second, the penalty for strict liability offenses is almost always mild (fines, not jail time).

But strict liability still has its critics. The critics say it's too easy to expand strict liability beyond offenses that seriously endanger the public. They're always wary of making exceptions to blameworthiness, which is central to the *mens rea* principle. It does no good (and probably a lot of harm) to punish people who haven't harmed others purposely, knowingly, recklessly, or at least negligently. At the end of the day, the critics maintain, a criminal law without blameworthiness will lose its force as a stern moral code.

The court decided that Minnesota's legislature created a strict liability open bottle offense in our next case excerpt, *State v. Loge* (2000).

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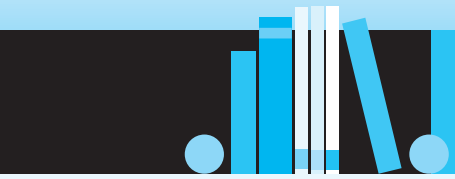


CASE Did the "Open Bottle Law" Create a Strict Liability Offense?

State v. Loge
608 N.W.2d 152 (Minn. 2000)

HISTORY

Appellant Steven Mark Loge was cited for a violation of Minn. Stat. § 169.122, subd. 3 (1998), which makes it unlawful for the driver of a motor vehicle, when the owner is not present, "to keep or allow to be kept in a motor vehicle when such vehicle is upon the public highway any bottle or receptacle containing intoxicating liquors or 3.2 percent malt liquors which has been opened." Violation of the statute is a misdemeanor. Loge was convicted in the District Court, Freeborn County, and he appealed. The Court of Appeals affirmed, and Loge appealed to the Minnesota Supreme Court. The Supreme Court affirmed.

GILBERT, J.

FACTS

On September 2, 1997, Steven Loge borrowed his father's pickup truck to go to his evening job. Driving alone on his way home from work, he was stopped by two Albert Lea City police officers on County Road 18 at approximately 8:15 p.m. because he appeared to be speeding. Loge got out of his truck and stood by the driver's side door. While one officer was talking with Loge, the second officer, who was standing by the passenger side of the truck, observed a bottle, which he believed to be a beer bottle, sticking partially out of a brown paper bag underneath the passenger's side of the seat. He retrieved that bottle, which was open and had foam on the inside. He searched the rest of the truck and found one full, unopened can of beer and one empty beer can. After the second officer found the beer bottle, the first officer asked Loge if he had been drinking.

Loge stated that he had two beers while working and was on his way home. Loge passed all standard field sobriety tests. The officers gave Loge a citation for a violation of the open bottle statute.

At the trial Loge testified that the bottle was not his, that he did not know it was in the truck and had said that to one of the officers. The trial court found that one of the police officers "observed the neck of the bottle, which was wrapped in a brown paper sack, under the pickup's seat of the truck being operated by defendant." The trial court held that subdivision 3 creates "absolute liability" on a driver/owner to "inspect and determine whether there are any containers" in the motor vehicle in violation of the open bottle law and found Loge guilty. Loge was sentenced to five days in jail, execution stayed, placed on probation for one year, and fined $150 plus costs of $32.50.

Loge appealed the verdict. The Court of Appeals affirmed the decision of the trial court. The Court of Appeals held that proof of knowledge that the bottle was in the truck is not required to sustain a conviction. Loge's petition for further review was granted. The Attorney General then assumed responsibility for this case and filed a respondent's brief in which the Attorney General argues, contrary to the previous position of the state, that there is no knowledge requirement under subdivision 3.

OPINION

Loge is seeking reversal of his conviction because, he argues, the trial court and court of appeals erroneously interpreted subdivision 3 of the open bottle statute not to

require proof of knowledge. Minnesota Statute § 169.122 reads in part:

> *Subdivision 1.* No person shall drink or consume intoxicating liquors or 3.2 percent malt liquors in any motor vehicle when such vehicle is upon a public highway.
>
> *Subdivision 2.* No person shall have in possession while in a private motor vehicle upon a public highway, any bottle or receptacle containing intoxicating liquor or 3.2 percent malt liquor which has been opened, or the seal broken, or the contents of which have been partially removed. This subdivision does not apply to a bottle or receptacle that is in the trunk of the vehicle if it is equipped with a trunk, or that is in another area of the vehicle not normally occupied by the driver and passengers if the vehicle is not equipped with a trunk.
>
> *Subdivision 3.* It shall be unlawful for the owner of any private motor vehicle or the driver, if the owner be not then present in the motor vehicle, to keep or allow to be kept in a motor vehicle when such vehicle is upon the public highway any bottle or receptacle containing intoxicating liquors or 3.2 percent malt liquors which has been opened, or the seal broken, or the contents of which have been partially removed except when such bottle or receptacle shall be kept in the trunk of the motor vehicle when such vehicle is equipped with a trunk, or kept in some other area of the vehicle not normally occupied by the driver or passengers, if the motor vehicle is not equipped with a trunk. A utility compartment or glove compartment shall be deemed to be within the area occupied by the driver and passengers.

An analysis of a statute must begin with a careful and close examination of the statutory language to ascertain and effectuate legislative intent. If the meaning of the statute is clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.

Minn.Stat. § 169.122, subd. 3 establishes liability for a driver when that driver "*keeps or allows to be kept*" [emphasis added] any open bottle containing intoxicating liquor within the area normally occupied by the driver and passengers. These two alternate concepts are separated by the disjunctive "or" not "and." Unlike the use of the word "and," "or" signifies the distinction between two factual situations. We have long held that in the absence of some ambiguity surrounding the legislature's use of the word "or," we will read it in the disjunctive and require that only one of the possible factual situations be present in order for the statute to be satisfied. Accordingly, we limit our opinion to the words "to keep."

In delineating the elements of the crime, we have also held that the legislature is entitled to consider what it deems "expedient and best suited to the prevention of crime and disorder." If knowledge was a necessary element of the open container offense, there would be a substantial, if not insurmountable, difficulty of proof. It is therefore reasonable to conclude that the legislature, weighing the significant danger to the public, decided that proof of knowledge under subdivision 3 was not required.

The legislature has made knowledge distinctions within its traffic statutes that also guide our interpretation. For example, with respect to marijuana in a motor vehicle, the Minnesota legislature has used language similar to the language found in section 169.122, subdivision 3 ("keep or allow to be kept") but added a knowledge requirement. An owner, or if the owner is not present, the driver, is guilty of a misdemeanor if he "knowingly *keeps* or *allows to be kept*" [emphasis added] marijuana in a motor vehicle. Minn.Stat. § 152.027, subd. 3 (1998). If the legislature had intended Section 169.122 to have a knowledge requirement, it could have added the word "knowingly," as the legislature did in Section 152.027.

Lastly, Loge argues that an interpretation excluding knowledge as an element could lead to absurd results. While it is true that the legislature does not intend a result that is absurd or unreasonable, we do not believe such a result exists here. Loge's conviction resulted from an officer standing outside the truck observing the open container of beer sticking partially out of a brown bag underneath the seat on the passenger side of the truck Loge was driving. By simply taking control of the truck, Loge took control and charge of the contents of the truck, including the open bottle, even if he did not know the open bottle was in the truck.

AFFIRMED.

DISSENT

ANDERSON, J.

I respectfully dissent. In its effort to reach a correct policy decision, the majority disregards our proper role as interpreters of the law. In doing so, the majority has preempted the legislature's function and assumed the mantle of policymaker.

I agree that under certain circumstances the legislature may provide that criminal liability attach without requiring any showing of intent or knowledge on the part of the person charged. Further, in the context of open containers of alcohol in motor vehicles, there is a credible argument that it is good public policy given the social and economic costs that result from the combination of alcohol and motor vehicles. But, all of that said, the majority's analysis simply does not demonstrate the requisite clear statement of legislative intent necessary to create criminal liability in the absence of a showing of knowledge or intent.

We have stated that when the legislature intends to make an act unlawful and to impose criminal sanctions without any requirement of intent or knowledge, it must do so clearly. Historically, our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do

wrong. § 169.122, subd. 3, simply lacks the requisite clarity to support the imposition of criminal liability without any showing of intent or knowledge.

The majority cannot avoid the implications of the term "allow" because it is convenient to do so. In other contexts, we have held that the inclusion of words like "permit" (a synonym of "allow") clearly indicates a legislative intent to require some level of knowledge or intent.

Under the majority's holding, we now will impose criminal liability on a person, not simply for an act that the person does not know is criminal, but also for an act the person does not even know he is committing. While the district court and the majority seem to assume that everyone who drives a motor vehicle knows that he or she is obligated to search the entire passenger compartment of the vehicle before driving on the state's roads, the law imposes no such requirement.

Most drivers would be surprised to discover that after anyone else used their vehicle—children, friends, spouse—they are criminally liable for any open containers of alcohol that are present, regardless of whether they know the containers are there. This also means that any prudent operator of a motor vehicle must also carefully check any case of packaged alcohol before transport and ensure that each container's seal is not broken. See Minn. Stat. § 169.122 (defining an open bottle as a container that is open, has the contents partially removed, or has the seal broken). Under the majority's interpretation, all of these situations would render the driver criminally liable under Minn. Stat. § 169.122. Without a more clear statement by the legislature that this is the law, I cannot agree with such an outcome.

QUESTIONS

1. **What words, if any, in the statute indicate a *mens rea* requirement?**
2. **What *mens rea*, if any, do the words in the statute require?**
3. **Summarize the arguments that the majority of the court give to support this as a strict liability offense.**
4. **What arguments did the dissent give in response to the majority's arguments?**
5. **Do you agree with the majority or the dissent? Defend your answer.**

Concurrence

The **principle of concurrence** means that some mental fault has to trigger the criminal act in conduct crimes and the cause in bad result crimes. So all crimes, except strict liability offenses, are subject to the concurrence requirement. In practice, concurrence is an element in all crimes where the mental attitude was formed with purpose, knowledge, recklessness, or negligence. Suppose you and your friend agree to meet at her house on a cold winter night. She's late because her car won't start. So she calls you on her cell phone and tells you to break the lock on her front door so you can wait inside safe from the cold. But once you're inside, you decide to steal her TiVo. Have you committed burglary? No, because in crimes of criminal conduct, the principle of concurrence requires that a criminal intent *(mens rea)* trigger a criminal act *(actus reus)*. You decided to steal her TiVo after you broke into and entered her house. Burglary requires that the intent to steal set in motion the acts of breaking and entering. That's how concurrence applies to burglary, a crime of criminal conduct.

Now, let's look at an example of concurrence in murder, a bad result crime. Shafeah hates her sister Nazirah and plans to kill her by running over her with her Jeep Grand Cherokee. Coincidentally, just as Shafeah is headed toward Nazirah in her Cherokee, a complete stranger in a Hummer H1 appears out of nowhere and accidentally runs over and kills Nazirah. Shafeah gets out of her Grand Cherokee, runs over to Nazirah's dead body, and gleefully dances around it. Although definitely a creepy thing to do, Shafeah's not a murderer because her criminal conduct (driving her Cherokee with the intent to kill Nazirah) didn't cause Nazirah's death. Concurrence here means the criminal conduct has to produce the criminal harm; the harm can't be a coincidence (Hall 1960, 185–90; Chapter 11).

We'll say no more about concurrence, either here or in the remaining chapters. Not because it's not important. Quite the contrary, it's critical to criminal liability. But it's never

an issue, at least not in real cases—not in the thousands of appellate court cases I've read over the years. And from what lawyers and trial judges I've known tell me, it's never an issue in the cases they try and decide. It's briefly noted here, but you'll rarely see it again. So for your purposes, know what it is, know it's a critical element, and that's enough.

Causation

LO 5

Causation is about holding an actor accountable for the results of her conduct. Causation applies only to bad result crimes, the most prominent being criminal homicide (Chapter 9). But there are others, such as causing bodily harm in assault, damage to property in malicious mischief, and destruction of property in arson. Like all elements of crime, prosecutors have to prove causation beyond a reasonable doubt. Proving causation requires proving two kinds of cause:

1. Factual cause (also called "but for" cause) of death, other bodily harm, and damage to and destruction of property.
2. Legal cause (also called "proximate" cause) of death, other bodily harm, and damage to and destruction of property.

Factual ("but for") Cause

Factual cause is an empirical question of fact that asks whether an actor's conduct triggered a series of events that ended in causing death or other bodily harm; damage to property; or destruction of property. In the cases and statutes, factual cause usually goes by the name "but for" cause, or if you want to be fancy and use its Latin name, *sine qua non* cause. **"But for" cause** means, if it weren't for an actor's conduct, the result wouldn't have occurred.

Put another way, an actor's conduct triggered a chain of events that, sooner or later, ended in death or injury to a person or damage to and/or destruction of property. For example, I push a huge smooth round rock down a hill with a crowd at the bottom because I want to watch the crowd panic and scatter. The people see the rock and, to my delight, they scatter. Unfortunately, the rock hits and kills two people who couldn't get out of its path. My push is the cause in fact (the "but for") that kills the two people at the bottom. If I hadn't pushed the rock, they'd be alive. The MPC, Section 2.03(1) puts it this way: "Conduct is the cause of a result when it is an antecedent but for which the result in question would not have occurred."

Factual cause is an objective, empirical question of fact; that's why we call it factual cause. Proving factual cause in almost all real cases is as easy as the no-brainer example of pushing the rock. Proving "but for" cause is necessary, but it's not enough to satisfy the causation requirement. To be sufficient, the prosecution has to prove legal (also called "proximate" cause), too.

Legal ("Proximate") Cause

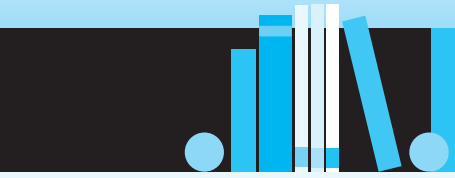
Legal ("proximate") cause is a subjective question of fairness that appeals to the jury's sense of justice. It asks, "Is it fair to blame the defendant for the harm triggered by a chain of events her action(s) set in motion?" If the harm is accidental enough or far enough

removed from the defendant's triggering act, there's a reasonable doubt about the justice of blaming the defendant, and there's no proximate cause.

Take our rock pushing example. Change the facts: On the way down the hill, the rock runs into a tree and lodges there. A year later, a mild earthquake shakes the rock free and it finishes its roll by killing the victims at the bottom. Now, the no-brainer isn't a no-brainer anymore. Why? Because something else, facts in addition to my pushing contributed to the deaths. We call this "something else" an **intervening cause**, and now we've got our proximate cause problem: Is it fair to punish me for something that's not entirely my fault? As with factual cause, most legal (proximate) cause cases don't create problems, but the ones that do are serious crimes involving death, mutilation, injury, and property destruction and damage.

How do we (and the jury or judge in nonjury cases) determine whether it's fair to attribute the cause of a result to a defendant's conduct? The common law, criminal codes, and the MPC have used various and highly intricate, elaborate devices to help fact finders decide the proximate cause question. For our purposes, they're not too helpful. The best way to understand how fact finders and judges answer the fairness question is to look at how they decided it was fair to impute the bad result to actors' conduct in some real cases. The court in our next case excerpt, *People v. Armitage* (1987), decided that it was fair to attribute his drinking buddy's death to Armitage's reckless boat driving. In other words, Armitage's conduct was the proximate cause of his friend's death.

The court in our next case excerpt, People v. Armitage (1987), decided that it was fair to attribute his drinking buddy's death to Armitage's reckless boat driving.



CASE Is It Fair to Blame the Defendant for His Drinking Buddy's Death?

People v. Armitage
239 Cal.Rptr. 515 (1987 Cal.App.)

HISTORY

David James Armitage (the defendant) was originally charged with one count of involuntary manslaughter (Pen. Code, § 192, subd. (b)), as well as felony drunk boating (Harb. & Nav.Code, § 655, subd. (c)). Pursuant to a bargain the People dismissed the involuntary manslaughter charge and agreed that if found guilty the defendant would not be sentenced to more than the middle base term (two years) for the felony drunk boating charge. Armitage was convicted in the Superior Court, Yolo County, of felony drunk boating causing death. The defendant appealed. The Court of Appeal, Third District, affirmed.

SPARKS, J.

FACTS

At the time of the defendant's crime, Harbors and Navigation Code, section 655, subdivision (c) provided:

> No person shall operate any boat or vessel or manipulate any water skis, aquaplane, or similar device while under the influence of intoxicating liquor, any drug, or under the combined influence of intoxicating liquor and any drug, and while so operating, do any act forbidden by law, or neglect any duty imposed by law, in the use of the boat, vessel, water skis, aquaplane, or similar device, which act or neglect proximately causes death or serious bodily injury to any person other than himself.

On the evening of May 18, 1985, the defendant and his friend, Peter Maskovich, were drinking in a bar in the riverside community of Freeport. They were observed

leaving the bar around midnight. In the early morning hours, the defendant and Maskovich wound up racing defendant's boat on the Sacramento River while both of them were intoxicated. An autopsy revealed that at the time of his death Maskovich had a blood alcohol level of .25 percent. A blood sample taken from the defendant at approximately 7:00 a.m. revealed a blood alcohol level at that time of .14 percent. The defendant does not dispute that he was intoxicated at the time of the accident. The boat did not contain any personal flotation devices.

At about 3:00 a.m. Gary Bingham, who lived in a house boat in a speed zone (five miles per hour, no wake), was disturbed by a large wake. He went out to yell at the boaters and observed a small aluminum boat with two persons in it at the bend in the river. The boaters had the motor wide open, were zig-zagging, and had no running lights on at the time. About the same time, Rodney and Susan Logan were fishing on the river near the Freeport Bridge when they observed an aluminum boat with two men in it coming up the river without running lights. The occupants were using loud and vulgar language and were operating the boat very fast and erratically.

James Snook lives near the Sacramento River in Clarksburg. Sometime around 3:00 a.m. the defendant came to his door. The defendant was soaking wet and appeared quite intoxicated. He reported that he had flipped his boat over in the river and had lost his buddy. He said that at first he and his buddy had been hanging on to the overturned boat, but that his buddy swam for shore and he did not know whether he had made it. As it turned out, Maskovich did not make it; he drowned in the river.

Mr. Snook notified the authorities of the accident. Deputy Beddingfield arrived and spent some time with the defendant in attempting to locate the scene of the accident and the victim. Eventually, Deputy Beddingfield took the defendant to the sheriff's boat shed to meet with officers who normally work on the river. At the shed they were met by Deputy Snyder.

Deputy Snyder attempted to question the defendant about the accident and the defendant stated that he had been operating the boat at a high rate of speed and zig-zagging until it capsized. The defendant also stated that he told the victim to hang on to the boat but his friend ignored his warning and started swimming for the shore. As he talked to the defendant, the officer formed the opinion that the defendant was intoxicated. Deputy Snyder then arrested the defendant and informed him of his rights. The defendant waived his right to remain silent and repeated his statement.

OPINION

The evidence establishes that at about 3 a.m., and while he was drunk, defendant operated his boat without lights at a very high rate of speed in an erratic and zig-zagging manner until he capsized it. This evidence supports the finding that defendant not only operated his boat while intoxicated, but that he operated his boat at an unsafe speed and in a reckless or negligent manner so as to endanger the life, limb or property of other persons (Har. & Nav.Code, § 655, subd. (a); 14 Cal.Admin.Code, § 6615). In doing so defendant did an act forbidden by law, or neglected a duty imposed by law, in the operation of his boat. This evidence supports defendant's conviction.

Defendant contends his actions were not the proximate cause of the death of the victim. In order to be guilty of felony drunk boating the defendant's act or omission must be the proximate cause of the ensuing injury or death. Defendant asserts that after his boat flipped over he and the victim were holding on to it and the victim, against his advice, decided to abandon the boat and try to swim to shore. According to defendant the victim's fatally reckless decision should exonerate him from criminal responsibility for his death.

We reject defendant's contention. The question whether defendant's acts or omissions criminally caused the victim's death is to be determined according to the ordinary principles governing proximate causation. **Proximate cause of a death** has traditionally been defined in criminal cases as "a cause which, in natural and continuous sequence, produces the death, and without which the death would not have occurred." Thus, proximate cause is clearly established where the act is directly connected with the resulting injury, with no intervening force operating.

Defendant claims that the victim's attempt to swim ashore, whether characterized as an intervening or a superseding cause, constituted a break in the natural and continuous sequence arising from the unlawful operation of the boat. The claim cannot hold water. It has long been the rule in criminal prosecutions that the contributory negligence of the victim is not a defense. In order to exonerate a defendant the victim's conduct must not only be a cause of his injury, it must be a **superseding cause**. A defendant may be criminally liable for a result directly caused by his act even if there is another contributing cause. If an intervening cause is a normal and reasonably foreseeable result of defendant's original act the intervening act is "dependent" and not a superseding cause, and will not relieve defendant of liability. An obvious illustration of a dependent cause is the victim's attempt to escape from a deadly attack or other danger in which he is placed by the defendant's wrongful act. Thus, it is only an unforeseeable intervening cause, an extraordinary and abnormal occurrence, which rises to the level of an exonerating, superseding cause.

Consequently, in criminal law a victim's predictable effort to escape a peril created by defendant is not considered a superseding cause of the ensuing injury or death. As leading commentators have explained it, an unreflective act in response to a peril created by defendant will not break a causal connection. In such a case, the actor has a choice, but his act is nonetheless unconsidered. "When defendant's conduct causes panic an act done under the influence of panic or extreme fear will not negate causal connection unless the reaction is wholly

abnormal" (Hart & Honore 1985, p. 149.) This rule is encapsulated in a standard jury instruction: "It is not a defense to a criminal charge that the deceased or some other person was guilty of negligence, which was a contributory cause of the death involved in the case" (CALJIC No. 8.56 (1979 Revision).

Here defendant, through his misconduct, placed the intoxicated victim in the middle of a dangerous river in the early morning hours clinging to an overturned boat. The fact that the panic-stricken victim recklessly abandoned the boat and tried to swim ashore was not a wholly abnormal reaction to the perceived peril of drowning. Just as "detached reflection cannot be demanded in the presence of an uplifted knife" (*Brown v. United States*, 1921), neither can caution be required of a drowning man. Having placed the inebriated victim in peril, defendant cannot obtain exoneration by claiming the victim should have reacted differently or more prudently. In sum, the evidence establishes that defendant's acts and omissions were the proximate cause of the victim's death.

The judgment is affirmed.

QUESTIONS

1. **List all of the facts and circumstances relevant to decide whether Armitage's actions were the "but for" cause of Peter Maskovich's death.**
2. **List all of the facts and circumstances relevant to decide whether Armitage's actions were the proximate cause of Peter Maskovich's death.**
3. **According to the Court, why were Maskovich's actions not a superseding cause of his own death?**

EXPLORING FURTHER

Causation

1. Were His Actions in the Drag Race the Legal Cause of Death?

Velazquez v. State, 561 So.2d 347 (Fla. App. 1990)

FACTS At about 2:30 a.m., Isaac Alejandro Velazquez met the deceased Adalberto Alvarez at a Hardee's restaurant in Hialeah, Florida. The two had never previously met, but in the course of their conversation agreed to "drag race" each other with their automobiles. They accordingly left the restaurant and proceeded to set up a quarter-mile drag race course on a nearby public road that ran perpendicular to a canal alongside the Palmetto Expressway in Hialeah; a guardrail and a visible stop sign stood between the end of this road and the canal.

The two men began their drag race at the end of this road and proceeded away from the canal in a westerly direction for a quarter mile. Upon completing the course without incident, the deceased Alvarez suddenly turned his automobile 180 degrees around and proceeded east toward the starting line and the canal; Velazquez did the same and followed. Alvarez led and attained an estimated speed of 123 miles per hour; he was not wearing a seat belt and subsequent investigation revealed that he had a blood alcohol level between .11 and .12.

Velazquez, who had not been drinking, trailed Alvarez the entire distance back to the starting line and attained an estimated speed of 98 miles per hour. As both drivers approached the end of the road, they applied their brakes, but neither could stop. Alvarez, who was about a car length ahead of Velazquez, crashed through the guardrail first and was propelled over the entire canal, landing on its far bank; he was thrown from his car upon impact, was pinned under his vehicle when it landed on him, and died instantly from the resulting injuries.

Velazquez also crashed through the guardrail but landed in the canal where he was able to escape from his vehicle and swim to safety uninjured. Velazquez was charged with vehicular homicide.

Were his actions in participating in the drag race the legal (proximate) cause of Alvarez's death?

DECISION No, according to the Appeals Court:

> In unusual cases like this one, whether certain conduct is deemed the legal cause of a certain result is ultimately a policy question. The question of legal causation thus blends into the question of whether we are willing to hold a defendant responsible for a prohibited result. Or, stated differently, the issue is not causation; it is responsibility. In my opinion, policy considerations are against imposing responsibility for the death of a participant in a race on the surviving racer when his sole contribution to the death is the participation in the activity mutually agreed upon.

2. Who Legally Caused His Death?

People v. Kibbe, 362 N.Y.S.2d 848 (1974)

FACTS Barry Kibbe and a companion, Roy Krall, met George Stafford in a bar on a cold winter night. They noticed Stafford had a lot of money and was drunk. When Stafford asked them for a ride, they agreed, having already decided to rob him. "The three men entered Kibbe's automobile and began the trip toward Canandaigua. Krall drove the car while Kibbe demanded that Stafford turn over any money he had. In the course of an exchange, Kibbe slapped Stafford several times, took his money, then compelled him to lower his trousers and to take off his shoes to be certain that Stafford had given up all his money. When they were satisfied that Stafford had no more money on his person, the defendants forced him to exit the Kibbe vehicle.

As he was thrust from the car, Stafford fell onto the shoulder of the rural two-lane highway on which they had

been traveling. His trousers were still down around his ankles, his shirt was rolled up toward his chest, he was shoeless, and he had also been stripped of any outer clothing. Before the defendants pulled away, Kibbe placed Stafford's shoes and jacket on the shoulder of the highway. Although Stafford's eyeglasses were in Kibbe's vehicle, the defendants, either through inadvertence or perhaps by specific design, did not give them to him before they drove away.

Michael W. Blake, a college student, was driving at a reasonable speed when he saw Stafford in the middle of the road with his hands in the air. Blake could not stop in time to avoid striking Stafford and killing him.

Did Kibbe and his companion or Blake legally cause Stafford's death?

DECISION Kibbe and his companion legally caused Stafford's death:

> To be a sufficiently direct cause of death so as to warrant the imposition of a criminal penalty, it will suffice if it can be said beyond a reasonable doubt, as indeed it can be here said, that the ultimate harm is something which should have been foreseen as being reasonably related to the acts of the accused. We conclude that Kibbe and his companion's activities were a sufficiently proximate cause of the death of George Stafford so as to warrant the imposition of criminal sanctions. In engaging in what may properly be described as a despicable course of action, Kibbe and Krall left a helplessly intoxicated man without his eyeglasses in a position from which, because of these attending circumstances, he could not extricate himself and whose condition was such that he could not even protect himself from the elements.
>
> Under the conditions surrounding Blake's operation of his truck (*i.e.*, the fact that he had his low beams on as the two cars approached; that there was no artificial lighting on the highway; and that there was insufficient time in which to react to Stafford's presence in his lane), we do not think it may be said that any intervening wrongful act occurred to relieve the defendants from the directly foreseeable consequences of their actions.

Ignorance and Mistake

> The rather simple rule that an honest mistake of fact or law is a defense when it negates a required mental element of the crime would appear to be fairly easy to apply to a variety of cases. One merely identifies the mental state or states, and then inquires whether that mental state can exist in light of the defendant's ignorance or mistake of fact or law. (LaFave 2003a, 283–304)

LO 6

Mistake is a defense whenever the mistake prevents the formation of any fault-based mental attitude, namely purpose, knowledge, recklessness, or negligence. There's a debate over whether to call mistakes a defense (*General v. State*, 2002). On one side are those who say what the defendant did was wrong, but her mistake excused her; they call mistake a **defense of excuse** (Chapter 6).

The other side says the mistake prevented the formation of a culpable state of mind; they say there's no crime at all because the mental element is missing. It's impossible to have a defense to conduct that's not criminal conduct in the first place. They're not really defenses, in the sense that they either justify or excuse criminal liability. Instead, mistakes raise a reasonable doubt that the required mental element for criminal conduct is present.

Mistakes sometimes are called a **failure-of-proof defense** because defendants usually present some evidence that the mistake raises a reasonable doubt about the formation of a mental element required for criminal liability. We'll see examples of defenses that can be called either defenses of excuse or failures of proof of mental attitude in Chapter 6. We won't get into the details of why, or whether to, treat mistakes as a defense of excuse or as a failure of proof here. But note that the debate isn't just an academic mental exercise; it has important procedural and other consequences (LaFave 2003a, 282–83).

To simplify matters for you, we'll follow the MPC's approach, which is that mistake matters when it prevents the formation of a mental attitude required by a criminal

statute. To decide whether a mistake negates the mental element, we need to know what mental element the statute requires. Suppose it's a crime in your state for a bartender to sell alcoholic beverages to anyone under 21 for the purpose of supplying a minor with an alcoholic beverage. You're a bartender; you believe the customer you just sold to is 21 because he showed you a driver's license with a birth date more than 22 years prior to today's date. He's really 18. Your mistake negates the mental element—purpose.

Suppose the statute says "recklessly supplies anyone under 21." You look at another customer's license; the date looks altered, but you're not sure. You say, "This date looks like it's been changed, but what the hell, I feel like living dangerously tonight" and sell her an orange blossom martini. She's 19. You're guilty, because you created a "substantial and unjustifiable risk" that she was under 21.

One final and important point about mistake; it doesn't work with strict liability crimes. Why? There's no mental element in strict liability offenses. In other words, the trail of mistake doesn't have to (in fact, it can't) lead to fault. To follow through with the bartender example, suppose the statute makes it a crime "to sell any alcoholic beverage to a person under 21." There's no mental element to negate, so it doesn't matter whether you sold it purposely, knowingly, recklessly, or negligently.

Our last case excerpt, *State v. Sexton* (1999), adopted the MPC failure of proof approach to mistake, holding that Ronald Sexton's alleged mistaken belief that the gun he fired at his friend "related to whether the state failed to prove recklessness beyond a reasonable doubt." In recommending the failure of proof approach, the unanimous New Jersey Supreme Court wrote:

> Evidence of an actor's mistaken belief relates to the fairly straightforward inquiry of whether the defendant "consciously disregarded a substantial and unjustifiable risk" that death would result from his conduct and that the risk was 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 involved a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation." (1132–33)

Our last case excerpt, State v. Sexton (1999), adopted the MPC failure of proof approach to mistake, holding that Ronald Sexton's alleged mistaken belief that the gun he fired at his friend "related to whether the state failed to prove recklessness beyond a reasonable doubt."

CASE Did He Shoot His Friend by Mistake?

State v. Sexton
733 A.2d 1125 (NJ 1999)

HISTORY

Ronald Sexton (defendant) was convicted in the Superior Court, Law Division, Essex County, of reckless manslaughter as a lesser-included offense of murder, and unlawful possession of a handgun without a permit. He appealed. The Superior Court, Appellate Division, reversed. The state's petition for certification was granted. The Supreme Court, O'Hern, J., held that defendant's alleged mistaken belief that the gun he fired at victim was not loaded related to whether state failed to prove essential element beyond reasonable doubt. Affirmed and remanded.

O'HERN, J. for a unanimous Court

FACTS

On May 10, 1993, Shakirah Jones (then 17), friend of Ronald Sexton (then 15), the defendant, and the victim (then 17), Alquadir Matthews, overheard the two young men having what she described as a "typical argument." The two young men walked from a sidewalk into a vacant lot. Jones saw defendant with a gun in his hand, but she did not see defendant shoot Matthews.

Jones heard Matthews tell defendant, "There are no bullets in that gun," and then walk away. Defendant called Matthews back and said, "You think there are no bullets in this gun?" Matthews replied, "Yeah." Jones heard the gun go off. A single bullet killed Matthews.

A ballistics expert testified that there was a spring missing from the gun's magazine, which prevented the other bullets from going into the chamber after the first bullet was discharged. In this condition, the gun would have to be loaded manually by feeding the live cartridge into the chamber prior to firing. The expert later clarified that if the magazine had been removed after one round had been inserted into the chamber, it would be impossible to see whether the gun was loaded without pulling the slide that covered the chamber to the rear. The expert agreed that, for someone unfamiliar with guns, once the magazine was removed, it was "probably a possible assumption" that the gun was unloaded.

Defendant's version was that when the two young men were in the lot, Matthews showed defendant a gun and "told me the gun was empty." Defendant "asked him was he sure," and "he said yes." When Matthews asked if defendant would like to see the gun, defendant said "yes." Defendant "took the gun and was looking at it and it just went off." He never unloaded the gun or checked to see if there were any bullets in the gun. He had never before owned or shot a gun.

A grand jury indicted defendant for purposeful or knowing murder, possession of a handgun without a permit, and possession of a handgun for an unlawful purpose. At the close of the state's case, defendant moved to dismiss the murder charge because the victim had told him that the gun was not loaded. The court denied the motion.

The court charged murder and the lesser-included offenses of aggravated manslaughter and reckless manslaughter. Concerning defendant's version of the facts, the court said:

> Defense contends this was a tragic accident. That Alquadir [Matthews], says the defense, handed the gun to Ronald [defendant]. Alquadir told Ronald, you know, the gun was not loaded. Ronald believed the gun was not loaded. Ronald did not think the gun was pointed at Alquadir when it went off. But the gun went off accidentally and, says the defense, that is a very tragic and sad accident but it is not a crime.
>
> If, after considering all the evidence in this case, including the evidence presented by the defense as well as the evidence presented by the State, if you have a reasonable doubt in your mind as to whether the State has proven all the elements of any of these crimes: murder, aggravated manslaughter, or reckless manslaughter, you must find the defendant not guilty of those crimes.

The jury found defendant not guilty of murder, aggravated manslaughter, or possession of a handgun for an unlawful purpose, but guilty of reckless manslaughter and unlawful possession of a handgun without a permit. On the charge of reckless manslaughter, the court sentenced defendant to the presumptive term of seven years, three of which were parole ineligible. For possession of a handgun without a permit, the court sentenced defendant to a concurrent four-year term with no period of parole ineligibility. The court recommended that defendant serve his sentence at the Youth Correction and Reception Center.

On appeal, the Appellate Division reversed defendant's conviction. The Appellate Division held that the trial court should have charged the jury that the state bore the burden of disproving beyond a reasonable doubt defendant's mistake-of-fact defense, and that the failure to do so was plain error. The Appellate Division noted that once the defendant presents evidence of a reasonable mistake of fact that would refute an essential element of the crime charged, the state's burden of proving each element beyond a reasonable doubt includes disproving the reasonable mistake of fact.

We granted the state's petition for certification, limited to the issue of whether "mistake of fact was a defense to the charge of reckless manslaughter."

OPINION

The MPC (Model Penal Code) provides that, "Ignorance or mistake as to a matter of fact or law is a defense if: the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense. Whether a mistake would negate a required element of the offense depended on the nature of the mistake and the state of mind that the offense required. This led commentators to observe:

> Technically, such provisions [for a mistake defense] are unnecessary. They simply confirm what is stated elsewhere: "No person may be convicted of an offense unless each element of such offense is proven beyond a reasonable doubt." If the defendant's ignorance or mistake makes proof of a required culpability element impossible, the prosecution will necessarily fail in its proof of the offense.

Correctly understood, there is no difference between a positive and negative statement on the issue—what is required for liability versus what will provide a defense to liability. What is required in order to establish liability for manslaughter is recklessness (as defined by the code) about whether death will result from the conduct. A faultless or merely careless mistake may negate that reckless state of mind and provide a defense.

How can we explain these concepts to a jury? We believe that the better way to explain the concepts is to explain what is required for liability to be established. Something along the following lines will help to convey to the jury the concepts relevant to a reckless manslaughter charge:

> In this case, ladies and gentlemen of the jury, the defendant contends that he mistakenly believed that the gun was not loaded. If you find that the State has not proven beyond a reasonable doubt that the defendant was reckless in forming his belief that the gun was not loaded, defendant should be acquitted of the offense of manslaughter. On the other hand, if you find that the State has proven beyond a reasonable doubt that the defendant was reckless in forming the belief that the gun was not loaded, and consciously disregarded a substantial and unjustifiable risk that a killing would result from his conduct, then you should convict him of manslaughter.

To sum up, evidence of an actor's mistaken belief relates to whether the state has failed to prove an essential element of the charged offense beyond a reasonable doubt. As a practical matter, lawyers and judges will undoubtedly continue to consider a mistake of fact as a defense. Despite the complexities perceived by scholars, the limited number of appeals on this subject suggests to us that juries have very little difficulty in applying the concepts involved.

To require the State to disprove beyond a reasonable doubt defendant's reasonable mistake of fact introduces an unnecessary and perhaps unhelpful degree of complexity into the fairly straightforward inquiry of whether defendant consciously disregarded a substantial and unjustifiable risk that death would result from his conduct and that the risk was 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 involved a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation.

The judgment of the Appellate Division is affirmed. The matter is remanded to the Law Division for further proceedings in accordance with this opinion.

SUMMARY

LO 1

- A criminal act (*actus reus*) is necessary, but it's not enough for criminal liability, at least not liability for most serious crimes. They include a mental element (*mens rea*). It's only fair and just to punish people we can blame. We call this culpability, or blameworthiness.

LO 2

- General intent consists of the intent to commit the criminal act. Specific intent consists of the intent to commit the act plus some other element.

LO 3

- The Model Penal Code (MPC) breaks down *mens rea* into four mental states—purpose, knowledge, recklessness, and negligence.

LO 4

- Liability without fault, or strict liability, exists when there is a crime, minor by design, without either subjective (purpose, knowledge) or objective (recklessness, negligence) legal fault.

LO 5

- The element of causation applies only to "bad result" crimes. Like all elements of crime, prosecutors have to prove causation beyond a reasonable doubt. Proving causation requires proving two kinds of cause: (1) factual ("but for") cause or (2) legal (proximate) cause.

LO 6

- Ignorance of facts and law can create a reasonable doubt that the prosecution has proved the element of criminal intent. Mistake is a defense whenever the mistake prevents the formation of criminal intent.

KEY TERMS

culpability, p. 105
blameworthiness, p. 105
concurrence, p. 106
cause in fact, p. 106
legal cause, p. 106
mens rea, p. 106
motive, p. 107
subjective fault, p. 108
objective fault, p. 109
strict liability, p. 109
general intent, p. 109
specific intent, p. 110
general intent "plus," p. 110
purpose, p. 112
knowledge, p. 112
recklessness, p. 113
negligence, p. 113
purposely, p. 113
principle of concurrence, p. 123
causation, p. 124
factual cause, p. 124
"but for" cause, p. 124
legal ("proximate") cause, p. 124
intervening cause, p. 125
proximate cause of a death, p. 126
superseding cause, p. 126
defense of excuse, p. 128
failure-of-proof defense, p. 128

WEB RESOURCES

To prepare for exams, visit the *Criminal Law* companion website at www.cengage.com/criminaljustice/samaha, which features essential review and study tools such as flashcards, a glossary of terms, tutorial quizzes, and Supreme Court updates.

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LEARNING OBJECTIVES

1 That the law of self-defense is undergoing major transformation.

2 That defendants are not criminally liable if their actions were justified under the circumstances.

3 That defendants are not criminally liable if they were not responsible for their actions.

4 Understand how the affirmative defenses operate in justified and excused conduct.

5 Appreciate that self-defense limits the use of deadly force to those who reasonably believe they are faced with the choice to kill or be killed right now.

6 To know and understand the differences of the four elements of self-defense.

7 Appreciate the historic transformation of retreat and its shaping of the stand-your-ground rule and the retreat rule.

8 Understand the retreat rule and appreciate its historic transformation.

9 Understand that there is no duty to retreat from your own home to avoid using deadly force.

10 Appreciate that the "New Castle Doctrine" laws are transforming the law of self-defense.

11 That the choice to commit a lesser crime to avoid an imminent threat of harm from a greater crime is justified.

12 That the defense of consent represents the high value placed on individual autonomy in a free society.

Mary Winkler put a shoe and a wig, which she said her husband, Matthew Winkler, wanted her to wear, on the witness stand as she testified during her murder trial on Wednesday, April 18, 2007, in Selmer, Tennessee. Mary was on trial for killing her husband Matthew with a shotgun blast to his back as he lay in bed. She was sentenced to three years in prison, but with time served she could be released on probation in a little more than two months. Judge Weber McCraw said she had to serve at least 210 days of her sentence, but she got credit for the 143 days she had already spent in jail.

Defenses to Criminal Liability

Justifications

CHAPTER OUTLINE

Right to Defend or License to Kill?

Opponents and supporters of the castle laws see them in fundamentally different ways. Supporters claim them as the public reasserting fundamental rights. Marion Hammer, the first woman president of the National Rifle Association, says the castle law codifies the "*right* of the people to use any manner of force to protect their home and its inhabitants." She contends this right goes back to the 1400s, and that Florida prosecutors and courts took away that right by requiring that "law-abiding citizens who are attacked by criminals" have to retreat.

Gun control advocates say the laws "are ushering in a violent new era where civilians may have more freedom to use deadly force than even the police." They're not a "right to defend"; they're a "license to kill."

LO 2

Proving **criminal conduct** (a criminal act and criminal intent) is necessary to hold individuals accountable for the crimes they commit. But criminal conduct alone is not enough to establish criminal liability. It's only the first of three requirements. Recall the framework for analyzing criminal liability. First, we have to answer the question asked in Chapters 3 and 4, "Was there criminal conduct?" If there wasn't, the inquiry is over, and the defendant is free. If there was, we have to answer the question of this chapter, "Was the criminal conduct justified?" If it was, the inquiry ends, and the defendant goes free. If it wasn't justified, we have to go on to answer the third question, asked in Chapter 6, "Was the unjustified conduct excused?" If it wasn't, the defendant is criminally accountable for her criminal conduct. If it was, the defendant may, or may not, go free.

The principles of justification and excuse comprise several traditional defenses to criminal liability; we'll discuss several in this chapter. In the **justification defenses**, defendants admit they were responsible for their acts but claim what they did was right (justified) under the circumstances. The classic justification is self-defense; kill or be killed. "I killed her; I'm responsible for killing her; but under the circumstances it was right to kill her." So, even if the government proves all the elements in the crime beyond a reasonable doubt, the defendant walks because she's not blameworthy. In the **excuse defenses**, defendants admit what they did was wrong but claim that, under the circumstances, they weren't responsible for what they did. The classic excuse is insanity. "What I did was wrong, but I was too insane to know or control what I did. So, under the circumstances, I'm not responsible for what I did."

LO 3

In addition to the traditional defenses of self and home, this chapter also examines, and asks you to think about "the epochal transformation" in self-defense and the defense of homes represented by the new "castle doctrine" statutes (Suk 2008, 237). More than 40 states have either passed or proposed statutes that expand the right to use deadly force to protect self and home in two ways:

1. "They permit a home resident to kill an intruder, by presuming rather than requiring proof of reasonable fear of death or serious bodily harm."
2. "They reject a general duty to retreat from attack, even when retreat is possible, not only in the home, but also in public space" (238).

LO 1

Before we examine the defenses themselves, and the dramatic changes taking place in the law of self-defense, let's look more closely at how the defenses operate in practice.

Affirmative Defenses and Proving Them

LO 4

Most justifications and excuses are **affirmative defenses**, which operate like this: Defendants have to "start matters off by putting in some evidence in support" of their justification or excuse (LaFave and Scott, 1986, 52). We call this the **burden of production**. Why put this burden on defendants? Because "We can assume that those who commit crimes are sane, sober, conscious, and acting freely. It makes sense, therefore, to make defendants responsible for injecting these extraordinary circumstances into the proceedings" (52).

The amount of evidence required "is not great; some credible evidence" is enough. In some jurisdictions, if defendants meet the burden of production, they also have to bear the **burden of persuasion**, meaning they have to prove their defenses by a **preponderance of the evidence**, defined as more than 50 percent. In other jurisdictions, once defendants meet the burden of production, the burden shifts to the government to prove defendants weren't justified or excused (Loewy 1987, 192–204).

Most defenses are **perfect defenses**; if they're successful, defendants are acquitted. There's one major exception. Defendants who successfully plead the excuse of insanity don't "walk"—at least not right away. Special hearings are held to determine if these defendants are still insane. Most hearings decide they are, and so they're sent to maximum-security hospitals to be confined there until they regain their sanity; in most serious crimes, that's never (Chapter 6).

Evidence that doesn't amount to a perfect defense might amount to an **imperfect defense**; that is, defendants are guilty of lesser offenses. For example, in *Swann v. U.S.* (1994), Ted Swann and Steve Crawford got into an argument while shooting baskets. Crawford's ball hit Swann in the stomach, where he had recently been stabbed. Crawford ordered Swann off the court. When Swann instead walked past him, ignoring the order, Crawford said, "You think you stabbed up now, just watch." Then, placing his hands to his side, Crawford appeared to be reaching for his back pocket. Swann, who had seen a bulge in Crawford's pocket, thought that he was reaching for a gun to kill him. Swann pulled his own gun from his waistband and shot Crawford twice in the head (929).

The Court ruled that Swann was entitled to a jury instruction on imperfect defense that would reduce the murder charge to manslaughter, because there was enough evidence for a jury to conclude that

> Swann's belief that he was in imminent danger and that he had to use deadly force to repel that danger was in fact actually and honestly held but was in one or both respects objectively unreasonable. (930)

Even when the evidence doesn't add up to an imperfect defense, it might still show mitigating circumstances that convince judges or juries that defendants don't deserve the maximum penalty for the crime they're convicted of. For example, words, however insulting, can't reduce murder to manslaughter in most states, but they might mitigate death to life without parole. So when a Black man killed a White man in a rage brought on by the White man's relentless taunting, "nigger, nigger," the killing was still murder but the taunting mitigated the death penalty to life without parole (Chapter 9).

Now, let's look at some justification defenses: self-defense, the defense of others, the defense of home and property, the choice-of-evils defense, and consent.

Self-Defense

If you use force to protect yourself, your home or property, or the people you care about, you've violated the rule of law, which our legal system is deeply committed to (Chapter 1). According to the rule of law, the government has a monopoly on the use of force; so when you use force, you're "taking the law into your own hands." With that great monopoly on force goes the equally great responsibility of protecting individuals who are banned from using force themselves.

Sometimes, the government isn't, or can't be, there to protect you when you need it. So necessity—the heart of the defense of justification—allows "self-help" to kick in. Self-defense is a grudging concession to necessity. It's only good before the law when three circumstances come together: the necessity is great, it exists "right now," and it's for prevention only. Preemptive strikes aren't allowed; you can't use force to prevent an attack that's going to take place tomorrow or even this afternoon. Retaliation isn't allowed either; you can't use it to "pay back" an attack that took place last year or even this morning. In short, preemptive strikes come too soon and retaliation too late; they both fail the necessity test. Individuals have to rely on conventional means to prevent future attacks, and only the state can punish past attacks (Fletcher 1988, 18–19).

LO 5

To learn more about the justification of self-defense, we'll examine the elements of self-defense. Then, we'll look at if and when claims of self-defense are justifiable when it's possible to retreat to escape harm.

Elements of Self-Defense

When can we ignore the government's monopoly on force and take the law into our own hands to defend ourselves? At common law, anyone who was subjected to an unprovoked attack could protect themselves by force from attacks that were going to happen right now. However, to justify the use of *deadly* force, the defender has to honestly and *reasonably* believe that she's faced with the choice of "kill or be killed, right now!"

LO 6

Specifically, self-defense consists of four elements:

1. *Unprovoked attack* The defender didn't start or provoke the attack.
2. *Necessity* Defenders can use deadly force only if it's necessary to repel an imminent deadly attack, namely one that's going to happen right now.
3. *Proportionality* Defenders can use deadly force only if the use of nondeadly force isn't enough, namely excessive force is not allowed.
4. *Reasonable belief* The defender has to reasonably believe that it's necessary to use deadly force to repel the imminent deadly attack.

Unprovoked Attack

Self-defense is available only against unprovoked attacks. So self-defense isn't available to an **initial aggressor**; someone who provokes an attack can't then use force to defend herself against the attack she provoked. With one exception: according to the **withdrawal exception**, if attackers completely withdraw from attacks they provoke, they can defend themselves against an attack by their initial victims. In a classic old case, *State v. Good* (1917, 1006), a son threatened to shoot his father with a shotgun. The father went to a neighbor's, borrowed the neighbor's shotgun, and came back. The son told him to "stop." When the father shot, the son turned and ran and the father pursued him. The son then turned and shot his father, killing him. The trial court failed to instruct the jury on the withdrawal exception. The Supreme Court of Missouri reversed because the trial judge's instruction ignores and excludes the defendant's right of self-defense. Although he may have brought on the difficulty with the intent to kill his father, still, if he was attempting to withdraw from the difficulty, and was fleeing from his father in good faith for the purpose of such withdrawal, and if his father, knowing that the defendant was endeavoring to withdraw from such conflict, pursued the defendant and sought to kill him, or do him some great bodily harm, then the defendant's right of self-defense is revived (1007).

Necessity, Proportionality, and Reasonable Belief

LO 5

Necessity refers to **imminent danger of attack**. Simply put, it means, "The time for defense is right now!" What kind of attacks? The best-known cases involve individuals who need to kill to save their own lives, but self-defense is broader than that. It also includes killing someone who's about to kill a member of your family—or any innocent person for that matter.

Necessity doesn't limit you to killing someone who's going to kill. You can also kill an attacker whom you reasonably believe is right now going to hurt you or someone else

badly enough to send you or them to the hospital for the treatment of serious injury. This is what serious (sometimes called "grievous") bodily injury means in most self-defense statutes.

Some self-defense statutes go even further. They allow you to kill someone you reasonably believe is about to commit a serious felony against you that doesn't threaten either your life or serious bodily injury. These felonies usually include rape, sodomy, kidnapping, and armed robbery. But the list also almost always includes home burglary and, sometimes, even personal property (discussed in "Defense of Home and Property" later).

What kind of belief does self-defense require? Is it enough that you *honestly* believe the imminence of the danger, the need for force, and the amount of force used? No. Almost all statutes require that your belief also be *reasonable*; that is, a reasonable person in the same situation would have believed that the attack was imminent, and that the need for force, and the amount of force used, were necessary to repel an attack. In the 1980s' sensational "New York Subway Vigilante Case," the New York Court of Appeals examined these elements as applied to the defense against the armed robbery provision in New York's self-defense statute (*Fletcher 1988*, 18–27).

In the 1980s' sensational "New York Subway Vigilante Case," the New York Court of Appeals examined the elements of self-defense as applied to the defense against the armed robbery provision in New York's self-defense statute.

CASE Did He Shoot in Self-Defense?

People v. Goetz
497 N.E.2d 41 (N.Y. 1986)

HISTORY

Bernhard Goetz, the defendant, was indicted for criminal possession of a weapon, attempted murder, assault, and reckless endangerment. The Supreme Court, Trial Term, New York County, dismissed the indictment and the People appealed. The Supreme Court, Appellate Division affirmed, and the People appealed. The Court of Appeals reversed and dismissed, and reinstated all the counts of the indictment.

WACHTLER, CJ.

FACTS

On Saturday afternoon, December 22, 1984, Troy Canty, Darryl Cabey, James Ramseur, and Barry Allen boarded an IRT express subway train in the Bronx and headed south toward lower Manhattan. The four youths rode together in the rear portion of the seventh car of the train. Two of the four, Ramseur and Cabey, had screwdrivers inside their coats, which they said were to be used to break into the coin boxes of video machines.

Bernhard Goetz boarded this subway train at 14th Street in Manhattan and sat down on a bench toward the rear section of the same car occupied by the four youths. Goetz was carrying an unlicensed .38-caliber pistol loaded with five rounds of ammunition in a waistband holster. The train left the 14th Street station and headed toward Chambers Street.

Canty approached Goetz, possibly with Allen beside him, and stated, "Give me five dollars." Neither Canty nor any of the other youths displayed a weapon. Goetz responded by standing up, pulling out his handgun, and firing four shots in rapid succession. The first shot hit Canty in the chest; the second struck Allen in the back; the third went through Ramseur's arm and into his left side; the fourth was fired at Cabey, who apparently was then standing in the corner of the car, but missed, deflecting instead off of a wall of the conductor's cab.

After Goetz briefly surveyed the scene around him, he fired another shot at Cabey, who then was sitting on the end bench of the car. The bullet entered the rear of Cabey's side and severed his spinal cord.

All but two of the other passengers fled the car when, or immediately after, the shots were fired. The conductor, who had been in the next car, heard the shots and instructed the

motorman to radio for emergency assistance. The conductor then went into the car where the shooting occurred and saw Goetz sitting on a bench, the injured youths lying on the floor or slumped against a seat, and two women who had apparently taken cover, also lying on the floor.

Goetz told the conductor that the four youths had tried to rob him. While the conductor was aiding the youths, Goetz headed toward the front of the car. The train had stopped just before the Chambers Street station and Goetz went between two of the cars, jumped onto the tracks, and fled.

Police and ambulance crews arrived at the scene shortly thereafter. Ramseur and Canty, initially listed in critical condition, have fully recovered. Cabey remains paralyzed and has suffered some degree of brain damage.

On December 31, 1984, Goetz surrendered to police in Concord, New Hampshire, identifying himself as the gunman being sought for the subway shootings in New York nine days earlier.

Later that day, after receiving *Miranda* warnings, he made two lengthy statements, both of which were tape recorded with his permission. In the statements, which are substantially similar, Goetz admitted that he had been illegally carrying a handgun in New York City for three years. He stated that he had first purchased a gun in 1981 after he had been injured in a mugging. Goetz also revealed that twice between 1981 and 1984 he had successfully warded off assailants simply by displaying the pistol.

According to Goetz's statement, the first contact he had with the four youths came when Canty, sitting or lying on the bench across from him, asked, "How are you?" to which he replied, "Fine." Shortly thereafter, Canty, followed by one of the other youths, walked over to the defendant and stood to his left, while the other two youths remained to his right, in the corner of the subway car.

Canty then said, "Give me five dollars." Goetz stated that he knew from the smile on Canty's face that they wanted to "play with me." Although he was certain that none of the youths had a gun, he had a fear, based on prior experiences, of being "maimed."

Goetz then established "a pattern of fire," deciding specifically to fire from left to right. His stated intention at that point was to "murder, to hurt them, to make them suffer as much as possible." When Canty again requested money, Goetz stood up, drew his weapon, and began firing, aiming for the center of the body of each of the four.

Goetz recalled that the first two he shot "tried to run through the crowd but they had nowhere to run." Goetz then turned to his right to "go after the other two." One of these two "tried to run through the wall of the train, but . . . he had nowhere to go." The other youth (Cabey) "tried pretending that he wasn't with [the others]," by standing still, holding on to one of the subway hand straps, and not looking at Goetz. Goetz nonetheless fired his fourth shot at him.

He then ran back to the first two youths to make sure they had been "taken care of." Seeing that they had both been shot, he spun back to check on the latter two. Goetz noticed that the youth who had been standing still was now sitting on a bench and seemed unhurt. As Goetz told the police, "I said, 'you seem to be all right, here's another,'" and he then fired the shot which severed Cabey's spinal cord. Goetz added that "If I was a little more under self-control . . . I would have put the barrel against his forehead and fired." He also admitted that "If I had had more [bullets], I would have shot them again, and again, and again."

After waiving extradition, Goetz was brought back to New York and arraigned on a felony complaint charging him with attempted murder and criminal possession of a weapon. The matter was presented to a grand jury in January 1985, with the prosecutor seeking an indictment for attempted murder, assault, reckless endangerment, and criminal possession of a weapon. Neither the defendant nor any of the wounded youths testified before this grand jury.

On January 25, 1985, the grand jury indicted Goetz on one count of criminal possession of a weapon in the third degree (Penal Law § 265.02) for possessing the gun used in the subway shootings, and two counts of criminal possession of a weapon in the fourth degree (Penal Law § 265.01) for possessing two other guns in his apartment building. It dismissed, however, the attempted murder and other charges stemming from the shootings themselves.

Several weeks after the grand jury's action, the People, asserting that they had newly available evidence, moved for an order authorizing them to resubmit the dismissed charges to a second grand jury. Supreme Court, Criminal Term, after conducting an in camera [in the judge's chambers] inquiry, granted the motion. Presentation of the case to the second Grand Jury began on March 14, 1985. Two of the four youths, Canty and Ramseur, testified. Among the other witnesses were four passengers from the seventh car of the subway who had seen some portions of the incident.

Goetz again chose not to testify, though the tapes of his two statements were played for the grand jurors, as had been done with the first grand jury.

On March 27, 1985, the second grand jury filed a ten-count indictment, containing four charges of attempted murder (Penal Law §§ 110.00, 125.25 [1]), four charges of assault in the first degree (Penal Law § 120.10[1]), one charge of reckless endangerment in the first degree (Penal Law § 120.25), and one charge of criminal possession of a weapon in the second degree (Penal Law § 265.03 [possession of a loaded firearm with intent to use it unlawfully against another]). Goetz was arraigned on this indictment on March 28, 1985, and it was consolidated with the earlier three-count indictment.

On October 14, 1985, Goetz moved to dismiss the charges contained in the second indictment, alleging, among other things, that the prosecutor's instructions to that grand jury on the defense of justification were erroneous and prejudicial to the defendant so as to render its proceedings defective.

On November 25, 1985, while the motion to dismiss was pending before Criminal Term, a column appeared in the *New York Daily News* containing an interview which the columnist had conducted with Darryl Cabey the previous day in Cabey's hospital room. The columnist claimed

that Cabey had told him in this interview that the other three youths had all approached Goetz with the intention of robbing him.

The day after the column was published, a New York City police officer informed the prosecutor that he had been one of the first police officers to enter the subway car after the shootings and that Canty had said to him, "We were going to rob [Goetz]." The prosecutor immediately disclosed this information to the Court and to defense counsel, adding that this was the first time his office had been told of this alleged statement and that none of the police reports filed on the incident contained any such information.

In an order dated January 21, 1986, the Court, after inspection of the grand jury minutes held that the prosecutor, in a supplemental charge elaborating upon the justification defense, had erroneously introduced an objective element into this defense by instructing the grand jurors to consider whether Goetz's conduct was that of a "reasonable man in [Goetz's] situation."

The Court concluded that the statutory test for whether the use of deadly force is justified to protect a person should be wholly subjective, focusing entirely on the defendant's state of mind when he used such force. It concluded that dismissal was required for this error because the justification issue was at the heart of the case. [We disagree.]

OPINION

Penal Law article 35 recognizes the defense of justification, which "permits the use of force under certain circumstances." One such set of circumstances pertains to the use of force in defense of a person, encompassing both self-defense and defense of a third person (Penal Law § 35.15). Penal Law § 35.15(1) sets forth the general principles governing all such uses of force:

> A person may use physical force upon another person when and to the extent he reasonably believes such to be necessary to defend himself or a third person from what he *reasonably* [emphasis added] believes to be the use or imminent use of unlawful physical force by such other person.

Section 35.15(2) sets forth further limitations on these general principles with respect to the use of "deadly physical force":

> A person may not use deadly physical force upon another person under circumstances specified in subdivision one unless
>
> a. He *reasonably believes* [emphasis added] that such other person is using or about to use deadly physical force or
>
> b. He reasonably believes that such other person is committing or attempting to commit a kidnapping, forcible rape, forcible sodomy or robbery.

Section 35.15(2)(a) further provides, however, that even under these circumstances a person ordinarily must retreat if he knows that he can with complete safety to himself and others avoid the necessity of using deadly physical force by retreating.

Thus, consistent with most justification provisions, Penal Law § 35.15 permits the use of deadly physical force only where requirements as to triggering conditions and the necessity of a particular response are met. As to the triggering conditions, the statute requires that the actor "reasonably believes" that another person either is using or about to use deadly physical force or is committing or attempting to commit one of certain enumerated felonies, including robbery.

As to the need for the use of deadly physical force as a response, the statute requires that the actor "reasonably believes" that such force is necessary to avert the perceived threat. While the portion of section 35.15(2)(b) pertaining to the use of deadly physical force to avert a felony such as robbery does not contain a separate "retreat" requirement, it is clear from reading subdivisions (1) and (2) of section 35.15 together, as the statute requires, that the general "necessity" requirement in subdivision (1) applies to all uses of force under section 35.15, including the use of deadly physical force under subdivision (2)(b).

Because the evidence before the second Grand Jury included statements by Goetz that he acted to protect himself from being maimed or to avert a robbery, the prosecutor correctly chose to charge the justification defense in section 35.15 to the Grand Jury. The prosecutor properly instructed the grand jurors to consider whether the use of deadly physical force was justified to prevent either serious physical injury or a robbery, and, in doing so, to separately analyze the defense with respect to each of the charges. He elaborated upon the prerequisites for the use of deadly physical force essentially by reading or paraphrasing the language in Penal Law § 35.15. The defense does not contend that he committed any error in this portion of the charge.

When the prosecutor had completed his charge, one of the grand jurors asked for clarification of the term "reasonably believes." The prosecutor responded by instructing the grand jurors that they were to consider the circumstances of the incident and determine "whether the defendant's conduct was that of a reasonable man in the defendant's situation." It is this response by the prosecutor—and specifically his use of "a reasonable man"—which is the basis for the dismissal of the charges by the lower courts. As expressed repeatedly in the Appellate Division's plurality opinion, because section 35.15 uses the term "he reasonably believes," the appropriate test, according to that court, is whether a defendant's beliefs and reactions were "reasonable to him."

Under that reading of the statute, a jury which believed a defendant's testimony that he felt that his own actions were warranted and were reasonable would have to acquit him, regardless of what anyone else in defendant's situation might have concluded. Such an interpretation defies the ordinary meaning and significance of the term "reasonably" in a statute, and misconstrues the clear intent of the Legislature, in enacting section 35.15, to retain an

objective element as part of any provision authorizing the use of deadly physical force.

Penal statutes in New York have long codified the right recognized at common law to use deadly physical force, under appropriate circumstances, in self-defense. These provisions have never required that an actor's belief as to the intention of another person to inflict serious injury be correct in order for the use of deadly force to be justified, but they have uniformly required that the belief comport with an objective notion of *reasonableness*. [emphasis added]. . . .

The plurality below agreed with defendant's argument that the change in the statutory language from "reasonable ground," used prior to 1965, to "he reasonably believes" in Penal Law § 35.15 evinced a legislative intent to conform to the subjective standard.

We cannot lightly impute to the Legislature an intent to fundamentally alter the principles of justification to allow the perpetrator of a serious crime to go free simply because that person believed his actions were reasonable and necessary to prevent some perceived harm. To completely exonerate such an individual, no matter how aberrational or bizarre his thought patterns, would allow citizens to set their own standards for the permissible use of force. It would also allow a legally competent defendant suffering from delusions to kill or perform acts of violence with impunity, contrary to fundamental principles of justice and criminal law.

We can only conclude that the Legislature retained a reasonableness requirement to avoid giving a license for such actions. Statutes or rules of law requiring a person to act "reasonably" or to have a "reasonable belief" uniformly prescribe conduct meeting an objective standard measured with reference to how "a reasonable person" could have acted.

Goetz argues that the introduction of an objective element will preclude a jury from considering factors such as the prior experiences of a given actor and thus require it to make a determination of "reasonableness" without regard to the actual circumstances of a particular incident. This argument, however, falsely presupposes that an objective standard means that the background and other relevant characteristics of a particular actor must be ignored. To the contrary, we have frequently noted that a determination of reasonableness must be based on the "circumstances" facing a defendant or his "situation." Such terms encompass more than the physical movements of the potential assailant.

As just discussed, these terms include any relevant knowledge the defendant had about that person. They also necessarily bring in the physical attributes of all persons involved, including the defendant. Furthermore, the defendant's circumstances encompass any prior experiences he had which could provide a reasonable basis for a belief that another person's intentions were to injure or rob him or that the use of deadly force was necessary under the circumstances.

Accordingly, a jury should be instructed to consider this type of evidence in weighing the defendant's actions. The jury must first determine whether the defendant had the requisite beliefs under section 35.15, that is, whether he believed deadly force was necessary to avert the imminent use of deadly force or the commission of one of the felonies enumerated therein. If the People do not prove beyond a reasonable doubt that he did not have such beliefs, then the jury must also consider whether these beliefs were reasonable. The jury would have to determine, in light of all the "circumstances," as explicated above, if a reasonable person could have had these beliefs.

The prosecutor's instruction to the second Grand Jury that it had to determine whether, under the circumstances, Goetz's conduct was that of a reasonable man in his situation was thus essentially an accurate charge.

The order of the Appellate Division should be REVERSED, and the dismissed counts of the indictment reinstated.

QUESTIONS

1. **Consider the following:**
   a. New York tried Goetz for attempted murder and assault. The jury acquitted him of both charges. The jury said Goetz "was justified in shooting the four men with the silver-plated .38-caliber revolver he purchased in Florida." They did convict him of illegal possession of a firearm, for which the Court sentenced Goetz to one year in jail.
   b. Following the sentencing, Goetz told the Court: "This case is really more about the deterioration of society than it is about me. . . . I believe society needs to be protected from criminals."
   c. Criminal law professor George Fletcher followed the trial closely. After the acquittal, he commented:

      > The facts of the Goetz case were relatively clear, but the primary fight was over the moral interpretation of the facts. . . . I am not in the slightest bit convinced that the four young men were about to mug Goetz. If he had said, "Listen buddy, I wish I had $5, but I don't," and walked to the other side of the car the chances are 60–40 nothing would have happened. Street-wise kids like that are more attuned to the costs of their behavior than Goetz was. (quoted in Roberts 1989)

   If Professor Fletcher is right, was Goetz justified in shooting?

2. **Under what circumstances can people use deadly force, according to the New York statutes cited in the opinion?**
3. **Do you agree with those circumstances?**
4. **Would you add more? Remove some? Which ones? Why?**
5. **Were Goetz's shots a preemptive strike? Retaliation? Necessary for self-protection? Explain.**

Retreat

What if you can avoid an attack by escaping? Do you have to retreat? Or can you stand your ground and fight back? According to Richard Maxwell Brown (1991), the leading modern authority on American violence, "As far back as the thirteenth century, English common law dealt harshly with the act of homicide" (3). The burden was on defendants to prove their innocence, and no one could prove innocence unless he (all homicides were committed by men), proved he'd "retreated to the wall." The English common law "retreat to the wall" survived in a minority of American states:

> But one of the most important transformations in American legal and social history occurred in the nineteenth century when the nation as a whole repudiated the English common-law tradition in favor of American theme of no duty to retreat: that one was legally justified in standing one's ground to kill in self-defense.
>
> Recognized at the time as a crucial change in the "American mind," it was a combination of Eastern legal authorities and Western judges who wrought the legal transformation from an English law that, as they saw it, upheld cowardice to an American law suited to the bravery of the "true man." The centuries-long English legal severity against homicide was replaced in our country by a proud new tolerance for killing in situations where it might have been avoided by obeying a legal duty to retreat. (5)

LO 7

Who was this "true man"? According to Jeannie Suk (2008), various social meanings contributed to the definition. A true man was honest; he made decisions based on what he believed to be true, and he shouldn't have to flee from attack because he'd done nothing wrong to provoke or deserve the attack. The "true" man also did whatever he had to do to provide for his wife and children; he was the source of strength for his vulnerable dependents. The true man's duty to his family extended to his country.

> True men were patriots and protectors of the nation who would fight if necessary . . . to safeguard the legal rights fundamental to freedom. They had a sense of civic responsibility tied to the duty to ensure the rule of law and leadership of the nation. (Suk 2008, 245)

LO 8

Relying on these meanings, judges and legislators generalized the right to self-defense into the majority **stand-your-ground rule**, namely that if he didn't start the fight, he could stand his ground and kill to "defend himself without retreating from *any* place he had a right to be" (245). The minority rule, the **retreat rule**, says you have to retreat, if you reasonably believe

1. that you're in danger of death or serious bodily harm *and*
2. that backing off won't unreasonably put you in danger of death or serious bodily harm.

LO 9

States that require retreat have carved out an exception to the retreat doctrine. According to this **castle exception**, when you're attacked in your home, you can stand your ground and use deadly force to fend off an unprovoked attack, but *only* if you reasonably believe the attack threatens death or serious bodily injury (*State v. Kennamore* 1980, 858). Later on in this chapter, we'll explore the explosion of new statutes that vastly expand ordinary people's power to defend themselves in their homes *and* in public places. But now, let's look at how the elements of self-defense as they apply to domestic violence, especially battered women.

Domestic Violence

What if two men live in the same "castle"? Can they both stand their ground? It was these cases of **cohabitants** that gave birth to the rules governing domestic violence. One of the most famous and most often-cited cohabitant cases, the World War I era *People v. Tomlins* (1914), involved a man who killed his 22-year-old son, who had attacked his father in their cottage. Then Judge Cardozo (later a U.S. Supreme Court Associate Justice), wrote:

> It is not now and never has been the law that a man assailed in his own dwelling is bound to retreat. If assailed there, he may stand his ground and resist the attack. He is under no duty to take to the fields and the highways, a fugitive from his own home. More than 200 years ago it was said by Lord Chief Justice Hale (1 Hale's Pleas of the Crown, 486):
>
> > In case a man "is assailed in his own house, he need not flee as far as he can, as in other cases of self-defense for he hath the protection of his house to excuse him from flying, as that would be to give up the protection of his house to his adversary by flight."
>
> Flight is for sanctuary and shelter, and shelter, if not sanctuary, is in the home. That there is, in such a situation, no duty to retreat is, we think, the settled law in the United States. (243)
>
> The rule is the same whether the attack proceeds from some other occupant or from an intruder. Why should one retreat from his own house, when assailed by a partner or cotenant, any more than when assailed by a stranger who is lawfully upon the premises? Whither shall he flee, and how far, and when may he be permitted to return? (243–44)

A modern cohabitant case, *State v. Shaw* (1981), recognized the implications for domestic violence case. Even though the case involved male roommates, the Connecticut Supreme Court relied on family violence to back up its creation of the cohabitant exception to the Connecticut rule requiring cohabitants to retreat. James Shaw Jr. rented one of two bedrooms in Wilson's owner-occupied house. Off the kitchen of this house were doors leading to both bedrooms, to a bathroom, to the hallway, and to the back door–fire escape. Wilson called Shaw to the common area of the house, where a discussion escalated first to an argument and then a physical altercation. (Each claimed that the other initiated the "tussle." Wilson went to his bedroom and grabbed his .30-30 Winchester rifle, intending to order Shaw to leave. Shaw went to his bedroom and got his .22 revolver. Weapons in hand, they both entered the kitchen from their bedrooms. Shaw fired five or six shots hitting Wilson three times (562).

The timing of the case coincided with the growing public recognition that domestic violence was a "serious and widespread crime." The feminist movement had convincingly argued that women were victims of violence at home. Law enforcement was beginning to treat domestic violence as a crime and not a private family matter (Suk 2008, 250). According to the Court:

> In the great majority of homicides the killer and the victim are relatives or close acquaintances. We cannot conclude that the Connecticut legislature intended to sanction the reenactment of the climactic scene from "High Noon" in the familial kitchens of this state. (*State v. Shaw*, 566)

By the late 1990s, the recognition that battered women cases fit the "real man" protecting his castle paradigm had definitely influenced the law of self-defense. Courts in several Castle Doctrine states have adopted rules that allow women to "stand their ground and kill their batterers." All of these courts supported their decisions with a "sympathetic understanding of the dynamics of domestic violence and its victims" (Suk 2008, 252). In our next case excerpt, *State v. Thomas* (1997), the Ohio Supreme Court based its decision on the idea that a battered woman has "already retreated to the wall."

LO 9

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CASE Did She Retreat to the Wall?

State v. Thomas
673 N.E.2d 1339 (1997 Ohio)

HISTORY

Teresa Thomas was convicted in the Court of Common Pleas, Athens County, of murder with a firearm specification, and she appealed. The Court of Appeals affirmed. The Supreme Court, Alice Robie Resnick, J., held that: (1) there is no duty to retreat from one's own home before resorting to lethal force in self-defense against a cohabitant with equal right to be in home, but (2) jury instructions on self-defense did not have to contain detailed definition of battered woman syndrome.

FACTS

On September 15, 1993, Teresa Thomas, defendant-appellant, shot and killed Jerry Flowers, her live-in boyfriend. At her trial for murder, Thomas admitted to shooting Flowers, but asserted that she had shot Flowers in self-defense, basing the defense on battered woman syndrome.

Thomas and Flowers had known each other for most of their lives when they first began dating two years prior to the shooting. By the end of 1991, Flowers and Thomas began living together. In July 1993, they moved into a new mobile home.

Thomas testified that the relationship was marked by violence and intimidation, including incidents of Flowers pushing her against a wall, injuring her shoulder enough for her to go to the emergency room, and punching her in the abdomen, rupturing an ovarian cyst. She stated that he would purposely soil his clothes and then order her to clean them. He controlled the couple's money, and eventually ordered Thomas to quit her jobs. He did virtually all of the grocery shopping. On the two occasions when he permitted her to do the shopping, he required her to present to him the receipt and the exact change. At times, he would deny her food for three to four days. He also blamed his sexual difficulties on her.

Approximately three weeks before the shooting, Flowers' behavior became more egregious. In the middle of the night, almost every night, he would wake Thomas up by holding his hands over her mouth and nose so that she could not breathe. Flowers had trouble sleeping and on several occasions accused Thomas of changing the time on the clocks. He often told her how easy it would be to kill her by snapping her neck, shooting her with a gun, or suffocating her, and then hiding her body in a cave. This discussion occurred almost every time they awoke.

Three days prior to the shooting, Thomas fixed a plate of food, which Flowers refused to eat or to let her clear from the table. He put cigarette butts in the food and played with it. Thomas testified that if she had cleaned up the food he would have beaten her.

Thomas testified that Flowers forced her into having sexual relations against her wishes, that he blamed her for his periodic impotency, and that two days prior to the shooting, he anally raped her.

The night before the shooting, Flowers yelled at Thomas and threw flour, sugar, cider, and bread on the floor. They argued all night, and before Flowers went to work on Wednesday morning, he ordered Thomas to clean up the mess, told her he would kill her if she did not do it by the time he came home, and struck her on the arm.

After he left, Thomas went to see her mother and they returned to Thomas' and Flowers' mobile home. Thomas testified that her mother seemed entirely uninterested in Thomas' situation. When Thomas' mother left, Thomas went to see Flowers' father, and then she returned to her

mobile home. Thomas started to clean up the kitchen but stopped to eat a sandwich, sitting at the kitchen table.

At 12:45 p.m., Flowers came home from work early and, according to Thomas, he sneaked to the mobile home so that she wouldn't see him. She did see him, however, and when she did not get up to meet him at the door, he started yelling. When Flowers moved to the kitchen door, Thomas ran to the bathroom. Thomas testified that she could not get out of the tiny bathroom window and that she was afraid that Flowers was going to kill her.

She then ran to Flowers' closet and grabbed his gun out of the holster. She ran back to the kitchen and Flowers continued to yell at her and threaten to kill her. According to Thomas, she fired two warning shots and when Flowers continued to threaten her, she shot him in the arm twice. Each of these two bullets also entered his torso. Flowers fell and then started to get up again, continuing to threaten Thomas. Thomas shot Flowers two more times, while he was bent over; the shots entered Flowers in the back.

Dr. Larry Tate, a pathologist with the Franklin County Coroner's Office, testified that Flowers had two bullet wounds in the arm, one in the chest, one in the abdomen, and two in the back.

In support of her self-defense argument, Thomas presented the testimony of Dr. Jill Bley, a clinical psychologist who has extensive experience in treating and diagnosing women with battered woman syndrome. Dr. Bley explained the classic symptoms and signs of battered woman syndrome and then described her examination of Thomas. Dr. Bley stated that she diagnosed Thomas as suffering from battered woman syndrome and that Thomas reasonably believed that Thomas was in danger of imminent death or serious bodily harm at the time of the shooting.

On September 22, 1993, the grand jury indicted Thomas for aggravated murder, a violation of R.C. 2903.01(A), with a firearm specification, a violation of R.C. 2941.141. From December 7 through 17, 1993, the case was tried before a jury. At the close of the state's case in chief, Thomas moved for an acquittal. The Court denied the motion in part, but finding that the element of "prior calculation and design" had not been proved, dismissed the charge of aggravated murder, allowing the case to proceed on the lesser included charge of murder with a firearm specification, in violation of R.C. 2903.02(A) and 2941.141. On December 20, 1993, the jury found Thomas guilty of murder with a firearm specification.

Upon appeal, Thomas argued that the trial court erred by not instructing the jury that she had no duty to retreat from a cohabitant and that the Court's instructions to the jury on battered woman syndrome were incomplete. The Court of Appeals affirmed the conviction. The cause is now before this court pursuant to the allowance of a discretionary appeal in case No. 95-1837.

ALICE ROBIE RESNICK, J.

This case presents issues involving the duty to retreat between cohabitants and jury instructions in trials in which the criminal defendant asserts battered woman syndrome as support for the defense of self-defense.

I

We first consider whether there is a duty to retreat when one is attacked in one's own home by a cohabitant with an equal right to be in the home. In Ohio, the affirmative defense of self-defense has three elements:

(1) the defendant was not at fault in creating the violent situation,

(2) the defendant had a bona fide belief that she was in imminent danger of death or great bodily harm and that her only means of escape was the use of force, and

(3) that the defendant did not violate any duty to retreat or avoid the danger.

Because of the third element, in most cases, a person may not kill in self-defense if he has available a reasonable means of retreat from the confrontation. This requirement derives from the common law rule that the right to kill in self-defense may be exercised only if the person assaulted attempted to "retreat to the wall" whenever possible.

However, there is no duty to retreat when one is assaulted in one's own home. This exception to the duty to retreat derives from the doctrine that one's home is one's castle and one has a right to protect it and those within it from intrusion or attack. The rationale is that a person in her own home has already retreated "to the wall," as there is no place to which she can further flee in safety. Thus, a person who, through no fault of her own, is assaulted in her home may stand her ground, meet force with force, and if necessary, kill her assailant, without any duty to retreat.

In Ohio, one is not required to retreat from one's own home when attacked by an intruder; similarly one should not be required to retreat when attacked by a cohabitant in order to claim self-defense. Moreover, in the case of domestic violence, as in this case, the attacks are often repeated over time, and escape from the home is rarely possible without the threat of great personal violence or death. The victims of such attacks have already "retreated to the wall" many times over and therefore should not be required as victims of domestic violence to attempt to flee to safety before being able to claim the affirmative defense of self-defense.

There is no rational reason for a distinction between an intruder and a cohabitant when considering the policy for preserving human life where the setting is the domicile, and, accordingly, we hold that there is no duty to retreat from one's own home before resorting to lethal force in self-defense against a cohabitant with an equal right to be in the home.

II

We next consider the issue of whether, when a defendant presents the defense of self-defense based on the theory of battered woman syndrome, the judge's instructions to the jury regarding self-defense must include a detailed definition of the syndrome. The trial court did not include in the jury charge the defendant's proposed instruction that would define battered women as those women in intimate

relationships that have gone through the battering cycle at least twice. The defendant's proposed instructions would further state that if the cycle occurs a second time and the victims remain in the situation, they are defined as battered women.

As stated above, the second element of the affirmative defense of self-defense requires the defendant to prove that she had a bona fide [honest] belief that she was in imminent danger of death or great bodily harm and that her only means of escape was the use of force.

The trial court's instructions correctly emphasized to the jury that the second element of self-defense is a combined subjective and objective test. Self-defense is placed on the grounds of the *bona fides* of defendant's belief, and reasonableness therefore, and whether, under the circumstances, he exercised a careful and proper use of his own faculties. The jury instructions given by the trial court properly instructed the jury to consider all the circumstances when determining if appellant had an objectively reasonable belief of imminent danger and whether she subjectively honestly believed she was in danger of imminent harm.

Accordingly, we reverse the court of appeals as to the duty to retreat between cohabitants and affirm as to the jury instruction regarding battered woman syndrome.

Judgment reversed in part and affirmed in part.

CONCUR

STRATTON, J.

This case poses a troubling issue of a balancing of societal interests. There are strong public policies for preserving the sanctity of life on one hand and, on the other hand, for allowing one to protect oneself from harm in one's own home.

However, the issues involved in domestic violence complicate any attempt to consider a duty to retreat from one's own home. Domestic violence is the result of the abuser's need to dominate and control. Often the risk of violence against a woman is heightened when she attempts to *leave* the abusive relationship. Research demonstrates that a battered woman's attempt to retreat often increases the immediate danger to herself. Statistics show that a woman is at the greatest risk of death when she attempts to leave a relationship. The abuser may perceive his mate's withdrawal, either emotionally or physically, as a loss of his dominance and control over her, which results in an escalation of his rage and more violence.

DISSENT

PFEIFER, J.

The sanctity of human life must pervade the law. Accordingly, a cohabitant should be required to attempt to retreat before resorting to lethal force in self-defense against another cohabitant. I respectfully dissent.

There are dramatically more opportunities for deadly violence in the domestic setting than in the intrusion setting. Thus, to hold that cohabitants do not have to retreat before resorting to lethal force is to invite violence. Cohabitants should be required to retreat before resorting to lethal force in self-defense whenever it can be done safely. Such a duty would encompass leaving the home if that is necessary to prevent the destruction of life. It would also encompass retreating to the wall.

Finally, whatever you think about the first four shots, it is unconscionable to suggest that the last two shots were fired in self-defense. The law of self-defense has hitherto always been a shield. In this case, the majority is allowing the defendant to use the law of self-defense as a sword. I dissent.

DISSENT

COOK, J.

I respectfully dissent. Contrary to the fears expressed by the majority and concurring opinions, imposing the duty to retreat upon cohabitants would not leave the occupant of a home defenseless from attacks. First, a person is relieved of the duty where there is no reasonable or safe means to avoid the confrontation. Accordingly, the use of deadly force is justified and the failure to retreat is of no consequence where retreat would increase the actor's own danger of death or great bodily harm.

For these reasons, I would hold that a person assaulted by another cohabitant in the home is obliged to "retreat to the wall" before defending with deadly force, provided that a reasonable and safe means of avoiding the danger exists.

QUESTIONS

1. **State the three elements of self-defense in cases involving coinhabitants.**
2. **Summarize the majority decision arguments supporting Ohio's law of self-defense involving coinhabitants.**
3. **Summarize the importance to the majority that the case involved domestic violence.**
4. **According to Justice Stratton's concurring opinion, how do "issues involved in domestic violence complicate any attempt to consider a duty to retreat from one's own home"?**
5. **According to Justice Pfeifer's dissent, why should a "cohabitant be required to attempt to retreat before resorting to lethal force in self-defense against another cohabitant"?**
6. **According to Justice Cook's dissent, why would "imposing the duty to retreat upon cohabitants not leave the occupant of a home defenseless from attacks"?**
7. **Consider the following comments:**
   a. Retaliation, as opposed to defense, is a common problem in cases arising from wife battering and domestic violence. The injured wife waits for the first possibility of striking against a distracted or unarmed husband. The man may even be asleep when the wife finally reacts.

Retaliation is the standard case of "taking the law into your own hands." There is no way, under the law, to justify killing a wife batterer or a rapist in retaliation or revenge, however much sympathy there may be for the wife wreaking retaliation. Private citizens cannot act as judge and jury toward each other. They have no authority to pass judgment and to punish each other for past wrongs (Fletcher 1988, 21–22).

b. "The right to use force in the defense of one's person, family, habitation, lands, or goods is one of the unalienable rights of man. As it is a right not granted by any human code, no human code can take it away. It was recognized by the Roman law, declared by that law to be a natural right, and part of the law of nations. It is no doubt recognized by the code of every civilized State" (Thompson 1880, 546).

c. "A man is not born to run away. The law must consider human nature and make some allowance for the fighting instinct at critical moments. In Texas it is well settled, as you might imagine, that a man is not born to run away" (DeWolfe Howe 1953 I, 331).

Are any of the statements relevant to battered woman domestic violence cases? Do you agree with the statements? Explain your answer.

8. **In your opinion, did Teresa Thomas kill Jerry Flowers in self-defense, as a preemptive strike, or as retaliation?**

Defense of Others

Historically, self-defense meant protecting yourself and the members of your immediate family. Although several states still require a special relationship, the trend is in the opposite direction. Many states have abandoned the special relationship requirement altogether, replacing it with the defense of anyone who needs immediate protection from attack.

Several states that retain the requirement have expanded it to include lovers and friends. The "others" have to have the right to defend themselves before someone else can claim the defense. This is important in cases involving abortion rights protestors. In *State v. Aguillard* (1990, 674), protestors argued they had the right to prevent abortions by violating the law because they were defending the right of unborn children to live. In rejecting the defense of others, the Court said:

> The "defense of others" specifically limits the use of force or violence in protection of others to situations where the person attacked would have been justified in using such force or violence to protect himself. In view of *Roe v. Wade* and the provisions of the Louisiana abortion statute, defense of others as justification for the defendants' otherwise criminal conduct is not available in these cases. Since abortion is legal in Louisiana, the defendants had no legal right to protect the unborn by means not even available to the unborn themselves. (676)

Defense of Home and Property

> The right to use force in the defense of one's person, family, habitation, lands, or goods is one of the natural and unalienable rights of man. As it is a right not granted by any human code, no human code can take it away. It was recognized by the Roman law; declared by that law to be a natural right, and a part of the law of nations. It is no doubt recognized by the code of every civilized State. (Thompson 1880, 546)

The right to use force to defend your home is deeply rooted in the common law idea that "a man's home is his castle." As early as 1604, Sir Edward Coke, the great common law judge, in his report of Semayne's Case, wrote:

> The house of everyone is to him his castle and fortress, as well for his defense against injury and violence, as for his repose; and although the life of a man is a thing precious and favored in law . . . if thieves come to a man's house to rob him, or murder, and the owner or his servants kill any of the thieves in defense of himself and his house, it is not felony and he shall lose nothing. (*State v. Mitcheson* 1977, 1122)

The most impassioned statement of the supreme value placed on the sanctity of homes came from the Earl of Chatham during a debate in the British Parliament in 1764:

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement. (quoted in Hall 1991, 2:4)

Don't let the Earl of Chatham's moving words lure you into thinking you can automatically kill an intruder to defend the sanctity of your home. Sir William Blackstone (1769), in his eighteenth-century *Commentaries* (the best-known—and often the only known—law book to American lawyers at that time), argues that the right is broad *but* limited. He writes:

> If any person attempts to break open a house in the nighttime and shall be killed in such attempt, the slayer shall be acquitted and discharged. This reaches not to the breaking open of any house in the daytime, unless it carries with it an attempt of robbery. (180)

You can see that the defense was limited to nighttime invasions, except for breaking into homes to commit daytime robberies. Most modern statutes limit the use of deadly force to cases where it's reasonable to believe intruders intend to commit crimes of violence (like homicide, assault, rape, and robbery) against occupants.

Statutes vary as to the area that the use of deadly force covers. Most require entry into the home itself. This doesn't include the **curtilage**, the area immediately surrounding the home. Many require entry into an *occupied* home. This means you can't set some automatic device to shoot whoever trips the switch when you're not home.

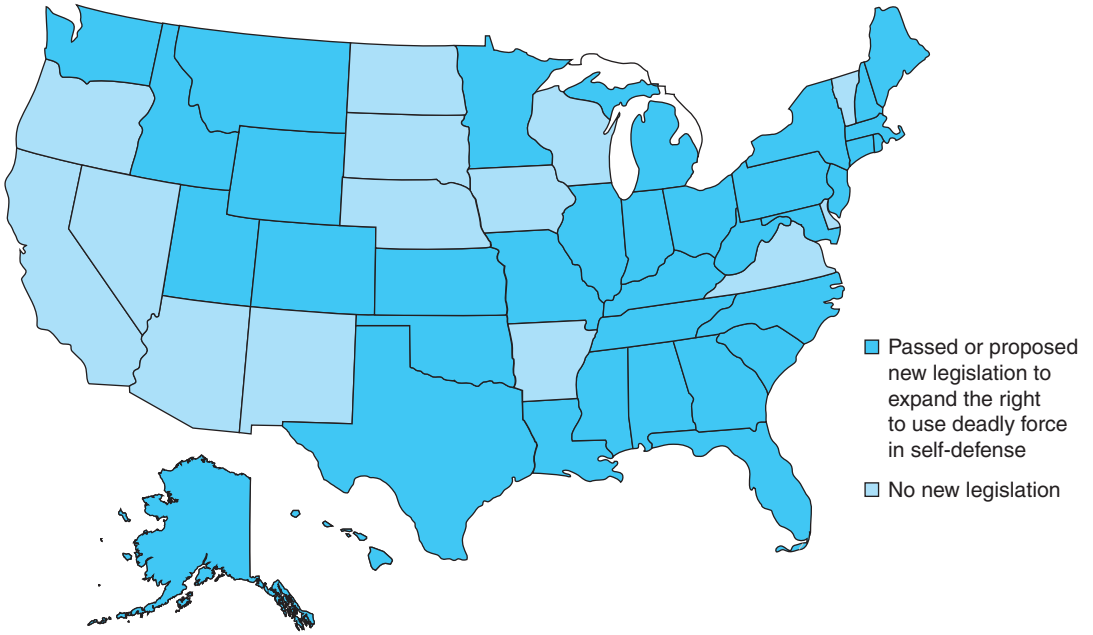
Homes are special places; they're not in the same category as our "stuff." Can you use force to protect your "stuff"? Not deadly force. But you can use the amount of nondeadly force you reasonably believe is necessary to prevent someone from taking your stuff. You also can run after and take back what someone has just taken from you. But, as with all the justifications based on necessity, you can't use force if there's time to call the police.

The "New Castle Laws": "Right to Defend" or "License to Kill"?

LO 10

Self-defense is undergoing an epochal transformation. Since 2005, more than forty states have passed or proposed new "Castle Doctrine" legislation intended to expand the right to use deadly force in self-defense. (See Figure 5.1) (Jeannie Suk 2008, 237)

FIGURE 5.1 Castle Doctrine Map Update for January 2009



Source: "Tekel," University of Oregon law student blog, http://tekel.wordpress.com/2009/01/24/castle-doctrine-map-update-for-january-2009/.

The first castle doctrine passed the Florida legislature in October 2005, by huge margins, unanimously in the state senate, and 94–20 in the state house of representatives. The **Florida Personal Protection Law** (2009) became the model for most of the new castle laws. It includes the following provisions:

> *Section 776.012.*
>
> A person is justified in using . . . deadly force and does not have a duty to retreat if:
>
> (1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony; or
> (2) Under those circumstances permitted pursuant to Section 776.013.
>
> *776.013.*
>
> (1) A person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or great bodily harm to another if:
>
> (a) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a dwelling, residence, or occupied vehicle, or if that person had removed or was attempting to remove another against that person's will from the dwelling, residence, or occupied vehicle; and
>
> (b) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

(3) A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony.
(4) A person who unlawfully and by force enters or attempts to enter a person's dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence.
(5) As used in this section, the term:
    (a) "Dwelling" means a building or conveyance of any kind, including any attached porch, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, and is designed to be occupied by people lodging therein at night.
    (b) "Residence" means a dwelling in which a person resides either temporarily or permanently or is visiting as an invited guest.
    (c) "Vehicle" means a conveyance of any kind, whether or not motorized, which is designed to transport people or property.

776.032

(1) A person who uses force as permitted in Sections 776.012 and 776.013 is justified in using such force and is immune from criminal prosecution and civil action for the use of such force, unless the person against whom force was used is a law enforcement officer who was acting in the performance of his or her official duties, and the officer identified himself or herself in accordance with any applicable law, or the person using force knew or reasonably should have known that the person was a law enforcement officer. As used in this subsection, the term "criminal prosecution" includes arresting, detaining in custody, and charging or prosecuting the defendant.
(2) A law enforcement agency may use standard procedures for investigating the use of force as described in subsection (1), but the agency may not arrest the person for using force unless it determines that there is probable cause that the force that was used was unlawful.
(3) The court shall award reasonable attorney's fees, court costs, compensation for loss of income, and all expenses incurred by the defendant in defense of any civil action brought by a plaintiff if the court finds that the defendant is immune from prosecution as provided in subsection (1).

In short, Florida's castle law accomplished the following:

- Abolished the duty to retreat rule
- Replaced the common law "reasonable person" requirement, which placed the burden on defendants to prove the reasonableness of their actions with a presumption of reasonableness or fear. The presumption shifts the burden of proof to prosecutors, forcing them to disprove reasonableness. Proving this negative, always a very difficult burden, makes the reasonableness presumption almost unrebuttable.
- Extended the right to use deadly force outside the home to "any place you have a right to be"

- Broadened the legitimate circumstances where deadly force applies, including threats to property and threats that aren't imminent
- Created blanket criminal *and* civil immunity for anyone using force permitted by the law. (This immunity is broader than law enforcement officers' immunity.) (Jansen and Nugent-Borakove 2008, 5–6)

"Right to Defend" or "License to Kill"?

LO 10

Opponents and supporters of the castle laws see them in fundamentally different ways. Supporters claim them as the public reasserting fundamental rights. Marion Hammer, the first woman president of the National Rifle Association, says the castle law codifies the "*right* of the people to use any manner of force to protect their home and its inhabitants." She contends this right goes back to the 1400s, and that Florida prosecutors and courts took away that right by requiring that "law-abiding citizens who are attacked by criminals" have to retreat.

> When they take away your basic rights and freedoms, every once in a while you have to take them back. No law abiding citizen should be forced to retreat from an attacker in their homes or any place they have a legal right to be. Under the existing law [before the castle law was enacted] you had a duty to try to run and maybe get chased down, and beat to death. Now, if you have a knife, firearm or pepper spray, you can use force to protect yourself. (Kleindienst 2005)

(Don't confuse the U.S. Supreme Court case, *District of Columbia v. Heller* (2008) discussed in Chapter 2, with the castle laws. *Heller* decided that the Second Amendment guaranteed the right to *have* a gun; the castle laws authorize individuals to *use* the guns they have the right to have.)

Gun control advocates say the laws "are ushering in a violent new era where civilians may have more freedom to use deadly force than even the police." They're not a "right to defend"; they're a "license to kill" (Rather 2009). The Brady Campaign to Prevent Gun Violence, established by Jim Brady who was badly wounded and paralyzed during John Hinckley's attempt to assassinate President Reagan (Chapter 6), and his wife Sarah, see the laws entirely differently. Peter Hamm, communications director for the Campaign:

> The biggest myth in Florida is that this is about protecting people who use legitimate self-defense. This law sends a message to people who are potentially dangerous and have an itchy trigger finger that as long as they can make a reasonable case they were in fear, they can use deadly force against somebody. It's a particular risk faced by travelers coming to Florida for a vacation because they have no idea it's going to be the law of the land. If they get into a road-rage argument, the other person may feel he has the right to use deadly force. (Kleindienst 2005)

Law Enforcement Concerns

In March 2007, the American Prosecutors Research Institute (APRI) held a symposium consisting of prosecution, law enforcement, government, public health, and academic experts from 12 states. The purpose? Discuss the possible *unintended* negative consequences for public safety created by the new castle laws. The main concerns include

officers' use of force; operations and training requirements; increased investigation burdens; law enforcement attitudes and their impact on officer performance; and doubts that the castle laws deter crime (Jansen and Nugent-Barakove 2008, 8–9). Let's look briefly at each of these concerns.

Officers' Use of Force

Police officers are held to a higher standard than individuals when they use deadly force, namely officers aren't protected by the blanket immunity granted to citizens under the castle laws. In short, close scrutiny of officers can lead to internal discipline as well as civil and criminal liability. This imbalance between citizen and police power to use deadly force "has created a dangerous situation for law enforcement." Take officer safety during "no-knock" searches as one important example. Officers have to get a judge's approval to enter homes without warrants by demonstrating that it would be dangerous to knock and announce their presence. Individuals inside are not held to similar restraints; under the new laws' presumption of reasonableness of danger provision, they can shoot officers (8–9).

Operations and Training Requirements

Law enforcement officials attending the symposium noted that it's impossible to train officers regarding the new laws. This is especially true of the presumption of reasonableness.

> Because the courts' interpretation of the new standard is only in its infancy, law enforcement officers may find it difficult—if not impossible—to determine whether the new law is properly invoked. Officer training would have to be continually updated to help define when and where the Castle expansion might apply. (9)

Increased Investigative Burdens

Before the castle laws, officers responding to "public places" crime scenes involving deadly force had to investigate only whether the danger was imminent and whether there was a duty to retreat. Now, they have to anticipate self-defense claims in far more cases. So, both prosecutors and police officers have to gather evidence and

> Demonstrate beyond a reasonable doubt that there was not a self-defense claim that would excuse or justify the use of deadly force, ideally before charges are brought.
>
> Proving a negative is very difficult when the evidence is in the hands of the defendant. . . .
>
> As a result . . . police chiefs, sheriffs, and prosecutors have officers and line prosecutors investigating each shooting or assault as a potential claim under the Castle Doctrine. The increased investigative time needed to prove or disprove self-defense claims are a major concern for already overworked and understaffed law enforcement.

Effect of Law Enforcement Attitudes on Performance

The castle laws have also generated practical concerns about law enforcement attitudes and their effect on officer performance. For example, officers might feel like the dead "victims" deserved what they got, especially if both parties are criminals. So, they don't carry out the more intensive investigation the castle laws require.

> Because a large number of assaults occur outside the home, the expansion of no-retreat laws to areas outside the home will logically increase the number of defendants invoking the Castle expansion. This will further burden police officers' time. Police officers may become apathetic to hearing such self-defense claims every time they respond to a crime scene, which will only benefit those who deny liability because of the presumption of fear.

Doubts That the Castle Laws Will Deter Crime

Symposium experts saw one possible positive effect of the castle laws—that they'll deter crime. But, they believe that the deterrent effect depends on

- Whether the expansion of citizens' right to use deadly force is widely publicized so that citizens will know they've got the right.
- Whether would-be criminals appreciate that citizens are armed and might shoot, stab, or otherwise kill or seriously injure them.

According to the symposium members, the possible negative consequence of the castle doctrine is that it raises questions about whether they're good public policy. People might feel safer because they have a right to defend themselves. Or, they might feel less safe because they don't know who might be carrying a weapon, misinterpret behavior as threatening, and shoot them. Also, people may opt to carry weapons because they feel less safe, and people who already carried weapons might respond to threats by using force more readily.

With little to no empirical research at present to answer these important questions, the symposium advised that

> It would be prudent for states considering expansions to their self-defense laws to wait until there is better evidence that the unintended negative consequences of these laws do not outweigh the possible positive impacts. (13)

Why the Spread of Castle Laws Now?

LO 10

There's no empirical research to help explain why so many states have adopted the "new castle laws." There was no similar reaction in the 1980s when Colorado's "make-my-day" law, enacted in 1985, expanded traditional self-defense to resemble in most respects the new laws. But there's plenty of speculation as to why these laws have proliferated now. Two commonly mentioned reasons are Americans' heightened consciousness and concern about their security since 9/11 and the lack of enough police officers to protect the public. Florida and Mississippi are examples:

- *The series of hurricanes that battered Florida in 2005* "In a lot of these devastated areas, law enforcement would tell communities, 'You're on your own, we can't get to you.' So, we needed to be sure that when people protected themselves, their families and their property, that they weren't gonna be prosecuted by some criminal-coddling prosecutor" (Rather 2009).
- *The cuts in law enforcement officers in Mississippi* Jackson Police Chief McMillin "says he's waging a battle of attrition with a force that's nearly 200 officers short of the 600 the city needs. So he says it's no wonder that civilians are taking up the fight and using tools like the castle doctrine to help protect themselves. People are

sick and tired of being victims. They're tired of being robbed. They're tired of their houses being broken into. They think that they have to take matters into their own hands if they're gonna be safe (Rather 2009).

Cliff Cargill, a firearms instructor certified by the National Rifle Association says business has been booming with Jackson's crime on the rise and the new laws on the books. "If I'm in my home, my place of business or my vehicle, I don't have to justify my existence in my surroundings. If somebody breaks into my house to rob and/or do me harm, then I should be presumed innocent by anybody that comes to investigate that situation." Cargill says, "Packing heat is not paranoia, but common sense." There's an old saying, 'When seconds count, the police are only minutes away.' Well the meantime, the clock's running. What's that intruder doing to you?" That's especially true in Jackson, where locals say the police are badly out-gunned (Rather 2009).

Cases under New Castle Laws

Let's look at some of the cases illustrating how some citizens are using the new laws, and how police, prosecutors, and courts are responding to citizens' actions under the laws (see Table 5.1).

Two Shootings in Florida

1. Jacqueline Galas (Liptak 2006)

Jacqueline Galas, a New Port Richey prostitute, 23, said that a longtime client, Frank Labiento, 72, threatened to kill her and then kill himself last month. A suicide note he

TABLE 5.1 Expansion of "New Castle Laws"

State	Year	Name	Facts	Disposition
Florida	2006	Jennifer Galas, 23	Prostitute shot and killed 72-year-old client with his gun	Not charged
Florida	2006	Robert Lee Smiley, 56	Taxi driver shot and killed drunk passenger outside cab after altercation	Charged with first-degree murder; trial jury deadlocked 9–3
Mississippi	2008	Sarbrinder Pannu, 31	Convenience store clerk followed shoplifter outside store and shot him twice	
Mississippi	2008	Unidentified clerk in gas mart	Terrence Prior, 23, man in a clown mask burst through the door of a gas mart waving a gun, demanding money from the register, the third time in recent weeks store robbed by masked man. The clerk followed him out the door and shot and killed him outside the station.	Not charged
Texas	2007	Joe Horn, 62	Retired computer consultant shot two men in the back and killed two men from his front porch, as they were leaving his neighbor's house with money and jewelry	Grand jury refused to indict
Arizona	2004	Harold Fish, 59	Retired teacher on a hike fatally shot Grant Kuenzli, 43, claiming the man and his dogs charged at him	Convicted and sentenced to 10 years in prison before Arizona passed a castle law to protect people like Fish

had left and other evidence supported her contention. The law came into play when Ms. Galas grabbed Mr. Labiento's gun and chose not to flee but to kill him. "Before that law," Mr. Halkitis said, "before you could use deadly force, you had to retreat. Under the new law, you don't have to do that." The decision not to charge Ms. Galas was straightforward, Mr. Halkitis said. "It would have been a more difficult situation with the old law," he said, "much more difficult."

2. Robert Lee Smiley Jr. (Liptak 2006)

In November 2004, before the new law was enacted, Robert Lee Smiley Jr., then 56, a cabdriver in West Palm Beach, killed a drunken passenger in an altercation after dropping him off. Mr. Smiley killed Jimmie Morningstar, 43. A sports bar had paid Mr. Smiley $10 to drive Mr. Morningstar home in the early morning of Nov. 6, 2004. Mr. Morningstar was apparently reluctant to leave the cab once it reached its destination, and Mr. Smiley used a stun gun to hasten his exit. Once outside the cab, Mr. Morningstar flashed a knife, Mr. Smiley testified at his first trial, though one was never found. Mr. Smiley, who had gotten out of his cab, reacted by shooting at his passenger's feet and then into his body, killing him. Cliff Morningstar, the dead man's uncle, said he was baffled by the killing. "He had a radio," Mr. Morningstar said of Mr. Smiley. "He could have gotten in his car and left. He could have shot him in his knee." Carey Haughwout, the public defender who represents Mr. Smiley, conceded that no knife was found. "However," Ms. Haughwout said, "there is evidence to support that the victim came at Smiley after Smiley fired two warning shots, and that he did have something in his hand."

Smiley was charged and tried for murder. The jury deadlocked 9–3 in favor of convicting him. According to Henry Munnilal, the jury foreman, a 62-year-old accountant, "Mr. Smiley had a lot of chances to retreat and to avoid an escalation. He could have just gotten in his cab and left. The thing could have been avoided, and a man's life would have been saved." Mr. Smiley tried to invoke the new law, which does away with the duty to retreat and would almost certainly have meant his acquittal, but an appeals court refused to apply it retroactively.

In April 2006, a Florida appeals court indicated that the new law, had it applied to Mr. Smiley's case, would have affected its outcome. "Prior to the legislative enactment, a person was required to 'retreat to the wall' before using his or her right of self-defense by exercising deadly force," Judge Martha C. Warner wrote. The new law, Judge Warner said, abolished that duty.

Two Robberies in Mississippi

1. Sarbrinder Pannu

Rather: It was just after ten on a hot Mississippi night in August 2008 at a gas mart on the outskirts of Jackson. A man in a black SUV pulled into the lot, walked inside, grabbed a case of beer from the cooler, and walked right out the door. Without paying. A single case of beer wasn't going to break the bank, but according to the property owner, Mr. Surinder Singh, who operates several sister stores nearby, the man was just the latest of a seemingly endless stream of thieves.

Surinder Singh, owner of the BP station property: They come, they take stuff . . . By the time we call the police they are already gone. And they know that. So when . . . when the police come, they say, "Well, call us if they come back."

Rather: But the clerk manning the counter that night wasn't willing to wait for anyone to come back. According to police, he ran outside with a .357 magnum, aimed at the man in the black SUV, and fired three shots.

Singh: Somebody got to stop him. The police cannot be there 24 hours. The only person who was there to stop him was the clerk. And he stopped him, whatever means he could.

Rather: Thirty-six-year-old James Hawthorne Jr. was pronounced dead at the hospital.

2. Unidentified Gas Mart Clerk

Just a few nights later, there was another shooting at a gas mart a few miles away; police say a man in a clown mask burst through the door waving a gun, demanding money from the register. It was the third time in recent weeks the store was robbed by a man in a clown mask, as captured on this surveillance video. But when the masked man ran out with the cash, this time the clerk didn't let him get away.

Reporter, WJTV Live Broadcast: The clerk went after him and shot him outside the store. . . .

Rather: Ten rounds, according to the police report. Twenty-three-year-old Terrence Prior was pronounced dead at the hospital.

In our next case excerpt, State v. Harold Fish, the prosecution of Harold Fish for second-degree murder led to a change in Arizona's self-defense law, but the change came too late to keep him out of prison.

CASE Was It Murder or Self-Defense?

State v. Harold Fish
(Corbett 2009)

The prosecution of Harold Fish for second-degree murder led to a change in Arizona's self-defense law, but the change came too late to keep the former Tolleson teacher out of prison. Fish, 62, is serving a ten-year sentence for killing a man on a hiking trail north of Payson five years ago this week. Fish fatally shot Grant Kuenzli, 43, saying the man and his dogs charged at him on a trail in the Coconino National Forest. "The choice was this: Use the firearm or let (Kuenzli) kill me or seriously hurt me," Fish said in a recent telephone interview from the Arizona State Prison Complex–Lewis near Buckeye. "I would do the same thing again today because I didn't have any choice. That gun saved my life."

A Coconino County investigator believed that Fish acted in self-defense based on Fish's statements and limited evidence at the scene. Prosecutors saw it differently and charged him with second-degree murder. Fish was convicted in June 2006. He must serve until June 2016 unless the conviction is overturned. The Arizona Court of Appeals reviewed Fish's appeal last July but has not ruled on it yet. Fish's case sparked debate about self-defense, drawing national attention from gun-rights advocates. The National Rifle Association contributed to Fish's defense.

Unconvinced Jurors

During the trial, jurors were not convinced that Fish was justified in shooting Kuenzli to protect himself. At the time of the shooting, Arizona's self-defense law required that a person claiming self-defense must prove that his or her actions were reasonable and justified. The law was changed in 2006 just before Fish's trial. It now puts the burden of proof on prosecutors to prove that shooters were not justified in using deadly force to protect themselves.

Fish's attorney, Melvin McDonald, lobbied for that change in the Arizona Legislature before Fish's case went to trial. Then Governor Janet Napolitano vetoed two bills

that would have made the change in the self-defense law retroactive to his case.

"Classic" Self-Defense

"The state finally got it right, but they didn't give it to me," Fish said. "It is a bitter, cruel irony." NRA spokesman Andrew Arulanandam said Wednesday that the shooting "was a classic case of a good person acting in self-defense." The group is holding its national convention Friday through Sunday in Phoenix. Arulanandam said the prosecutor manipulated the legal system to exclude "the mental history of the attacker (Kuenzli)."

Hike Ends in Tragedy

Fish, a father of seven who taught English and Spanish at Tolleson High School for 27 years, was completing a day-long hike along a forested trail north of Strawberry on May 11, 2004, when he fired the fatal shots from a Kimber 10mm handgun that he was legally carrying. Kuenzli, unemployed and living out of his car, was camped at the trailhead with three dogs. Fish said he saw Kuenzli's car and was relieved that his ten-mile hike was nearly over. Just then, Kuenzli's dogs charged down the hill, barking and snarling at him.

Single Warning Shot

Fish said he yelled to Kuenzli to call off his dogs. He fired a warning shot into the ground. The dogs veered off the trail, Fish said. Suddenly, Fish said, Kuenzli charged down the hill, swinging his fists and threatening to kill him. Fish dropped Kuenzli with three shots to his chest. Kuenzli fell dead in the dirt at Fish's feet. Members of the grand jury later asked Fish why he had fired a warning shot at the dogs but did not do the same for Kuenzli. Fish said he did not have time and had been trained not to fire warning shots.

Victim's Past at Issue

Kuenzli was unarmed, but the defense argued that a screwdriver in his pocket could have been used as a weapon. Judge Mark Moran of Coconino County Superior Court did not allow that evidence into the trial. The issue is part of Fish's appeal. McDonald also tried to introduce evidence about Kuenzli's mental health problems, a domestic violence incident, and previous heated encounters Kuenzli had had with police, court officials, and strangers.

Moran excluded testimony about any prior confrontations. The legal theory was that Fish did not know of Kuenzli's mental stability when they squared off, so it was irrelevant. "Baloney!" Fish said. "If you look in the eyes of a man who wants to kill, you know he's not right. I'll never forget those eyes. This guy was as nutty as anyone I've ever seen." McDonald said he hopes the Arizona Court of Appeals will overturn Fish's conviction and set him free so he can return to his wife and family.

Family Is Still Hopeful

For three years, Debora Fish has been raising their seven children, ages 5 to 20, without her husband. She supports the family with his retirement income and her paycheck from a nursing home. "We're keeping our heads above water," she said, adding that the family is eager for a ruling that would overturn the conviction and free her husband without another expensive trial.

Flagstaff attorneys, John Trebon and Lee Phillips, filed an appeal for Fish in April 2008. Coconino County Prosecutor Michael Lessler said he is awaiting the appellate court's decision, but he declined to speculate about the outcome. After the trial verdict nearly three years ago, Lessler said of the shooting that Fish "engaged in conduct that the law just can't accept."

Kuenzli's sister, Linda Almeter, said Fish was unhurt in the deadly encounter and did nothing to substantiate his self-defense claim. "He didn't have a button missing from his shirt," she said. "I think justice put him where he is, and he needs to stay there," she said.

"God and I Are OK"

Fish, a member of the Church of Jesus Christ of Latter-Day Saints, said he has had a lot of time to reflect about what happened five years ago. "God and I are OK with this," Fish said of the shooting. Did he pray for Kuenzli? "I wish I could say I did," Fish said, adding that it would be hypocritical for him to do that.

As prisoner No. 208513, Fish spends his time reading and watching TV. His family visits every week. "It's not a happy place," he said of prison. "It's not meant to be an experience you want to repeat."

"Innocent Citizen"

Fish will be 69 years old when he is released unless Trebon and Phillips succeed in getting his conviction overturned sooner. People empathize with Fish because he went to prison for defending himself, Trebon said. "Here's an ordinary, innocent citizen in a life-and-death situation," the attorney said. "He makes the most reasonable decision under the circumstances and then is second-guessed by people who didn't have to live through that situation."

QUESTIONS

1. **Summarize the story of Harold Fish's shooting Grant Kuenzli.**
2. **State the elements of the Arizona castle doctrine law.**
3. **Assume you're the prosecutor; present the case for murder.**
4. **Now, assume you're the defense attorney; present the case for self-defense.**
5. **In your opinion, should the new law be applied to Harold Fish, or should the governor pardon him? Defend your answer with specific points from the case.**

ETHICAL DILEMMA

New Castle Doctrine: Right to Defend or License to Kill?

Marion Hammer, executive director of Unified Sportsmen of Florida, representative of the National Rifle Association in Florida:

> When you are prosecuting law-abiding people for defending themselves against criminals, it's wrong and it has to be fixed. And the castle doctrine laws fixed that.

Gregory Hicks, Warren City attorney:

> I believe in protecting one's property. I believe in the fact that your home is your castle. But I don't believe you have the right to use that kind of deadly force on a prank. I'm sorry, that's not the way an ordered society acts.

Dan Rather, *Dan Rather Reports*:

> To shoot or not to shoot? For even the most seasoned police officer, it's the ultimate dilemma. A split-second choice that could prevent a violent crime or be a fatal mistake. But it's no longer just police who are deciding whether or not to pull the trigger. There's a new breed of laws that's expanding the rights of civilians to use deadly force. They are called the "castle doctrine" laws, and since 2005, they've been passed or proposed in more than 35 states.
>
> The new laws are not about the right to bear arms, but the right to use them. The National Rifle Association says the castle doctrine is restoring a tradition of self-defense that dates back to medieval England, when a man's home was considered his castle. But others say these laws are ushering in a violent new era where civilians may have more freedom to use deadly force than even the police.

Instructions

1. Go to the website www.cengage.com/criminaljustice/samaha.
2. Read the transcript of the report on the new castle laws.
3. List the arguments for the proposition that the new castle doctrine laws represent a right to defend guaranteed by the Constitution.
4. List the arguments for the proposition that the new castle doctrine laws represent a license to kill.
5. Write a one-page essay stating what you believe best balances the right to defend yourself while protecting the lives of innocent people. Explain how your position represents the most ethical public policy regarding the right to bear arms. Back up your answer with the selections you read and with the New Castle Doctrine sections in your text.

"Choice of Evils" (General Principle of Necessity)

At the heart of the choice-of-evils defense is the necessity to prevent imminent danger; so in that respect, it's like all the defenses we've discussed up to now. The justifications based on the necessity of defending yourself, other people, and your home aren't

controversial. Why? Because we see the attackers of us, our families, and our homes as evil and the defenders as good. However, in the general choice-of-evils defense, the line between good and evil isn't always drawn as clearly as it is in self-defense and defense of home.

LO 11

The **choice-of-evils defense**, also called the **general principle of necessity**, has a long history in the law of Europe and the Americas. And, throughout that history, the defense has generated heated controversy. Bracton, the great thirteenth-century jurist of English and Roman law, declared that what "is not otherwise lawful, necessity makes lawful." Other distinguished English commentators, such as Sir Francis Bacon, Sir Edward Coke, and Sir Matthew Hale in the sixteenth and seventeenth centuries, agreed with Bracton. The influential seventeenth-century English judge Hobart expressed the argument this way: "All laws admit certain cases of just excuse, when they are offended in letter, and where the offender is under necessity, either of compulsion or inconvenience."

On the other side of the debate, the distinguished nineteenth-century English historian of criminal law Judge Sir James F. Stephen believed that the defense of necessity was so vague that judges could interpret it to mean anything they wanted. In the mid-1950s, the distinguished professor of criminal law Glanville Williams (1961) wrote: "It is just possible to imagine cases in which the expediency of breaking the law is so overwhelmingly great that people may be justified in breaking it, but these cases cannot be defined beforehand" (724–25).

Early cases record occasional instances of defendants who successfully pleaded the necessity defense. In 1500, a prisoner successfully pleaded necessity to a charge of prison break; he was trying to escape a fire that burned down the jail. The most common example in the older cases is destroying houses to stop fires from spreading. In 1912, a man was acquitted on the defense of necessity when he burned a strip of the owner's heather to prevent a fire from spreading to his house (Hall 1960, 425).

The most famous case of imminent necessity is *The Queen v. Dudley and Stephens* (1884). Dudley and Stephens, two adults with families, and Brooks, an 18-year-old man without any family responsibilities, were lost in a lifeboat on the high seas. They had no food or water, except for two cans of turnips and a turtle they caught in the sea on the fourth day. After 20 days (the last 8 without food), perhaps a thousand miles from land and with virtually no hope of rescue, Dudley and Stephens—after failing to get Brooks to cast lots—told him that, if no rescue vessel appeared by the next day, they were going to kill him for food. They explained to Brooks that his life was the most expendable because they each had family responsibilities and he didn't.

The following day, no vessel appeared. After saying a prayer for him, Dudley and Stephens killed Brooks, who was too weak to resist. They survived on his flesh and blood for four days, when they were finally rescued. Dudley and Stephens were prosecuted, convicted, and sentenced to death for murder. They appealed, pleading the defense of necessity.

Lord Coleridge, in this famous passage, rejected the defense of necessity:

> The temptation to act here was not what the law ever called necessity. Nor is this to be regretted. Though law and morality are not the same, and many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequence; and such divorce would follow if the temptation to murder in this case were to be held by law an absolute defense of it. It is not so.

> To preserve one's life is generally speaking a duty, but it may be the plainest and the highest duty to sacrifice it. War is full of instances in which it is a man's duty not to live, but to die. The duty, in case of shipwreck, of a captain to his crew, of the crew to the passengers, of soldiers to women and children; these duties impose on men the moral necessity, not of the preservation, but of the sacrifice of their lives for others. It is not correct, therefore, to say that there is any absolute or unqualified necessity to preserve one's own life.
>
> It is not needful to point out the awful danger of admitting the principle contended for.
>
> Who is to be the judge of this sort of necessity? By what measure of the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own.
>
> In this case, the weakest, the youngest, the most unresisting, was chosen. Was it more necessary to kill him than one of the grown men? The answer must be "No"—"So spake the Fiend, and with necessity, The tyrant's plea, executed his devilish deeds." It is not suggested that in this particular case, the deeds were "devilish," but it is quite plain that such a principle once admitted might be made the legal cloak for unbridled passion and atrocious crime.

Lord Coleridge sentenced them to death but expressed his hope that Queen Victoria would pardon them. The queen didn't pardon them, but she almost did—she commuted their death penalty to six months in prison.

The crux of the choice-of-evils defense is proving that the defendant made the right choice, the only choice—namely, the necessity of choosing now to do a lesser evil to avoid a greater evil. The Model Penal Code choice-of-evils provision contains three elements laid out in three steps:

1. Identify the evils.
2. Rank the evils.
3. Reasonable belief that the greater evil is imminent, namely it's going to happen right now (ALI 1985, 1:2, 8–22).

Simply put, the choice-of-evils defense justifies choosing to commit a lesser crime to avoid the harm of a greater crime. The choice of the greater evil has to be both imminent and necessary. Those who choose to do the lesser evil have to believe reasonably their only choice is to cause the lesser evil to avoid the imminent greater evil.

The Model Penal Code (ALI 1985, 1:2, 8) lists all of the following "right" choices:

1. Destroying property to prevent spreading fire
2. Violating a speed limit to get a dying person to a hospital
3. Throwing cargo overboard to save a sinking vessel and its crew
4. Dispensing drugs without a prescription in an emergency
5. Breaking into and entering a mountain cabin to avoid freezing to death

The right choices are life, safety, and health over property. Why? Because according to our values, life, safety, and health always trump property interests (ALI 1985, 12).

The MPC doesn't leave the ranking of evils to individuals; it charges legislatures or judges and juries at trial with the task. Once an individual has made the "right" choice, she's either acquitted, or it's considered a mitigating circumstance that can

lessen the punishment. Courts rarely uphold choice-of-evils defendants' claims. In our next case excerpt, *The People of the State of New York, Plaintiff v. John Gray et al., Defendants*, the Criminal Court of the City of New York ruled that a demonstration organized by Transportation Alternatives at the entrance to the Queensboro Bridge was a lesser evil than the harm to the environment and New York City's population caused by opening the bridge's bicycle and pedestrian lane to motor vehicle traffic during evening rush hours.

In our next case excerpt,* The People of the State of New York, Plaintiff v. John Gray et al., Defendants, *the Criminal Court of the City of New York ruled that a demonstration organized by Transportation Alternatives at the entrance to the Queensboro Bridge was a lesser evil than the harm to the environment and New York City's population caused by opening the bridge's bicycle and pedestrian lane to motor vehicle traffic during evening rush hours.

CASE Was the Demonstration Against Pollution the Lesser Evil?

The People of the State of New York, Plaintiff v. John Gray et al., Defendants
150 Misc.2d 852 (N.Y.City Crim.Ct. 1991)

HISTORY AND FACTS

John Gray and others were charged with disorderly conduct (Penal Law § 240.20 [5], [6]). These charges are a result of their participation in a demonstration organized by Transportation Alternatives on October 22, 1990, at the entrance to the south outer roadway of the Queensboro Bridge, in opposition to the opening to vehicular traffic of the one lane that had been reserved for bicycles and pedestrians during evening rush hours.

Pursuant to an agreement with the Manhattan District Attorney's office, defendants stipulated to the facts constituting the People's direct case. In substance, they admitted their presence on the south outer roadway of the Queensboro Bridge at approximately 4:00 p.m. on October 22, 1990. They also admitted that at about 4:15 p.m., a New York City police officer ordered them to move and that they did not comply with that order until they were placed under arrest, at which time they moved voluntarily and did not resist in any way. In return for this stipulation, the prosecution agreed not to offer any objections to the presentation of a necessity defense by these defendants.

LAURA SAFER-ESPINOZA, J.W.

OPINION

Defendants are all members of an organization called Transportation Alternatives, an organization devoted to the promotion of nonvehicular, ecologically sound means of transportation. Through their testimony and that of their expert witnesses, it was clear that these defendants' actions were motivated by the desire to prevent what they called the "asphyxiation of New York" by automobile-related pollution. Specifically, the harm they seek to combat is the release of ever higher levels of pollution from vehicular traffic, and the unnecessary death and serious illness of many New Yorkers as a result.

Defendants also articulated a motivation to put an end to an extremely hazardous situation that had resulted on the Queensboro Bridge south outer roadway subsequent to the implementation of the regulation opening of that roadway to vehicular traffic during the evening rush hour. Since many pedestrians and bicyclists continued to use that roadway, the defendants testified that they also acted to prevent serious injuries to those individuals who continued to use alternative forms of transportation on the bridge.

Certainly, neither of these harms could be said to have developed through any fault of these defendants.

Legislative Preemption

There is no issue of legislative preemption in this case. *In fact, in a departure from the usual situation in citizen intervention cases, it is clear that it is the defendants' point of view concerning air pollution and its accompanying dangers that has been confirmed and adopted by the Legislature.*

As testified to by the former Commissioner of Transportation, Ross Sandler, the federal Clean Air Act Amendments of 1970 (42 USC §§ 7401–7642, as amended) required the Environmental Protection Agency (EPA) to promulgate "clean air" standards. New York is not now, and has never been, in compliance with those

minimum standards set by the EPA. This noncompliance has been the cause of numerous citizen suits seeking enforcement of pollution level standards in New York City.

Broad legislative preferences such as that expressed by the Clean Air Act have often been used in the reverse situation by the courts to ban the necessity defense on grounds of legislative preemption. This is particularly true in a number of cases where courts have implied a legislative choice in favor of nuclear power and weaponry. Other courts have required that the Legislature have specifically weighed competing harms, including those foreseen by defendants, and made a value choice rejecting defendant's position.

Nor is this a case where the defendants are acting against what the courts have already recognized as a fundamental right, as in the abortion protests which have asserted a necessity defense. There is no corresponding fundamental right to contribute to life-threatening air pollution. (*People v Archer,* 143 Misc 2d 390 [Rochester City Ct 1988].) In *Archer*, the court submitted the necessity defense to the jury to be considered if they found second trimester abortions were being performed. The court failed to recognize the protections extended to such procedures under *Roe v Wade* (410 US 113 [1973]). Defendants in that case were convicted.

The Necessity Defense and Citizen Intervention

The necessity defense is fundamentally a balancing test to determine whether a criminal act was committed to prevent a greater harm. The common elements of the defense found in virtually all common law and statutory definitions include the following:

(1) the actor has acted to avoid a grave harm, not of his own making;

(2) there are not adequate legal means to avoid the harm; and

(3) the harm sought to be avoided is greater than that committed.

A number of jurisdictions, New York among them, have included two additional requirements—first, the harm must be imminent, and second, the action taken must be reasonably expected to avert the impending danger.

Burdens of Proof in Necessity Defense Cases under Penal Law § 35.05 (2)

Justification in New York, as defined in Penal Law §§ 35.05 through 35.30 is an ordinary and not an affirmative defense (Penal Law § 35.00). Thus, the People have the burden of disproving such a defense beyond a reasonable doubt. Penal Law § 35.05 (2) requires, however, that a defendant establish a prima facie case by producing evidence from which a reasonable juror could find that he has met each element of the defense.

Therefore, when seeking to establish a defense under Penal Law § 35.05 (2), a defendant bears the same initial burden as those presenting affirmative defenses—that of establishing a prima facie case (29 Am Jur 2d, Evidence, § 156 [1967]). If that burden is met, the People must then disprove the defense of necessity beyond a reasonable doubt. Unlike true affirmative defenses, defendants in cases under Penal Law § 35.05 (2) do not have the burden of establishing their defense by a preponderance of the evidence.

It is particularly important to clearly delineate and evaluate whether defendants have met their initial burden of production in trials involving the necessity defense, since if that question is resolved in a defendant's favor, the burden of proof then shifts dramatically, and the People must disprove the defense beyond a reasonable doubt. This is true whether the trier of fact is a jury or a Judge. As to the burden of production in affirmative defenses, it is uniformly held that a defendant is obliged to start matters off by putting in *some* evidence of his defense unless the prosecution does so in presenting its side (1 LaFave & Scott, Substantive Criminal Law § 1.8).

In light of the strong constitutional considerations in favor of allowing defendants to have their defenses submitted to the trier of fact, the discrepancy between the low standard of production which some courts have articulated in theory and the extraordinarily high standard ultimately imposed in many instances on civil disobedients who raise the necessity defense seems inappropriate.

The Reasonable Belief Standard

In *People v Goetz* (68 NY2d 96 [1986]), the New York Court of Appeals emphasized that the justification statute requires a determination of reasonableness that is both subjective and objective. The critical focus must be placed on the particular defendant and the circumstances actually confronting him at the time of the incident, and what a reasonable person in those circumstances and having defendant's background and experiences would conclude. The same basic standards should apply in cases where defendants assert the justification defense defined by Penal Law § 35.05 (2).

There is only one element of the necessity defense to which a standard more stringent than reasonable belief must be applied—that is the actor's choice of values, for which he is strictly liable. An actor is not justified, for example, in taking human life to save imperiled property. No matter how real the threat to property is, by making the wrong choice in placing the value of property over human life, the actor loses the defense. Thus, the choice of values requirement ensures that the defense cannot be used to challenge shared societal values.

The Choice of Evils Requirement

As stated earlier, defendants' value choice is the one area where they must be held strictly liable. A Judge must decide whether the actor's values are so antithetical to shared social values as to bar the defense as a matter of law. As part of this objective inquiry, the requirement that a Judge also determine whether or not the defendant's value choice has been preempted by the Legislature has sometimes been

read into the statute. New York provided that defendants must not be protesting only against the morality and advisability of the statute under which they are charged.

A reading of the cases in this area reveals that it is seldom the correctness of defendants' values which is at issue. Courts have generally recognized that the harms perceived by activists protesting nuclear weapons and power and United States domestic and foreign policy—nuclear holocaust, international law violations, torture, murder, the unnecessary deaths of United States citizens as a result of environmental hazards and disease—are far greater than those created by a trespass or disorderly conduct.

In this case, as well as in most necessity cases, it is clear that defendants chose the correct societal value. It is beyond question that both the death and illness of New Yorkers as a result of additional air pollution, and the danger to cyclists and pedestrians posed by vehicles on the south outer roadway, are far greater harms than that created by the violation of disorderly conduct.

The more difficult issue in many of the necessity defense cases has been whether the actors' perception of harm was reasonable. The court will now turn to a discussion of this requirement, and the additional requirement of Penal Law § 35.05, that the harm be imminent.

The Imminence of Grave Harm Requirement

In evaluating whether defendants' perceptions of the harm they sought to avoid in this case were reasonable, the court must decide whether they had a well-founded belief in imminent grave injury. Such determination is almost always a question for the trier of fact. Defendants in the instant case presented several witnesses, as well as submitting studies, to establish the existence of a grave and imminent harm. Defendants themselves testified that the DOT regulation, if obeyed, would prove to be a devastating disincentive to New Yorkers who use alternative or nonvehicular means of transportation between the Boroughs of Manhattan and Queens. The only road open to bicyclists and pedestrians is practically inaccessible to them during the hours most critical to their return home. In contrast to this disincentive to nonpolluting forms of transportation, another lane is open to vehicular traffic.

Defendants clearly articulated their belief that encouraging automobiles at a rush hour traffic "chokepoint" while discouraging walkers and cyclists produces a specific, grave harm that is not only imminent, but is occurring daily. This belief was supported by the testimony of expert witnesses and studies submitted into evidence. Former Commissioner of Transportation Sandler gave undisputed testimony that New York City *would have to reduce vehicular traffic in order to come into compliance with the minimum standards set by the Environmental Protection Agency for air pollution*. Indeed, recent litigation corroborates defendants' claim that New York's failure to comply with EPA standards is due, in substantial measure, to automobile-related pollution.

Additionally, Dr. Steven Markowitz of the Mount Sinai Department on Environmental and Occupational Diseases testified that air pollution in New York and elsewhere is a major cause of lung, respiratory tract and heart disease. *The EPA's 1989 assessment concluded that motor vehicles were the single largest contributor to cancer risks from exposure to air toxics. Motor vehicles, said the EPA, are responsible for 55% of the total cancer incidence from air contaminants, five times greater than from any other air pollution source.*

The above-cited DOT study also acknowledges that bicycle riding has a significant and untapped potential to reduce traffic congestion and its accompanying air pollution. It indicates that the numbers of people who would adopt this form of transportation if encouraged by simple safety measures *including bicycle lanes* on the part of New York City (almost 30% of those surveyed) is impressive. It states that the current level of bicycle ridership in New York City is indicative only of those individuals who are so dedicated to cycling that they are willing to utilize a transportation system that has been shaped for decades without provisions for bicycles.

Unlike many of the cases in this area, where the harm sought to be prevented was perceived as too far in the future to be found "imminent," the grave harm in this case is occurring every day. The additional pollution breathed by all New Yorkers (in a city that is already out of compliance with the minimal standards set by the EPA), as a result of the fact that more road space will be devoted to vehicles and its corollary that those hundreds of individuals who would otherwise bicycle or walk are discouraged from using nonpolluting forms of transportation is a concrete harm being suffered by the population at this moment.

In light of all the evidence of grave and imminent harm cited by these defendants, the court finds that it would be improper to hold as a matter of law that they had not met their burden of production on this element of the defense, i.e., that no reasonable juror could find that defendants had a reasonable belief that grave and imminent harm was occurring. The inquiry therefore becomes whether the People have disproved this element beyond a reasonable doubt.

This court rejects the contention that proof of the imminent death of New Yorkers as a result of high levels of air pollution or accidents on the south outer roadway is required before the finding of an emergency can be made to uphold this defense. The medical evidence connecting air pollution and disease—namely, cancer and heart disease—is too well established for such a position to be logical.

In recent cases, it has become evident that the lesser evil sometimes must occur well in advance of the greater harm. In *People v Harmon* (53 Mich App 482, 220 NW2d 212 [1974]), the defendants escaped from prison one evening after threat of assault, although there was no present or impending assault. The court ruled that imminency is "to be decided by the trier of fact taking into consideration all the surrounding circumstances, including defendant's opportunity and ability to avoid the feared harm" (*People v Harmon, supra,* at 484, at 214.) In this case, the threatened harm of increased deaths and illness through air pollution is a uniquely modern horror, very different from the fires, floods and

famines which triggered necessity situations in simpler days. However, the potential injury is just as great, if not greater.

Pursuant to the foregoing discussion, this court finds the prosecution has failed to disprove the element that defendants in this case had a reasonable belief in a grave and imminent harm constituting an emergency, beyond a reasonable doubt.

The No Legal Alternative Requirement

A key requirement of the necessity defense is that no reasonable legal option exists for averting the harm. Once again, the proper inquiry here is whether the defendant reasonably believed that there was no legal alternative to his actions. The defense does not legalize lawlessness; rather it permits courts to distinguish between necessary and unnecessary illegal acts in order to provide an essential safety valve to law enforcement in a democratic society.

Defendants in this case testified to a long history of attempts to prevent the harm they perceived. Although Transportation Alternatives is a group that is regularly consulted by the Department of Transportation and meets often with agency officials to propose measures to encourage walking, cycling and the use of mass transit, and to relieve traffic congestion with its accompanying pollution, they received no advance warning that the closing of the bicycle and pedestrian lane on the Queensboro Bridge was being considered.

The Causal Relationship Requirement

New York is among the jurisdictions that require a defendant's actions to be reasonably designed to actually prevent the threatened greater harm. As with the other elements of this defense, the test consistent with the purposes of this defense is one of reasonable belief. Defendants' initial burden is to offer sufficient evidence of a reasonable belief in a causal link between their behavior and ending the perceived harm. The New York statute and most common-law formulations use the term "necessary" rather than "sufficient." In the opinion of this court, a defendant's reasonable belief must be in the necessity of his action to avoid the injury. The law does not require certainty of success.

Defendants testified that they had participated in two short-term campaigns in the recent past which only became successful when civil disobedience was employed. One of these campaigns resulted in the defeat of Mayor Koch's attempt in 1987 to ban bicycles from Manhattan streets. The second involved their attempts during the 1980s to obtain access to a roadway along the river in New Jersey for cyclists and walkers. All efforts at letter writing and petitioning had been rebuffed, and it was only after members of Transportation Alternatives were arrested for acts of civil disobedience that a three-month trial period of access to the roadway for walkers and cyclists was instituted.

Pursuant to the foregoing opinion, this court finds that the People have not disproved the elements of the necessity defense in this case beyond a reasonable doubt. Defendants are therefore acquitted.

QUESTIONS

1. **Identify the lesser and the greater evil.**
2. **List the elements of the choice of evils defense discussed by the court.**
3. **Summarize the court's arguments that support the defendants' choice.**
4. **Assume you're the prosecutor. List the arguments against the choice-of-evils defense.**
5. **Assume you're the defense attorney. List the arguments in favor of the choice-of-evils defense.**
6. **In your opinion, should there be a choice-of-evils defense? Back up your answer with specific details from the case, and from the text.**

EXPLORING FURTHER

Choice of Evils

1. Was Violating the Marijuana Law a Lesser Evil?

State v. Ownbey, 996 P.2d 510 (Ore.App. 2000)

DEITS, C.J.

FACTS Jack Ownbey is a veteran of the Vietnam War. He has been diagnosed with post-traumatic stress disorder (PTSD). In his defense to the charges against him, Ownbey intended to show that "his actions in growing marijuana and possessing marijuana were as a result of medical necessity or choice of evils."

ORS 161.200, codifies that defense in Oregon. It provides:

> . . . (2) Unless inconsistent with . . . some other provision of law, conduct which would otherwise constitute an offense is justifiable and not criminal when:
>
> (a) That conduct is necessary as an emergency measure to avoid an imminent public or private injury; and
>
> (b) The threatened injury is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.
>
> (3) The necessity and justifiability of conduct under subsection (1) of this section shall not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder.

Was Ownbey entitled to the defense of necessity?

DECISION No, according to the Oregon Court of Appeals:

> Ownbey fails to recognize that the defense of necessity is available only in situations wherein the legislature has not itself, in its criminal statute, made a determination of values. If the legislature has not made such a value judgment, the defense would be available. However, when, as here, the legislature has already balanced the competing values that would be presented in a choice-of-evils defense and made a choice, the court is precluded from reassessing that judgment.

2. Was Speeding the Lesser Evil?

People v. Dover, 790 P.2d 834 (Colo. 1990)

FACTS The prosecution proved beyond a reasonable doubt by the use of radar readings that James Dover was driving 80 miles per hour in a 55 mile-per-hour zone. However, the court also found that the defendant, who is a lawyer, was not guilty on the grounds that his speeding violation was justified because he was late for a court hearing in Denver as a result of a late hearing in Summit County, Colorado.

A Colorado statute, § 42-4-1001(8)(a) provides:

> The conduct of a driver of a vehicle which would otherwise constitute a violation of this section is justifiable and not unlawful when: It is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no conduct of said driver and which is of sufficient gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweigh the desirability of avoiding the consequences sought to be prevented by this section.

Was Dover justified in speeding because of necessity?

DECISION No, said the Colorado Supreme Court:

> In this case, the defendant did not meet the foundational requirements of § 42-4-1001(8)(a). He merely testified that he was driving to Denver for a "court matter" and that he was late because of the length of a hearing in Summit County. No other evidence as to the existence of emergency as a justification for speeding was presented. The defendant did not present evidence as to the type or extent of the injury that he would suffer if he did not violate § 42-4-1001(1). He also failed to establish that he did not cause the situation or that his injuries would outweigh the consequences of his conduct.

3. Was Burglary the Lesser Evil?

State v. Celli, 263 N.W.2d 145 (S.D. 1978)

FACTS On a cold winter day, William Celli and his friend, Glynis Brooks, left Deadwood, South Dakota, hoping to hitchhike to Newcastle, Wyoming, to look for work. The weather turned colder, they were afraid of frostbite, and there was no place of business open for them to get warm. Their feet were so stiff from the cold that it was difficult for them to walk.

They broke the lock on the front door, and entered the only structure around, a cabin. Celli immediately crawled into a bed to warm up, and Brooks tried to light a fire in the fireplace. They rummaged through drawers to look for matches, which they finally located, and started a fire. Finally, Celli came out of the bedroom, took off his wet moccasins, socks, and coat; placed them near the fire; and sat down to warm himself. After warming up somewhat they checked the kitchen for edible food. That morning, they had shared a can of beans but had not eaten since. All they found was dry macaroni, which they could not cook because there was no water.

A neighbor noticed the smoke from the fireplace and called the police. When the police entered the cabin, Celli and Brooks were warming themselves in front of the fireplace. The police searched them but turned up nothing belonging to the cabin owners.

Did Celli and his friend choose the lesser of two evils?

DECISION The trial court convicted Celli and Brooks of fourth-degree burglary. The appellate court reversed on other grounds, so, unfortunately for us, the court never got to the issue of the defense of necessity.

Consent

LO 12

Now we turn to a justification that has nothing to do with necessity. At the heart of the **defense of consent** is the high value placed on individual autonomy in a free society. If mentally competent adults want to be crime victims, so the argument for the justification of consent goes, no paternalistic government should get in their way.

Consent may make sense in the larger context of individual freedom and responsibility, but the criminal law is hostile to consent as a justification for committing crimes.

For all the noise about choice, you know already that except for the voluntary act requirement (discussed in Chapter 3), there are many examples of crimes where choice is either a total fiction or very limited. We've seen some major examples in the chapters so far. There's the rule of lenity discussed in Chapter 1; the void-for-vagueness doctrine discussed in Chapter 2; and the mental state of negligence and the absence of mental fault in strict liability discussed in Chapter 4.

Individuals can take their own lives and inflict injuries on themselves, but in most states they can't authorize others to kill them or beat them. Let's look at how confined choice is in the defense of consent and examine some of the reasons. Here's an example from the Alabama Criminal Code:

Alabama Criminal Code (1977) Section 13a-2-7

(a) In general. The consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense if such consent negatives a required element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense.

(b) Consent to bodily harm. When conduct is charged to constitute an offense because it causes or threatens bodily harm, consent to such conduct or to the infliction of such harm is a defense only if:

  (1) The bodily harm consented to or threatened by the conduct consented to is not serious; or

  (2) The conduct and the harm are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport.

(c) Ineffective consent. Unless otherwise provided by this Criminal Code or by the law defining the offense, assent does not constitute consent if:

  (1) It is given by a person who is legally incompetent to authorize the conduct; or

  (2) It is given by a person who by reason of immaturity, mental disease or defect, or intoxication is manifestly unable and known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct; or

  (3) It is given by a person whose consent is sought to be prevented by the law defining the offense; or

  (4) It is induced by force, duress or deception.

In most states, the law recognizes only four situations where consent justifies otherwise criminal conduct:

1. No serious injury results from the consensual crime.
2. The injury happens during a sporting event.
3. The conduct benefits the consenting person, such as when a patient consents to surgery.
4. The consent is to sexual conduct. (Fletcher 1978, 770)

Fitting into one of these four exceptions is necessary, but it's not enough to entitle defendants to the defense. They also have to prove that the consent was voluntary, knowing, and authorized. **Voluntary consent** means consent was the product of free will, not of force, threat of force, promise, or trickery. Forgiveness after the commission of a crime

doesn't qualify as voluntary consent. **Knowing consent** means the person consenting understands what she's consenting to; she's not too young or insane to understand. Authorized consent means the person consenting has the authority to give consent; I can't give consent for someone else whom I'm not legally responsible for. The court dealt with the sporting event exception in *State v. Shelley* (1997).

In* State v. Shelley*, the court dealt with the sporting event exception in the defense of consent.

CASE Did He Consent to the Attack?

State v. Shelley
929 P.2d 489 (Wash.App. 1997)

HISTORY

Jason Shelley was convicted in the Superior Court, King County, of second-degree assault, arising out of an incident in which Shelley intentionally punched another basketball player during a game. Shelley appealed. The Court of Appeals affirmed the conviction.

GROSSE, J.

FACTS

On March 31, 1993, Jason Shelley and Mario Gonzalez played "pickup" basketball on opposing teams at the University of Washington Intramural Activities Building (the IMA). Pickup games are not refereed by an official; rather, the players take responsibility for calling their own fouls.

During the course of three games, Gonzalez fouled Shelley several times. Gonzalez had a reputation for playing overly aggressive defense at the IMA. Toward the end of the evening, after trying to hit the ball away from Shelley, he scratched Shelley's face and drew blood. After getting scratched, Shelley briefly left the game and then returned.

Shelley and Gonzalez have differing versions of what occurred after Shelley returned to the game. According to Gonzalez, while he was waiting for play in the game to return to Gonzalez's side of the court, Shelley suddenly hit him. Gonzalez did not see Shelley punch him. According to Shelley's version of events, when Shelley rejoined the game, he was running down the court and he saw Gonzalez make "a move towards me as if he was maybe going to prevent me from getting the ball." The move was with his hand up "across my vision." Angry, he "just reacted" and swung. He said he hit him because he was afraid of being hurt, like the previous scratch. He testified that Gonzalez continually beat him up during the game by fouling him hard.

A week after the incident, a school police detective interviewed Shelley and prepared a statement for Shelley to sign based on the interview. Shelley reported to the police that Gonzalez had been "continually slapping and scratching him" during the game. Shelley "had been getting mad" at Gonzalez, and the scratch on Shelley's face was the "final straw."

As the two were running down the court side by side, "I swung my right hand around and hit him with my fist on the right side of his face." Shelley asserted that he also told the detective that Gonzalez waved a hand at him just before Shelley threw the punch and that he told the detective that he was afraid of being injured.

Gonzalez required emergency surgery to repair his jaw. Broken in three places, it was wired shut for six weeks. His treating physician believed that a "significant" blow caused the damage.

During the course of the trial, defense counsel told the court he intended to propose a jury instruction that: "A person legally consents to conduct that causes or threatens bodily harm if the conduct and the harm are reasonably foreseeable hazards of joint participation in a lawful, athletic contest or competitive sport."

Although the trial court agreed that there were risks involved in sports, it stated that "the risk of being intentionally punched by another player is one that I don't think we ever do assume." The court noted, "In basketball you consent to a certain amount of rough contact. If they were both going for a rebound and Mr. Shelley's elbow or even his fist hit Mr. Gonzalez as they were both jumping for the rebound and Mr. Gonzalez's jaw was fractured in exactly the same way then you would have an issue."

Reasoning that "our laws are intended to uphold the public peace and regulate behavior of individuals," the court ruled "that as a matter of law, consent cannot be a defense to an assault." The court indicated that Shelley

could not claim consent because his conduct "exceeded" what is considered within the rules of that particular sport:

> Consent is a contact that is contemplated within the rules of the game and that is incidental to the furtherance of the goals of that particular game. If you can show me any rule book for basketball at any level that says an intentional punch to the face in some way is a part of the game, then I would take another look at your argument. I don't believe any such rule book exists.

Later, Shelley proposed jury instructions on the subject of consent:

> An act is not an assault, if it is done with the consent of the person alleged to be assaulted. It is a defense to a charge of second degree assault occurring in the course of an athletic contest if the conduct and the harm are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport.

The trial court rejected these, and Shelley excerpted. The trial court did instruct the jury about self-defense.

OPINION

First, we hold that consent is a defense to an assault occurring during an athletic contest. This is consistent with the law of assault as it has developed in Washington. A person is guilty of second-degree assault if he or she "intentionally assaults another and thereby recklessly inflicts substantial bodily harm."

One common law definition of assault recognized in Washington is "an unlawful touching with criminal intent." At the common law, a touching is unlawful when the person touched did not give consent to it, and it was either harmful or offensive. As our Supreme Court stated in *State v. Simmons*, "Where there is consent, there is no assault." The State argues that because Simmons was a sexual assault case, the defense of consent should be limited to that realm. We decline to apply the defense so narrowly.

Logically, consent must be an issue in sporting events because a person participates in a game knowing that it will involve potentially offensive contact and with this consent the "touchings" involved are not "unlawful." The rationale that courts offer in limiting consent as a defense is that society has an interest in punishing assaults as breaches of the public peace and order, so that an individual cannot consent to a wrong that is committed against the public peace.

Urging us to reject the defense of consent because an assault violates the public peace, the State argues that this principle precludes Shelley from being entitled to argue the consent defense on the facts of his case. In making this argument, the State ignores the factual contexts that dictated the results in the cases it cites in support. When faced with the question of whether to accept a school child's consent to hazing or consent to a fight, *People v. Lenti*, 253 N.Y.S.2d 9 (1964), or a gang member's consent to a beating, *Helton v. State*, 624 N.E.2d 499, 514 (Ind. Ct.App.1993), courts have declined to apply the defense. Obviously, these cases present "touchings" factually distinct from "touchings" occurring in athletic competitions.

If consent cannot be a defense to assault, then most athletic contests would need to be banned because many involve "invasions of one's physical integrity." Because society has chosen to foster sports competitions, players necessarily must be able to consent to physical contact and other players must be able to rely on that consent when playing the game. This is the view adopted by the drafters of the Model Penal Code:

> There are, however, situations in which consent to bodily injury should be recognized as a defense to crime.
>
> There is the obvious case of participation in an athletic contest or competitive sport, where the nature of the enterprise often involves risk of serious injury. Here, the social judgment that permits the contest to flourish necessarily involves the companion judgment that reasonably foreseeable hazards can be consented to by virtue of participation.

The more difficult question is the proper standard by which to judge whether a person consented to the particular conduct at issue. The State argues that when the conduct in question is not within the rules of a given sport, a victim cannot be deemed to have consented to this act. The trial court apparently agreed with this approach.

Although we recognize that there is authority supporting this approach, we reject a reliance on the rules of the games as too limiting. Rollin M. Perkins in Criminal Law explains:

> The test is not necessarily whether the blow exceeds the conduct allowed by the rules of the game. Certain excesses and inconveniences are to be expected beyond the formal rules of the game. It may be ordinary and expected conduct for minor assaults to occur. However, intentional excesses beyond those reasonably contemplated in the sport are not justified.

Instead, we adopt the approach of the Model Penal Code which provides:

> . . . (4) Consent to Bodily Injury. When conduct is charged to constitute an offense because it causes or threatens bodily injury, consent to such conduct or to the infliction of such injury is a defense if:
>
> (c) the conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport or other concerted activity not forbidden by law.

The State argues the law does not allow "the victim to 'consent' to a broken jaw simply by participating in an unrefereed, informal basketball game." This argument presupposes that the harm suffered dictates whether the defense is available or not. This is not the correct inquiry.

The correct inquiry is whether the conduct of defendant constituted foreseeable behavior in the play of the game.

Additionally, the injury must have occurred as a byproduct of the game itself.

In *State v. Floyd*, a fight broke out during a basketball game and the defendant, who was on the sidelines, punched and severely injured several opposing team members. The defense did not apply because the statute "contemplated a person who commits acts during the course of play." There is a "continuum, or sliding scale, grounded in the circumstances under which voluntary participants engage in sport which governs the type of incidents in which an individual volunteers (i.e., consents) to participate."

The New York courts provide another example. In a football game, while tackling the defendant, the victim hit the defendant. After the play was over and all of the players got off the defendant, the defendant punched the victim in the eye. . . . Initially it may be assumed that the very first punch thrown in the course of the tackle was consented to by defendant. The act of tackling an opponent in the course of a football game may often involve "contact" that could easily be interpreted to be a "punch." Defendant's response after the pileup to complainant's initial act of "aggression" cannot be mistaken. This was not a consented to act. *People v. Freer*, 381 N.Y.S.2d 976, 978 (1976).

The State may argue that the defendant's conduct exceeded behavior foreseeable in the game. Although in "all sports players consent to many risks, hazards and blows," there is "a limit to the magnitude and dangerousness of a blow to which another is deemed to consent." This limit, like the foreseeability of the risks, is determined by presenting evidence to the jury about the nature of the game, the participants' expectations, the location where the game has been played, as well as the rules of the game.

Here, taking Shelley's version of the events as true, the magnitude and dangerousness of Shelley's actions were beyond the limit. There is no question that Shelley lashed out at Gonzalez with sufficient force to land a substantial blow to the jaw, and there is no question but that Shelley intended to hit Gonzalez. There is nothing in the game of basketball, or even rugby or hockey, that would permit consent as a defense to such conduct. Shelley admitted to an assault and was not precluded from arguing that the assault justified self-defense; but justification and consent are not the same inquiry.

We AFFIRM.

QUESTIONS

1. **According to the Court, why can participants in a sporting event consent to conduct that would otherwise be a crime?**
2. **Why should they be allowed to consent to such conduct when in other situations, such as those enumerated in the Exploring Further cases that follow, they can't consent?**
3. **Should individuals be allowed to knowingly and voluntarily consent to the commission of crimes against themselves? Why or why not?**
4. **Why was Shelley not allowed the defense of consent in this case?**
5. **Do you agree with the Court's decision? Relying on the relevant facts in the case, defend your answer.**

EXPLORING FURTHER

Consent

1. Is Shooting BB Guns a Sport?

State v. Hiott, 987 P.2d 135 (Wash.App. 1999)

FACTS Richard Hiott and his friend Jose were playing a game of shooting at each other with BB guns. During the game, Jose was hit in the eye and lost his eye as a result. Richard was charged with third-degree assault. His defense was consent. Was he entitled to the defense?

DECISION No, said the Washington Court of Appeals:

> Hiott argues that the game they were playing "is within the limits of games for which society permits consent." Hiott compares the boys' shooting of BB guns at each other to dodgeball, football, rugby, hockey, boxing, wrestling, "ultimate fighting," fencing, and "paintball." We disagree.
>
> The games Hiott uses for comparison, although capable of producing injuries, have been generally accepted by society as lawful athletic contests, competitive sports, or concerted activities not forbidden by law. And these games carry with them generally accepted rules, at least some of which are intended to prevent or minimize injuries. In addition, such games commonly prescribe the use of protective devices or clothing to prevent injuries.
>
> Shooting BB guns at each other is not a generally accepted game or athletic contest; the activity has no generally accepted rules; and the activity is not characterized by the common use of protective devices or clothing.
>
> Moreover, consent is not a valid defense if the activity consented to is against public policy. Thus, a child cannot consent to hazing, a gang member cannot consent to an initiation beating, and an individual cannot consent to being shot with a pistol. Assaults are breaches of the public peace. And we consider shooting at another person with a BB gun a breach of the public peace and, therefore, against public policy.

2. Can She Consent to Being Assaulted?

State v. Brown, 364 A.2d 27 (N.J. 1976)

FACTS Mrs. Brown was an alcoholic. On the day of the alleged crime she had been drinking, apparently to her husband Reginald Brown's displeasure. Acting according to the terms of an agreement between the defendant Reginald Brown and his wife, he punished her by beating her severely with his hands and other objects.

Brown was charged with atrocious assault and battery. He argued he wasn't guilty of atrocious assault and battery because he and Mrs. Brown, the victim, had an understanding to the effect that if she consumed any alcoholic beverages (and/or became intoxicated), he would punish her by physically assaulting her. The trial court refused the defense of consent.

Was Mr. Brown justified because of Mrs. Brown's consent?

DECISION No, said the New Jersey Appellate Court:

> The laws are simply and unequivocally clear that the defense of consent cannot be available to a defendant charged with any type of physical assault that causes appreciable injury. If the law were otherwise, it would not be conducive to a peaceful, orderly and healthy society.
>
> This court concludes that, as a matter of law, no one has the right to beat another even though that person may ask for it. Assault and battery cannot be consented to by a victim, for the State makes it unlawful and is not a party to any such agreement between the victim and perpetrator. To allow an otherwise criminal act to go unpunished because of the victim's consent would not only threaten the security of our society but also might tend to detract from the force of the moral principles underlying the criminal law.
>
> Thus, for the reasons given, the State has an interest in protecting those persons who invite, consent to and permit others to assault and batter them. Not to enforce these laws which are geared to protect such people would seriously threaten the dignity, peace, health and security of our society.

3. Can He Consent to Being Shot?

State v. Fransua, 510 P.2d 106 (N.Mex.App. 1973)

FACTS Daniel Fransua and the victim were in a bar in Albuquerque. Fransua had been drinking heavily that day and the previous day. Sometime around 3:00 p.m., after an argument, Fransua told the victim he'd shoot him if he had a gun. The victim got up, walked out of the bar, went to his car, took out a loaded pistol, and went back in the bar. He came up to Fransua, laid the pistol on the bar, and said, "There's the gun. If you want to shoot me, go ahead." Fransua picked up the pistol, put the barrel next to the victim's head, and pulled the trigger, wounding him seriously.

Was the victim's consent a justification that meant Fransua wasn't guilty of aggravated battery?

DECISION No, said the New Mexico Court of Appeals:

> It is generally conceded that a state enacts criminal statutes making certain violent acts crimes for at least two reasons: One reason is to protect the persons of its citizens; the second, however, is to prevent a breach of the public peace. While we entertain little sympathy for either the victim's absurd actions or the defendant's equally unjustified act of pulling the trigger, we will not permit the defense of consent to be raised in such cases.
>
> Whether or not the victims of crimes have so little regard for their own safety as to request injury, the public has a stronger and overriding interest in preventing and prohibiting acts such as these. We hold that consent is not a defense to the crime of aggravated battery, irrespective of whether the victim invites the act and consents to the battery.

SUMMARY

LO 2, LO 3

- Defendants who plead justification admit they're responsible for committing crimes but contend they're right under the circumstances. If a defendant pleads excuse she admits she's wrong but contends that, under the circumstances, she's not responsible.

LO 4

- Most justifications and excuses are affirmative defenses in which defendants have to start matters by presenting some evidence in support of their arguments.

LO 4

- Most defenses are perfect defenses and the defendants are acquitted. There's one major exception. Defendants who successfully plead the excuse of insanity don't "walk." Evidence that doesn't amount to a perfect defense might amount to an imperfect defense; that is, defendants are guilty of lesser offenses.

LO 5
- When you use force to protect yourself, your home or property, or the people you care about, you're "taking the law into your own hands." Sometimes, the government isn't, or can't be, there to protect you when you need it. So necessity is the heart of the defense of self-defense.

LO 6
- To justify the use of deadly force in self-defense the defender has to honestly and reasonably believe that she's faced with the choice of "kill or be killed, right now."

LO 7
- The English common law put the burden on the defendants to prove they "retreated to the wall" before acting in self-defense. The American majority "stand-your-ground rule" was based on the idea that a "man" shouldn't have to flee from attack because he'd done nothing wrong to provoke or deserve the attack and the need to protect the family and country, and could stand his ground and kill to "defend himself without retreating from any place he had a right to be."

LO 9
- States that require the minority retreat rule created an important exception when it comes to the home to avoid using deadly force. This exception, known as the castle exception, allows the defendant to stand his ground and use deadly force to fend off an unprovoked attack.

LO 1, LO 7
LO 8, LO 9
LO 10
- Recently under the "New Castle Doctrine" there has been an explosion of new statutes that vastly expand ordinary people's power to defend themselves in their homes and in public places, or anywhere else they have a legal right to be.

LO 11
- At the heart of the choice-of-evils defense is the necessity to prevent imminent danger as is true of most other defenses. The difference is, however, this defense justifies choosing to commit a lesser crime to avoid the harm of a greater crime.

LO 12
- If mentally competent adults want to be crime victims, the justification of consent says that no paternalistic government should get in their way. The consent has to be voluntary and knowing.

KEY TERMS

criminal conduct, p. 135
justification defenses, p. 136
excuse defenses, p. 136
affirmative defenses, p. 136
burden of production, p. 136
burden of persuasion, p. 136
preponderance of the evidence, p. 136
perfect defenses, p. 136
imperfect defense, p. 137
initial aggressor, p. 138
withdrawal exception, p. 138
necessity, p. 138
imminent danger of attack, p. 138
stand-your-ground rule, p. 143
retreat rule, p. 143
castle exception, p. 143
cohabitants, p. 144
curtilage, p. 149
Florida Personal Protection Law, p. 150
choice-of-evils defense (general principle of necessity) , p. 160
defense of consent, p. 166
voluntary consent, p. 167
knowing consent, p. 168

WEB RESOURCES

To prepare for exams, visit the *Criminal Law* companion website at www.cengage.com/criminaljustice/samaha, which features essential review and study tools such as flashcards, a glossary of terms, tutorial quizzes, and Supreme Court updates.

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LEARNING OBJECTIVES

1 Understand that defendants who plead an excuse defense admit what they did was wrong but argue that, under the circumstances, they were not responsible for their actions.

2 Understand that the defense of insanity excuses criminal liability when it seriously damages defendants' capacity to control their acts and/or capacity to reason and understand the wrongfulness of their conduct.

3 Appreciate that very few defendants plead the insanity defense, and those who do rarely succeed.

4 Understand how insanity is not the equivalent of mental disease of defect.

5 Understand how the right-wrong test focuses on defect in reason or cognition.

6 Understand how the volitional incapacity test focuses on defect in self-control or will.

7 Understand how the substantial capacity test focuses on reason and self-control.

8 Understand how the product-of-mental-illness test focuses on criminal acts resulting from mental disease.

9 Know how current trends favor shifting the burden of proof for insanity to defendants.

10 Understand the difference between diminished capacity and diminished responsibility and appreciate how they apply only to homicide.

11 Understand the different processes regarding how the law handles age and how juvenile court judges can use their discretion to transfer a juvenile to adult criminal court.

12 Understand how it is sometimes okay to excuse people who harm innocent people to save themselves.

13 Understand that voluntary intoxication is no excuse for committing a crime; involuntary intoxication is.

14 Understand that entrapment is used in all societies even though it violates a basic purpose of government in free societies—to prevent crime, not to encourage it.

15 Despite criticism of them, understand why syndrome excuses should be taken seriously.

Amber Hill, who drowned her two young daughters in the bathtub of her Cleveland apartment, will be institutionalized indefinitely in a high-security psychiatric clinic. On February 2, 2009, Cuyahoga County Common Pleas Judge John Sutula ordered Hill to be committed to the Northfield Campus of the Northcoast Behavioral Healthcare System after a court psychiatrist determined that Hill could pose a risk to herself and others as the gravity of her actions became clearer with the help of medication. Sutula and Common Pleas Judges Nancy Fuerst and Jose Villanueva found Hill, 23, not guilty by reason of insanity of killing Janelle Cintron, four, and Cecess Hill, two.

Defenses to Criminal Liability

Excuse

CHAPTER OUTLINE

Was He Too Young to Commit Burglary?

In July 1990, K.R.L., who was then 8 years and 2 months old, was playing with a friend behind a business building in Sequim, Washington. Catherine Alder, who lived near the business, heard the boys playing, and she instructed them to leave because she believed the area was dangerous. Alder said that K.R.L.'s response was belligerent, the child indicating that he would leave "in a minute." Losing patience with the boys, Alder said, "No, not in a minute, now; get out of there, now." The boys then ran off. Three days later, during daylight hours, K.R.L. entered Alder's home without her permission. He pulled a live goldfish from her fishbowl, chopped it into several pieces with a steak knife, and "smeared it all over the counter." He then went into Alder's bathroom and clamped a "plugged in" hair curling iron onto a towel.

(State v. K.R.L. 1992)

LO 1

In Chapter 5, you learned that defendants who plead defenses of justification accept responsibility for their actions but claim that, under the circumstances (necessity and consent), what they did was justified. In this chapter, you'll learn about defendants who plead excuse. They admit what they did was wrong but claim that, under the circumstances, they weren't responsible for what they did. The best-known excuse is insanity, but there are others.

Some defenses in this chapter can be viewed according to two theories. One theory is that they're defenses that excuse criminal conduct the prosecution has proved beyond a reasonable doubt. Remember our three-step analysis of criminal liability:

1. Was there criminal conduct? (Chapters 3 and 4)
2. If there was criminal conduct, was it justified? (Chapter 5)
3. If it wasn't justified, was it excused? (That's where we are now.)

Chronologically, the first theory occurs in Step 3. The prosecution has proved its case beyond a reasonable doubt; next, the defendant hasn't proved that her conduct was justified, but now, she claims she's excused. Legally, she's pleading an affirmative defense. In affirmative defenses of excuse, defendants have to carry some of the burden of proving they have an excuse that will relieve them of criminal responsibility. We'll examine this later on in the "The Burden of Proof" section.

Chronologically, the second theory, the **failure-of-proof theory** of excuse, comes during Step 1, proving criminal conduct. At this stage, defendants don't have any burden to prove their conduct wasn't criminal, but they can raise a reasonable doubt about the prosecution's case. Here, they can present evidence that something about their mental capacity shows they couldn't form the state of mind required by the mental element in the crime they're charged with committing. If they're successful, they negate the mental element. In other words, there's no proven criminal conduct. So these so-called failure-of-proof defenses aren't really defenses at all. Defenses justify or excuse criminal conduct; logically, of course, you can't (and, practically, you don't need to) justify or excuse conduct that's not criminal.

In this chapter, we'll look at insanity, diminished capacity, age, duress, intoxication, entrapment, and syndrome defenses. We'll note when appropriate how these excuse defenses fit in with either of the theories presented here.

Defense of Insanity

Thanks to CNN, in 1994 the whole world knew that Lorena Bobbitt walked out of a mental hospital after she successfully pleaded "not guilty by reason of insanity" for cutting off her husband's penis with a kitchen knife. By contrast, no one knew that John Smith, who drove a Greyhound bus out of the New York City Port Authority bus terminal in 1980, crashed and was acquitted "by reason of insanity" and is still locked up in the Manhattan Psychiatric Center on Ward's Island in New York City. For a brief moment in 1994, CNN may have made "Lorena Bobbitt" a household name throughout the world, whereas no one but the lawyers, doctors, and hospital staff probably knows of John Smith. But Smith's case is hands-down the more typical insanity defense case; Bobbitt's is extremely rare (Perlin 1989–90; Sherman 1994, 24).

LO 4

The **insanity defense** attracts a lot of public and scholarly attention, but the public badly misunderstands the way the defense actually works (see Table 6.1). Keep in mind that "insanity" is a legal concept, not a medical term. What psychiatry calls "mental illness" may or may not be legal insanity. Mental disease is legal insanity only when the disease affects a person's reason and/or will.

LO 2

Insanity excuses criminal liability only when it seriously damages the person's capacity to act and/or reason and understand. This means that if defendants were so mentally diseased they couldn't form a criminal intent and/or control their actions, we can't blame them for what they did. Psychiatrists testify in courts to help juries decide whether defendants are legally insane, not to prove defendants are mentally ill.

The verdict "guilty but mentally ill," used by several states, makes this point clear. In this verdict, juries can find defendants sane but mentally ill when they committed crimes. These defendants receive criminal sentences and go to prison, where they're treated for their mental illness while they're being punished for their crimes.

TABLE 6.1 Popular Myths and Empirical Realities about the Insanity Defense

Myth	Reality
1. The insanity defense is overused.	All empirical analyses are consistent: "the public, legal profession and—specifically—legislators 'dramatically' and 'grossly' overestimate both the frequency and the success rate of the insanity plea."
2. The use of the insanity defense is limited to murder cases.	In one jurisdiction where the data have been closely studied, slightly fewer than one-third of the successful insanity pleas entered over an eight-year period were reached in cases involving a victim's death. Further, individuals who plead insanity in murder cases are no more successful at being found "Not Guilty by Reason of Insanity" (NGRI) than persons charged with other crimes.
3. There is no risk to the defendant who pleads insanity.	Defendants who asserted an insanity defense at trial and who were ultimately found guilty of their charges served significantly longer sentences than defendants tried on similar charges who didn't assert the insanity defense.
4. NGRI acquittees are quickly released from custody.	Of all the individuals found NGRI over an eight-year period in one jurisdiction, only 15 percent had been released from all restraints; 35 percent remained in institutional custody; and 47 percent were under partial court restraint following conditional release.
5. NGRI acquittees spend much less time in custody than do defendants convicted of the same offenses.	NGRI acquittees actually spend almost double the amount of time that defendants convicted of similar charges spend in prison settings and often face a lifetime of post-release judicial oversight.
6. Criminal defendants who plead insanity are usually faking.	Of 141 individuals found NGRI in one jurisdiction over an eight-year period, there was no dispute that 115 were schizophrenic (including 38 of the 46 cases involving a victim's death), and in only 3 cases was the diagnostician unable to specify the nature of the patient's mental illness.
7. Criminal defense attorneys employ the insanity defense plea solely to "beat the rap."	First, the level of representation afforded to mentally disabled defendants is frequently substandard. Second, the few studies that have been done paint an entirely different picture: lawyers may enter an insanity plea to obtain immediate mental health treatment for their client, as a plea-bargaining device to ensure that their client ultimately receives mandatory mental health care, and to avoid malpractice litigation. Third, the best available research suggests that jury biases exist relatively independent of lawyer functioning and are generally "not induced by attorneys."

Source: Perlin 1997, 648–55.

LO 3

Contrary to widespread belief, few defendants plead the insanity defense (only a few thousand a year). The few who do plead insanity hardly ever succeed. According to an eight-state study funded by the National Institute of Mental Health (American Psychiatric Association 2003):

> The insanity defense was used in less than one percent of the cases in a representative sampling of cases before those states' county courts. The study showed that only 26 percent of those insanity pleas were argued successfully. Most studies show that in approximately 80 percent of the cases where a defendant is acquitted on a "not guilty by reason of insanity" finding, it is because the prosecution and defense have agreed on the appropriateness of the plea before trial. That agreement occurred because both the defense and prosecution agreed that the defendant was mentally ill and met the jurisdiction's test for insanity.

The few who "succeed" don't go free. In a noncriminal proceeding, called a **civil commitment**, courts have to decide if defendants who were insane when they committed their crimes are still insane. If they are—and courts almost always decide they are—they're locked up in maximum-security prisons called "hospitals." And like John Smith, but unlike Lorena Bobbitt, they stay there for a long time—until they're no longer "mentally ill and dangerous"—often for the rest of their lives. Our next case excerpt, *U.S. v. Hinckley* (2007), is an excellent example. John Hinckley was found not guilty by reason of insanity for attempting to assassinate President Ronald Reagan to impress the actress Jodie Foster. It details the difficulties, and the stringent conditions attached to, proposals for even brief furloughs 25 years after a jury found Hinckley "not guilty by reason of insanity." In U.S. District Court Judge Paul Friedman's words:

> This is the third such proposal that the Hospital has submitted in the last four years. On each occasion, after considering the Hospital's proposal . . . the Court has granted the Hospital's request—never precisely under the terms and conditions proposed by either the Hospital or Mr. Hinckley, and usually with additional conditions crafted by the Court.

In our next case excerpt, U.S. v. Hinckley (2007), John Hinckley was found not guilty by reason of insanity for attempting to assassinate President Ronald Reagan to impress the actress Jodie Foster.

CASE What Should Be the Conditions of His Furlough?

U.S. v. Hinckley
493 F.Supp.2d 65 (D.D.C., 2007)

HISTORY AND FACTS

St. Elizabeth's Mental hospital submitted a proposal for the limited conditional release of patient John Hinckley, who was committed to the hospital upon a jury finding of not guilty, by reason of insanity, for the attempted assassination of the president of the United States. The Court granted the request but modified its terms.

OPINION

PAUL L. FRIEDMAN, DJ.

This matter is before the Court on the proposal of St. Elizabeth's Hospital for the conditional release of John Hinckley. This is the third such proposal that the Hospital has submitted in the last four years. On each occasion, after considering the Hospital's proposal, Mr. Hinckley's views on the Hospital's proposal, sometimes Mr. Hinckley's own petition, and the government's opposition, and after an evidentiary hearing, the Court has granted the Hospital's request—never precisely under the terms and conditions proposed by either the Hospital or Mr. Hinckley, and usually with additional conditions crafted by the Court.

At first, the Court allowed local day visits by Mr. Hinckley with his parents outside of the confines of St. Elizabeth's Hospital without the supervision of Hospital personnel within a 50-mile radius of Washington, D.C.—so-called Phase I visits. It then permitted local overnight visits by Mr. Hinckley with his parents within a 50-mile radius of Washington, D.C. (Phase II). Each visit was thoroughly assessed by the Hospital before a subsequent visit took place. There were a total of six Phase I visits and eight Phase II visits.

By order of December 30, 2005, the Court permitted so-called Phase III visits to begin in January 2006; these were visits outside of the Washington metropolitan area to Mr. Hinckley's parents' community. The Court permitted three initial visits by Mr. Hinckley to his parents' home, each visit to last three nights or 76 hours. Thereafter, the Court permitted visits of four nights, or 100 hours in duration. These periodic visits have continued to this day and each, according to the Hospital's reports to the Court, has been therapeutic, without incident and, by all measures, successful.

On August 18, 2006, the Court issued an order granting Mr. Hinckley's request to permit additional four-night Phase III visits of no specific number in the same form and under the same conditions. On November 21, 2006, the Court issued a further opinion and order permitting an indefinite number of additional four-night Phase III visits to Mr. Hinckley's parents' home outside the Washington, D.C. area, with slightly modified conditions. To date there have been a total of 13 visits by Mr. Hinckley to his parents' home.

The Hospital's current proposal is premised on the notion that Mr. Hinckley is ready for Phase IV in which, over the period of approximately one year, he would be integrated into his parents' community with more and more absences from the Hospital, greater freedom, more independence, and more privileges. The ultimate goal of Phase IV is to determine if Mr. Hinckley is ready to be released from the Hospital to live independently in his parents' community. Even then, of course, it is contemplated that he would have the support of his parents, so long as they are alive and healthy, his siblings, and psychiatric and counseling professionals in his parents' community.

As has been its practice in prior years, the Court held an extensive evidentiary hearing on the Hospital's proposal and heard testimony over the course of five full days in April and May of this year and final arguments on the morning of the sixth day. The professionals who work with Mr. Hinckley at the Hospital (called to the stand by Mr. Hinckley's counsel) and the government's experts were all in substantial agreement about Mr. Hinckley's current diagnosis. All agree that he is currently mentally ill and suffers from two Axis I disorders: psychotic disorder, not otherwise specified ("psychotic disorder NOS"), and major depression. All the experts agree that there have been no active symptoms or symptoms of any significance of these Axis I disorders in many years. All the experts describe Mr. Hinckley's psychotic disorder NOS and major depression as being in full remission.

All the experts also agree that Mr. Hinckley suffers from an Axis II disorder: narcissistic personality disorder. Most of the experts believe that this disorder is "significantly attenuated," and all agree that it is significantly reduced, although he still shows some symptoms of this disorder. For the Hospital, Dr. Rafanello testified that Mr. Hinckley currently has shown no active symptoms of depression or any delusions, has shown insight into his Axis I diagnoses, and is less socially isolated and somewhat less self-absorbed and more open than in the past.

All of the experts agree that the visits by Mr. Hinckley to his parents' community during Phase III have been therapeutic and successful. The Hospital and Mr. Hinckley believe he is ready to begin the re-integration into his parents' community with the ultimate goal of transitioning him into that community as a resident who works (perhaps as a volunteer, perhaps in a paid position) and lives full-time in the community. The Hospital therefore has proposed a move from Phase III to Phase IV at this time, and Mr. Hinckley and his family support that proposal.

The primary goals of the Hospital's Phase IV proposal are to permit Mr. Hinckley to gain and improve life skills, to increase his independence, to increase his opportunities for socialization, to improve his judgment, to increase his empathy, self-esteem and family interaction, and to increase his familiarity with his parents' community; all of these goals, the Hospital suggests, can be furthered by providing more freedom and less structure in his parents' community.

While the Hospital believes that there are risk factors in releasing any patient from the Hospital back into the community, in Mr. Hinckley's case these risk factors are viewed as minimal, and the Hospital asserts that they can be controlled and monitored under the proposal now before the Court. The Hospital believes that between Dr. Sidney Binks (Mr. Hinckley's treating psychologist) and other members of the treatment team at the Hospital and Dr. Lee and Mr. Beffa in the parents' community, Mr. Hinckley will receive the treatment, counseling and monitoring he needs and that there will be sufficient feedback to the Hospital and to the Court to assure the safety of Mr. Hinckley and the community.

Neither Dr. Phillips nor Dr. Patterson believes that Mr. Hinckley is ready for Phase IV, at least not under the (e) proposal submitted by the Hospital. Each of them sees three significant problems with the Hospital's recommendations:

(1) The proposal lacks specificity. It is not clear what Mr. Hinckley will be doing during the expanded Phase IV visits and how the risk factors will be monitored and controlled while he is away from the Hospital for significantly longer periods of time.

(2) The Hospital's proposal does not make clear precisely what roles are to be played by Dr. Lee and Mr. Beffa, that Dr. Lee and Mr. Beffa have agreed to undertake these responsibilities, or that they fully understand (and have the information necessary to understand and carry out) the responsibilities expected of them in Phase IV. This issue became even more ambiguous during the evidentiary hearing.

(3) Mr. Hinckley's relationship with Ms. M, like his earlier relationships with women (some real, some delusional), requires exploration by Hospital staff at the Hospital. While relationship issues are by definition risk factors for Mr. Hinckley, they are not currently clearly understood by the Hospital in the context of Mr. Hinckley's recent relationship with Ms. M. The relationship needs exploration and clarification before a proposal from the Hospital for Phase IV visits can be properly assessed by the experts and by the Court.

For all of these three reasons, Dr. Phillips testified that in his opinion, "this motion is best left alone. It is such a moving target." While flexibility may be useful in enhancing Mr. Hinckley's independence in a conditional release plan, there is a difference between flexibility and ambiguity. In Dr. Phillips' view, there is no clarity on "where we are or where the Hospital is. In Dr. Patterson's view, it is a mistake to reduce the level of intervention and assessment by the Hospital for longer periods of time unless and until there is more structure to the plan under which this would be done.

Having carefully considered the Hospital's March 1, 2007 proposal, and the testimony of all of the witnesses at the evidentiary hearing, the Court agrees with Dr. Patterson and Dr. Phillips that the current proposal must be denied. The reasons the Court has reached this decision rest with the Hospital, not with Mr. Hinckley. The 13 visits by Mr. Hinckley to his parents' community have been therapeutic and uneventful. Mr. Hinckley, his parents and his siblings have done all that has been asked of them. To quote Dr. Phillips, Mr. Hinckley has "demonstrated his readiness for the next level."

Unfortunately, the Hospital has not taken the steps it must take before any such transition can begin. While it waits for the treatment team and the Hospital Review Board to address the concerns expressed by Dr. Phillips and Dr. Patterson, as discussed further in this Opinion, the Court will expand from four days to six days the length of the visits now permitted by Mr. Hinckley to his parents' home under this Court's orders, subject to the same conditions as set forth in the Court's Order of November 21, 2006. As for the proposal itself, however, it must be denied. An Order consistent with this Opinion will issue this same day.

SO ORDERED.

ORDER

For the reasons stated in the Opinion issued this same day, it is hereby ORDERED that the Court will permit John W. Hinckley, Jr. (subject to successful conclusion of each) an additional six Phase III visits to Mr. Hinckley's parents' home outside the Washington, D.C. area for six nights in duration, subject to the following conditions: [Some of the conditions are omitted; the numbering reflects these omissions.]

1. Mr. Hinckley is being allowed a limited conditional release under the supervision of his mother. He is not permitted to leave his mother's supervision at any time during the course of the conditional release except where the Hospital's plan for his acclimation to his parents' community provides for time spent away from his mother's supervision. Within the confines of the Hinckleys' home, Mr. Hinckley will be considered to be under his mother's supervision so long as she is in the home with him at all times. They need not always be in the same room. If either of Mr. Hinckley's siblings is present for one of the visits authorized by this Order, he or she may act as supervisor/custodian in lieu of Mr. Hinckley's mother. The time to be spent outside her supervision will be of limited duration, never to exceed more than two hours (120 minutes) and within a finite geographic area, to be determined by the Hospital.
2. Mr. Hinckley will be allowed six Phase III visits to his parents' home outside the metropolitan Washington D.C. area with the purpose of acclimating him to his parents' community and permitting him to engage in the Phase III activities discussed in the December 30, 2005 Opinion of this Court, each visit of a duration of six nights, or 148 hours. The success of each visit will be thoroughly assessed by the Hospital before a subsequent visit is permitted.
3. Itineraries will be developed by the Hospital together with Mr. Hinckley and submitted, under seal, to the Court. Those itineraries also will be provided to defense counsel and to counsel for the government. If the Hospital deems it necessary, it can create and submit an individual itinerary for each visit, or the Hospital may submit a single, more generalized itinerary for every two visits. Each itinerary shall be submitted two weeks prior to the visit or visits to which it pertains. In particular, the itinerary should include the details as to the time and place that Mr. Hinckley is to spend outside the supervision of his mother. During any time that Mr. Hinckley spends out of the supervision of his mother, he is required to carry a cell phone, to be provided by his mother. However often the frequency of itineraries, they must include specific details regarding the time that Mr. Hinckley will spend out of the presence of his mother on each visit to his parents' home.
4. Mrs. Hinckley and (if they are to be present) Mr. Hinckley's sibling(s) will sign and agree to the "Agreement to Assume Supervisory Responsibility for Patient while on Conditional Release."
5. Mr. Hinckley and his mother will maintain telephone contact with the Hospital at least once a day during each visit.
6. Mr. Hinckley will meet with Dr. John J. Lee, a psychiatrist in the area near his parents' community, at least once during each visit. The appointment times will be determined and agreed upon in advance and included in the itinerary submitted by the Hospital to the Court. Dr. Lee will submit a report to the Hospital after each appointment and communicate orally with Mr. Hinckley's treatment team, as needed, regarding their sessions. If for any reason outside the control of Mr. Hinckley, his mother, or Dr. Lee, one of these appointments

must be cancelled during a particular visit and cannot be rescheduled during the same visit, the Hospital will notify the Court of the reasons for the cancellation in its written report submitted to the Court following each visit (pursuant to Paragraph 16 of this Order). Every effort will be made to reschedule a missed appointment during the same visit. Any refusal by Mr. Hinckley to meet with Dr. Lee would constitute a violation of his conditions of release. . . .

8. If there are any signs of decompensation or deterioration in Mr. Hinckley's mental condition, no matter how slight, of danger to himself or others, or of elopement, Mr. Hinckley will immediately be returned to the Hospital.
9. Mr. Hinckley will be permitted to use the Internet in his parents' home only under the supervision of his mother or his siblings with the use of technology or technologies that can both track his Internet use and restrict it to the use of certain sites, such as ones that provide online courses. The use of the Internet, what sites will be visited, and what goals will be met through that use will be determined in advance and provided in the Hospitals' itinerary. If Mr. Hinckley's Internet use is monitored through the use of a tracking and restrictive technology, the Hospital treatment team must review his usage after every visit to determine that it is in compliance with the itinerary and his treatment plan. Any deviation from this usage will be considered a violation of Mr. Hinckley's conditions of release.
10. Mr. Hinckley and his mother will sign and agree to adhere to the "Media Plan to Be Utilized for Patient While on Conditional Release," which provides that any effort to contact the media, either by Mr. Hinckley or by his mother, in person or by any other means while Mr. Hinckley is on conditional release, will constitute a violation of this conditional release. Mr. Hinckley's siblings will sign and agree to adhere to the same Media Plan. If approached by the media, Mr. Hinckley and members of his family will decline to speak with them, and if the media persists, Mr. Hinckley and the members of his family will withdraw.
11. If there are any negative incidents regarding the public or the media, Mrs. Hinckley will immediately return to her residence and call the Nursing Supervisor's Office at the Hospital. If so directed, they will return to the Hospital.
12. Mr. Hinckley will not be allowed any contact with Leslie DeVeau or Ms. M, either in person or by telephone, during the course of the conditional release. Any contact with Ms. DeVeau or Ms. M will be considered a violation of Mr. Hinckley's conditional release, and Mr. Hinckley will be returned immediately to the Hospital.
13. Mr. Hinckley will continue to receive psychotropic medication during these activities, and any failure to self-medicate will be a violation of the conditional release and Mr. Hinckley will be returned immediately to the Hospital. . . .
17. Mr. Hinckley and his mother will stay at the Hinckleys' residence, and Mr. Hinckley will not be permitted to leave unless accompanied by his mother or unless his time spent alone is part of the therapeutic plan devised by the Hospital prior to the visit and submitted to the Court in accordance with Paragraphs 1 and 3 of this Order. Mr. Hinckley will not be permitted to leave his mother's supervision except under the conditions stated. Any attempt to do so would constitute a violation of his conditions of release.
18. Should Mr. Hinckley fail to adhere to any of the conditions of release imposed on him by this Order, this conditional release will be terminated immediately.

SO ORDERED.

QUESTIONS

1. **Summarize the arguments for and against St. Elizabeth's proposal for John Hinckley's furloughs.**
2. **Summarize Judge Friedman's reasons for attaching additional conditions to Hinckley's furloughs.**
3. **In your opinion, were the conditions Judge Friedman attached to the furlough "fair"? Back up your answer with details from the case.**
4. **Has your opinion of the insanity defense changed after reading the excerpt? Explain your answer.**

It might be used only rarely, but the insanity defense stands for the important proposition—familiar to you by now—that we can only blame people who are responsible. For those who aren't responsible, retribution is out of order. There are four tests of insanity:

1. **Right-wrong test (the M'Naghten rule)** The rule in 28 jurisdictions (*Clark v. Arizona* 2006, slip opinion, majority 9).

2. **Volitional incapacity (irresistible impulse)** The rule in a few jurisdictions (LaFave 2003b, 389).
3. **Substantial capacity test (the MPC test)** The majority rule until John Hinckley attempted to murder President Reagan in 1981. It's still the rule in 14 jurisdictions (*Clark v. Arizona* 2006, slip opinion, majority, 10) but not in federal courts, where it was abolished in 1984 and replaced with the right-wrong test.
4. **Product test (*Durham* rule)** Followed only in New Hampshire.

All four tests look at defendants' mental capacity, but they differ in what they're looking for. The right-wrong test focuses exclusively on **reason**—psychologists call it "cognition"—that is, on the capacity to tell right from wrong. The other tests focus on either reason or will. **Will**—psychologists call it "volition"—popularly means "willpower"; in the insanity tests it refers to defendants' power to control their actions.

The Right-Wrong Test of Insanity

LO 5

The right-wrong test depends on defendants' mental capacity to know right from wrong. It's also known as the **M'Naghten rule** after a famous 1843 English case. Daniel M'Naghten suffered the paranoid delusion that the prime minister, Sir Robert Peel, had masterminded a conspiracy to kill him. M'Naghten shot at Peel in a delusion of self-defense, but killed Peel's secretary, Edward Drummond, by mistake. Following his trial for murder, the jury returned a verdict of "not guilty by reason of insanity."

On appeal, in M'Naghten's Case (1843), England's highest court, the House of Lords, created the two-pronged right-wrong test, or the M'Naghten rule, of insanity. The test consists of two elements:

1. The defendant had a mental disease or defect at the time of the crime, and
2. The disease or defect caused the defendant not to know either
   a. The nature and the quality of his or her actions, or
   b. That what he or she was doing was wrong.

Several terms in the test need defining, because there's a lot of back and forth in the courts about just what the terms mean. Statutes rarely give the courts much guidance, leaving the courts to "legislate" judicially on the matter. Nevertheless, we can say this much. **Mental disease** means psychosis, mostly paranoia, which M'Naghten suffered, and schizophrenia. It doesn't include personality disorders, such as psychopathic and sociopathic personalities that lead to criminal or antisocial conduct. **Mental defect** refers to mental retardation or brain damage severe enough to make it impossible to know what you're doing, or if you know, you don't know that it's wrong.

In most states, "know" means "simple awareness": "cognition." Some states require more—that defendants understand or "appreciate" (grasp the true significance of) their actions. Most states don't define the term, leaving juries to define it by applying it to the facts of specific cases as they see fit. The "nature and quality of the act" means you don't know what you're doing (ALI 1985 1:2, 174–76). (To use an old law school example, "If a man believes he's squeezing lemons when in fact he's strangling his wife," he doesn't know the "nature and quality of his act.")

Deciding the meaning of "wrong" has created problems. Some states require that defendants didn't know their conduct was *legally* wrong; others say it means *morally* wrong. In *People v. Schmidt* (1915), Schmidt confessed to killing Anna

Aumuller by slitting her throat. He pleaded insanity, telling physicians who examined him that

> he had heard the voice of God calling upon him to kill the woman as a sacrifice and atonement. He confessed to a life of unspeakable excesses and hideous crimes, broken, he said, by spells of religious ecstasy and exaltation. In one of these moments, believing himself, he tells us, in the visible presence of God, he committed this fearful crime. (325)

The trial judge instructed the jury that Schmidt had to know that slitting Aumuller's throat was legally wrong. The New York Court of Appeals disagreed: "We are unable to accept the view that the word 'wrong' . . . is to receive such a narrow construction." The Court of Appeals recommended this as a suitable jury instruction:

> Knowledge of the nature and quality of the act has reference to its physical nature and quality, and that knowledge that it is wrong refers to its moral side; that to know that the act is wrong, the defendant must know that it is "contrary to law, and contrary to the accepted standards of morality, and then he added . . . that it must be known to be contrary to the laws of God and man." (336)

The Irresistible Impulse Test of Insanity

LO 6

Just because you know something is wrong, even if you fully appreciate its wrongfulness, doesn't mean you can stop yourself from doing it. I used to be fat. I knew and fully appreciated the wrongfulness of overeating. I can remember so many times knowing those french fries were really bad for me, but I just couldn't stop myself from shoving them in. According to the **irresistible impulse test**, we can't blame or deter people who because of a mental disease or defect lose their self-control and can't bring their actions into line with what the law requires.

A few jurisdictions have responded to criticism that the insanity defense should look at the effect of mental disease on reason *and* will. These jurisdictions supplement the right-wrong test with a test that takes volition into account.

According to the test, even if defendants know what they're doing and know it's wrong, they can qualify for a verdict of not guilty by reason of insanity if they suffer from a mental disease that damages their volition (willpower). In 1877, the court in *Parsons v. State* spelled out the application of the right-wrong test with its irresistible impulse supplement:

1. At the time of the crime, was the defendant afflicted with "a disease of the mind"?
2. If so, did the defendant know right from wrong with respect to the act charged? If not, the law excuses the defendant.
3. If the defendant did have such knowledge, the law will still excuse her if two conditions concur:
    a. If the mental disease caused the defendant to so far lose the power to choose between right and wrong and to avoid doing the alleged act that the disease destroyed his free will and
    b. If the mental disease was the sole cause of the act.

Some critics say the irresistible impulse supplement doesn't go far enough. First, they argue that it should include not just sudden impulses but also conduct

"characterized by brooding and reflection." Others claim that the irresistible requirement requires that defendants lack total control over their actions. In practice, however, juries do acquit defendants who have some control. Sometimes, statutes don't use the phrase at all; for example, Georgia's Criminal Code (2006, Title 17, Section 16-3-3) provides:

> A person shall not be found guilty of a crime when, at the time of the act, . . . because of mental disease, injury, or congenital deficiency, [he] acted as he did because of a delusional compulsion as to such act which overmastered his will to resist committing the crime.

Other critics reject volition utterly. They argue that allowing people who lack self-control to escape punishment cripples both retribution and deterrence. They point to the high-profile case of John Hinckley Jr., acquitted because the jury found him insane when, in 1981, he attempted to assassinate President Ronald Reagan to get actress Jodie Foster's attention. Shortly after Hinckley's trial, Harvard criminal law professor Charles Nesson (1982) wrote:

> To many Mr. Hinckley seems like a kid who had a rough life and who lacked the moral fiber to deal with it. This is not to deny that Mr. Hinckley is crazy but to recognize that there is a capacity for craziness in all of us. Lots of people have tough lives, many tougher than Mr. Hinckley's, and manage to cope. The Hinckley verdict let those people down. For anyone who experiences life as a struggle to act responsibly in the face of various temptations to let go, the Hinckley verdict is demoralizing, an example of someone who let himself go and who has been exonerated because of it. (29)

After Hinckley's attempt to kill President Reagan, the federal government and several states abolished the irresistible impulse defense on the ground that juries can't distinguish between irresistible impulses beyond the power to control and those that aren't. The federal statute (U.S. Code 2003) abolishing the irresistible impulse test in federal cases provides as follows:

> It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

The Substantial Capacity Test of Insanity

LO 7

The substantial capacity test, adopted in the MPC, is supposed to remove the objections to both the right-wrong test and its irresistible impulse supplement while preserving the legal nature of both tests. It emphasizes both of the qualities in insanity that affect culpability: reason and will (Schlopp 1988).

As the name of the test indicates, defendants have to lack *substantial*, not complete, mental capacity. The substantial capacity element clears up the possibility that "irresistible" in "irresistible impulse" means total lack of knowledge and/or control. So people who can tell right from wrong only modestly and/or who have only a feeble will to resist are insane. Most substantial capacity test states follow the MPC's (ALI 1985 [3]) definition of "substantial capacity":

> 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 [wrongfulness] of his conduct or to conform his conduct to the requirements of law. (163)

The use of "appreciate" instead of "know" makes clear that intellectual awareness by itself isn't enough to create culpability; emotional (affective) components of understanding are required. The phrase "conform his conduct" removes the requirement of a "sudden" lack of control. In other words, the code provision eliminates the suggestion that losing control means losing it on the spur of the moment, as the "impulse" in "irresistible impulse test" can be read to mean. The MPC's definition of "mental disease or defect" excludes psychopathic personalities, habitual criminals, and antisocial personalities from the defense.

In *People v. Drew* (1978), our next case excerpt, the California Supreme Court dropped the right-wrong test after more than a century of use; replaced it with the MPC substantial capacity test; and applied it retroactively, all in a single case.

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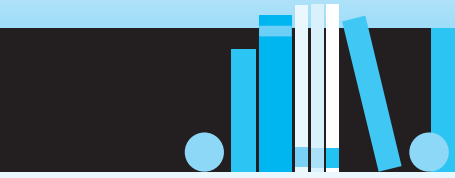

CASE Did He Lack "Substantial Capacity" to Appreciate the Wrongfulness of His Acts?

People v. Drew
583 P.2d 1318 (Cal. 1978)

HISTORY

Ronald Jay Drew, the defendant, was charged with battery on a peace officer and related offenses, and pled not guilty and not guilty by reason of insanity. The jury, Superior Court, Imperial County, found Drew guilty as charged, and also found him sane. Drew was sentenced to prison on the battery charge. The California Supreme Court reversed and remanded for a new trial on the issue raised by Drew's plea of not guilty by reason of insanity.

Note: California's procedure for insanity defense cases is a **two-stage (bifurcated) trial**. The first is to determine guilt, and the second is to determine sanity.

TOBRINER, J.

FACTS

Guilt Stage

Defendant Drew, a 22-year-old man, was drinking in a bar in Brawley during the early morning of October 26, 1975. He left $5 on the bar to pay for drinks and went to the men's room. When he returned, the money was missing. Drew accused Truman Sylling, a customer at the bar, of taking the money. A heated argument ensued, and the bartender phoned for police assistance.

Officers Guerrero and Bonsell arrived at the bar. When Guerrero attempted to question Sylling, Drew interfered to continue the argument. Bonsell then asked Drew to step outside. Drew refused. Bonsell took Drew by the hand, and he and Officer Schulke, who had just arrived at the bar, attempted to escort Drew outside. Drew broke away from the officers and struck Bonsell in the face. Bonsell struck his head against the edge of the bar and fell to the floor. Drew fell on top of him and attempted to bite him, but was restrained by Guerrero and Schulke. Drew continued to resist violently until he was finally placed in a cell at the police station.

Charged with battery on a peace officer (Pen. Code, ß 243), obstructing an officer (Pen. Code, ß 148), and disturbing the peace (Pen. Code, ß 415), Drew pled not guilty and not guilty by reason of insanity. At the guilt trial, Drew testified on his own behalf; he denied striking Bonsell and maintained that the officer's injuries were accidental. Bonsell's testimony, however, was corroborated by Guerrero and Sylling. The jury found Drew guilty as charged.

Sanity Stage

Two court-appointed psychiatrists testified at the sanity trial. Dr. Otto Gericke, former Medical Director at Patton State Hospital described Drew's condition as one of latent schizophrenia, characterized by repeated incidents of assaultive behavior and by conversing with inanimate objects and nonexistent persons; this condition could be controlled by medication but if left untreated would deteriorate to paranoid schizophrenia. Relying upon his examinations and Drew's medical history at Patton State Hospital, Dr. Gericke concluded that Drew was unable to appreciate the difference between right and wrong at the time he attacked Officer Bonsell.

The second witness, Dr. Ethel Chapman, was a staff psychiatrist at Patton State Hospital. She also examined Drew under court appointment in February and June of 1976, and was acquainted with him from his stay at the hospital in 1972. She concurred with Dr. Gericke's diagnosis of his condition, adding the observation that his symptoms would be aggravated by the ingestion of alcohol, and joined in Dr. Gericke's conclusion that Drew did not understand that his assault upon Officer Bonsell was wrong.

The prosecution presented no evidence at the sanity trial. Nevertheless the jury, instructed that the defendant has the burden of proving insanity under the M'Naghten test, found him sane. The court thereupon sentenced Drew to prison on the battery conviction. He appeals from the judgment of conviction.

OPINION

Although the Legislature has thus provided that "insanity" is a defense to a criminal charge, it has never attempted to define that term. The task of describing the circumstances under which mental incapacity will relieve a defendant of criminal responsibility has become the duty of the judiciary. Since . . . 1864, the California courts have followed the M'Naghten rule to define the defense of insanity.

To establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused 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 (M'Naghten's Case, 8 Eng. Rep. 718, 722). Although an advisory opinion, and thus most questionable authority, this language became the basis for the test of insanity in all American states except New Hampshire.

Despite its widespread acceptance, the deficiencies of M'Naghten have long been apparent. Principal among these is the test's exclusive focus upon the cognitive capacity of the defendant. The M'Naghten rules fruitlessly attempt to relieve from punishment only those mentally diseased persons who have no cognitive capacity. This formulation does not comport with modern medical knowledge that an individual is a mentally complex being with varying degrees of awareness. It also fails to attack the problem presented in a case wherein an accused may have understood his actions but was incapable of controlling his behavior.

M'Naghten's exclusive emphasis on cognition would be of little consequence if all serious mental illness impaired the capacity of the affected person to know the nature and wrongfulness of his action. Current psychiatric opinion, however, holds that mental illness often leaves the individual's intellectual understanding relatively unimpaired, but so affects his emotions or reason that he is unable to prevent himself from committing the act. The annals of this court are filled with illustrations of the above statement: the deluded defendant in *People v. Gorshen*, 51 Cal.2d 716, who believed he would be possessed by devilish visions unless he killed his foreman; the schizophrenic boy in *People v. Wolff*, 61 Cal.2d 795, who knew that killing his mother was murder but was unable emotionally to control his conduct despite that knowledge; the defendant in *People v. Robles* (1970) 2 Cal.3d 205, suffering from organic brain damage, who mutilated himself and killed others in sudden rages. To ask whether such a person knows or understands that his act is "wrong" is to ask a question irrelevant to the nature of his mental illness or to the degree of his criminal responsibility.

Secondly, M'Naghten's single-track emphasis on the cognitive aspect of the personality recognizes no degrees of incapacity. Either the defendant knows right from wrong or he does not. But such a test is grossly unrealistic. . . . As the commentary to the American Law Institute's Model Penal Code observes, "The law must recognize that when there is no black and white it must content itself with different shades of gray." In short, M'Naghten purports to channel psychiatric testimony into the narrow issue of cognitive capacity, an issue often unrelated to the defendant's illness or crime.

In our opinion the continuing inadequacy of M'Naghten as a test of criminal responsibility cannot be cured by further attempts to interpret language dating from a different era of psychological thought, nor by the creation of additional concepts designed to evade the limitations of M'Naghten. It is time to recast M'Naghten in modern language, taking account of advances in psychological knowledge and changes in legal thought.

The definition of mental incapacity appearing in section 4.01 of the American Law Institute's Model Penal Code represents the distillation of nine years of research, exploration, and debate by the leading legal and medical minds of the country. It specifies that

> 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 [wrongfulness] of his conduct or to conform his conduct to the requirements of law.

The American Law Institute takes no position as to whether the term "criminality" or the term "wrongfulness"

best expresses the test of criminal responsibility; we prefer the term "criminality." Adhering to the fundamental concepts of free will and criminal responsibility, the American Law Institute test restates M'Naghten in language consonant with current legal and psychological thought.

In the opinion of most thoughtful observers the ALI test is a significant improvement over M'Naghten. The advantages may be briefly summarized. First, the ALI test adds a volitional element, the ability to conform to legal requirements, which is missing from the M'Naghten test. Second, it avoids the all-or-nothing language of M'Naghten and permits a verdict based on lack of substantial capacity. Third, the ALI test is broad enough to permit a psychiatrist to set before the trier of fact a full picture of the defendant's mental impairments and flexible enough to adapt to future changes in psychiatric theory and diagnosis. Fourth, by referring to the defendant's capacity to "appreciate" the wrongfulness of his conduct the test confirms that mere verbal knowledge of right and wrong does not prove sanity. Finally, by establishing a broad test of nonresponsibility, including elements of volition as well as cognition, the test provides the foundation on which we can order and rationalize the convoluted and occasionally inconsistent law of diminished capacity.

Although we have today rejected the M'Naghten rule, we must nevertheless determine whether the jury's verdict based on that rule is supported by the record. We therefore explain our conclusion that on the present record a jury instructed under the M'Naghten rule could reasonably reject the opinions of psychiatric witnesses; finding that Drew had thus failed to prove his lack of understanding of the nature or wrongfulness of his act, the jury accordingly could return a verdict of sanity.

Drew relies on the fact that both court-appointed psychiatrists testified that he was unaware of the wrongfulness of his assault. The jurors, however, are not automatically required to render a verdict which conforms to the expert opinion. . . . However impressive this seeming unanimity of expert opinion may at first appear, our inquiry on this just as on other factual issues is necessarily limited at the appellate level to a determination whether there is substantial evidence in the record to support the jury's verdict of sanity under the law of this state. It is only in the rare case when the evidence is uncontradicted and entirely to the effect that the accused is insane that a unanimity of expert testimony could authorize upsetting a jury finding to the contrary. Indeed we have frequently upheld on appeal verdicts which find a defendant to be sane in the face of contrary unanimous expert opinion.

In the present case the jurors might well note that both experts were unfamiliar with Drew's conduct during the four years following his release from Patton State Hospital, and that their subsequent examinations of him were relatively brief. More significantly, the jurors could note that although both psychiatrists stated an opinion that Drew did not appreciate the wrongfulness of his act, nothing in their testimony explained the reasoning which led to this opinion. Although the psychiatric testimony described Drew's repeated aggressive acts, and diagnosed his condition as one of latent schizophrenia, neither psychiatrist explained why that behavior and diagnosis would lead to the conclusion that Drew was unable to appreciate the wrongfulness of his aggressive acts.

The prosecution presented no evidence at the sanity trial. Defendant, however, has the burden of proof on the issue of insanity; if neither party presents credible evidence on that issue the jury must find him sane. Thus the question on appeal is not so much the substantiality of the evidence favoring the jury's finding as whether the evidence contrary to that finding is of such weight and character that the jury could not reasonably reject it. Because the jury could reasonably reject the psychiatric opinion that Drew was insane under the M'Naghten test on the ground that the psychiatrists did not present sufficient material and reasoning to justify that opinion, we conclude that the jury's verdict cannot be overturned as lacking support in the trial record.

It is not surprising that in view of the fact that we had not then endorsed the ALI test of mental incapacity neither witnesses nor counsel structured their presentation at trial in terms of the ALI test, and the court did not instruct the jury on that standard. The record on appeal, nevertheless, adduces substantial evidence of incapacity under the ALI criteria.

In view of the absence of prosecution evidence on the insanity issue, we conclude that if the case had been tried under the ALI standard and the jury instructed accordingly, it probably would have returned a verdict finding Drew insane. The trial court's failure to employ the ALI test therefore constitutes prejudicial error.

The judgment is reversed and the cause remanded for a new trial on the issue raised by defendant's plea of not guilty by reason of insanity. Bird, C.J., Mosk, J., and Newman, J., concurred.

DISSENT

RICHARDSON, J.

I respectfully dissent. My objection to the majority's approach may be briefly stated. I believe that a major change in the law of the type contemplated by the majority should be made by the Legislature. Although variously phrased, this has been the consistent, firm, and fixed position of this court for many years for reasons equally as applicable today as when first expressed.

The majority now proposes to abandon both deference to legislative interest and a carefully constructed accretion of California law and opt for an entirely different standard. Suddenly, "The task of describing the circumstances under which mental illness will relieve a defendant of criminal responsibility has become the duty of the judiciary." Why has it now become our duty? Frankly, and I say this with complete respect, there is only one explanation for this judicial U-turn, namely, impatience.

The majority, wearied of waiting, and browsing among the varied offerings at a judicial smorgasbord, has picked the ALI formulation. There may be merit in the choice, but a decision to adopt it or any other proposed test and thereby abandon the carefully structured California rule, already a substantial "recast" of the original M'Naghten rule and "an integral part of the legislative scheme," should be preceded by a much more extensive factual investigation and analysis than we are able to perform.

We are not equipped to pick and choose the best among the various alternatives that are available, and we should leave the task to those who are so equipped. A legislative committee aided by staff can conduct hearings and studies, question experts, and develop a policy consensus on the questions of fact or mixed questions of fact and law that are involved. Such a legislative inquiry doubtless will reveal that the ALI test is not without its critics. Indeed, in its desire to abandon the modified California test, the majority accepts a proposed new rule which may well create an entirely new set of problems.

Clark, J., and Manuel, J., concurred.

CLARK, J.

Today's majority opinion shatters California's intricate and enlightened system of criminal responsibility, replacing it with a vague behavioral test to be determined by court psychiatrists. The venerable equations of right versus wrong, good versus evil, go down in favor of an experiment determining criminal conduct by probing a defendant's metaphysical thought process. Worse, the majority orders its new rule to apply retroactively, requiring retrial of dozens, if not hundreds, of criminal cases.

QUESTIONS

1. **Summarize the majority's criticisms of the right-wrong test.**
2. **Summarize the majority's reasons for adopting the substantial capacity test.**
3. **Summarize the dissent's criticisms of the majority's decision.**
4. **Which test would you adopt? Defend your answer.**
5. **In your opinion, was Drew insane under the right-wrong test? Back up your answer with the facts from the excerpt.**
6. **In your opinion, was Drew insane under the substantial capacity test? Back up your answer with the facts from the excerpt.**

The Product-of-Mental-Illness Test

LO 8

As the science of psychiatry and psychology advanced, the right-wrong test generated increasing criticism. One line of criticism began in the 1950s, when many social reformers thought that Freudian psychology could cure individual and social "diseases." *Durham v. U.S.* (1954) reflects the influence of that psychology. According to the court:

> The science of psychiatry now recognizes that a man is an integrated personality and that reason, which is only one element in that personality, is not the sole determinant of his conduct. The right-wrong test, which considers knowledge or reason alone, is therefore an inadequate guide to mental responsibility for criminal behavior. (871)

Based on these insights, the U.S. Circuit Court for the District of Columbia replaced the right-wrong test with the **product-of-mental-illness test**, also known as the ***Durham* rule**. According to this "new" test (New Hampshire adopted it in 1871), acts that are the "products" of mental disease or defect excuse criminal liability. So, with this test, the Court stretched the concept of insanity beyond the purely intellectual knowledge examined by the right-wrong test into deeper areas of cognition and will.

Disillusionment with Freudian psychology, a major shift in public opinion from rehabilitation to punishment, and the anger and disgust following the verdict in John Hinckley's trial for attempting to kill President Reagan prompted the U.S. Congress to replace the product test with the right-wrong test. That legislation did away with the product test in the District of Columbia, where *Durham* was decided. Only two

states, New Hampshire and Maine, ever adopted the product test. Maine abandoned the test. That leaves the product test in effect only in New Hampshire, where it was created in 1871.

The Burden of Proof

LO 9

The defense of insanity not only poses definition problems but also gives rise to difficulties in application. States vary as to who has to prove insanity and how convincingly they have to do so. The Hinckley trial made these questions the subject of heated debate and considerable legislative reform in the 1980s.

Federal law required the government to prove Hinckley's sanity beyond a reasonable doubt. So if Hinckley's lawyers could raise a doubt in jurors' minds about his sanity, the jury had to acquit him. That means that even though the jury thought Hinckley was sane, if they weren't convinced beyond a reasonable doubt that he was, they had to acquit him.

And that's just what happened: the jury did believe Hinckley was sane but had their doubts, so they acquitted him. In 1984, the federal Comprehensive Crime Control Act (Federal Criminal Code and Rules 1988, § 17[b]) shifted the burden of proof from the government having to prove sanity beyond a reasonable doubt to defendants having to prove they were insane by clear and convincing evidence.

Most states don't follow the federal standard; they call insanity an affirmative defense. As an affirmative defense, sanity and, therefore, responsibility are presumed. The practical reason for the presumption saves the government the time and effort to prove sanity in the vast number of cases where insanity isn't an issue. In that sense, it's like concurrence: it's necessary but practically never an issue (*Clark v. Arizona* 2006, slip opinion majority, 26).

To overcome the sanity presumption, the defense has the burden to offer some evidence of insanity. If they do, the burden shifts to the government to prove sanity. States differ as to how heavy the government's burden to prove sanity is. Some states require proof beyond a reasonable doubt; some require clear and convincing evidence; and some require a preponderance of the evidence.

There's a trend in favor of shifting the burden to defendants and making that burden heavier. This is both because Hinckley's trial generated antagonism toward the insanity defense and because of growing hostility toward rules that the public believes coddle criminals (ALI 1985 [3], 226; Perlin 1989–90).

Defense of Diminished Capacity

LO 10

"**Diminished capacity**" is an unfortunate term. First, it's not an affirmative defense in the sense that it excuses criminal conduct. It's a failure-of-proof defense (discussed at the beginning of the chapter), "a rule of evidence that allows the defense to introduce evidence to negate . . . specific intent" in a very narrow set of cases—mostly premeditation in first-degree murder. "It is an attempt to prove that the defendant, incapable of the requisite intent of the crime charged, is innocent of that crime but may well be guilty of a lesser one" (*State v. Phipps* 1994, 143)—second-degree murder instead of first-degree murder.

Second, diminished capacity isn't the same as diminished responsibility, with which it's often confused. **Diminished responsibility** is a defense of excuse; it's a variation on the defendant's argument, "What I did was wrong, but under the circumstances I'm not responsible." In diminished responsibility, the defendant argues, "What I did was wrong, but under the circumstances I'm less responsible." According to *State v. Phipps* (1994; excerpted later in the "The Syndromes Defense" section):

> A defendant pleading diminished responsibility does not seek relief from punishment by justification or excuse, but seeks to be punished for a lesser offense which he generally admits committing. In contrast, diminished capacity focuses on a defendant's capacity to commit a specific intent crime, and, if established, does not excuse punishment, but results in punishment instead for the general intent crime defendant was capable of committing. Evidence to demonstrate such a lack of specific intent is not equivalent to evidence to establish diminished responsibility. (144)

Most states reject diminished capacity of both types. California is one example. The legislature abolished diminished capacity, mostly because of public hostility to it:

> The defense of diminished capacity is hereby abolished. In a criminal action . . . evidence concerning an accused person's . . . mental illness, disease, or defect shall not be admissible to show or negate capacity to form the particular purpose, intent, motive, malice aforethought, knowledge, or other mental state required for the commission of the crime charged. . . . (California Penal Code 2003, § 25)

The statute didn't eliminate diminished capacity altogether. It provided that "diminished capacity or of a mental disorder may be considered by the court [but] only at the time of sentencing."

In practice, diminished capacity and diminished responsibility apply only to homicide. Most of the cases involve reducing first- to second-degree murder. In a very few cases, defendants are allowed to introduce evidence to reduce murder to manslaughter. In other words, diminished capacity and responsibility are very rare issues in criminal law (LaFave 2003a, 453). How often do defendants succeed in reducing their liability when they're allowed to introduce "diminishment" evidence? Unfortunately, we don't know.

The Excuse of Age

LO 11

The common law divided children into three categories for the purpose of deciding their capacity to commit crimes:

1. *Under 7* Children had no criminal capacity.
2. *Ages 7–14* Children were presumed to have no criminal capacity, but the presumption could be overcome.
3. *Over 14* Children had the same capacity as adults.

Today, statutes determine when young people can be convicted of crimes. These statutes come in several varieties, and they vary as to the age of capacity to commit crimes. One type of statute identifies a specific age, usually 14, but sometimes as young as 10

and as old as 18. These statutes usually provide that children under the specified age are subject to juvenile delinquency proceedings, even very young children. Another type of statute grants exclusive jurisdiction to juvenile courts up to a certain age but makes exceptions for a list of serious crimes. A third type of statute simply states that juvenile court jurisdiction is not exclusive (LaFave 2003a, 487).

All states have established juvenile justice systems to handle juvenile delinquency. One kind of delinquency, and the one we're concerned with here, is conduct that violates the criminal law. Most juvenile court statutes place no lower age limit on delinquency; they all place an upper age limit, almost always 18. Don't misunderstand this to mean that all juvenile cases will be handled in juvenile court. Every state has a statute that provides for the transfer of juveniles to adult criminal court. The technical term for this transfer is "waiver to adult criminal court," meaning the juvenile court gives up its jurisdiction over the case and turns it over to the adult criminal court.

The shift from the philosophy of rehabilitation to retribution has led to more juveniles at younger ages being tried as adults. Here are a few examples illustrating this trend:

> In New York, two fifteen-year-old private school students stand accused of savagely slashing to death a forty-four-year-old real estate agent and dumping his body in the lake at midnight in Central Park. In New Jersey, a fifteen-year-old awaits trial for the murder, sexual assault, and robbery of an eleven-year-old who had been going door to door collecting for his school's PTA fundraiser. In Mississippi, a sixteen-year-old slit the throat of his own mother before going to Pearl High School to hunt down the girl who had just broken up with him—killing her, killing another girl, and wounding seven of his high school classmates. In Arizona, three teenagers (out of a believed ten), ages thirteen, fourteen, and sixteen, face prosecution for the eighteen-hour abduction and gang rape of a fourteen-year-old. In California, three Satan-worshipping high school students, ages fifteen, sixteen, and seventeen, stand charged with drugging, raping, torturing, and murdering a fifteen-year-old, reportedly in hopes that a virgin sacrifice would earn them "a ticket to hell." (Gordon 1999, 193–94)

Waivers come in three varieties: judicial, prosecutorial, and legislative. By far, the most common is **judicial waiver**; that's when a juvenile court judge uses her discretion to transfer a juvenile to adult criminal court. Most states have adopted the criteria for making the waiver decision approved by the U.S. Supreme Court (*Kent v. United States* 1966) for the District of Columbia. These include:

1. The seriousness of the offense
2. Whether the offense was committed in an aggressive, violent, premeditated, willful manner
3. Whether the offense was against a person
4. The amount of evidence against the juvenile
5. The sophistication and maturity of the juvenile
6. The prior record of the juvenile
7. The threat the juvenile poses to public safety (LaFave 2003a, 490)

In our next case excerpt, *State v. K.R.L.* (1992), the Washington State Supreme Court rejected the state's argument that an eight-year-old boy had the capacity to form criminal intent.

In our next case excerpt, **State v. K.R.L.** *(1992), the Washington State Supreme Court rejected the state's argument that an eight-year-old boy had the capacity to form criminal intent.*

CASE Was He Too Young to Commit Burglary?

State v. K.R.L.
840 P.2d 210 (Wash.App. 1992)

HISTORY

K.R.L., an eight-year-old boy, was convicted of residential burglary by the Superior Court, Clallam County, and he appealed. The Court of Appeals reversed.

ALEXANDER, J.

FACTS

In July 1990, K.R.L., who was then 8 years and 2 months old, was playing with a friend behind a business building in Sequim. Catherine Alder, who lived near the business, heard the boys playing and she instructed them to leave because she believed the area was dangerous. Alder said that K.R.L.'s response was belligerent, the child indicating that he would leave "in a minute." Losing patience with the boys, Alder said "no, not in a minute, now, get out of there now." The boys then ran off. Three days later, during daylight hours, K.R.L. entered Alder's home without her permission. He proceeded to pull a live goldfish from her fishbowl, chopped it into several pieces with a steak knife, and "smeared it all over the counter." He then went into Alder's bathroom and clamped a "plugged in" hair curling iron onto a towel.

Upon discovering what had taken place, Alder called the Sequim police on the telephone and reported the incident.

A Sequim police officer contacted K.R.L.'s mother and told her that he suspected that K.R.L. was the perpetrator of the offense against Alder. K.R.L.'s mother confronted the child with the accusation and he admitted to her that he had entered the house. She then took K.R.L. to the Sequim Police Department where the child was advised of his constitutional rights by a Sequim police officer.

This took place in the presence of K.R.L.'s mother, who indicated that she did not believe "he really understood." K.R.L. told the police officer that he knew it was wrong to enter Alder's home. The statement given by K.R.L. to the officer was not offered by the State to prove guilt. Initially, the State took the position that K.R.L. fully understood those rights and that he had made a free and voluntary waiver of rights. Defense counsel objected to the admission of the statements and eventually the State withdrew its offer of the evidence, concluding that the evidence was cumulative in that K.R.L.'s admissions were already in evidence through the testimony of his mother.

K.R.L. was charged in Clallam County Juvenile Court with residential burglary, a class B felony. Residential burglary is defined in RCW 9A.52.025 as:

> A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling. . . .

At trial, considerable testimony was devoted to the issue of whether K.R.L. possessed sufficient capacity to commit that crime. The juvenile court judge heard testimony in that regard from K.R.L.'s mother, Catherine Alder, two school officials, a Sequim policeman who had dealt with K.R.L. on two prior occasions as well as the incident leading to the charge, one of K.R.L.'s neighbors, and the neighbor's son. K.R.L.'s mother, the neighbor, the neighbor's son, and the police officer testified to an incident that had occurred several months before the alleged residential burglary.

This incident was referred to by the police officer as the "Easter Candy Episode." Their testimony revealed that K.R.L. had taken some Easter candy from a neighbor's house without permission. As a consequence, the Sequim police were called to investigate. K.R.L. responded to a question by the investigating officer, saying to him that he "knew it was wrong and he wouldn't like it if somebody took his candy."

The same officer testified to another incident involving K.R.L. This was described as the "Joyriding Incident," and it occurred prior to the "Easter Candy Episode." It involved K.R.L. riding the bicycles of two neighbor children without having their permission to do so. K.R.L. told the police officer that he "knew it was wrong" to ride the bicycles.

The assistant principal of K.R.L.'s elementary school testified about K.R.L.'s development. He said that K.R.L. was of "very normal" intelligence. K.R.L.'s first grade teacher said that K.R.L. had "some difficulty" in school. He said that he would put K.R.L. in the "lower age academically."

K.R.L.'s mother testified at some length about her son and, in particular, about the admissions he made to her regarding his entry into Alder's home. Speaking of that incident, she said that he admitted to her that what he did was wrong "after I beat him with a belt, black and blue."

She also said that her son told her "that the Devil was making him do bad things."

The juvenile court rejected the argument of K.R.L.'s counsel that the State had not presented sufficient evidence to show that K.R.L. was capable of committing a crime. It found him guilty, saying:

> From my experience in my eight, nine years on the bench, it's my belief that the so-called juvenile criminal system is a paper tiger and it's not going to be much of a threat to Mr. [K.R.L.], so I don't think that for that reason there is a whole lot to protect him from.

OPINION

There is only one issue—did the trial court err in concluding that K.R.L. had the capacity to commit the crime of residential burglary? RCW 9A.04.050 speaks to the capability of children to commit crimes and, in pertinent part, provides:

> Children under the age of eight years are incapable of committing crime. Children of eight and under twelve years of age are presumed to be incapable of committing crime, but this presumption may be removed by proof that they have sufficient capacity to understand the act or neglect, and to know that it was wrong.

This statute applies in juvenile proceedings. Because K.R.L. was 8 years old at the time he is alleged to have committed residential burglary, he was presumed incapable of committing that offense. The burden was, therefore, on the State to overcome that presumption and that burden could only be removed by evidence that was "clear and convincing." Thus, on review we must determine if there is evidence from which a rational trier of fact could find capacity by clear and convincing evidence.

There are no reported cases in Washington dealing with the capacity of 8-year-old children to commit crimes. That is not too surprising in light of the fact that up to age 8, children are deemed incapable of committing crimes.

The State emphasizes the fact that K.R.L. appeared to appreciate that what he did at Alder's home and on prior occasions was wrong. When K.R.L. was being beaten "black and blue" by his mother, he undoubtedly came to the realization that what he had done was wrong. We are certain that this conditioned the child, after the fact, to know that what he did was wrong. That is a far different thing than one appreciating the quality of his or her acts at the time the act is being committed.

In arguing that it met its burden, the State placed great reliance on the fact that K.R.L. had exhibited bad conduct several months before during the so-called "Easter Candy" and "Joyriding" incidents. Again, we do not know much about these incidents, but it seems clear that neither of them involved serious misconduct and they shed little light on whether this child understood the elements of the act of burglary or knew that it was wrong.

Here, we have a child of very tender years—only two months over 8 years. While the State made a valiant effort to show prior bad acts on the part of the child, an objective observer would have to conclude that these were examples of behavior not uncommon to many young children.

Furthermore, there was no expert testimony in this case from a psychologist or other expert who told the court anything about the ability of K.R.L. to know and appreciate the gravity of his conduct. Although two school officials testified, one of them said K.R.L. was of an age lower than 8, "academically." In short, there is simply not enough here so that we can say that in light of the State's significant burden, there is sufficient evidence to support a finding of capacity.

REVERSED.

QUESTIONS

1. **Was the trial judge or the Supreme Court of Washington right in the ruling on the capacity of K.R.L. to form criminal intent? Back up your answer with facts from the case.**
2. **Did K.R.L. know what he was doing intellectually yet not sufficiently appreciate what he was doing? What facts support this conclusion?**
3. **Should it matter whether he appreciated what he did as long as he knew what he did was wrong? Explain your answer.**

EXPLORING FURTHER

The Excuse of Age

1. Was He Too Old to Be Responsible?

FACTS A prosecutor was faced with the question of whether the other end of the age spectrum, old age, should affect the capacity to commit crimes:

> You have this married couple, married for over 50 years, living in a retirement home. The guy sends his wife out for bagels and while the wife can still get around she forgets and brings back onion rolls. Not a capital offense, right?
>
> Anyway, the guy goes berserk and he axes his wife; he kills the poor woman with a Boy Scout–type axe! What do we do now? Set a high bail? Prosecute? Get a conviction and send the fellow to prison? You tell me! We did nothing. The media dropped it quickly and, I hope, that's it. (Cohen 1985, 9)

DECISION The prosecutor declined to prosecute.

Youth doesn't always excuse criminal conduct; it can also make the consequences worse. For example, 17-year-old Miguel Muñoz (*People v. Muñoz* 1961) was convicted of possessing a switchblade under a New York City ordinance that prohibited youths under 21 from carrying such knives. Had Muñoz been over 21, what he did wouldn't have been a crime.

ETHICAL DILEMMA

When Are Parents Criminally Liable for Their Children's Crimes?

St. Johns Boy, 8, Suspected of Double Murder
Dad, 2nd Man Found Shot to Death; Charges Planned

by Dennis Wagner—Nov. 8, 2008 12:00 AM

The Arizona Republic

An eight-year-old boy faces double-murder charges in the shooting death of his father and another man while residents in the bucolic community of St. Johns try to make sense of the chilling crime. "This is precedent-setting. We're going to charge an eight-year-old with two counts of homicide," Police Chief Roy Melnick said. "We haven't had anything like this in Apache County in my 23 years as a prosecutor," County Attorney Criss Candelaria said. "We need to figure out what was going on in this boy's head."

The child's father, 29, and a boarder, Tim Romans, 39, were found dead at the family residence about 5 p.m. Wednesday, shortly after neighbors reported the sound of gunfire. The *Arizona Republic* is withholding the father's and child's names to avoid identifying a juvenile. Melnick said police discovered one of the bodies outside the front door, the other in an upstairs room.

Instructions

1. Go to the website www.cengage.com/criminaljustice/samaha.
2. Watch the YouTube video and read the selections on the site.
3. Write a one-page essay answering the question: Is it ethical public policy to charge a 10-year-old with first-degree murder. Back up your answer with the information you got from the selections and from the "The Excuse of Age" section on pp. 190–91 of your text.

Defense of Duress

LO 12

"Sometimes people are forced to do what they do," writes Professor Hyman Gross (1978). What if what they're forced to do is a crime? Should they be excused? The **defense of duress** is about answering these questions. According to Professor Gross, "It seems that the compulsion ought to count in their favor. After all, we say, such a person wasn't free to do otherwise—he couldn't help himself" (276). On the other hand, he continues:

> There are times . . . when we ought to stand firm and run the risk of harm to ourselves instead of taking a way out that means harm to others. In such a situation we must expect to pay the price if we cause harm when we prefer ourselves, for then the harm is our fault even though we did not mean it and deeply regret it. (276)

Let's take a closer look at the problem of duress and its elements.

The Problem of the Defense of Duress

Professor Gross' comments strike at the heart of the problem of duress: it's hard to blame someone who's forced to commit a crime, but should we excuse people who harm innocent people to save themselves? The positions taken by three of the last two centuries' great authorities on criminal law show how different the answers can be. At one extreme is a historian of the criminal law and judge, Sir James Stephen (1883a, 108), who maintained that duress is never an excuse for crime. (Stephen did say duress should mitigate the punishment.) At the other extreme is Professor Glanville Williams (1961, 755). Author of a highly respected treatise on criminal law, he says the law should excuse individuals if they're so "in thrall[ed] to some power" the law can't control their choice. Professor Jerome Hall (1960, 448), author of yet another distinguished treatise, took the middle position that duress shouldn't excuse the most serious crimes, but it should be an excuse when the choice is either commit a minor crime or face imminent death.

The Elements of the Defense of Duress

There are four elements in the defense of duress. The definitions of the elements vary from state to state:

1. *Threats amounting to duress* Death threats are required in some states. Threats of "serious bodily injury" qualify in several states. Others don't specify what threats qualify.
2. *Immediacy of the threats* In some states, the harm has to be "instant." In others, "imminent" harm is required. In Louisiana, duress is an excuse only if the defendant reasonably believed the person making the threats would "immediately carry out the threats if the crime were not committed."
3. *Crimes the defense applies to* In the majority of states, duress isn't a defense to murder. In other states, it's a defense to all crimes. Some states are silent on the point.
4. *Degree of belief regarding the threat* Most states require a reasonable belief the threat is real. Others demand the threat actually be real. Some say nothing on the point.

Duress Statutes

New York Penal Code, § 40.00

In any prosecution for an offense, it is an affirmative defense that the defendant engaged in the proscribed conduct because he was coerced to do so by the use or threatened imminent use of unlawful physical force upon him or a third person, which force or threatened force a person of reasonable firmness in his situation would have been unable to resist.

Alabama Penal Code, Section 13A-3-30 (a)

It is a defense to prosecution that the actor engaged in the proscribed conduct because he was compelled to do so by the threat of imminent death or serious physical injury to himself or another. . . .

(d) The defense provided by this section is unavailable in a prosecution for:

(1) murder; or

(2) any killing of another under aggravated circumstances.

Minnesota Criminal Code, § 609.08 (3)

When any crime is committed or participated in by two or more persons, any one of whom participates only under compulsion by another engaged therein, who by threats creates a reasonable apprehension in the mind of such participator that in case of refusal that participator is liable to instant death, such threats and apprehension constitute duress which will excuse such participator from criminal liability.

The Defense of Intoxication

LO 13

Johnny James went quietly to his death by lethal injection . . . inside the Texas prison system's Huntsville Unit. His crimes were grisly. He abducted two women, forced them to have sex with each other, and then shot them both in the head. One died, but the other lived to identify him at trial. The Texas courts turned a deaf ear to James' plea that he was too drunk to know what he was doing when he abducted, raped, and shot his victims.

According to Professor George Fletcher (1978), the defense of intoxication is "buffeted between two conflicting principles":

1. *Accountability* Those who get drunk should take the consequences of their actions. Someone who gets drunk is liable for the violent consequences.
2. *Culpability* Criminal liability and punishment depend on blameworthiness (846).

The common law approach focused on the first principle:

> As to artificial, voluntarily contracted madness, by drunkenness or intoxication, which, depriving men of their reason, puts them in a temporary frenzy; our law looks upon this as an aggravation of the offense, rather than as an excuse for any criminal misbehavior. (Blackstone 1769, 25–26)

The Johnny James case is only one dramatic example that the common law principle is alive and well today. John Gibeaut, who wrote about the James case in the article "Sobering Thoughts" (Gibeaut 1997), notes the contemporary emphasis on accountability in the subtitle: "Legislatures and courts increasingly are just saying no to intoxication as a defense or mitigating factor." Section 13-03 of the Arizona Criminal Code (2003) is a typical accountability statute:

> Temporary intoxication resulting from the voluntary ingestion, consumption, inhalation or injection of alcohol, an illegal substance under chapter 34 of this title or other psychoactive substances or the abuse of prescribed medications does not constitute insanity and is not a defense for any criminal act or requisite state of mind.

Between November 1996 and May 1997, at least ten states introduced bills similar to the Arizona statute. According to a member of the Prosecution Function Committee of the American Bar Association's Criminal Justice Section, "The fight goes back to the ancient struggle over just how much free will one has" (Gibeaut 1997, 57).

What we have said so far applies only to *voluntary* intoxication. Involuntary intoxication is an excuse to criminal liability in all states. Involuntary intoxication includes cases in which defendants don't know they are taking intoxicants or know but are forced to take them. In *People v. Penman* (1915), a man took what his friend told him were "breath

perfumer" pills; in fact, they were cocaine tablets. While under their influence, he killed someone. The Court allowed the defense of intoxication.

Involuntary intoxication applies only under extreme conditions. According to one authority (Hall 1960), "A person would need to be bound hand and foot and the liquor literally poured down his throat, or . . . would have to be threatened with immediate serious injury" (540). In another case, *Burrows. v. State* (1931), where the defendant claimed involuntary intoxication, an 18-year-old man was traveling with an older man across the desert. The older man insisted that the young man drink some whiskey with him.

When he said no, the older man got abusive. Afraid that the older man would throw him out of the car in the middle of the desert without any money, he drank the whiskey, got drunk, and killed the older man. The Court rejected his defense of involuntary intoxication, because the older man had not compelled the youth "to drink against his will and consent."

The reason the law excuses involuntary intoxication and not voluntary intoxication is that we can blame voluntarily intoxicated persons and hold them accountable for their actions. Why? They chose to put themselves in a state where they either didn't know or couldn't control what they were doing. We can't blame involuntarily intoxicated persons for their actions. Why not? Because people forced or tricked into an intoxicated state didn't choose to put themselves out of control. (Review Chapter 3 where we discussed voluntarily induced involuntary conditions or acts qualifying as *actus reus*.)

Alcohol isn't the only intoxicant covered by the defense of intoxication. In most states, it includes all "substances" that disturb mental and physical capacities. In *State v. Hall* (1974), Hall's friend gave him a pill, telling him it was only a "little sunshine" to make him feel "groovy." In fact, the pill contained LSD (lysergic acid diethylamide). A car picked up Hall while he was hitchhiking. The drug caused Hall to hallucinate that the driver was a rabid dog, and, under this sad delusion, Hall shot and killed the driver. The Court said that criminal responsibility recognizes no difference between alcohol and other intoxicants.

The Defense of Entrapment

LO 14

Ancient tyrants and modern dictators alike have relied on secret agents as a law enforcement tool. From the days of Henry VIII to the era of Hitler and Stalin, to Slobodan Milosevic and Saddam Hussein in our own time, the world's police states have relied on persuading people to commit crimes, so they could catch and then crush their opponents.

But government persuasion isn't only a dictator's tool. All societies rely on it, even though it violates a basic purpose of government in free societies. The great Victorian British Prime Minister William Gladstone was referring to this purpose when he advised government to make it easy to do right and difficult to do wrong. Persuading people to commit crimes also flies in the face of the entreaty of the Lord's Prayer to "lead us not into temptation, but deliver us from evil" (Carlson 1987).

For a long time, U.S. courts rejected the idea that **entrapment** (government agents getting people to commit crimes they wouldn't otherwise commit) excused criminal liability. In *Board of Commissioners v. Backus* (1864), the New York Supreme Court explained why:

> Even if inducements to commit crime could be assumed to exist in this case, the allegation of the defendant would be but the repetition of the pleas as ancient as the world, and first interposed in Paradise: "The serpent beguiled me and I did eat." That defense was overruled by the great Lawgiver, and whatever estimate we may form, or whatever judgment pass upon the character or conduct of the tempter, this plea has never since availed to shield crime or give indemnity to the culprit, and it is safe to say that under any code of civilized, not to say Christian ethics, it never will. (42)

The Court in *People v. Mills* (1904) summed up the acceptance of entrapment this way:

> We are asked to protect the defendant, not because he is innocent, but because a zealous public officer exceeded his powers and held out a bait. The courts do not look to see who held out the bait, but to see who took it. (791)

The earlier attitude was based on indifference to government encouragement to commit crimes. After all, "once the crime is committed, why should it matter what particular incentives were involved and who offered them?" However, attitudes have shifted from indifference to both a "limited sympathy" toward entrapped defendants and a growing intolerance of government inducements to entrap otherwise law-abiding people (Marcus 1986).

The practice of entrapment arose because of the difficulty in enforcing laws against consensual crimes, such as drug offenses, pornography, official wrongdoing, and prostitution. There's no constitutional right not to be entrapped. Entrapment is an affirmative defense created by statutes; that is, defendants have to show some evidence they were entrapped. If they do this, the burden shifts to the prosecution to prove defendants were not entrapped. The jury—or the judge in trials without juries—decides whether officers in fact entrapped defendants. The courts have adopted two types of tests for entrapment; one is subjective and the other objective.

The Subjective Test of Entrapment

The majority of state and all federal courts have adopted a **subjective test of entrapment**. The subjective test of entrapment focuses on the predisposition of defendants to commit crimes. According to the test, the defense has to prove the government pressured the defendants to commit crimes they wouldn't have committed without the pressure.

The crucial question in the subjective test is: "Where did the criminal intent originate?" If it originated with the defendant, then the government didn't entrap the defendant. If it originated with the government, then the government did entrap the defendant.

For example, in a leading U.S. Supreme Court entrapment case, *Sherman v. U.S.* (1958), Kalchinian, a government informant and undercover agent, met Sherman in a drug treatment center. He struck up a friendship with Sherman and eventually asked Sherman to get him some heroin. Sherman (a heroin addict) refused. Following weeks of persistent begging and pleading, Sherman finally gave in and got Kalchinian some heroin. The police arrested Sherman. The U.S. Supreme Court found that the intent originated with the government. According to the Court, Sherman was hardly predisposed to commit a drug offense given that he was seriously committed to a drug treatment program to cure his addiction.

After defendants present some evidence that the government persuaded them to commit crimes they wouldn't have committed otherwise, the government can prove disposition to commit the crimes in one of the following ways:

1. Defendants' prior convictions for similar offenses
2. Defendants' willingness to commit similar offenses
3. Defendants' display of criminal expertise in carrying out the offense
4. Defendants' readiness to commit the crime

Consensual crimes, especially drug offenses, are the usual target of law enforcement inducement tactics, but some police departments have also used them to combat street muggings. In *Oliver v. State* (1985) and *DePasquale v. State* (1988), the Nevada Supreme Court dealt with two street mugging decoy cases operating in an area of Las Vegas with a high population of "street people."

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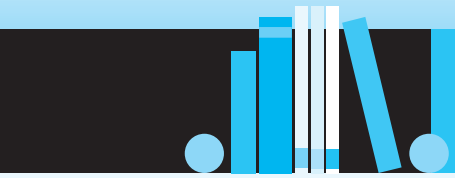

CASE Were They Entrapped?

Oliver v. State
703 P.2d 869 (Nev. 1985)

HISTORY

Ernest Oliver was convicted of larceny from the person in the Eighth Judicial District Court and sentenced to ten years in prison. He appealed. The Supreme Court reversed.

GUNDERSON, J.

FACTS

On the night of Oliver's arrest, three policemen undertook to conduct a "decoy operation" near the intersection of Main and Ogden in Las Vegas. That corner is in a downtown area frequented by substantial numbers of persons commonly characterized as "street people," "vagrants," and "derelicts." It appears Oliver, a black man, is one of these.

Disguised as a vagrant in an old Marine Corps jacket, the decoy officer slumped against a palm tree, pretending to be intoxicated and asleep. His associates concealed themselves nearby. The decoy prominently displayed a ten-dollar bill, positioning it to protrude from the left breast pocket of his jacket. This was done, the decoy later testified, "to provide an opportunity for a dishonest person to prove himself." Oliver, who had the misfortune to come walking down the street, saw the decoy and evidently felt moved to assist him. Shaking and nudging the decoy with his foot, Oliver attempted to warn the decoy that the police would arrest him if he did not move on. The decoy did not respond, and Oliver stepped away. Up to this point, Oliver had shown no predisposition whatever to commit any criminal act.

Then, Oliver saw the ten-dollar bill protruding from the decoy's pocket. He reached down and took it. "Thanks, Home Boy," he said. Thereupon, he was arrested by the decoy and the two other officers. Following the trial, a jury convicted Oliver of larceny from the person, and he has been sentenced to ten years' imprisonment.

OPINION

Oliver's counsel contends he was entrapped into committing the offense in question. We agree. Government agents or officers may not employ extraordinary temptations or inducements. They may not manufacture crime.

We have repeatedly endorsed the following concept: Entrapment is the seduction or improper inducement to commit a crime for the purpose of instituting a criminal prosecution, but if a person in good faith and for the purpose of detecting or discovering a crime or offense furnishes the opportunity for the commission thereof by one who has the requisite criminal intent, it is not entrapment.

Thus, because we discern several facts which we believe combined to create an extraordinary temptation, which was inappropriate to apprehending merely those

bent on criminal activity, we feel constrained to reverse Oliver's conviction. We note, first of all, that the decoy portrayed himself as completely susceptible and vulnerable. He did not respond when Oliver attempted to wake him, urging him to avoid arrest by moving to another location. Moreover, the decoy displayed his ten-dollar bill in a manner calculated to tempt any needy person in the area, whether immediately disposed to crime or not.

In the case of Oliver, the police succeeded in tempting a man who apparently did not approach the decoy with larceny in mind, but rather to help him. Even after being lured into petty theft by the decoy's open display of currency and apparent helplessness, Oliver did not go on to search the decoy's pockets or to remove his wallet.

He appealed and the Nevada Supreme Court affirmed.

YOUNG, J.

FACTS

Four officers on the LVMPD's S.C.A.T. Unit (Street Crime Attack Team) were performing a decoy operation near the intersection of Fremont Street and Casino Center Blvd. in Las Vegas on April 30, 1983, at 11:45 p.m. Officer Debbie Gautwier was the decoy, and Officers Shalhoob, Young, and Harkness were assigned to "backup." Officer Gautwier was dressed in plain clothes and was carrying a tan shoulder bag draped over her left shoulder.

Within one of the side, zippered pockets of the bag, she had placed a $5 bill and $1 bill wrapped with a simulated $100 bill. The money, including the numbers of the simulated $100 bill, were exposed so as to be visible to persons near by; however, the zipper was pulled tight against the money so as to require a concentrated effort to remove it.

Officer Young, also in plain clothes, was standing approximately six to seven feet away from Officer Gautwier (the decoy), near the entrance of the Horseshoe Club, when Randall DeBelloy approached Officer Gautwier from behind and asked if he could borrow a pen. Officer Gautwier stated that she did not have a pen, and DeBelloy retreated eight to ten feet. Within a few seconds he approached a second time, asking for a piece of paper. Again the response was "no." During these approaches Officer Young observed DeBelloy reach around Officer Gautwier toward the exposed cash.

DeBelloy again retreated eight to ten feet from Officer Gautwier. He then motioned with his hand to two men who were another eight to ten feet away, and the trio huddled together for 15 to 30 seconds. As DeBelloy talked with the two men, he looked up and over in the direction of Officer Gautwier. Vincent DePasquale was one of the two men who joined DeBelloy in this huddle.

While this trio was conversing, Officer Gautwier had been waiting for the walk signal at the intersection. When the light changed, she crossed Fremont Street and proceeded southbound on the west sidewalk of Casino Center Blvd. DePasquale and DeBelloy followed her, 15 to 20 feet behind. After crossing the street, Officer Gautwier looked back briefly and saw DeBelloy following her. DePasquale was four to seven feet behind DeBelloy and to his right.

As they walked in this formation, DePasquale yelled out, "Wait lady, can I talk to you for a minute." As Officer Gautwier turned to her right in response—seeing DePasquale whom she identified in court—DeBelloy took a few quick steps to her left side, took the money with his right hand, and ran.

DeBelloy was arrested, with the marked money in his possession, by Officers Harkness and Shalhoob. DePasquale was arrested by Officers Gautwier and Young. Both were charged with larceny from the person and convicted by a jury.

OPINION

DePasquale argues that he was entrapped, that the district court erred in its instruction to the jury on the law of entrapment, that the evidence fails to support the verdict, and that the sentence of ten years is disproportionate and, therefore, cruel and unusual.

Upon these facts, the decoy simply provided the opportunity to commit a crime to anyone who succumbed to the lure of the bait. Entrapment encompasses two elements:

(1) an opportunity to commit a crime is presented by the state

(2) to a person not predisposed to commit the act.

Thus, this subjective approach focuses upon the defendant's predisposition to commit the crime. In the present case, the cash, although exposed, was zipped tightly to the edge of a zippered pocket, not hanging temptingly from the pocket of an unconscious derelict. Admittedly, the money was exposed; however, that attraction alone fails to cast a pall over the defendant's predisposition. The exposed valuables (money) were presented in a realistic situation, an alert and well-dressed woman walking on the open sidewalks in the casino area.

The fact that the money was exposed simply presented a generally identified social predator with a logical target. These facts suggest that DePasquale was predisposed to commit this crime. Furthermore, the fact that DePasquale had no contact with the decoy but rather succumbed to the apparent temptation of his co-defendant to systematically stalk their target evidences his predisposition.

Lastly, DePasquale complains that his sentence was disproportionate to the crime and, therefore, cruel and unusual punishment. A sentence is unconstitutional if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity. While the punishment authorized in Nevada is strict, it is not cruel and unusual.

Accordingly, we AFFIRM the judgment of conviction.

QUESTIONS

1. **State the test for entrapment according to Nevada law.**
2. **What facts led the Court to conclude that Oliver was entrapped but DePasquale wasn't?**

The Objective Test of Entrapment

A minority of courts follows an **objective test of entrapment**. The objective test focuses not on the predisposition of defendants but instead on the actions that government agents take to induce individuals to commit crimes. According to the objective test, if the intent originates with the government and their actions would tempt an "ordinarily law-abiding" person to commit the crime, the Court should dismiss the case even if the defendant was predisposed to commit the crime. This test is a prophylactic rule aimed to deter "unsavory police methods" (ALI 1985 1:2, 406–7).

The Syndromes Defense

LO 15

Since the 1970s, a range of **syndromes**, describing affected mental states, has led to novel defenses in criminal law. Webster defines a "syndrome" as "a group of symptoms or signs typical of a disease, disturbance, or condition." Law professor and famous defense attorney Alan Dershowitz (1994) has written a book about these novel defenses. Its title, *The Abuse Excuse and Other Cop-Outs, Sob Stories, and Evasions of Responsibility,* makes clear his opinion of them.

Dershowitz's book includes discussions of the policeman's love, fear, chronic brain, and holocaust syndromes. He worries these excuses are "quickly becoming a license to kill and maim" (3). His is probably a needless worry because defendants rarely plead these excuses, and, except for a few notorious cases picked up by television, the newspapers, and the Internet, defendants rarely succeed when they do plead syndromes and other "abuse excuses."

Some syndromes are (and should be) taken seriously as excuses. For example, some women have claimed the battered woman syndrome to justify killing spouses in self-defense, even though they weren't in imminent danger (Chapter 7). Occasionally, women also have used the premenstrual syndrome (PMS) to excuse their crimes. In a New York case, Shirley Santos called the police, telling them, "My little girl is sick." The medical team in the hospital emergency room diagnosed the welts on her little girl's legs and the blood in her urine as the results of child abuse. The police arrested Santos, who explained, "I don't remember what happened. . . . I would never hurt my baby. . . . I just got my period" (Press and Clausen 1982, 111).

At a preliminary hearing, Santos asserted PMS as a complete defense to assault and endangering the welfare of a child, both felonies. She admitted beating her child but argued that she had blacked out because of PMS; hence, she couldn't have formed the intent to assault or endanger her child's welfare. After lengthy plea bargaining, the prosecutor dropped the felony charges, and Santos pleaded guilty to the misdemeanor of harassment. She received no sentence, not even probation or a fine, even though her daughter spent two weeks in the hospital from the injuries. The plea bargaining prevented a legal test of the PMS defense in this case. Nevertheless, the judge's leniency suggests that PMS affected the outcome informally.

There are three obstacles to proving the PMS defense (Carney and Williams 1983):

1. Defendants have to prove that PMS is a disease; little medical research exists to prove that it is.

2. The defendant has to suffer from PMS; rarely do medical records document the condition.
3. The PMS has to cause the mental impairment that excuses the conduct; too much skepticism still surrounds PMS to expect ready acceptance that it excuses criminal conduct.

The Vietnam War led to another syndrome defense, post-traumatic stress disorder (PTSD). Many of the war's combat soldiers suffered emotional and mental casualties that were often more lasting and serious than their physical wounds. PTSD is another defense that can be treated either as a failure to prove the mental element, so there's no criminal conduct at all, or as an affirmative excuse defense ("What I did was wrong, but I'm not responsible because my PTSD made me do it.")

In *State v. Phipps* (1994), when a Gulf War veteran killed his wife's boyfriend, the Tennessee Court of Criminal Appeals ruled that PTSD could negate premeditation and purpose to kill.

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CASE Is Post-Traumatic Stress Disorder an Excuse?

State v. Phipps
883 S.W.2d 138 (Tenn.App. 1994)

HISTORY

David Phipps, the defendant, was convicted of first-degree murder of his wife's boyfriend following a trial in the Circuit Court, Henry County. The defendant appealed. The Court of Criminal Appeals reversed and remanded for new trial.

WHITE, J.

FACTS

In the fall of 1990, the appellant, David Phipps, a career soldier, was sent to Saudi Arabia as part of the forces in Desert Shield and Desert Storm. His military occupational specialty was that of a nuclear-chemical/biological-chemical warfare coordinator with an emphasis on decontamination. He was responsible for providing appropriate chemical measures and countermeasures and served in a front line unit that was one of the first to enter Iraq. The appellant received a bronze star for his exemplary service in Desert Storm.

Within a month of appellant's return to the States, his wife informed him that she had been living with Michael Presson while he was overseas and that she wanted a divorce. She then moved her possessions out of their home. Marcie Phipps continued to communicate with appellant, visited him occasionally to discuss financial matters, shared meals, and had sexual relations with him. The appellant accompanied her to a trial in which she was a plaintiff. The appellant implored her to move back home, but she refused. Approximately a week after his wife left him, the appellant attempted suicide.

At approximately 4:45 a.m. on June 1, 1990, several of the victim's neighbors were awakened by the sounds of a struggle. The neighbors heard cries for help, grunting, and moaning. In the dark, one neighbor saw "something" being dragged across the yard to a vehicle. In response to a disturbance call at 4:51 a.m., Officer Damon Lowe, a Henry County deputy sheriff, went to the scene. He found a white Oldsmobile Cutlass parked in the driveway and a white male, the appellant, sitting on the driver's side. The keys were in the ignition. The victim, who was still alive, was lying on the back seat of the car. He appeared to have been brutally and savagely beaten.

When the deputy found the appellant in the car, his pants, shirt, and shoes were covered with blood, he was sweating profusely, and he appeared to be very exhausted. He was wearing a knife in a sheath. At first, the appellant said that as he was driving down the road he saw a fight and had stopped to take the injured man to the emergency

room. A few minutes later, he told the officer that he thought the man's name was David Presson and that his wife had been living with Presson.

The appellant did not deny beating Presson to death. He testified that he went to the house to wait for his wife to return from work in the hope that he could convince her to leave Presson and come back to him. However, at some point, he approached the house carrying the knapsack. According to the appellant, Presson was watching television. The appellant knocked on the screen door and entered. Presson jumped up, threw a glass at the appellant, and ran out a side door.

Presson went to his car and Phipps thought he was going to leave. However, Presson returned to the house with a stick in his hand. Presson told Phipps that Marcie was no longer his and to leave. According to Phipps, Presson threatened him with the stick. Phipps grabbed the stick and a struggle ensued. Although Phipps said that he had no clear memory of the events that followed, he had no doubt that he struck many blows to the body and head of Presson. He remembered moving the body and being in the car with the body.

On cross-examination, Richard Hixson testified that two weeks before the murder, he, the appellant, and a third party had discussed a murder in which the body was hidden in the woods and burned.

Four experts testified as to the appellant's mental state. Dr. Samuel Craddock and Dr. Jackson B. White testified for the state and Dr. William D. Kenner and Dr. Patricia Auble testified for the appellant. All four experts agreed that David Phipps was competent to stand trial and that he was not legally insane at the time of the murder. However, all four experts also agreed that the appellant was suffering from major depression and post-traumatic stress disorder.

The appellant testified to his experiences during Operation Desert Storm, which included his killing a young Iraqi soldier outside the camp and the suicide of an officer. Soldiers who served with the defendant testified to the constant tension created by being on the front line and the anxiety caused by Iraqi Scud attacks. They also recounted two incidents in which the appellant had behaved in an unusual manner. In addition to failing to report to his superiors the incident with the young Iraqi, the appellant threw his gun into the sand when ordered to remain in Iraq after the rest of his unit moved out. Witnesses viewed those actions as totally out of character for the appellant, who was considered an outstanding soldier with an exemplary military record.

Dr. Craddock testified that appellant's depression was "of a sufficient level to significantly affect his thinking, reasoning, judgment, and emotional well-being," and that the "components of his post-traumatic stress disorder may have lessened his threshold or made him more sensitive to defending himself and protecting himself and increased the likelihood of him over-reacting to a real or perceived threat." Dr. White, the other state expert, agreed that the appellant's anxiety was sufficient to significantly affect his thinking and reasoning.

Dr. Kenner, testifying for the defense, stated that while the defendant was not insane, he was unable to make a calculated decision to murder someone. While Dr. Auble, a psychologist, expressed no opinion on the appellant's ability to formulate intent, she agreed with the other three experts that the appellant was suffering from major depression, severe anxiety, and post-traumatic stress disorder.

All experts expressed the opinion that the appellant was truthful and that he was not dissembling or faking any symptoms.

OPINION

At trial, the appellant did not deny committing the murder, nor did he plead insanity. His theory of defense was that at the time of the killing he could not and did not formulate the specific intent required to commit first-degree murder.

After giving instructions on the elements of first-degree murder, including premeditation and deliberation, second-degree murder, and voluntary manslaughter, [the Court] issued the following instruction:

> The defendant contends that he was suffering from mental conditions known as post traumatic stress disorder, and major depression at the time of the commission of the criminal offense giving rise to this case. I charge you that post traumatic stress disorder and major depression are not defenses to a criminal charge. Insanity may be a defense, however, the defendant makes no claim that he was insane at the time of the killing giving rise to this case.

The essence of appellant's defense was that at the time of the killing he lacked the requisite mental state for first-degree murder. In support of that defense he offered expert and lay testimony which, without contradiction, indicated that he was suffering from post-traumatic stress syndrome and major depression. The court instructed the jury that the evidence offered did not constitute a defense and refused to instruct the jury, as appellant requested, that the evidence could be considered on the issue of proof of requisite mental state.

Appellant contends that the jury instruction given by the trial court which stated that post-traumatic stress syndrome and major depression were not defenses to a criminal offense in effect precluded the jury from considering the expert testimony relating to his mental state on the element of intent. We agree.

Although the trial court correctly instructed the jury on the elements of first-degree murder, second-degree murder, and voluntary manslaughter, the comment on the nonexistence of the "defense" of post-traumatic stress disorder did not clearly reflect the state of the law in Tennessee. Moreover, it suggested that the evidence was impertinent. As such it served to exclude from jury consideration defendant's theory of the case.

Appellant did not rely on an insanity defense or on any affirmative defense. The cornerstone of appellant's case was that he did not have the requisite intent to commit first-degree murder. Virtually all of his testimony was directed toward negating the specific intent element of first-degree murder. While those schooled in the law may be able to discern the difference between considering expert testimony on defendant's mental condition as a complete defense to the charge and considering it to determine whether the requisite mental state has been proved, that subtlety would be lost on most jurors absent clear instructions.

DISSENT

CORNELIUS, SJ.

In my opinion the direct evidence overwhelmingly established a most brutal and atrocious homicide. The evidence points unerringly to this having been an intentional, deliberately premeditated killing of another human being.

QUESTIONS

1. **State the exact rule the court adopted regarding post-traumatic stress disorder.**
2. **Summarize the court's arguments for admitting evidence of post-traumatic stress disorder.**
3. **List all the evidence supporting the claim that David Phipps suffered from post-traumatic stress disorder.**
4. **Assume you're the prosecutor, and argue Phipps had the specific intent to kill his wife's boyfriend.**
5. **Assume you're the defense attorney, and argue Phipps didn't have the specific intent to kill his wife's boyfriend.**
6. **Now, assume you're a juror. Would you vote to convict or acquit? Defend your answer.**

SUMMARY

LO 1
- Defendants who plead an excuse defense admit what they did was wrong but argue that, under the circumstances, they were not responsible for their actions. Defenses can be viewed according to two theories. In affirmative defenses of excuse, defendants have to carry some of the burden of proving they have an excuse that will relieve them of criminal responsibility. In failure-of-proof theory, defendants don't have any burden to prove their conduct wasn't criminal, but they can raise a reasonable doubt about the prosecution's case.

LO 2
- The defense of insanity excuses criminal liability when it seriously damages defendants' capacity to control their acts and/or capacity to reason and understand the wrongfulness of their conduct.

LO 3, LO 4, LO 5, LO 6, LO 7, LO 8
- Insanity might be used only rarely, but the insanity defense stands for the important proposition that we can only blame people who are responsible. For those who aren't responsible, retribution is out of order. There are four tests of insanity: (1) Right-wrong test (the M'Naghten rule); (2) Volitional incapacity (irresistible impulse) test; (3) Substantial capacity test (the MPC test); (4) product test (*Durham* rule).

LO 9
- Current trends favor shifting the burden of proof for insanity to defendants and to making that burden heavier.

LO 10
- Diminished capacity is the attempt to prove the defendant is guilty of a lesser crime by negating specific intent.

LO 11
- The common law divided children into three categories for the purpose of deciding their capacity to commit crimes: (1) *Under 7*: Children had no criminal capacity; (2) *Ages 7–14*: Children were presumed to have no criminal capacity, but the presumption could be overcome; (3) *Over 14*: Children had the same capacity as adults. Today, statutes focus on when young people can be convicted of crimes. These statutes come in several varieties, and they vary as to the age of capacity to commit crimes.

LO 11
- Every state has a statute that provides for the transfer (waiver) of juveniles to adult criminal court. Waivers come in three varieties: judicial, prosecutorial, and legislative.

LO 12
- The heart of the problem of duress is that it is hard to blame someone who's forced to commit a crime, but excusing people who harm innocent people to save themselves causes debate. The elements of duress vary from state to state.

LO 13
- The defense of voluntary intoxication is buffeted between two conflicting principles: (1) accountability: those who get drunk should take the consequences of their actions. Someone who gets drunk is liable for the violent consequences; and (2) culpability criminal liability and punishment depend on blameworthiness.

LO 13
- Involuntary intoxication is an excuse to criminal liability in all states. This includes cases in which defendants don't know they are taking intoxicants or know but are forced to take them. The law excuses involuntary intoxication and not voluntary intoxication because we can blame voluntarily intoxicated persons and hold them accountable for their actions.

LO 14
- For a long time, U.S. courts rejected the idea that entrapment excused criminal liability, based on the idea that once the crime is committed it did not matter what particular incentives were involved and who offered them. However, attitudes have shifted from indifference to both a limited sympathy toward entrapped defendants and a growing intolerance of government inducements to entrap otherwise law-abiding people.

LO 15
- Since the 1970s, a range of syndromes has led to novel defenses in criminal law. Though there is criticism because of a few notorious cases, some syndromes are taken seriously as excuses. Defendants rarely plead these excuses and they rarely succeed when they do plead syndromes.

KEY TERMS

failure-of-proof theory, p. 176
insanity defense, p. 176
civil commitment, p. 178
right-wrong test (M'Naghten rule), p. 181
volitional incapacity (irresistible impulse), p. 182
substantial capacity test (the MPC test), p. 182
product test (*Durham* rule), p. 182
reason, p. 182
will, p. 182
M'Naghten rule, p. 182
mental disease, p. 182
mental defect, p. 182
irresistible impulse test, p. 183
two-stage (bifurcated) trial, p. 185
product-of-mental-illness test, p. 188
Durham rule, p. 188
diminished capacity, p. 189
diminished responsibility, p. 190
judicial waiver, p. 191
defense of duress, p. 194
entrapment, p. 197
subjective test of entrapment, p. 198
objective test of entrapment, p. 201
syndromes, p. 201

WEB RESOURCES

To prepare for exams, visit the *Criminal Law* companion website at www.cengage.com/criminaljustice/samaha, which features essential review and study tools such as flashcards, a glossary of terms, tutorial quizzes, and Supreme Court updates.

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LEARNING OBJECTIVES

1 Appreciate that participants before and during the commission of crimes are guilty of the crime itself.

2 Understand how participants after the commission of crimes are guilty of a separate, less serious offense.

3 Understand that the core idea of accessory liability is that it is not as blameworthy to help someone else escape prosecution and punishment as it is to participate in the crime itself.

4 Understand that vicarious liability has to be created by statute.

5 Understand that vicarious liability can apply either to enterprises (mainly business) or to individuals.

Bernard Madoff's fraud victims held a news conference following the sentencing hearing for Madoff at Federal District Court in Manhattan on June 29, 2009, in New York City. Madoff, who was convicted of running a multibillion-dollar Ponzi scheme, received a sentence of 150 years in prison for fraud that totaled an estimated $65 billion. Eleven victims spoke to the Court about how they lost their life savings to Madoff.

Parties to Crime and Vicarious Liability

CHAPTER OUTLINE

Was the Fraternity Guilty of Prostitution and Selling Alcohol to Minors?

Zeta Chi fraternity, a New Hampshire corporation at the University of New Hampshire in Durham, held a "rush" at its fraternity houses. In order to encourage people to attend the rush, Zeta Chi hired two female strippers to perform at the event. Fraternity brothers encouraged guests to give the strippers dollar bills so that they would continue to perform. Andrew Strachan, a nineteen-year-old guest at the fraternity party, at some point during the evening, learned that beer was available from a soda machine. He made his way to an apartment in another part of the fraternity house where the machine was located, waited in line with three or four other people, and purchased three to five cans of beer.

(State v. Zeta Chi Fraternity 1997)

The principle of *actus reus* stands on the fundamental idea that we punish people for what they do, not for who they are. The principle of *mens rea* stands on the fundamental idea that we can only punish people we can blame. This chapter affirms another basic idea of our criminal law: that one person can be liable for someone else's crimes. This liability arises in two ways:

1. When an actor is liable for someone else's *conduct* (complicity)
2. When the *relationship* between two parties makes one party criminally liable for another party's conduct (vicarious liability)

In this chapter, we'll look more closely at parties to crimes and vicarious liability.

Parties to Crime

LO 1

"Two heads are better than one." "The whole is greater than the sum of its parts." These popular sayings express the positive side of teamwork, an ordinary phenomenon under ordinary circumstances. When, under extraordinary circumstances, teamwork turns malicious, then benign "teamwork" can become "complicity" in criminal law. A group of young men playing football generates no criminal liability; a gang rape—teamwork turned malicious—is aggravated rape. **Complicity** establishes when you can be criminally liable for someone else's conduct. It applies criminal liability to accomplices and accessories because they *participate* in crimes.

LO 2

Vicarious liability establishes when a party can be criminally liable because of a relationship. Vicarious liability transfers the criminal conduct of one party to another because of their *relationship*. By far the most common relationships are business relationships, such as employer-employee, corporation-manager, buyer-seller, producer-consumer, and service provider–recipient. But vicarious liability can also arise in other situations, such as making the owner of a car liable for the driver's traffic violations and holding parents liable for their children's crimes.

At common law, there were four parties to crime:

1. *Principals in the first degree* Persons who actually commit the crime
2. *Principals in the second degree* Persons present when the crime is committed and who help commit it (lookouts and getaway drivers)
3. *Accessories before the fact* Persons not present when the crimes are committed but who help before the crime is committed (for example, someone who provided a weapon used in a murder)
4. *Accessories after the fact* Persons who help after the crime is committed (harboring a fugitive)

These distinctions used to be important because of the common law rule that the government couldn't try accomplices until principals in the first degree were convicted. This ban on trying accomplices before these principals were convicted applied even if there was absolute proof of guilt. Why? Probably because all felonies were capital offenses. But as the number of capital crimes shrank, so did the need for the complicated law of principals and accessories.

Today, there are two parties to crime:

1. *Accomplices* Participants before and during the commission of crimes
2. *Accessories* Participants after crimes are committed

Participation Before and During the Commission of a Crime

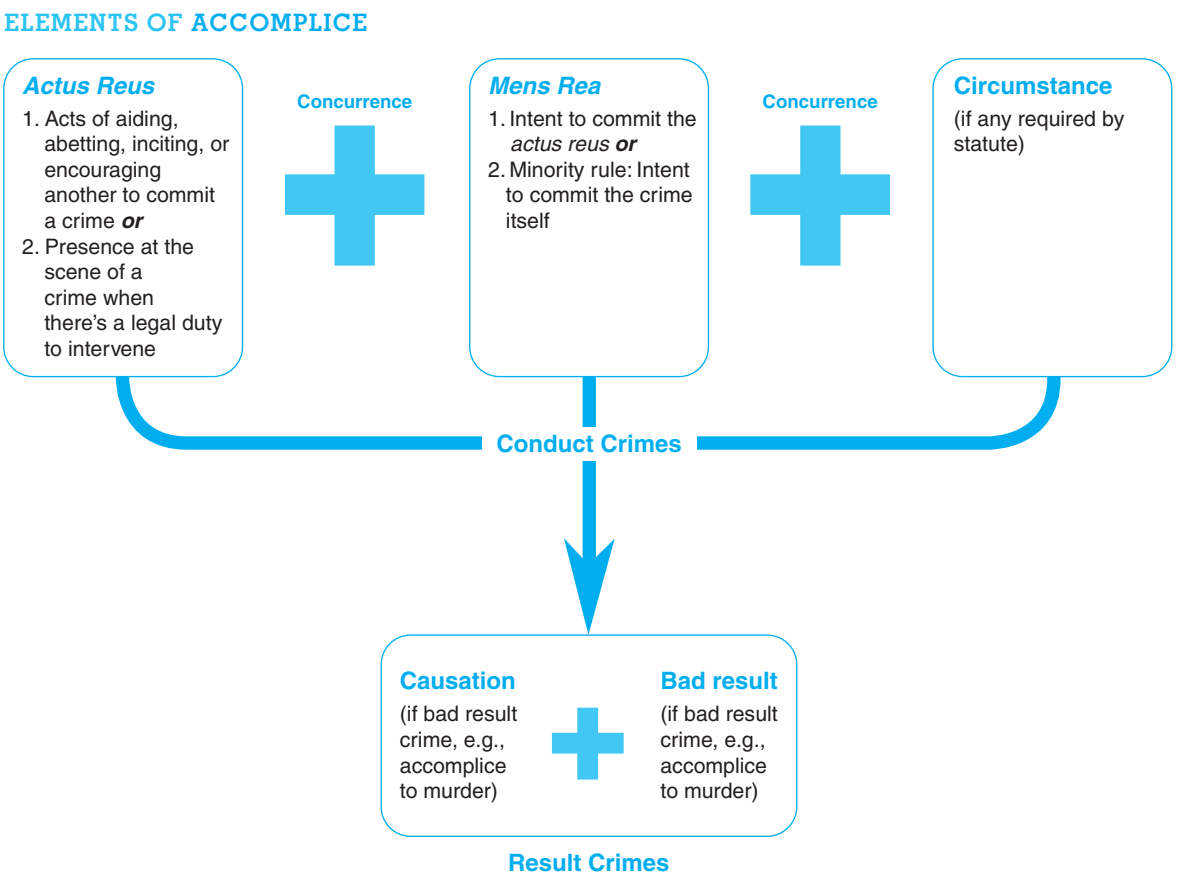
LO 1

All participants before and during the commission of a crime (**accomplices**) are prosecuted for the crime itself (accomplices to murder are prosecuted as murderers). So participation before and during a crime (accomplice liability) is a very serious business, because the punishment for being an accomplice is the same as for the person who

actually committed the crime. Participation after crimes are committed (accessory liability) is prosecuted as a separate, minor offense (accessory to murder). **Accessories** are punished for misdemeanors, a much less serious offense because accessories are looked at as obstructors of justice, not as felons.

We need to clear up a problem before we get further into accomplice liability. Accomplices are often confused with co-conspirators (Chapter 8), because both accomplice and conspiracy cases have more than one participant, but they're two completely different crimes. **Conspiracy** is an agreement to commit some other crime. A conspiracy to commit murder is not murder; it's the lesser offense of agreeing to commit murder (Chapter 8). Participating in a murder is the crime of murder itself. For example, two people agree to commit a murder. At this point, they've committed conspiracy to murder. Now they go to a gun shop, buy a gun, and drive together to the victim's house. One acts as a lookout while the other shoots the victim, who dies instantly. They drive away together. They're both murderers. They've committed two separate crimes—the less serious crime of conspiracy to commit murder and the crime of murder.

The rule that the crime of conspiracy and the crime the conspirators agree to commit are separate offenses is called the ***Pinkerton* rule**. The name comes from a leading U.S. Supreme Court case, *Pinkerton v. U.S.* (1946). The two Pinkerton brothers conspired to evade taxes. They were found guilty of both conspiracy to evade taxes and tax evasion itself. According to Justice Douglas, who wrote the opinion for the Court: "It has been long and consistently recognized by the Court that the commission of the offense and a conspiracy to commit it are separate and distinct offenses (643)."



Accomplice *Actus Reus*

You'll usually see words borrowed from the old common law of principals and accessories to define accomplice *actus reus* in modern accomplice statutes. The use of words such as "aid," "abet," "assist," "counsel," "procure," "hire," or "induce" is widespread.

The meaning of these words boils down to one core idea: The actor took "some positive act in aid of the commission of the offense." How much aid is enough? It's not always easy to decide, but here are a few acts that definitely qualify:

- Providing guns, supplies, or other instruments of crime
- Serving as a lookout
- Driving a getaway car
- Sending the victim to the principal
- Preventing warnings from getting to the victim (ALI 1953, 43)

Words can also qualify as accomplice *actus reus*, *if* they encourage and approve the commission of the crime.

Mere presence at the scene of a crime isn't enough to satisfy the accomplice *actus reus* requirement. According to the **mere presence rule**, even presence at the scene of a crime followed by flight is not enough action to satisfy the *actus reus* requirement of accomplice liability. For example, in *Bailey v. U.S.* (1969), Bailey spent most of the afternoon shooting craps with another man. Then, when a man carrying cash walked by, Bailey's craps partner pulled a gun and robbed the man with the cash. Both Bailey and the other man fled the scene. Bailey was caught; the other man never was. The Court held that although flight from the scene of a crime can be taken into account, it's not enough to prove accomplice *actus reus*. According to the Court:

> We no longer hold tenable the notion that "the wicked flee when no man pursueth, but the righteous are as bold as a lion." The proposition that "one flees shortly after a criminal act is committed or when he is accused of something does so because he feels some guilt concerning the act" is not absolute as a legal doctrine "since it is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as guilty parties or from an unwillingness to appear as witnesses." (1114)

There's one major exception to the mere presence rule: when defendants have a legal duty to act, presence alone is enough to satisfy the *actus reus* requirement. In *State v. Walden* (1982), George Hoskins beat Aleen Walden's one-year-old son Lamont "repeatedly over an extended period of time," with a leather belt, until he was bloody. Walden "looked on the entire time the beating took place but did not say anything or do anything to stop the 'Bishop' [Hoskins] from beating Lamont or to otherwise deter such conduct (783)."

A jury found Walden guilty as an accomplice to assault. On appeal, the Court said that

> the trial court properly allowed the jury to consider a verdict of guilty of assault upon a theory of aiding and abetting, solely on the ground that the defendant was present when her child was brutally beaten. A person who so aids or abets under another in the commission of a crime is equally guilty with that other person as a principal. (787)

One final point about accomplice *actus reus*: actions taken *after* crimes are committed aren't themselves accomplice *actus reus*, but juries can use participation after the crime to prove defendants participated before or during the commission of the crime. In the grisly murder case, *State v. Ulvinen* (1981), the Minnesota Supreme Court dealt with these issues in connection with Helen Ulvinen's participation in her son David's murder of his wife, Carol:

1. Words of encouragement before and during the commission of the crime
2. Accomplices not present when the crime was committed
3. Inferring participation before and during the commission of the crime from actions to help after the commission of the crime

In our next case excerpt, State v. Ulvinen (1981), the Minnesota Supreme Court dealt with issues of accomplice actus reus in connection with Helen Ulvinen's participation in her son David's murder of his wife, Carol.

CASE Did She Murder Her Daughter-in-Law?

State v. Ulvinen
313 N.W.2d 425 (Minn. 1981)

HISTORY

Helen Ulvinen was convicted of first-degree murder pursuant to Minn. Stat. § 609.05, subd. 1 (1980), which imposes criminal liability on one who "intentionally aids, advises, hires, counsels, or conspires with or otherwise procures" another to commit a crime. The Minnesota Supreme Court reversed.

OTIS, J.

FACTS

Carol Hoffman, Helen Ulvinen's (appellant's) daughter-in-law, was murdered late on the evening of August 10 or the very early morning of August 11 by her husband, David Hoffman. She and David had spent an amicable evening together playing with their children, and when they went to bed David wanted to make love to his wife.

When she refused him he lost his temper and began choking her. While he was choking her, he began to believe he was "doing the right thing" and that to get "the evil out of her" he had to dismember her body.

After his wife was dead, David called down to the basement to wake his mother, asking her to come upstairs to sit on the living room couch. From there she would be able to see the kitchen, bathroom, and bedroom doors and could stop the older child if she awoke and tried to use the bathroom.

Mrs. Ulvinen didn't respond at first but after being called once, possibly twice more, she came upstairs to lie on the couch. In the meantime, David had moved the body to the bathtub. Mrs. Ulvinen was aware that while she was in the living room her son was dismembering the body but she turned her head away so that she could not see.

After dismembering the body and putting it in bags, Hoffman cleaned the bathroom, took the body to Weaver Lake, and disposed of it. On returning home, he told his mother to wash the cloth covers from the bathroom toilet and tank, which she did. David fabricated a story about Carol leaving the house the previous night after an argument, and Helen agreed to corroborate it. David phoned the police with a missing person report, and during the ensuing searches and interviews with the police, he and his mother continued to tell the fabricated story.

On August 19, 1980, David confessed to the police that he had murdered his wife. In his statement, he indicated that not only had his mother helped him cover up the crime but she had known of his intent to kill his wife that night. After hearing Hoffman's statement the police

arrested Mrs. Ulvinen and questioned her with respect to her part in the cover up [*sic*]. Police typed up a two-page statement, which she read and signed. The following day a detective questioned her further regarding events surrounding the crime, including her knowledge that it was planned.

Mrs. Ulvinen's relationship with her daughter-in-law had been a strained one. She moved in with the Hoffmans on July 26, two weeks earlier to act as a live-in babysitter for their two children. Carol was unhappy about having her move in and told friends that she hated Helen, but she told both David and his mother that they could try the arrangement to see how it worked.

On the morning of the murder, Helen told her son that she was going to move out of the Hoffman residence because "Carol had been so nasty to me." In his statement to the police, David reported the conversation that morning as follows:

> Sunday morning I went downstairs and my mom was in the bedroom reading the newspaper and she had tears in her eyes, and she said in a very frustrated voice, "I've got to find another house." She said, "Carol don't want me here," and she said, "I probably shouldn't have moved in here." And I said then, "Don't let what Carol said hurt you. It's going to take a little more period of readjustment for her." Then, "I told mom that I've got to do it tonight so that there can be peace in this house."

Q: What did you tell your mom that you were going to have to do that night?

A: I told my mom I was going to have to put her to sleep.

Q: Dave, will you tell us exactly what you told your mother that morning, to the best of your recollection?

A: I said I'm going to have to choke her tonight, and I'll have to dispose of her body so that it will never be found. That's the best of my knowledge.

Q: What did your mother say when you told her that?

A: She just—she looked at me with very sad eyes and just started to weep. I think she said something like "it will be for the best." David spent the day fishing with a friend of his. When he got home that afternoon he had another conversation with his mother. She told him at that time about a phone conversation Carol had had in which she discussed taking the children and leaving home. David told the police that during the conversation with his mother that afternoon he told her, "Mom, tonight's got to be the night."

Q: When you told your mother, "Tonight's got to be the night," did your mother understand that you were going to kill Carol later that evening?

A: She thought I was just kidding her about doing it. She didn't think I could.

Q: Why didn't your mother think that you could do it?

A: Because for some time I had been telling her I was going to take Carol scuba diving and make it look like an accident.

Q: And she said?

A: And she always said, "Oh, you're just kidding me."

Q: But your mother knew you were going to do it that night?

A: I think my mother sensed that I was really going to do it that night.

Q: Why do you think your mother sensed you were really going to do it that night?

A: Because when I came home and she told me what had happened at the house, and I told her, "Tonight's got to be the night," I think she said, again I'm not certain, that "it would be the best for the kids."

OPINION

It is well-settled in this state that presence, companionship, and conduct before and after the offense are circumstances from which a person's participation in the criminal intent may be inferred. The evidence is undisputed that appellant was asleep when her son choked his wife. She took no active part in the dismembering of the body but came upstairs to intercept the children, should they awake, and prevent them from going into the bathroom.

She cooperated with her son by cleaning some items from the bathroom and corroborating David's story to prevent anyone from finding out about the murder. She is insulated by statute from guilt as an accomplice after-the-fact for such conduct because of her relation as a parent of the offender. (See Minn. Stat. § 609.495, subd. 2 (1980).)

The jury might well have considered appellant's conduct in sitting by while her son dismembered his wife so shocking that it deserved punishment. Nonetheless, these subsequent actions do not succeed in transforming her behavior prior to the crime to active instigation and encouragement. Minn.Stat. § 609.05, subd. 1 (1980) implies a high level of activity on the part of an aider and abettor in the form of conduct that encourages another to act. Use of terms such as "aids," "advises," and "conspires" requires something more of a person than mere inaction to impose liability as a principal.

The evidence presented to the jury at best supports a finding that appellant passively acquiesced in her son's plan to kill his wife. The jury might have believed that David told his mother of his intent to kill his wife that night and that she neither actively discouraged him nor told anyone in time to prevent the murder. Her response that "it would be the best for the kids" or "it will be the

best" was not, however, active encouragement or instigation. There is no evidence that her remark had any influence on her son's decision to kill his wife.

Minn.Stat. § 609.05, subd. 1 (1980) imposes liability for actions which affect the principal, encouraging him to take a course of action which he might not otherwise have taken. The state has not proved beyond a reasonable doubt that appellant was guilty of anything but passive approval.

However morally reprehensible it may be to fail to warn someone of their impending death, our statutes do not make such an omission a criminal offense. We note that mere knowledge of a contemplated crime or failure to disclose such information without evidence of any further involvement in the crime does not make that person liable as a party to the crime under any state's statutes.

David told many people besides appellant of his intent to kill his wife but no one took him seriously. He told a co-worker, approximately three times a week, that he was going to murder his wife, and confided two different plans for doing so. Another co-worker heard him tell his plan to cut Carol's air hose while she was scuba diving, making her death look accidental, but did not believe him. Two or three weeks before the murder, David told a friend of his that he and Carol were having problems and he expected Carol "to have an accident sometime." None of these people has a duty imposed by law to warn the victim of impending danger, whatever their moral obligation may be.

Her conviction must be reversed.

QUESTIONS

1. **List all the facts (including words) surrounding Mrs. Ulvinen's behavior before or during the murder that might make her an accomplice.**
2. **List all the facts after the murder that a jury could infer proved Mrs. Ulvinen participated before or during the murder itself.**
3. **According to the Court, why isn't Mrs. Ulvinen guilty of murder?**
4. **Do you agree with the Court that however morally reprehensible her behavior, she nonetheless was not an accomplice? Defend your answer.**

Accomplice *Mens Rea*

My friend Steve: Lend me your gun.

Me: What for?

Steve: So I can rob the grocery store.

Me: OK, but only if you give me half the take.

My intent is clear in this scenario (as it is in most complicity cases): my purpose in lending Steve my gun is to help him rob the grocery store, and I definitely want the robbery to succeed. So we can say my mental attitude is "purposely"; I'm acting for the very purposes of (1) helping Steve and (2) committing a robbery. Cases like this scenario don't give courts much trouble. Others do—like *knowingly* helping someone who is going to commit a crime but not for the very purpose of benefiting from the criminal venture, such as in these examples:

- I lease an apartment to someone I know is going to use it for prostitution.
- A gun dealer sells me a gun she knows I'm going to use to shoot someone.
- A telephone company provides service to a customer it knows is going to use it for illegal gambling.
- A farmer leases 200 acres of farmland to a renter he knows is going to grow marijuana for sale. (ALI 1985 I:2, 316)

Early court decisions ruled that knowingly helping someone was enough to prove the mental element required for accomplice liability. For example, in *Backun v. United States* (1940), Max Backun sold silver to Zucker, silver that he knew was

stolen. But Backun didn't sell the silver for the purpose of sharing any profits with Zucker. Still, according to the Court, knowingly selling the stolen property was good enough:

> Guilt depends, not on having a stake in the outcome of crime but on aiding and assisting the perpetrators; and those who make a profit by furnishing to criminals, whether by sale or otherwise, the means to carry on their nefarious undertakings aid them just as truly as if they were actual partners with them, having a stake in the fruits of their enterprise.
>
> To say that the sale of goods is a normally lawful transaction is beside the point. The seller may not ignore the purpose for which the purchase is made if he is advised of that purpose, or wash his hands of the aid that he has given the perpetrator of a felony by the plea that he has merely made a sale of merchandise. One who sells a gun to another knowing that he is buying it to commit a murder would hardly escape conviction as an accomplice to the murder by showing that he received full price for the gun; and no difference in principle can be drawn between such a case and any other case of a seller who knows that the purchaser intends to use the goods which he is purchasing in the commission of felony. (637)

In another famous federal case, *U.S. v. Peoni* (1938, 401), decided by the well-known and enormously respected Judge Learned Hand, the outcome was the opposite. Joseph Peoni sold counterfeit money to Dorsey in the Bronx. Dorsey was caught trying to pass the fake money in Brooklyn. Peoni was indicted as an accomplice to Dorsey.

At the trial, the prosecution relied on the words "aids, abets, counsels, commands, induces, or procures" in the U.S. Criminal Code's accomplice statute. The prosecution argued that Peoni knew Dorsey possessed counterfeit money and that knowledge was enough to convict him. The jury convicted Peoni, but, on appeal, Judge Hand didn't buy the prosecution's argument. According to Judge Hand, if someone were suing Peoni for damages, knowledge would be good enough, but, this was a criminal case, where all the words in the statute

> demand that he in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. All the words used—even the most colorless, "abet"—carry an implication of purposive attitude towards it. (402)

U.S. v. Peoni is cited over and over again as defining the *mens rea* of accomplice liability. If only it were that clear, but it's not. In a 2002 survey of only federal court cases, Assistant U.S. Attorney Baruch Weiss (2002) cited "a few examples" illustrating the confusion. Here's one:

> Is simple knowledge enough? Yes, said the Supreme Court in 1870; no, said Judge Learned Hand in 1938; yes, implied the Supreme Court in 1947; no, said the Supreme Court in 1949; yes, if it is accompanied by an act that substantially facilitates the commission of the underlying offense, said the Supreme Court in 1961; usually, said the Second Circuit in 1962; only if knowledge is enough for the underlying offense, said the Second Circuit in another case in 1962; sometimes, said the Seventh Circuit in 1985; always, implied the Seventh Circuit in 1995; no, said the Second Circuit in 1995 and the Seventh Circuit in 1998. (1351–52)

Further confusion arises because both recklessness and negligence can satisfy the *mens rea* requirement. For example, if participants can predict that aiding and abetting one crime might reasonably lead to another crime, they're guilty of both.

Participation after the Commission of a Crime

LO 3

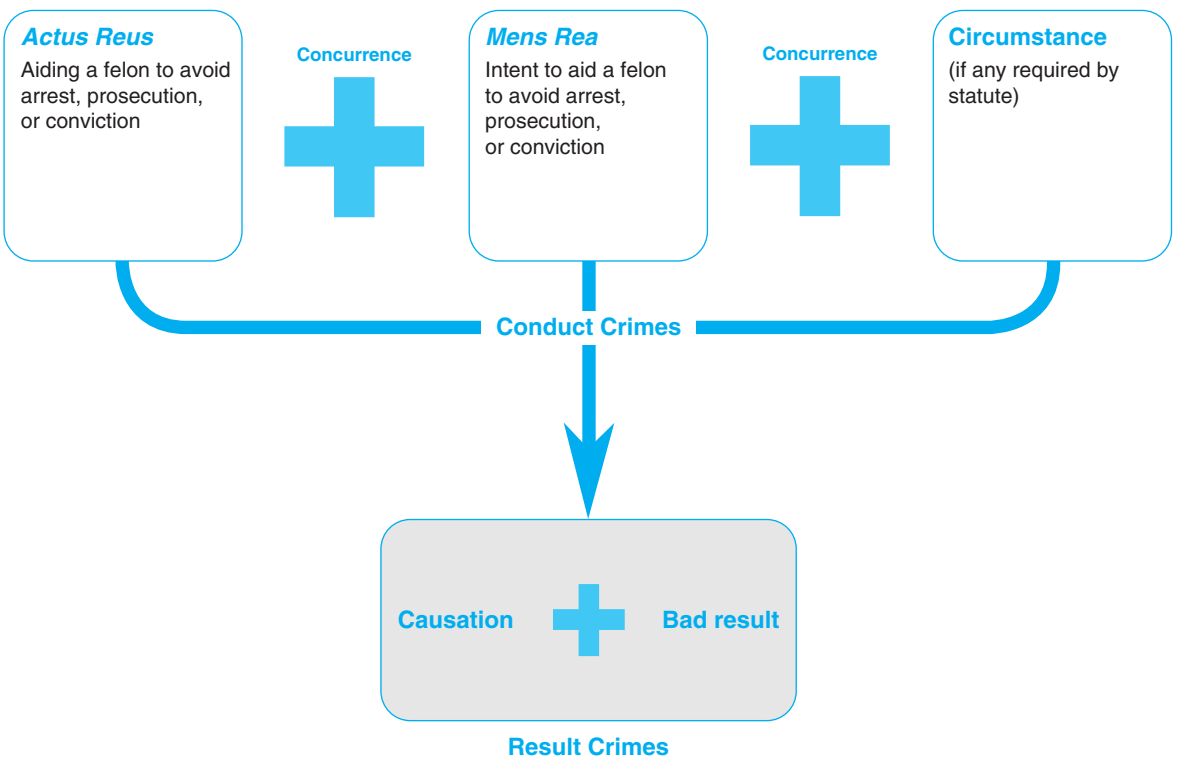
At common law, accessories after the fact were punished like accomplices; that is, they were treated as if they'd committed the crime itself. So if you gave a burglar a place to hide after he'd committed burglary, you were guilty of burglary, too. But accessories aren't really burglars; they don't come on the scene until the burglary is over. That's why they used to be called "accessories after the fact." And (so the thinking goes), it's not as bad to help someone who's already committed a crime as it is to help her commit the crime in the first place.

LO 3

Modern statutes have reduced the punishment to fit this less serious offense. Accessory after the fact (now called simply, "accessory") is a separate offense, usually a misdemeanor. Sometimes, it's even got a different name, such as "obstructing justice," "interfering with prosecution," and "aiding in escape."

Most accessory-after-the-fact statutes have four elements, which includes one *actus reus*, two *mens rea*, and one circumstance element:

ELEMENTS OF ACCESSORY-AFTER-THE-FACT LIABILITY



1. The accessory personally aided the person who committed the crime (the *actus reus* element).
2. The accessory knew the felony was committed (*mens rea* element).
3. The accessory aided the person who committed the crime for the purpose of hindering the prosecution of that person (*mens rea* element).
4. Someone besides the accessory actually committed a felony (the circumstance element).

The Supreme Court of Louisiana dealt with these elements under Louisiana's accessory-after-the-fact statute in the bizarre case of *State v. Chism* (1983).

In our next case excerpt, the Supreme Court of Louisiana dealt with Louisiana's accessory-after-the-fact statute in the bizarre case of* State v. Chism *(1983).

CASE Was He an Accessory after the Fact?

State v. Chism
436 So.2d 464 (La. 1983)

HISTORY

Brian Chism (the defendant) was convicted before the First Judicial District Court, Caddo Parish, of being an accessory after the fact, and was sentenced to three years in Parish Prison, with two and one-half years suspended, and the defendant appealed. The Louisiana Supreme Court affirmed the conviction, vacated the sentence, and remanded the case for resentencing.

DENNIS, J.

FACTS

On the evening of August 26, 1981, in Shreveport, Tony Duke gave the defendant, Brian Chism, a ride in his automobile. Brian Chism was impersonating a female, and Duke was apparently unaware of Chism's disguise. After a brief visit at a friend's house, the two stopped to pick up some beer at the residence of Chism's grandmother.

Chism's one-legged uncle, Ira Lloyd, joined them, and the three continued on their way, drinking as Duke drove the automobile. When Duke expressed a desire to have sexual relations with Chism, Lloyd announced that he wanted to find his ex-wife Gloria for the same purpose. Shortly after midnight, the trio arrived at the St. Vincent Avenue Church of Christ and persuaded Gloria Lloyd to come outside. As Ira Lloyd stood outside the car attempting to persuade Gloria to come with them, Chism and Duke hugged and kissed on the front seat as Duke sat behind the steering wheel.

Gloria and Ira Lloyd got into an argument, and Ira stabbed Gloria with a knife several times in the stomach and once in the neck. Gloria's shouts attracted the attention of two neighbors, who unsuccessfully tried to prevent Ira from pushing Gloria into the front seat of the car alongside Chism and Duke. Ira Lloyd climbed into the front seat also, and Duke drove off. One of the bystanders testified that she could not be sure but she thought she saw Brian's foot on the accelerator as the car left.

Lloyd ordered Duke to drive to Willow Point, near Cross Lake. When they arrived, Chism and Duke, under Lloyd's direction, removed Gloria from the vehicle and placed her on some high grass on the side of the roadway, near a wood line. Ira was unable to help the two because his wooden leg had come off. Afterward, as Lloyd requested, the two drove off, leaving Gloria with him.

There was no evidence that Chism or Duke protested, resisted, or attempted to avoid the actions which Lloyd ordered them to take. Although Lloyd was armed with a knife, there was no evidence that he threatened either of his companions with harm.

Duke proceeded to drop Chism off at a friend's house, where he changed to male clothing. He placed the blood-stained women's clothes in a trash bin. Afterward, Chism went with his mother to the police station at 1:15 a.m. He gave the police a complete statement, and took the officers to the place where Gloria had been left with Ira Lloyd. The police found Gloria's body in some tall grass several feet from that spot.

An autopsy indicated that stab wounds had caused her death. Chism's discarded clothing disappeared before the police arrived at the trash bin.

OPINION

According to Louisiana statute 14:25:

> An accessory after the fact is any person who, after the commission of a felony, shall harbor, conceal, or aid the offender, knowing or having reasonable ground to believe that he has committed the felony, and with the intent that he may avoid or escape from arrest, trial, conviction, or punishment. . . .
>
> Whoever becomes an accessory after the fact shall be fined not more than five hundred dollars, or imprisoned, with or without hard labor, for not more than five years, or both; provided that in no case shall his punishment be greater than one-half of the maximum provided by law for a principal offender.

Chism appealed from his conviction and sentence and argues that the evidence was not sufficient to support the judgment. Consequently, in reviewing the defendant's assigned error, we must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found beyond a reasonable doubt that:

(a) a completed felony had been committed by Ira Lloyd before Brian Chism rendered him the assistance described below; *and*

(b) Chism knew or had reasonable grounds to know of the commission of the felony by Lloyd; *and*

(c) Chism gave aid to Lloyd personally under circumstances that indicate either that he actively desired that the felon avoid or escape arrest, trial conviction, or punishment or that he believed that one of these consequences was substantially certain to result from his assistance.

There was clearly enough evidence to justify the finding that a felony had been completed before any assistance was rendered to Lloyd by the defendant. The record vividly demonstrates that Lloyd fatally stabbed his ex-wife before she was transported to Willow Point and left in the high grass near a wood line. Thus, Lloyd committed the felonies of attempted murder, aggravated battery, and simple kidnapping, before Chism aided him in any way. A person cannot be convicted as an accessory after the fact to a murder because of aid given after the murderer's acts but before the victim's death, but under these circumstances the aider may be found to be an accessory after the fact to the felonious assault.

The evidence overwhelmingly indicates that Chism had reasonable grounds to believe that Lloyd had committed a felony before any assistance was rendered. In his confessions and his testimony Chism indicates that the victim was bleeding profusely when Lloyd pushed her into the vehicle, that she was limp and moaned as they drove to Willow Point, and that he knew Lloyd had inflicted her wounds with a knife.

The Louisiana offense of accessory after the fact deviates somewhat from the original common law offense in that it does not require that the defendant actually know that a completed felony has occurred. Rather, it incorporates an objective standard by requiring only that the defendant render aid "knowing or having reasonable grounds to believe" that a felony has been committed.

The closest question presented is whether any reasonable trier of fact could have found beyond a reasonable doubt that Chism assisted Lloyd under circumstances that indicate that either Chism actively desired that Lloyd would avoid or escape arrest, trial, conviction, or punishment, or that Chism believed that one of these consequences was substantially certain to result from his assistance.

In this case we conclude that a trier of fact reasonably could have found that Chism acted with at least a general intent to help Lloyd avoid arrest because:

(1) Chism did not protest or attempt to leave the car when his uncle, Lloyd, shoved the mortally wounded victim inside;

(2) he did not attempt to persuade Duke, his would-be lover, to exit out the driver's side of the car and flee from his uncle, whom he knew to be one-legged and armed only with a knife;

(3) he did not take any of these actions at any point during the considerable ride to Willow Point;

(4) at their destination, he docilely complied with Lloyd's directions to remove the victim from the car and leave Lloyd with her, despite the fact that Lloyd made no threats and that his wooden leg had become detached;

(5) after leaving Lloyd with the dying victim, he made no immediate effort to report the victim's whereabouts or to obtain emergency medical treatment for her;

(6) before going home or reporting the victim's dire condition he went to a friend's house, changed clothing and discarded his own in a trash bin from which the police were unable to recover them as evidence;

(7) he went home without reporting the victim's condition or location;

(8) and he went to the police station to report the crime only after arriving home and discussing the matter with his mother.

The defendant asserted that he helped to remove the victim from the car and to carry her to the edge of the bushes because he feared that his uncle would use the knife on him. However, fear as a motivation to help his uncle is inconsistent with some of Chism's actions after he left his uncle. Consequently, we conclude that despite Chism's testimony, the trier of fact could have reasonably found that he acted voluntarily and not out of fear when he aided Lloyd and that he did so under circumstances indicating that he believed that it was substantially certain to follow from his assistance that Lloyd would avoid arrest, trial, conviction, or punishment.

For the foregoing reasons, it is also clear that the judge's verdict was warranted. There is evidence in this record from which a reasonable trier of fact could find a defendant guilty beyond a reasonable doubt. Therefore, we affirm the defendant's conviction.

We note, however, that the sentence imposed by the trial judge is illegal. The judge imposed a sentence of three years. He suspended two and one-half of years of the term. The trial judge has no authority to suspend part of a sentence in a felony case. The correct sentence would have been a suspension of all three years of the term, with a six-month term as a condition of two years probation. We therefore vacate the defendant's sentence and remand the case for resentencing.

Conviction AFFIRMED; sentence vacated; REMANDED.

DISSENT

DIXON, CJ.

I respectfully dissent from what appears to be a finding of guilt by association. The majority lists five instances of inaction, or failure to act, by defendant:

(1) did not protest or leave the car;

(2) did not attempt to persuade Duke to leave the car;

(3) did neither (1) nor (2) on ride to Willow Point; . . .

(5) made no immediate effort to report crime or get aid for the victim; . . .

(7) failed to report victim's condition or location after changing clothes.

The three instances of defendant's action relied on by the majority for conviction were stated to be:

. . . (4) complying with Lloyd's direction to remove the victim from the car and leave the victim and Lloyd at Willow Point;

(6) changing clothes and discarding bloody garments; and . . .

(8) discussing the matter with defendant's mother before going to the police station to report the crime.

None of these actions or failures to act tended to prove defendant's intent, specifically or generally, to aid defendant avoid arrest, trial, conviction or punishment.

QUESTIONS

1. **Identify the elements of accessory after the fact according to the Louisiana statute.**
2. **List all the facts stated by the Court, and then match them to each of the elements of the statute.**
3. **Summarize the Court's conclusions regarding the evidence of each of the elements.**
4. **Do you agree with the Court that Chism is guilty of being an accessory after the fact? Back up your answer with facts in the case.**
5. **Summarize the reasons the dissent couldn't go along with the majority. Do you agree with the dissent? Defend your answer.**

EXPLORING FURTHER

Participation after the Commission of a Crime

1. Was He an Accessory after the Fact to Grand Larceny?

Dunn v. Commonwealth, WL 147448 (Va.App. 1997)

FACTS On two separate occasions, Charles Lee Dunn was a passenger in a car when two grand larcenies occurred. He claimed he didn't know the others in the car planned to break into cars and didn't participate in the thefts of stereo equipment and CDs. He admitted that, after the first theft on September 4, he voluntarily went with the others when they sold the equipment, and he received a small piece of crack cocaine from the proceeds. Regarding one of the offenses, he testified that he took no active part in the theft and was taken home immediately thereafter.

The Commonwealth's evidence included testimony from the investigating officer, Detective Ramsey, that appellant (Dunn) told him that he knew the purpose of going to the location of the first offense was "to take equipment belonging to Mr. Roberts. It was known there was equipment in his car."

As to the September 7, 1995 offense, Ramsey testified that Dunn said:

> The three of them went to a location near Mr. Jackson's house. Mr. Dunn waited in the car, and Mr. Walker and Mr. Kraegers approached Mr. Jackson's vehicle. They entered the vehicle through an unlocked door and took stereo equipment from the vehicle, brought it back to the car. [Appellant] states that they put the speaker box in the trunk, put the amp and a CD player in the car, and he says, I think they got some CDs. That equipment was also taken to the city and traded for crack cocaine which they all used, and that property has not been recovered.
>
> Ramsey stated that Dunn admitted to participating and taking the property to the city in exchange for crack cocaine.

Was Dunn an accessory after the fact?

DECISION Yes, said the Virginia Court of Appeals:

> While Dunn contends that the evidence failed to establish he did anything other than ride in a car with friends, the trial court was not required to accept his explanation.
>
> Dunn admitted to Ramsey that he knew the others intended to steal on both occasions; he smoked crack cocaine purchased with the money received from disposing of the goods; and he went out with the codefendants three days after the first larceny occurred.
>
> Under the facts of this case, the Commonwealth's evidence was sufficient to prove beyond a reasonable doubt that appellant was an accessory after the fact to the two grand larcenies. Affirmed.

Vicarious Liability

LO 2, LO 5

As noted at the beginning of the chapter, vicarious liability transfers the *actus reus* and the *mens rea* of one person to another person—or from one or more persons to an enterprise—because of their *relationship*. Most vicarious liability involves business relationships, such as employer-employee, manager-corporation, buyer-seller, producer-consumer, and service provider–recipient. But it can also apply to other enterprises, like the college fraternity (case excerpt, p. 207), and relationships between individuals, such as making the owner of a car liable for the driver's traffic violations and holding parents liable for their children's crimes.

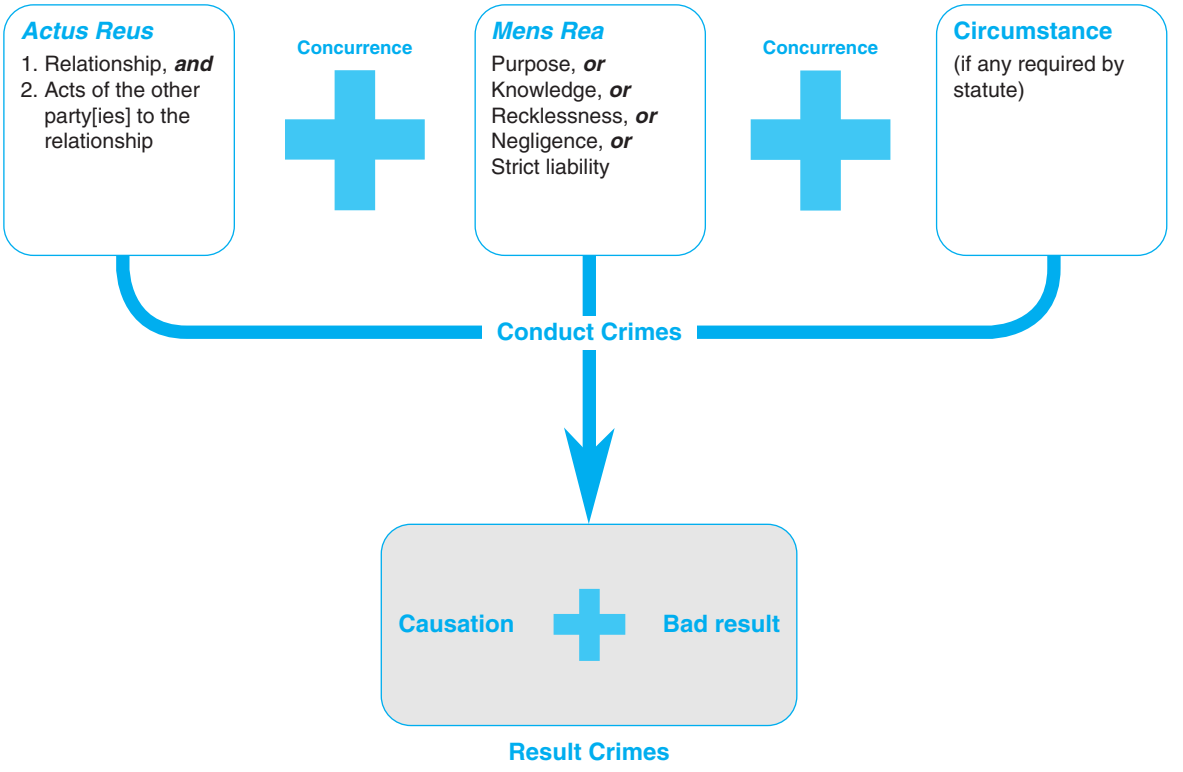
Let's look first at the vicarious criminal liability of corporations based on their relationships with those employed by the corporation.

Corporate Liability

> Did you ever expect a corporation to have a conscience when it has no soul to be damned, and no body to be kicked?
> *Lord Chancellor Edward Thurlow (Weismann 2009)*

> We may congratulate ourselves that this cruel war is nearing its end. It has cost a vast amount of treasure and blood. It has indeed been a trying hour for the Republic; but I see in the near future a crisis approaching that unnerves me and

ELEMENTS OF VICARIOUS LIABILITY



> causes me to tremble for the safety of my country. As a result of the war, corporations have been enthroned and an era of corruption in high places will follow, and the money power of the country will endeavor to prolong its reign by working upon the prejudices of the people until all wealth is aggregated in a few hands and the Republic is destroyed. I feel at this moment more anxiety for the safety of my country than ever before, even in the midst of war. God grant that my suspicions may prove groundless.
>
> *President Abraham Lincoln, November 21, 1864 (Shaw 1950)*

> Since a corporation acts by its officers and agents, their purposes, motives, and intent are just as much those of the corporation as are the things done. If, for example, the invisible, intangible essence or air which we term a corporation can level mountains, fill up valleys, lay down iron tracks, and run railroad cars on them, it can intend to do it, and can act therein as well viciously as virtuously.
>
> *Joel Bishop,* New Criminal Law, *quoted in* New York Central & Hudson River Railroad Company v. United States *(1909)*

History

Criminologist Edward Sutherland introduced us to the "white collar criminal" and "white collar crime" in 1939, but as the introductory quotes demonstrate, concern about corporate crime is centuries old. The history of corporations began with the charters the English monarchs granted as a privilege exchanged for money. In other words, they were government entities. The industrial revolution dramatically changed the nature of corporations from government entities controlled by government to private business operated by internal management.

LO 4

Corporate criminal law began as, and still is, the creature of *federal* law, stemming from the "contracts" and "commerce" clauses in the U.S. Constitution. The contracts clause (Article 1, Section 10, paragraph 1) provides: "No State shall . . . pass any . . . law impairing the Obligation of Contracts. . . ." The interstate commerce clause (Article I, Section 8) provides: "The Congress shall have power to . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." As corporate business increasingly affected interstate commerce in the late nineteenth century, Congress stepped in to legislate, and U.S. attorneys to prosecute, corporate crime.

Throughout most of the twentieth century, and continuing today, is the belief that self-regulation is the best model to make sure that corporations are meeting their obligations to shareholders and the public. The belief is captured in the old "shingle theory" of corporate governance:

> If you hold yourself out to the public as offering to do business, you are implicitly representing that you will do so in a fair and honest manner. As such, self-regulation became the cornerstone of most business, including the securities industry, beginning in the early part of the twentieth century. (Weismann 2009, 1)

According to then chairman of the Securities and Exchange Commission (SEC), and later Supreme Court Justice William O. Douglas, and told to the Hartford Bond Club in 1938:

> Self-discipline is always more welcome than discipline imposed from above. From the broad public viewpoint, such regulation can be far more effective . . .

> and persuasive and subtle in its conditioning over business practices and business morality. By and large, the government can operate satisfactorily only by proscription. That leaves untouched large areas of conduct and activity; some of it susceptible of government regulation but in fact too minute for satisfactory control, some of it lying beyond the periphery of the law in ethics and morality. Into these large areas, self-regulation is by far the preferable course from all viewpoints. (Seligman 2004, 1361–62)

Earlier the same year, Douglas told a congressional committee that if self-regulation of the stock market was to succeed, the Securities and Exchange Commission had to play an important, but *residual* role. In Douglas' blunt words:

> Government would keep the shotgun, so to speak, behind the door, loaded, well-oiled, cleaned, ready to use, but with hope that it would never have to be used. (1361)

According to Professor Joel Seligman (2004), the leading expert on the history of the SEC, after 70 years, "stock market self-regulation remains a work in progress" (1348). The same can be said for all corporate regulation (Weismann 2009, 2). The weaknesses of self-regulation are well-recognized, as this list in 1973 demonstrates:

- Lack of enthusiasm for regulation by the regulated group
- Temptation to use a corporate façade of regulation as a "shield to ward off meaningful regulation"
- Businesspeople's "tendency to use collective action to advance their interests through the imposition of purely anticompetitive restraints as opposed to those justified by regulatory needs"
- Resistance to regulatory changes because of the economic interest in preserving the current status (Seligman 2004, 1347)

LO 4

Writing after the subprime crisis, the collapse of the financial corporate giants, and the ensuing recession in 2008, former white collar crime defense and then prosecutor Professor Miriam Weismann (2009) sums up the history and current state of corporate regulation:

> Corporate regulation is, therefore, dependent for the most part on self-restraint and ethical corporate governance within the regulatory environment mandated by Congress. The role of the regulators and law enforcement is proscriptive in nature as opposed to proactive. This means that the government is not in a meaningful position to prevent misconduct. Instead, its role is largely reactive, punishing and/or prosecuting once the misconduct is uncovered. (2)

Let's look now at the legal and policy bases for vicarious corporate criminal liability—namely, the doctrine of ***respondeat superior*** **("let the master answer")**.

(Respondeat Superior) "Let the Master Answer"

We begin with a legal fiction created by the U.S. Supreme Court in *Trustees of Dartmouth College v. Woodward* (1918). According to the Court, "A corporation is an artificial being, invisible, intangible." So, a corporation can sue, be sued, and enter into contracts. And, most important for us—corporations can commit crimes. The Supreme Court decided that in *New York Central & Hudson River Railroad Company v. U.S.* (1909).

The New York Central and Hudson River Railroad Company was convicted and fined $180,000 for paying "kickbacks" to the American Sugar Refining Company for shipments of sugar from New York City to the city of Detroit, Michigan. The railroad fixed the shipping rate for sugar at 23 cents per 100 pounds from New York City to Detroit. The railroad's general traffic manager and assistant traffic manager entered into an unlawful agreement with the shippers, the American Sugar Refining Company of New York and the American Sugar Refining Company of New Jersey, and the consignees of the sugar, W. H. Edgar & Son, of Detroit. Pursuant to the agreement, the shippers paid the full rate, and the railroad "kicked back" to the shippers 5 cents for each 100 pounds.

The purpose of the kickback was to "prevent them from resorting to transportation by the water route between New York and Detroit, thereby depriving the roads interested of the business, and to assist Edgar & Son in meeting the severe competition with other shippers and dealers" (490–91).

The railroad attacked the constitutional validity of certain features of the Elkins Act, the law the railroad was convicted under. According to the act:

> Anything done or omitted to be done by a corporation common carrier subject to the act to regulate commerce, and the acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said acts, or under this act, shall also be held to be a misdemeanor committed by such corporation; and, upon conviction thereof, it shall be subject to like penalties as are prescribed in said acts, or by this act, with reference to such persons, except as such penalties are herein changed.
>
> In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, acting within the scope of his employment, shall, in every case, be also deemed to be the act, omission, or failure of such carrier, as well as that of the person. (491–492)

The railroad argued that

> these provisions of the law are unconstitutional because Congress has no authority to impute to a corporation the commission of criminal offenses, or to subject a corporation to a criminal prosecution by reason of the things charged. The argument is that to thus punish the corporation is in reality to punish the innocent stockholders, and to deprive them of their property without opportunity to be heard, consequently without due process of law. (492)

The Court rejected the argument, and relied on doctrine of *respondeat superior* ("let the master answer"), borrowed from tort (noncriminal wrongs) law. According to *respondeat superior*, corporate employees' acts are imputed to the corporation.

> The general freight traffic manager and the assistant freight traffic manager were authorized to establish rates at which freight should be carried over the line of the New York Central & Hudson River Company, and were authorized to unite with other companies in the establishing, filing, and publishing of through rates, including the through rate or rates between New York and Detroit referred to in the indictment. Thus, the subject-matter of making and fixing rates was within the scope of the authority and employment of the agents of the company, whose acts in this connection are sought to be charged upon the company.

> Thus clothed with authority, the agents were bound to respect the regulation of interstate commerce enacted by Congress, requiring the filing and publication of rates and punishing departures therefrom. Applying the principle governing civil liability, we go only a step farther in holding that the act of the agent, while exercising the authority delegated to him to make rates for transportation, may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting. (494)

The Court's rationale for extending vicarious liability by the doctrine of *respondeat superior* was the "history of the times":

> It is a part of the public history of the times that statutes against rebates could not be effectually enforced so long as individuals only were subject to punishment for violation of the law, when the giving of rebates or concessions inured to the benefit of the corporations of which the individuals were but the instruments. This situation, developed in more than one report of the Interstate Commerce Commission, was no doubt influential in bringing about the enactment of the Elkins law, making corporations criminally liable. (495)
>
> This statute does not embrace things impossible to be done by a corporation; its objects are to prevent favoritism, and to secure equal rights to all in interstate transportation, and one legal rate, to be published and posted and accessible to all alike. We see no valid objection in law, and every reason in public policy, why the corporation, which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has entrusted authority to act in the subject-matter of making and fixing rates of transportation, and whose knowledge and purposes may well be attributed to the corporation for which the agents act.
>
> While the law should have regard to the rights of all, and to those of corporations no less than to those of individuals, it cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands, and to give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at.
>
> There can be no question of the power of Congress to regulate interstate commerce, to prevent favoritism, and to secure equal rights to all engaged in interstate trade. It would be a distinct step backward to hold that Congress cannot control those who are conducting this interstate commerce by holding them responsible for the intent and purposes of the agents to whom they have delegated the power to act in the premises.
>
> We find no error in the proceedings of the Circuit Court, and its judgment is affirmed. (495–496)

Those were the "good old days," when the typical corporate crime case involved "slush funds," fraudulent billing schemes, and tax cheats. Corporate crime was an "inside job," and the corporate criminals hid misconduct from their accountants and lawyers. Now, there's a whole new kind of corporate crime and criminal. Corporate "watchdogs" (law firms, accounting firms, auditors, investment advisors, banks, and even regulators) who were supposed to "bark" when the public interest was threatened were silent; even worse,

they were part of the "runaway organizational corporate behavior that injected chaos into America's capital markets" (Weismann 2009, xvii–xviii). Our next case excerpt, *U.S. v. Arthur Andersen, LLP* (2004), is the story of how the Arthur Andersen, LLC, then one of the largest accounting and consulting firms in the world, was brought down as a member of the "supporting cast" in the "rubble of Enron Corporation, which fell from its lofty corporate perch in 2001 wreaking financial ruin upon thousands of investors, creditors, and employees."

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CASE Are the Accountants Vicariously Liable for the Corporation's Crimes?

U.S. v. Arthur Andersen, LLP
374 F.3d 281 (CA5, 2004)

HISTORY

Accounting firm was convicted in the U.S. District Court for the Southern District of Texas, Melinda Harmon, J., of obstructing Securities and Exchange Commission (SEC) proceeding, and it appealed. The U.S. Court of Appeals 5th Circuit, Texas, affirmed.

REAVLEY, HIGGINBOTHAM and BENAVIDES, JJ., PATRICK E. HIGGINBOTHAM, J.

Today we decide one of the many cases arising from the rubble of Enron Corporation, which fell from its lofty corporate perch in 2001 wreaking financial ruin upon thousands of investors, creditors, and employees. Like a falling giant redwood, it took down with it many members of its supporting cast. Our present focus is upon one of those, Arthur Andersen, LLP, then one of the largest accounting and consulting firms in the world. The indictment leading to the conviction charged Andersen of corruptly persuading one or more Andersen personnel to withhold, alter, destroy, or conceal documents with the intent to impair their availability in an official proceeding. Writ large, the government says that Andersen, in an effort to protect itself and its largest single account, ordered a mass destruction of documents to keep them from the hands of the SEC.

FACTS

During the 1990s, Enron transformed itself from a natural gas pipeline operator into a trading and investment conglomerate with a large volume of trading in the energy business. Andersen both audited Enron's publicly filed financial statements and provided internal audit and consulting services. By the late 1990s, Andersen's "engagement team" for its Enron account included more than 100 people, a significant number of which worked exclusively in Enron quarters in Houston, Texas.

From 1997 through 2001, the engagement team's leader was David Duncan. He was in turn subject to certain managing partners and accounting experts in Andersen's Chicago office. Enron was a valued client producing $58 million in revenue in 2000 for Andersen with projections of $100 million for the next year. Enron's chief accounting officer and treasurer throughout this period came to the employ of Enron from the accounting staffs of Andersen, as did dozens of others. This was a close relationship. Indeed, the jury heard evidence that Andersen removed at Enron's request at least one accountant from his assignment with Enron after Enron disagreed with his accounting advice.

With Enron's move to energy trading and rapid growth came aggressive accounting, pushing generally accepted accounting principles to its advantage. Part of this picture included Enron's use of "special purpose entities," SPEs. These were "surrogate" companies whose purpose was to engage in business activity with no obligation to account for the activity on Enron's balance sheet. Four of these SPEs—called Raptors—play a large role in this story. They were created in 1999 and 2001, with the assistance of Andersen, largely capitalized with Enron stock. The Raptors engaged in transactions with "LJM," an entity run by Andrew Fastow, Enron's chief financial officer.

By late 2000 and early 2001, the traded price of Enron's stock was dropping and some of the Raptor's investments were also turning downward. Some of the SPEs were profitable and some were experiencing sharp losses. But aggregated they reflected a positive return to Enron. GAAP would not permit such an aggregation of the four entities and Andersen's Chicago office told David Duncan that it would not—that it was a "black and white" violation. That advice was ignored and the losses were buried under the profits of the group in the public reporting for the first quarter 2001. The slide of Enron stock continued, dropping some 50 percent from January to August 2001.

The summer of 2001 brought problems to Andersen on other fronts, and these "unrelated" events later become important to the issues before us. In June 2001 Andersen settled a dispute with the SEC regarding Andersen's accounting and auditing work for Waste Management Corporation. Andersen was required to pay some $7 million, the largest monetary settlement ever exacted by the SEC, and Andersen suffered censure under SEC Rule 102(e). Then in July 2001, the SEC sued five officers of Sunbeam Corporation and the lead Andersen partner on its audit.

Meanwhile, events at Enron began to accelerate. On August 14, 2001, Jeffrey Skilling, Enron's CEO, resigned, pushing Enron stock further downward. Within days, Sherron Watkins, a senior accountant at Enron, formerly at Andersen, warned Enron's chairman, Kenneth Lay, that Enron "could implode in a wave of accounting scandals." She also warned David Duncan and Michael Odom, an Andersen partner in Houston who had oversight responsibility for Duncan. Chairman Lay promptly asked Enron's principal outside legal counsel to examine the accused transactions. And by early September, senior Andersen officials and members of its legal department formed a "crisis-response" group, including, among others, its top risk manager and Nancy Temple, an inhouse lawyer in Chicago assigned to Enron matters on September 28, 2001.

Possible proceedings became a reality on November 8, 2001, when Andersen received an SEC subpoena. The time line between September 28 and November 8, from a possibility of a proceeding to fact, is important and we turn briefly to that narrative.

On October 8, Andersen contacted a litigation partner at Davis, Polk & Wardwell in New York regarding representation of Andersen. The following day, Nancy Temple discussed the problem of Enron with senior inhouse counsel at Andersen. Her notes from this meeting refer to an SEC investigation as "highly probable" and to a "reasonable possibility" of a restatement of earnings. Her notes also recorded, "without PSG agreement, restatement and probability of charge of violating cease and desist in Waste Management."

Two days later, on October 10, Michael Odom urged Andersen personnel to comply with the document retention policy, noting "if it's destroyed in the course of normal policy and litigation is filed the next day, that's great; we've followed our own policy and whatever there was that might have been of interest to somebody is gone and irretrievable."

On October 12, Temple entered the Enron crisis into Andersen's internal tracking system for legal matters, labeling it "government regulatory investigation," and asked Odom if the engagement team was in compliance with Andersen's document policy. Odom forwarded the email to Duncan in Houston.

Meanwhile, Enron was facing an October 16 date for announcing its third quarter results. That release had to disclose a $1.01 billion charge to earnings and, to correct an accounting error, a $1.2 billion reduction in shareholder equity. Enron's draft of the proposed release described the charge to earnings as "nonrecurring." Andersen's Chicago personnel advised that this phrase was misleading, but Enron did not change it. With one exception, Andersen took no action when its advice was not followed: Temple suggested that Andersen's characterization of the draft release as misleading be deleted from the email exchanges.

An SEC letter to Enron quickly followed the releases of October 16. In the letter the SEC advised that it had opened an informal investigation in August and an additional accounting letter would follow. Andersen received a copy of the letter on Friday, October 19. A Saturday morning conference of Andersen's Enron crisis group followed. While the meeting traversed a range of issues, Temple again reminded all "to make sure to follow the policy."

The following Tuesday, October 23, Enron had a telephone conference with security analysts. At the same time, Duncan scheduled an "urgent" and "mandatory" meeting in Houston at which, following lengthy discussion of technical accounting issues, he directed the engagement team to comply with Andersen's records retention policy.

On October 26, a senior partner at Andersen circulated an article from the *New York Times* discussing the SEC's response to Enron. In an email, he commented that "the problems are just beginning and we will be in the cross-hairs. The marketplace is going to keep the pressure on this and it's going to force the SEC to be tough." Evidence that this prediction of SEC toughness was sound came quickly. On October 30, the SEC sent Enron a second letter requesting accounting documents—a letter signed by the two top enforcement division officials.

Throughout this period Andersen's Houston office shredded documents. Government witnesses detailed the steady shredding and deletion of documents and the quantity of paper trucked away from the Houston office. Almost two tons of paper were shipped to Andersen's main office in Houston for shredding. The government produced an exhibit at trial charting the time and quantity of the carted waste paper from January 2001 through December of that year. The pounds carted remained fairly steady at a rate under 500 pounds, but spiked on October

25 to just under 2,500 pounds. The shredding continued until the SEC served its subpoena for records on November 8. Temple advised Duncan that the subpoena had been served. The next day Duncan's assistant advised the Houston team: "Per DAVE—No more shredding. We have been officially served for our documents."

Enron filed for bankruptcy on December 2, 2001. The following April, David Duncan pleaded guilty to obstructing the SEC.

OPINION

The government relied on the volume of documents destroyed as evidence of Andersen's intent. Andersen did not attempt to deny that it shredded large numbers of documents and for sustained periods, leaving the government's assertion to this extent largely unchallenged. Some 21 boxes of Duncan's preserved desk files were introduced by Andersen and displayed to the jury. Andersen's explanation for the undeniable surge in shredding and the persistent and uncustomary reminders to employees to abide Andersen's retention policy was that it wanted to leave only the work papers of auditing efforts, and that Duncan did not want his superiors in Chicago to face his unkempt files. That explanation pointed to the upsurge in papers trucked away shortly after he learned of his superior's planned visit to Houston. The jury was free to evaluate this testimony. We are not persuaded that the district court committed reversible error in its rulings regarding the evidence of the volume of documents destroyed or retained.

We turn next to Andersen's contention that the district court erred in allowing the government to offer evidence of two SEC proceedings filed against it arising out of Andersen's work with Sunbeam Corp and Waste Management, Inc. Andersen urges that evidence about Sunbeam and Waste Management could not be relevant, absent proof that the facts offered were known by a single person, a corrupt persuader. It urges that it cannot be charged with the collective knowledge of all its agents. The government replies that the law is to the contrary, pointing to decisions of courts of appeals.

We need not resolve that debate. The notes of Nancy Temple, an in-house lawyer, make clear that she was keenly aware of the cease and desist order and the 102(e) censure proceedings in Waste Management, and that she viewed Waste Management and Sunbeam as a "model" for the Enron difficulties. There is much more. On November 6, Lawrence Rieger, a senior partner, sent an email to Temple with press accounts of the press releases by Sunbeam and Waste Management. He included an Andersen memorandum entitled "Action Steps in Response to Indications of Possible Restatement of Financial Statement." That document had been distributed to all U.S. partners. Goolsby, an Andersen partner, and John Riley had extensive knowledge of the proceedings in both Waste Management and Sunbeam and participated in conference calls with Andersen personnel addressing the Enron "crisis." Goolsby had signed the court papers in Waste Management. David Duncan, who had never worked on either Waste Management or Sunbeam matters, knew about those cases. It defies common sense to assert that partners in Andersen would not be informed about both of these cases. At the least, a jury could reasonably so conclude.

Andersen contends that the jury instructions were flawed in three ways: first in explaining the meaning of "corruptly persuades," then in misstating the element of "official proceeding," and finally in not instructing the jury that the government had to prove that Andersen knew that its destruction of records was unlawful.

Andersen was convicted of obstructing justice under what has come to be known as the "corrupt persuasion" prong of 18 U.S.C. § 1512(b)(2)(A) & (B). It provides:

> Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to . . . cause or induce any person to (A) . . . withhold a record, document, or other object, from an official proceeding; [or] (B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding . . . shall be fined under this title or imprisoned not more than ten years, or both.

In this case, the charge read in relevant part:

> To "persuade" is to engage in any non-coercive attempt to induce another person to engage in certain conduct. The word "corruptly" means having an improper purpose. An improper purpose, *for this case*, is an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding.

The district court instructed that "an improper purpose, for this case, is an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding," including "subvert" and "undermine" as urged by Andersen. Acting with an intent to "subvert, undermine, or impede" an investigation narrowed the reach of the statute, insisting upon a degree of culpability beyond an intent to prevent a document from being available at a later proceeding. A routine document retention policy, for example, evidences an intent to prevent a document from being available in any proceeding. But it does not alone evidence an intent to "subvert, undermine, or impede" an official proceeding. In narrowing the statute's potential reach, the district judge rejected the government's argument that the jury should be charged on the bare bones of the statute and shaped the charge to the facts of the case. It also gave meaning to "corruptly persuades." "Subvert" means "to overturn or overthrow from the foundation, ruin" or "to pervert or corrupt by an undermining of

morals, allegiance, or faith." The most relevant definition of "undermine" is "to subvert or weaken insidiously or secretly." Impede means "to interfere with or get in the way of," to "hold up." Each of these terms implies a degree of personal culpability beyond a mere intent to make documents unavailable.

Acting with an intent to withhold a record from an official proceeding casts a wider net than acting with an intent to subvert, undermine, or impede the entire fact-finding ability of the proceeding. There is nothing improper about following a document retention policy when there is no threat of an official investigation, even though one purpose of such a policy may be to withhold documents from unknown, future litigation. A company's sudden instruction to institute or energize a lazy document retention policy when it sees the investigators around the corner, on the other hand, is more easily viewed as improper. The instruction's requirement of an improper purpose in withholding the documents ensures that the jury found a level of culpability over and above the mere intent to withhold a document from an official proceeding. We cannot say that the error had a substantial and injurious effect on the jury's verdict.

Finally, Andersen argues that the district court erroneously charged the jury by not instructing that "a conviction under section 1512(b)(2) is permissible only if the defendant is shown to have known that its conduct was wrongful." It asserts that because persuading another to withhold documents from an official proceeding is not necessarily culpable conduct, Congress must have intended "corruptly" to shield those who act without knowledge of their unlawful conduct from culpability.

The government responds, and we agree, that the jury was properly instructed because knowledge of one's violation is not an element of § 1512(b)(2). The general rule, of course, is that ignorance of the law is no defense. When Congress wishes to avoid the general rule, it usually does so by requiring that a defendant act willfully or with specific intent to violate the law. Section 1512(b)(2) does not require that the defendant act willfully, and does not provide that a defendant may be convicted only if the defendant knows his conduct is unlawful. Andersen's argument misses the import of the jury's finding that it acted with an improper purpose; one could act with an improper purpose even if one did not know that the actions were unlawful. The instructions required the jury to find the appropriate mental states for a § 1512(b)(2) violation: the jury could convict Andersen only if it found that Andersen intended to subvert, undermine, or impede the fact-finding ability of an official proceeding. The district court did not err by refusing to give an "ignorance of the law" instruction.

For these reasons, we AFFIRM the judgment of conviction.

QUESTIONS

1. **Describe the relationship between Arthur Andersen and Enron.**
2. **State exactly what about the relationship gave rise to Anderson's crime and its ultimate "death."**
3. **State the *mens rea* required to impute Anderson employees' acts to Arthur Andersen, LLC.**
4. **Is Arthur Andersen, LLC a criminal? If so, what should the punishment be?**

Individual Vicarious Liability

LO 5

Vicarious liability cases that attract the most attention involve large national corporations like Enron, and their derivatives like Arthur Andersen LLC, tried in federal courts. But not all vicarious liability are federal cases like Enron and Arthur Andersen, LLC. Individuals are vicariously liable for their agents' actions in state cases that don't attract our attention. Most common are cases of employees' crimes, committed within the scope of their employment but without the approval or knowledge of their employers.

LO 4

Because state individual vicarious liability, like federal corporate vicarious criminal liability, depends on a statute, the issue in most vicarious liability cases is interpreting whether the statute actually imposes vicarious liability. In *State v. Tomaino* (1999), the Ohio Court of Appeals interpreted the Ohio "disseminating harmful matter to juveniles" statute not to include vicarious liability.

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CASE Was the Owner Liable for the Clerk Renting "Pornos" to a Minor?

State v. Tomaino
733 N.E.2d 1191 (Ohio App. 1999)

HISTORY

Peter Tomaino, the owner of an adult video store, was convicted in the Court of Common Pleas, Butler County, of disseminating matter harmful to juveniles. He appealed. The Court of Appeals reversed and remanded.

WALSH, J.

FACTS

Peter Tomaino, the appellant, owns VIP Video, a video sales and rental store in Millville, Ohio. VIP Video's inventory includes only sexually oriented videotapes and materials. On October 13, 1997, Carl Frybarger, age 37, and his son Mark, age 17, decided that Mark should attempt to rent a video from VIP. Mark entered the store, selected a video, and presented it to the clerk along with his father's driver's license and credit card.

The purchase was completed and the Frybargers contacted the Butler County Sheriff's Department. After interviewing Mark and his father, Sergeant Greg Blankenship, supervisor of the Drug and Vice Unit, determined that Mark should again attempt to purchase videos at VIP Video with marked money while wearing a radio transmitter wire.

On October 14, 1997, Mark again entered the store. A different clerk was on duty. Following Blankenship's instructions, Mark selected four videos and approached the clerk. He told her that he had been in the store the previous day and that he was 37. Mark told the clerk that he had used a credit card on that occasion and that he was using cash this time and thus did not have his identification with him. The clerk accepted the cash ($100) and did not require any identification or proof of Mark's age. It is this video transaction that constitutes the basis of the indictment.

The clerk, Billie Doan, was then informed by Blankenship that she had sold the videos to a juvenile and that she would be arrested. Doan said that she needed to call the appellant and made several unsuccessful attempts to contact the appellant at different locations.

The grand jury indicted appellant Tomaino and Doan on two counts. Count One charged the defendants with recklessly disseminating obscene material to juveniles and Count Two charged the defendants with disseminating matter that was harmful to juveniles.

OPINION

Billie Doan was tried separately from appellant. Appellant moved to dismiss the indictment against him. During pretrial proceedings, appellant argued that criminal liability could not be imputed to him based on the actions of the clerk. The state moved to amend the bill of particulars to provide that appellant "recklessly failed to supervise his employees and agents." The trial court denied appellant's motion to dismiss and the case against appellant proceeded to a jury trial on August 25, 1998. Mark and Carl Frybarger and Blankenship testified on behalf of the state; the defense presented no evidence. Counsel for appellant made a motion for acquittal pursuant to Crim.R. 29 at the close of the state's case. The trial court overruled the motion.

The state argued that appellant was reckless by not having a sign saying "no sales to juveniles." Appellant argued in part that he was not liable for the clerk's actions. The jury was instructed that in order to convict they must find beyond a reasonable doubt that appellant, recklessly and with knowledge of its character or content, sold to a juvenile any material that was obscene (Count One) and harmful to a juvenile (Count Two).

The jury was also instructed on the definitions of *knowingly* and *recklessly* and on the definitions of *obscene material* and of *material harmful to juveniles* (emphasis added). The jury found appellant not guilty on Count One (disseminating obscene material) and guilty on Count Two (disseminating matter harmful to juveniles).

Following the verdict, appellant moved for both a judgment of acquittal and a new trial. Appellant again argued that he could not be held criminally liable for the acts of another and that there was no evidence that he had recklessly provided material harmful to a juvenile. The trial court denied both motions. . . . The court stated that the jury could find that appellant was the owner of the store and thus had knowledge of the character or content of

the material being sold in his store. The court also stated that appellant "did not implement any policies, plans or procedures to prohibit entrance of juveniles into his store or the sale of material to juveniles."

Appellant argues that no statute imposed criminal liability for his actions or inactions. Having carefully reviewed the state's arguments, we must agree, although we hold that the court erred in its instructions to the jury rather than in denying the motion for acquittal.

Appellant was convicted of disseminating matter harmful to juveniles. R.C. 2907.31 provides in relevant part:

(A) No person, with knowledge of its character or content, shall recklessly do any of the following:

(1) Sell, deliver, furnish, disseminate, provide, exhibit, rent, present to a juvenile any material or performance that is obscene or harmful to juveniles.

Ohio has no common law offenses. Criminal liability is rigidly and precisely limited to those situations that the General Assembly has specifically delineated by statute. In R.C. 2901.21, the legislature has further provided that a person is not guilty of an offense unless both of the following apply:

(1) His liability is based on conduct which includes either a voluntary act, or an omission to perform an act or duty which he is capable of performing;

(2) He has the requisite degree of culpability for each element as to which a culpable mental state is specified by the section defining the offense.

Vicarious liability for another's criminal conduct or failure to prevent another's criminal conduct can be delineated by statute; it cannot be created by the courts. Statutes defining offenses are to be strictly construed against the state and liberally construed in favor of the accused. The elements of a crime must be gathered wholly from the statute. Liability based on ownership or operation of a business may be specifically imposed by statute. For instance, the owner of premises used for gambling—even if he is not present while gambling occurs—can be criminally liable under the statute prohibiting operating a gambling house. Such premises-oriented liability is specifically imposed by the statute, which provides in part that "no person being the owner of premises shall recklessly permit such premises to be used or occupied for gambling" (R.C. 2915.03).

It is undisputed that the clerk furnished the video to the minor and that appellant was not present. Because we find that a plain reading of the disseminating matter harmful to juveniles statute requires personal action by a defendant and does not by its terms impose vicarious or premises-oriented liability, the jury was not correctly instructed in this case.

Judgment reversed and cause remanded.

QUESTIONS

1. **State the elements of the Ohio statutes relevant to Peter Tomaino's liability for Billie Doan's acts.**
2. **Summarize the events that led to Tomaino's prosecution.**
3. **Summarize the state's arguments in favor of Tomaino's vicarious liability.**
4. **Summarize Tomaino's arguments against his vicarious liability for Billie Doan's acts.**
5. **Summarize the Ohio Court of Appeals' reasons for rejecting vicarious liability under the Ohio statute referred to in (1).**
6. **In your opinion, should Peter Tomaino be liable for Billie Doan's acts? Back up your answer with facts from the case and the arguments from the state, Tomaino, and the court.**

LO 4, LO 5

Virtually all vicarious liability statutes involve the employer-employee relationship. But not all do; for example, in some states and municipalities, registered vehicle owners are liable for some traffic violations involving their vehicles, regardless of who violated the law. So if you let your friend drive your car to go shopping, and he didn't feed the parking meter, you're liable for paying the fine.

Another nonbusiness relationship subject to individual vicarious criminal liability is parents' criminal liability for their kids' crimes. For example, in 1995, Salt Lake City enacted an ordinance that made it a crime for parents to fail to "supervise and control their children." By 1997, 17 states and cities had adopted one of these **parent responsibility laws**.

The idea of holding parents responsible for their children's crimes is nothing new. Contributing to the delinquency of a minor is an old offense. Contributing to the

delinquency of minors statutes mandate that the acts of minor children were done at the direction or with the consent of their parents. So, in one case, a father was found guilty for "allowing his child to violate a curfew ordinance," and, in another, a mother was convicted for "knowingly" permitting her children "to go at large in violation of a valid quarantine order."

One disturbing case involved the Detroit suburb of St. Clair Shores, which has an ordinance making it a crime to fail to "exercise reasonable control" to prevent children from committing delinquent acts. Alex Provenzino, 16, committed a string of seven burglaries. The local police ordered his parents to "take control" of Alex. When his father tried to discipline him, Alex "punched his father." When he tried to restrain him, Alex escaped by pressing his fingers into his father's eyes. When Alex tried to attack him with a golf club, his father called the police. The parents were charged with, but acquitted of, both vicariously committing the seven burglaries and failing to supervise their son (Siegel 1996, A1).

Traditional parent responsibility statutes aren't the same as vicarious liability. Parent responsibility statutes are based on parents' *acts* and *omissions*; vicarious liability statutes are based on the parent-child *relationship*. Vicarious liability statutes grew out of public fear, frustration, and anger over juvenile violence and parents' failure to control their kids. However, there are only a few cases in the appellate courts based on these vicarious liability statutes that make the crimes of kids the crimes of their parent solely on the basis of the parent-child relationship (DiFonzo 2001). One of these rare cases is now more than 30 years old. In *State v. Akers* (1979), the New Hampshire Supreme Court dealt with a state statute making parents liable for their children's illegal snowmobile driving.

In State v. Akers (1979), the New Hampshire Supreme Court dealt with a state statute making parents liable for their children's illegal snowmobile driving.

CASE Are the Parents Guilty of Illegal Snowmobiling?

State v. Akers
400 A.2d 38 (N.H. 1979)

HISTORY

Parent defendants were found guilty of violating a snowmobile statute which makes parents vicariously liable for the acts of their children simply because they occupy the status of parents. The parents waived all right to an appeal de novo ("new trial") to superior court. The parents objected to the constitutionality of the parent responsibility statute. The New Hampshire Supreme Court sustained the objections.

GRIMES, J.

FACTS

The defendants are fathers whose minor sons were found guilty of driving snowmobiles in violation of RSA 269-C:6—a II (operating on public way) and III (reasonable speed) (Supp.1977). RSA 269-C:24 IV, which pertains to the operation and licensing of off Highway Recreational Vehicles (OHRV) and provides that "the parents or guardians or persons assuming responsibility will be responsible for any damage incurred or for any violations of this chapter by any person under the age of 18." Following a verdict of guilty for violating RSA 269-C:24 IV the two defendants waived all right to an appeal de novo to the superior court and all questions of law were reserved and transferred by the District Court to the New Hampshire Supreme Court.

OPINION

The defendants argue that (1) RSA 269-C:24 IV, the statute under which they were convicted, was not intended by the legislature to impose criminal responsibility, and (2) if in fact the legislative intention was to impose criminal responsibility, then the statute would violate N.H.Const. pt. 1, art. 15 and U.S.Const. amend. XIV, § 1.

The language of RSA 269-C:24 IV, "Parents will be responsible for any violations of this chapter by any person under the age of 18," clearly indicates the legislature's intention to hold the parents criminally responsible for the OHRV violations of their minor children. It is a general principle of this State's Criminal Code that "a person is not guilty of an offense unless his criminal liability is based on conduct that includes a voluntary act or the voluntary omission to perform an act of which he is physically capable." RSA 269-C:24 IV seeks to impose criminal liability on parents for the acts of their children without basing liability on any voluntary act or omission on the part of the parent. Because the statute makes no reference at all to parental conduct or acts it seeks to impose criminal responsibility solely because of their parental status contrary to the provisions of RSA 626:1.

The legislature has not specified any voluntary acts or omissions for which parents are sought to be made criminally responsible and it is not a judicial function to supply them. It is fundamental to the rule of law and due process that acts or omissions which are to be the basis of criminal liability must be specified in advance and not ex post facto. N.H.Const. pt. 1, art. 23.

It is argued that liability may be imposed on parents under the provisions of RSA 626:8 II(b), which authorizes imposing criminal liability for conduct of another when "he is made accountable for the conduct of such other person by the law defining the offense." This provision comes from the Model Penal Code § 2.04(2)(b). The illustrations of this type of liability in the comments to the Code all relate to situations involving employees and agents, and no suggestion is made that it was intended to authorize imposing vicarious criminal liability on one merely because of his status as a parent.

Without passing upon the validity of statutes that might seek to impose vicarious criminal liability on the part of an employer for acts of his employees, we have no hesitancy in holding that any attempt to impose such liability on parents simply because they occupy the status of parents, without more, offends the due process clause of our State constitution.

Parenthood lies at the very foundation of our civilization. The continuance of the human race is entirely dependent upon it. It was firmly entrenched in the Judeo-Christian ethic when "in the beginning" man was commanded to "be fruitful and multiply" (Genesis I). Considering the nature of parenthood, we are convinced that the status of parenthood cannot be made a crime. This, however, is the effect of RSA 269-C:24 IV. Even if the parent has been as careful as anyone could be, even if the parent has forbidden the conduct, and even if the parent is justifiably unaware of the activities of the child, criminal liability is still imposed under the wording of the present statute.

There is no other basis for criminal responsibility other than the fact that a person is the parent of one who violates the law. One hundred and twenty seven years ago the justices of this court in giving their opinions regarding a proposed law that would have imposed vicarious criminal liability on an employer for acts of his employee stated, "(b)ut this does not seem to be in accordance with the spirit of our Constitution . . ." Because the net effect of the statute is to punish parenthood, the result is forbidden by substantive due process requirements of N.H.Const. pt. 1, art. 15.

Exceptions sustained.

DISSENT

BOIS, J.

The majority read RSA 269-C:24 IV in isolation. They conveniently ignore RSA 626:8 (Criminal Liability for Conduct of Another), which provides in subsection II that "(a) person is legally accountable for the conduct of another person when: (b) he is made accountable for the conduct of such other person by the law defining the offense." RSA 269-C:24 IV is such a law. Imposing criminal liability based on status for certain violations of a *mala prohibitum* nature does not offend constitutional requirements.

Even if I were to accept the majority's conclusion that the vicarious imposition of criminal liability on parents of children who have committed an OHRV [Off Highway Recreational Vehicles] violation under RSA ch. 269-C is constitutionally impermissible, I would still uphold the validity of RSA 269-C:24 IV. A closer reading of this State's Criminal Code belies the majority's reasoning that RSA 269-C:24 IV holds parents of minor offenders criminally responsible for their children's offenses solely on the basis of their parental status. RSA 626:1 I, enunciating the fundamental principle of the Criminal Code, states that all criminal liability must be based on a "voluntary act" or "voluntary omission."

When RSA 269-C:24 IV is read in conjunction with RSA 626:1 I, a parental conviction can result only when the State shows beyond a reasonable doubt that a minor child has committed a violation under a provision of chapter 269-C, and that his parent voluntarily performed or omitted to perform an act such as participating in the minor's conduct, or entrusting, or negligently allowing his minor child to operate an OHRV.

When RSA 269-C:24 IV is construed to require a voluntary act or voluntary omission in accordance with RSA 626:1 I, there are no due process infirmities, either under N.H.Const. pt. 1, art. 15 or U.S. Const. amend. XIV, § 1. Culpable intent is not required to impose criminal penalties for minor infractions. "It is well settled in this jurisdiction that the Legislature may declare criminal a

certain act or omission to act without requiring it to be done with intent." When the legislature imposes criminal responsibility without requiring intent, we will override it only when such imposition violates concepts of fundamental fairness.

In the present case, there is a demonstrable public interest to assure the safe operation of OHRVs, and the minor penalties imposed upon violators of RSA 269-C:24 IV are insubstantial. In such circumstances, we will not second guess the wisdom of the legislature.

Public welfare offenses requiring no criminal intent have also been held consistent with the due process requirements of U.S. Const. amend. XIV, § 1. "There is wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition. . . . In vindicating its public policy a State in punishing particular acts may provide that "he shall do them at his peril."

QUESTIONS

1. **Exactly what does the New Hampshire statute prohibit?**
2. **Summarize all of the arguments of the majority and dissenting opinions. Which side do you agree with? Defend your answer.**
3. **Apart from the legal and constitutional arguments, do you think it's good public policy to make parents criminally liable for their children's crimes? Defend your answer.**

ETHICAL DILEMMA

Is It Wise Public Policy to Make Parents Guilty for Their Children's Crimes?

Susan and Anthony Provenzino of St. Clair Shores, Michigan, knew their 16-year-old son, Alex, was troubled. His first arrest occurred in May 1995, and in the year that followed, he continued his delinquent behavior by committing burglary, drinking alcohol, and using and selling marijuana. Alex was difficult at home as well, verbally abusing his parents and once attacking his father with a golf club. Although the Provenzinos were disturbed by Alex's behavior, they supported his release from juvenile custody during the fall of 1995, fearing he would be mistreated in the youth facility where he was detained—a facility where juveniles charged with more violent crimes were housed.

It is unlikely that the Provenzinos expected to be the first parents tried and convicted of violating a two-year-old St. Clair Shores ordinance that places an affirmative responsibility on parents to ". . . exercise reasonable control over their children." On May 5, 1996, however, after a jury deliberated only 15 minutes, the Provenzinos were convicted of violating the parental accountability ordinance. They were each fined $100 and ordered to pay an additional $1,000 in court fees.

Instructions

1. Go to the website www.cengage.com/criminaljustice/samaha.
2. Read the selection from the Office of Juvenile Justice and Delinquency Prevention's essay on "parental responsibility" for their children's crimes.
3. Compile a list of the various responses, criminal, civil, and private to parental responsibility for their children's crimes.
4. Write a one-page essay on which of the alternatives is the wisest ethical public policy.

SUMMARY

LO 1, LO 2
- To understand the different sort of parties to crime you need to appreciate the difference between complicity and vicarious liability. Complicity establishes when you can be criminally liable for someone else's conduct. Vicarious liability establishes when a party can be criminally liable because of a relationship.

LO 1, LO 2
- Today, there are two parties to crime: (1) *Accomplices.* Participants before and during the commission of crimes and (2) *Accessories.* Participants after crimes are committed.

LO 1
- Accomplice *actus reus* boils down to one core idea: the actor took "some positive act in aid of the commission of the offense." Mere presence at the scene of a crime isn't enough to satisfy the accomplice *actus reus* requirement, except when defendants have a legal duty to act, presence alone is enough to satisfy the *actus reus* requirement.

LO 1
- Purposely acting and wanting a crime to succeed clearly qualifies as accomplice *mens rea*. Knowingly, recklessly, and negligently helping someone who is going to commit can under some circumstances also satisfy the *mens rea* requirement.

LO 2, LO 3
- Accessory to a crime is a separate offense, usually a misdemeanor. Accessory liability is not as blameworthy as participation in the crime itself.

LO 4, LO 5
- Vicarious liability transfers the *actus reus* and the *mens rea* of one person to another person—or from one or more persons to an enterprise—because of their relationship. Most vicarious liability involves business relationships, such as employer-employee, manager-corporation, buyer-seller, producer-consumer, and service provider–recipient. Sometimes, individuals are vicariously liable for their agents' actions. Virtually all vicarious liability statutes involve the employer-employee relationship.

KEY TERMS

complicity, p. 208
vicarious liability, p. 208
accomplices, p. 208
accessories, p. 209
conspiracy, p. 209
Pinkerton rule, p. 209
mere presence rule, p. 210
respondeat superior ("let the master answer"), p. 221
parent responsibility laws, p. 229

WEB RESOURCES

To prepare for exams, visit the *Criminal Law* companion website at www.cengage.com/criminaljustice/samaha, which features essential review and study tools such as flashcards, a glossary of terms, tutorial quizzes, and Supreme Court updates.

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LEARNING OBJECTIVES

1 Understand how inchoate offenses punish people for crimes they've started to commit but have not finished committing.

2 Appreciate the dilemma inchoate offenses present to free societies and know the three different ways inchoate offenses are resolved.

3 Understand how liability for criminal attempt offenses is based on two rationales: preventing dangerous conduct and neutralizing dangerous people.

4 The *mens rea* of inchoate crimes is always the purpose or specific intent to commit a specific crime.

5 Understand that the *actus reus* of attempt is an action that is beyond mere preparation but not enough to complete the crime.

6 Understand that legal impossibility is a defense to attempt liability and that factual impossibility is not.

7 Understand that voluntary and complete abandonment of an attempt in progress is a defense to attempt liability in about half the states.

8 Understand that punishing conspiracy and solicitation to commit a crime is based on nipping in the bud the special danger of group criminality.

Dalia Dippolito was arrested on August 5, 2009, for allegedly hiring an undercover police officer to kill her husband of six months, authorities said. A Boynton Beach Police Department spokeswoman said Dalia Dippolito, 26, was charged with solicitation to commit first-degree murder and taken to the Palm Beach County jail.

Inchoate Crimes

Attempt, Conspiracy, and Solicitation

CHAPTER OUTLINE

Did He Attempt to Murder His Wife?

Ralph Damms and his estranged wife, Marjory, were parked in a restaurant parking lot. Ralph asked Marjory how much money she had with her, and she said "a couple of dollars." Ralph then requested to see Marjory's checkbook; she refused to give it to him. They quarreled. Marjory opened the car door and started to run around the restaurant building screaming, "Help!" Ralph pursued her with a pistol in his hand. Marjory's cries for help attracted the attention of the people inside the restaurant, including two officers of the state traffic patrol who were eating lunch. One officer rushed out of the front door and the other the rear door. In the meantime, Marjory had run nearly around three sides of the building. In seeking to avoid colliding with a child who was in her path, she turned, slipped, and fell. Ralph crouched down, held the pistol at her head, and pulled the trigger; but nothing happened. He then exclaimed, "It won't fire. It won't fire."

(State v. Damms 1960)

We all know that a man who chases his wife around a restaurant parking lot and shoots her in the head and kills her with a loaded gun in his hand when she trips and falls commits murder. However, what about the same man who does the same thing, but unknown to him, the gun isn't loaded? When he pulls the trigger and nothing happens, he yells, "It won't fire! It won't fire!" What crime is that? That's what this chapter is about—criminal liability for trying to commit crimes, **criminal attempts**; for making agreements to commit crimes, **criminal conspiracy**; and for trying to get someone else to commit a crime, **criminal solicitation**.

LO 1

We call these three crimes **inchoate offenses**. The word "inchoate" comes from Latin and means "to begin." Each inchoate offense has some of its own elements, but they all share two elements: the *mens rea* of purpose or specific intent (Chapter 4) and the *actus reus* of taking some steps toward accomplishing the criminal purpose—but not enough steps to complete the intended crime.

Just to keep your bearings about where you are in the grand scheme of the criminal law—and in your book—with regard to the general part (criminal conduct, justification, and excuse) and the special part (specific crimes) of criminal law, the inchoate offenses stand partly in the general and partly in the special part. Unlike the principles in the general part, they're specific crimes, such as attempted robbery. But, like the general part, they apply to many crimes, such as the mental attitude of specific intent or purpose and the voluntary acts that fall short of completing the intended crime. That's why the Model Penal Code calls them "**offenses of general application**" (Dubber 2002, 142).

LO 2

Incomplete criminal conduct poses a dilemma: whether to punish someone who's done no harm or to set free someone who's determined to commit a crime. The doctrine of inchoate crimes asks the question: How far should criminal law go to prevent crime by punishing people who haven't accomplished their criminal purpose?

Creating criminal liability for uncompleted crimes flies in the face of the notion that free societies punish people for what they have done, not for what they might do. On the other hand, the doctrine of inchoate crimes reflects the widely held belief that "an ounce of prevention is worth a pound of cure." The law of inchoate crimes resolves the dilemma by three means:

1. Requiring a specific intent or purpose to commit the crime or cause a harm
2. Requiring some action to carry out the purpose
3. Punishing inchoate crimes less severely than completed crimes (ALI 1985, 3:293–98; Perkins and Boyce 1982, 611–58)

Attempt

Failure is an unwelcome part of everyday life, but in criminal law, we hope for failure. Criminal attempt is probably the best-known failure in criminal law. So we're relieved when a would-be murderer shoots at someone and misses the target, and we're happy when a store detective interrupts an aspiring thief just about to steal a Blue Ray disc of the latest Academy Award winner from a bin in Wal-Mart.

In this section, we'll look at how the history of attempt law has evolved over more than two thousand years; the rationales for attempt law; the elements of criminal attempt; and how failures to complete crimes due to either impossibility or voluntary abandonment are treated within the law.

History of Attempt Law

> One who has a purpose and intention to slay another and only wounds him should be regarded as a murderer. (Plato, *Laws*, 360 BC)
>
> For what harm did the attempt cause, since the injury took no effect? (Henry of Bracton, about 1300; Bracton 1968–77, 3:21)

These two quotes, almost a thousand years apart, underscore how long philosophers and judges have struggled with how the criminal law should respond to criminal attempts. Until the 1500s, the English common law sided with Bracton; in attempts, "a miss was as good as a mile" (Hall 1960, 560). A few cases of attempted murder in the 1300s adopted Plato's view according to the maxim, "The intent shall be taken for the deed." One was a servant who cut his master's throat and ran off with his goods; the other was a man who attacked his lover's husband, leaving him for dead (561). But according to the great scholar of medieval English law, Maitland, "The adoption of this perilous saying was but a momentary aberration" provoked by excessive leniency in these "murderous assaults that which did not cause death" (560).

Modern attempt law began in 1500s England out of frustration with this "excessive leniency" in a violent society where tempers were short and hot, and everyone was armed. The famous royal court (a special court of the monarch not bound by common law rules) that met in the Star Chamber started punishing a wide range of potential harms, hoping to nip violence in the bud. Typical cases included lying in wait, threats, challenges, and even words that "tended to challenge." Surviving records are full of efforts to punish budding violence that too often erupted into serious injury and death (Elton 1972, 170–71).

In the early 1600s, the English common law courts began to develop a doctrine of attempt law. Stressing the need to prevent the serious harms spawned by dueling, Francis Bacon maintained that "all the acts of preparation should be punished." He argued for this criminal attempt principle:

> I take it to be a ground infallible: that where so ever an offense is capital, or matter of felony, though it be not acted, there the combination or acting tending to the offense is punishable. Nay, inceptions and preparations in inferior crimes, that are not capital have likewise been condemned. (quoted in Samaha 1974; 1981, 189)

By the late 1700s, the English common law courts had created a full-fledged law of attempt. In the great case of *Rex v. Scofield* (1784), a servant put a lighted candle in his master's house, intending to burn the house down. The house didn't burn, but the servant was punished anyway. According to the Court, "The intent may make an act, innocent in itself, criminal; nor is the completion of an act, criminal in itself, necessary to constitute criminality." By the 1800s, common law attempt was well defined:

> All attempts whatever to commit indictable offenses, whether felonies or misdemeanors are misdemeanors, unless by some special statutory enactment they are subjected to special punishment. (Stephen 1883, 2:224)

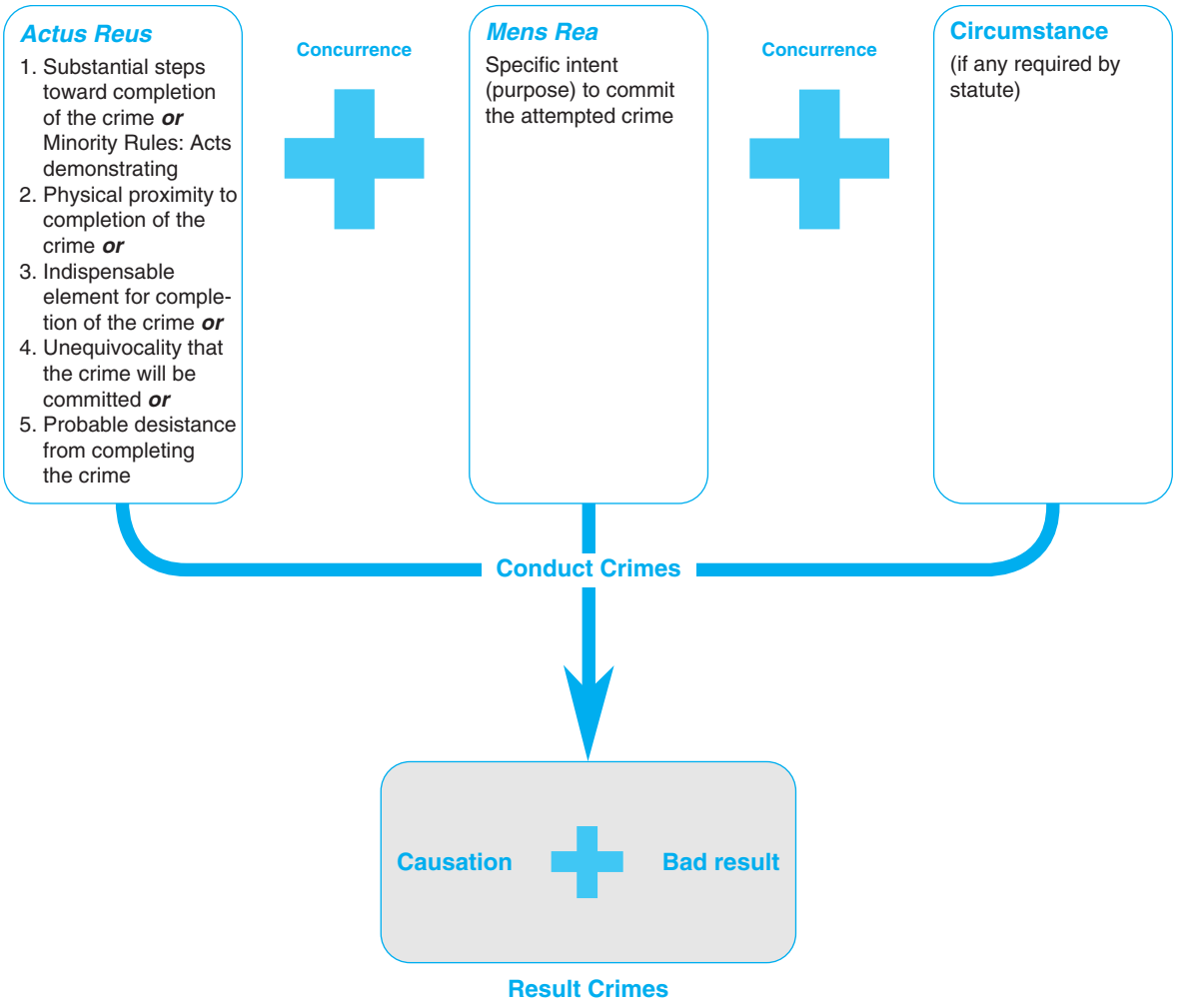
Some jurisdictions still follow the common law of attempt. In 1979, a Maryland Appeals Court judge confidently wrote that "the common law is still alive and well in Maryland" and that the common law of attempt "still prospers on these shores" (*Gray v. State* 1979, 854). As of July 2006, no cases in Maryland had disputed this claim.

Rationales for Attempt Law

LO 3

Why do we punish people who haven't hurt anyone? There are two old and firmly entrenched rationales. One focuses on dangerous acts *(actus reus)*, the other on dangerous persons *(mens rea)*. The **dangerous act rationale** looks at how close defendants came to completing their crimes. The **dangerous person rationale** concentrates on how fully defendants have developed their criminal purpose.

ELEMENTS OF ATTEMPT LIABILITY



Both rationales measure dangerousness according to actions, but they do so for different reasons. The dangerous act rationale aims at preventing harm from dangerous conduct, so its concern is how close to completion the crime was. The dangerous person rationale aims at neutralizing dangerous people, so it looks at how developed the defendant's criminal purpose was (Brodie 1995, 237–38).

Elements of Attempt Law

The crime of attempt consists of two elements:

(1) Intent or purpose to commit a specific crime and

(2) An act, or acts, to carry out the intent.

There are two types of attempt statutes, general attempt and specific intent. Alabama's attempt statute is a typical **general attempt statute**: "A person is guilty of an attempt to commit a crime if, with the intent to commit a specific offense, he does any overt act towards the commission of such offense" (Alabama Criminal Code 1975). **Specific attempt statutes** define attempts in terms of specific crimes, such as attempted murder,

attempted robbery, and attempted rape in separate statutes. Let's look at each of the two elements the prosecution has to prove beyond a reasonable doubt in criminal attempts, *mens rea* and *actus reus*.

Attempt Mens Rea

LO 4

Attempt is a crime of purpose. "Attempt" means to try, and you can't try to do what you don't specifically intend to do. As one authority put it:

> To attempt something necessarily means to seek to do it, to make a deliberate effort in that direction. [Specific] intent is inherent in the notion of attempt; it is the essence of the crime. An attempt without intent is unthinkable; it cannot be. (Enker 1977, 847)

So when it comes to **attempt *mens rea***, you don't have to worry about the difficult task of figuring out whether it was knowing, reckless, negligent, or strict liability. All attempt crimes require *purpose* to engage in criminal conduct or cause a criminal result. U.S. Supreme Court Justice and legal philosopher Oliver Wendell Holmes (1963), in his classic, *The Common Law*, criticized the view that there can be no attempt without specific intent:

> Acts should be judged by their tendency, under the known circumstances, not by the actual intent which accompanies them. It may be true that in the region of attempts, as elsewhere, the law began with cases of actual intent, as these cases were the most obvious ones. But it cannot stop with them, unless it attaches more importance to the etymological meaning of the word attempt than to the general principles of punishment. (54–55)

Despite the weight of Justice Holmes' views, having the purpose to act or to bring about a specific result remains the linchpin of the criminal attempt mental attitude. In our next case excerpt, the Michigan Court of Appeals examined, and rejected, the defendant's claim that he didn't intend to rob the Alpine Party Store—he was only joking.

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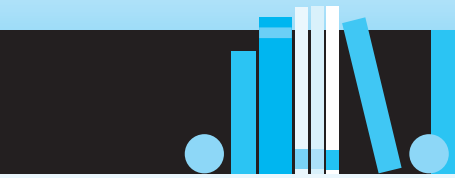

CASE Did He Intend to Rob the Store?

People v. Kimball
311 N.W.2d 343 (1981 Mich.App.)

HISTORY

James Kimball, the defendant, was charged with and convicted of attempted unarmed robbery, at a bench trial conducted in early August 1979. He was sentenced to a prison term of from three to five years and appeals by leave granted. Reversed and remanded.

MAHER, J.

There is really very little dispute as to what happened on May 21, 1979, at the Alpine Party Store near Suttons Bay, Michigan. Instead, the dispute at trial centered on

whether what took place amounted to a criminal offense or merely a bad joke.

FACTS

James Kimball, the defendant, went to the home of a friend, Sandra Storey, where he proceeded to consume a large amount of vodka mixed with orange juice. The defendant was still suffering from insect stings acquired the previous day so he also took a pill called "Eskaleth 300," containing 300 milligrams of Lithium, which Storey had given him.

After about an hour, the pair each mixed a half-gallon container of their favorite drinks (vodka and orange juice, in the defendant's case), and set off down the road in Storey's '74 MGB roadster. At approximately 8:15 or 8:30 in the evening, the defendant (who was driving) pulled into the parking lot of the Alpine Party Store. Although he apparently did not tell Storey why he pulled in, the defendant testified that the reason for the stop was to buy a pack of cigarettes.

Concerning events inside the store, testimony was presented by Susan Stanchfield, the clerk and sole employee present at the time. She testified that the defendant came in and began talking to and whistling at the Doberman Pinscher guard dog on duty at the time. She gave him a "dirty look," because she didn't want him playing with the dog. The defendant then approached the cash register, where Stanchfield was stationed, and demanded money. Stanchfield testified that she thought the defendant was joking, and told him so, until he demanded money again in a "firmer tone."

> *STANCHFIELD:* "By his tone I knew he meant business; that he wanted the money."
>
> *PROSECUTION:* "You felt he was serious?"
>
> *STANCHFIELD:* "I knew he was serious."

Stanchfield then began fumbling with the one dollar bills until the defendant directed her to the "big bills." Stanchfield testified that as she was separating the checks from the twenty dollar bills the defendant said, "I won't do it to you; you're good looking and I won't do it to you this time, but if you're here next time, it won't matter."

A woman then came in (Storey), who put a hand on the defendant's shoulder and another on his stomach and directed him out of the store. Stanchfield testified that she called after the defendant, saying that she would not call the police if he would "swear never to show your face around here again." To this the defendant is alleged to have responded, "You could only get me on attempted anyway." Stanchfield then directed a customer to get the license plate number on the defendant's car while she phoned the owner of the store.

The defendant also testified concerning events inside the store. He stated that the first thing he noticed when he walked in the door was the Doberman Pinscher. When he whistled the dog came to him and started licking his hand. The defendant testified that while he was petting the dog Stanchfield said, "Watch out for the dog; he's trained to protect the premises."

> *DEFENDANT*: Well, as soon as she told me that the dog was a watchdog and a guarddog [*sic*], I just walked up in front of the cash register and said to Sue (Stanchfield) I said, "I want your money."
>
> I was really loaded and it just seemed to me like it was kind of a cliché because of the fact that they've got this big bad watchdog there that's supposed to watch the place and there I was just petting it, and it was kind of an open door to carry it a little further and say hey, I want all your money because this dog isn't going to protect you. It just kind of happened all at once.
>
> She said, I can't quote it, but something to the effect that if this is just a joke, it's a bad joke, and I said, "Just give me your big bills."
>
> Then she started fumbling in the drawer, and before she pulled any money out of the drawer I don't know whether she went to the ones or the twenties I said as soon as she went toward the drawer to actually give me the money, I said, "Hey, I'm just kidding," and something to the effect that "you're too good looking to take your money."
>
> And she said, "Well, if you leave right now and don't ever come back, I won't call the police," and I said, "Okay, okay," and I started to back up. And Sandy (Storey) I mean I don't know if I was stumbling back or stepping back, but I know she grabbed me, my arm, and said, "Let's go," and we turned around and left, and that was it.

Both Stanchfield and the defendant testified that there were other people in the store during the time that the defendant was in the store, but the testimony of these people revealed that they did not hear what was said between Stanchfield and the defendant.

Storey testified that she remained in the car while the defendant went into the store but that after waiting a reasonable time she went inside to see what was happening. As she approached the defendant she heard Stanchfield say, "Just promise you will never do that again and I won't take your license number." She then took defendant's arm, turned around, gave Stanchfield an "apologetic smile," and took the defendant back to the car.

Once in the car, the defendant told Storey what had happened in the store, saying "But I told her (Stanchfield) I was only kidding." The defendant and Storey then drove to a shopping center where the defendant was subsequently arrested.

OPINION

The general attempt statute, under which defendant was prosecuted, provides in part as follows:

> Any person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act towards the commission of such offense, but shall fail in the perpetration, or shall be intercepted or prevented in the execution of the same, when no express provision is made by law for the punishment of such attempt, shall be punished. (M.C.L. ß 750.92; M.S.A. ß 28.287)

The elements of an attempt are:

(1) the specific intent to commit the crime attempted and

(2) an overt act going beyond mere preparation towards the commission of the crime.

Considering the second element first, it is clear that in the instant case defendant committed sufficient overt acts. As the trial court noted, there was evidence on every element of an unarmed robbery except for the actual taking of money. From the evidence presented, including the evidence of defendant's intoxication, the question of whether defendant undertook these acts with the specific intent to commit an unarmed robbery is a much closer question. After hearing all the evidence, however, the trial court found that defendant possessed the requisite intent and we do not believe that finding was clearly erroneous.

REVERSED AND REMANDED. [The court reversed and remanded because the trial court didn't allow the defendant to prove that he voluntarily abandoned his attempt to rob the store. Abandonment is discussed later in the chapter.]

QUESTIONS

1. **Summarize Susan Stanchfield's version and then James Kimball's version of what happened in the Alpine Party Store.**
2. **If you were a juror, which version would you believe? Explain your answer.**
3. **List all the facts relevant to deciding whether Kimball specifically intended to rob the store.**
4. **Did Kimball specifically intend to rob the store? Back up your answer with the relevant facts and portions of the opinion.**

Attempt Actus Reus

LO 5

You're sitting in your apartment, planning in detail when, how, and where you're going to kill your boyfriend and your best friend because they cheated on you with each other. You decide to do it tonight with your roommate's gun. You get up, go to her room, get the gun, pick up your car keys, and go to your car. Then, the enormity of what you're going to do hits you. You say to yourself, "What's wrong with me? What am I doing? I can't kill them." You go back and turn on the TV.

I don't believe anyone would think you committed attempted murder. Why? First, because, as we learned in Chapters 3 and 4, we don't punish people for their *bare* intentions. Justice Holmes in a famous passage wrote, "There is no law against a man's intending to commit a murder the day after tomorrow" (1963, 54). Of course, there's no more than bare intention in our example. You got the gun, picked up your car keys, and went to your car. But we have a deeply entrenched rule that *preparing* to carry out your intention to commit a crime doesn't qualify as attempt *actus reus*.

But what if you went into your room, took the gun, loaded it, got your car keys, got in your car, and drove to your boyfriend's apartment. When he answered the door, you took out the gun, and pulled the trigger, but your hands were shaking so much you missed? I believe everybody would think you attempted to murder your boyfriend. Why? Because you did everything you could to kill him. This version of the example represents the strictest rule of **attempt *actus reus*** called the **last proximate act rule**. Proximate means that your acts brought you as close as possible to completing the crime.

Most real cases aren't so easy. They fall somewhere between mere intent and "all but the last act" necessary to complete the crime. The toughest question in attempt law is, "How close to completing a crime is close enough to satisfy the criminal act requirement

of attempt *actus reus*?" The general answer is somewhere on a continuum between preparation and the last proximate act.

This general answer is so general that it's useless as a guide for deciding (and for us, understanding) real cases. So courts and attempt statutes have established tests to help decide when defendants' acts have taken them further than just getting ready to attempt and brought them close enough to completing crimes to qualify as attempt *actus reus*.

LO 3, LO 5

The tests reflect the focus of the two theories of attempt: dangerous conduct and dangerous people. **Proximity tests** focus on dangerous conduct; they look at what *remains* for actors to do before they hurt society by completing the crime. Other tests focus on dangerous people; they look at what actors have already *done* to demonstrate that they're a danger to society, not just in this crime but, more important, crimes they may commit in the future if they're not dealt with now. We'll look at three proximity tests of dangerous conduct: physical proximity, dangerous proximity, and indispensable element. Then, we'll examine two dangerous people tests: unequivocality (also called *res ipsa loquiter*) and substantial steps.

Before we examine the tests, be sure to understand that the tests aren't mutually exclusive. As you work your way through the tests, don't look at them as conflicting definitions of the one single "true" test. Instead, think of them as efforts to describe more definitely the acts that are enough to fall within the spectrum between the end of preparation and short of the completed crime.

Also, you should avoid thinking of one test as meaning closer in time to the completed crime than the others. That *might* be true (as in dangerous proximity), but it doesn't *have* to be. It can also mean more in quantity and quality (as when an indispensable element is present). Finally, *enough* and, as some courts say, *sufficient*, are "weasel" words, meaning they're purposely ambiguous to allow for variations in particular crimes and facts in specific cases.

Usually, courts in a jurisdiction adopt one test to determine if there are enough acts to satisfy the *actus reus* element in attempt. Others don't. According to the Florida Court of Appeals, "It does not appear that Florida has ever expressly adopted one of the approaches." It went on to note that "adopting one approach to the exclusion of the others may not be advisable" (*State v. Hudson* 1999, 1000). Why isn't it advisable? So courts can use the tests as flexible instruments that best fit the countless variations in facts among individual cases. Now, let's look at the tests.

The proximity tests ask, "Were the defendant's acts close enough to the intended crime to count as the criminal act in the attempt?" Before we can answer that, we have to answer the question, "How close is close enough?" No cases or statutes have limited attempt *actus reus* to the last proximate act. Of course, "all but the last proximate act" satisfies the proximity test. The problem with this strict test is that it excludes dangerous conduct that falls short of the last proximate act that should be included. For example, the first dose of poison in a case of intended killing by small doses of poison wouldn't satisfy the last proximate act test for attempted murder *actus reus*. But the first dose *should* qualify as the *actus reus* (LaFave 2003a, 590).

Some courts have adopted broader proximity tests to help judges decide whether the facts that juries find the prosecution has proven beyond a reasonable doubt are enough to satisfy the *actus reus*. That is, they help to decide whether the defendant's acts fall within the spectrum between preparation, which clearly doesn't, and the last proximate act, which clearly does, satisfy the proximity test. Let's look at two of these broader proximity tests: the dangerous proximity to success and indispensable element tests.

LO 5

The **dangerous proximity to success test** (also called the **physical proximity test**) asks whether defendants have come "dangerously close" to completing the crime. In Justice Holmes' words, "There must be a dangerous proximity to success" (*Hyde v. U.S.* 1912, 388). This test focuses on what actors still have to do to carry out their purpose to commit crimes, not on what they've already done to commit them. For example, if you plan to rob a bank messenger, and you're driving around checking out places where you think she might be, but you haven't found her yet, have you attempted to rob her? No, according to the court that decided the famous case of *People v. Rizzo* (1927):

> These defendants had planned to commit a crime, and were looking around the city for an opportunity to commit it, but the opportunity fortunately never came. Men would not be guilty of attempt at burglary if they planned to break into a building while they were hunting about the streets for the building not knowing where it was. Neither would a man be guilty of an attempt to commit murder if he armed himself and started out to find the person he intended to kill but could not find him. So here these defendants were not guilty of an attempt to commit robbery . . . when they had not found or reached the presence of the person they intended to rob. (888)

LO 5

The **indispensable element test** asks whether defendants have reached a point where they've gotten control of everything they need to complete the crime. For example, a drug dealer can't attempt to sell Ecstasy until she gets some Ecstasy, even if she has a customer right there, ready, and waiting to buy it. Once she's got the Ecstasy, she's close (proximate) enough to completing the crime to satisfy the attempt criminal act requirement.

Now, let's turn to two dangerous person tests that look at what defendants have already *done*, not at what they still have to do: the unequivocality and substantial steps tests.

LO 5

The **unequivocality test**, also called the ***res ipsa loquiter* test** ("the act speaks for itself"), examines whether an ordinary person who saw the defendant's acts without knowing her intent would believe she was determined to commit the intended crime. Notice, it's the "intended" crime, not any crime. Here's a frequently used example to describe the test:

> It is as though a cinematograph film, which had so far depicted the accused person's act without stating what was his intention, had been suddenly stopped, and the audience were asked to say to what end those acts were directed. If there is only one reasonable answer to this question then the accused has done what amounts to an "attempt" to attain that end. (Turner 1934, 238)

Walter Lee Stewart passed the "stop the film test." In *State v. Stewart* (1988, 50), the facts were that

> Scott Kodanko was waiting for a bus on a Saturday afternoon after leaving work. He was alone in a three-sided plexiglas bus shelter open to the street in downtown Milwaukee. Two men, Mr. Moore and Walter Lee Stewart, the defendant, entered the bus shelter while a third man, Mr. Levy, remained outside.
>
> Moore and the defendant stood one to two feet from Kodanko. Kodanko was in a corner of the shelter, his exit to the street blocked by the two men. Moore asked Kodanko if he wanted to buy some cigarettes. Kodanko responded that he did not. Moore then said, "Give us some change." When Kodanko refused, the defendant said "Give us some change, man." The defendant repeated this demand in an increasingly loud voice three to four times. Kodanko still refused to give the two men

> change. The defendant then reached into his coat with his right hand at about the waist level, whereupon Moore stated something to the effect of "put that gun away." At that point Levy, who had been waiting outside the bus shelter, entered and said to the defendant and Moore "Come on, let's go." Levy showed Kodanko some money, stating, "I don't want your money, I got lots of money." (45–46)

According to the Court:

> If the defendant had been filmed in this case and the film stopped just before Levy entered the bus stop and the three men departed, we conclude that a trier of fact could find beyond a reasonable doubt that the defendant's acts were directed toward robbery. The film would show the defendant demanding money and appearing to reach for a gun. This evidence is sufficient to prove that the defendant had taken sufficient steps for his conduct to constitute an attempted robbery. (50)

The distinguished Professor Glanville Williams (1961) criticizes the unequivocality test because it "would acquit many undoubted criminals" (630).

LO 5

The **probable desistance test** is another dangerous person test that focuses on how far defendants have gone, not on what's left for them to do to complete the crime. The test determines if defendants have gone far enough toward completing the crime that it's unlikely they'll turn back. Former prosecutor Robert Skilton provides us with this excellent description of probable desistance:

> The defendant's conduct must pass that point where most . . . [people], holding such an intention as the defendant holds, would think better of their conduct and desist. All of us, or most of us, at some time or other harbor what may be described as a criminal intent to effect unlawful consequences. Many of us take some steps—often slight enough in character—to bring the consequences about; but most of us, when we reach a certain point, desist, and return to our roles as law-abiding citizens. The few who do not and pass beyond that point are, if the object of their conduct is not achieved, guilty of a criminal attempt. (Skilton 1937, 309–10)

LO 5

The Model Penal Code's **substantial steps test** (also called the **"MPC test"**) was designed to accomplish three important goals:

1. Replace (or at least drastically reform) the proximity and unequivocality tests with a clearer and easier to understand and apply test
2. Draw more sharply (and push back further toward preparation) the line between preparation and beginning to attempt the crime
3. Base the law of attempt firmly on the theory of neutralizing dangerous persons, not just on preventing dangerous conduct

In line with these goals, the MPC's attempt *actus reus* includes two elements:

(1) "Substantial steps" toward completing the crime and

(2) Steps that "strongly corroborate the actor's criminal purpose." In other words, the code requires that attempters take enough steps toward completing the crime not to show that a crime is about to occur but to prove that the attempters are determined to commit it.

To sharpen the line between preparation and attempt, push it back closer to preparation, and make clear the commitment to neutralizing dangerous people, the code lists seven acts (most of which would qualify as mere preparation in traditional attempt

statutes) that can amount to "substantial steps" if they strongly corroborate the actor's criminal purpose to commit the intended crime:

1. Lying in wait, searching for, or following the contemplated victim of the crime
2. Enticing, or seeking to entice, the contemplated victim of the crime to go to the place contemplated for its commission
3. Reconnoitering, or "casing," the place contemplated for the commission of the crime
4. Unlawful entry of a structure, vehicle, or enclosure in which it is contemplated that the crime will be committed
5. Possession of materials to be employed in the commission of the crime that are specially designed for such unlawful use or that can serve no lawful purpose of the actor under the circumstances
6. Possession, collection, or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, if such possession, collection, or fabrication serves no lawful purpose of the actor under the circumstances
7. Soliciting an innocent agent to engage in conduct constituting an element of the crime (ALI 1985, 3:296)

Borrowing from indecent liberties statutes (which make it a crime to lure minors into cars or houses for sex), the Model Penal Code provides that enticement satisfies the *actus reus* of criminal attempt. The drafters of the MPC say that enticement clearly demonstrates the intent to commit a crime—so enticers are dangerous enough to punish.

The MPC provides that reconnoitering—popularly called "casing a joint"—satisfies attempt *actus reus*, because "scouting the scene of a contemplated crime" clearly signals the intent to commit the crime. By their unlawful entries, intruders also demonstrate their criminal purpose.

The unlawful entry provision is particularly useful in two types of cases: entries to commit sex offenses and entries to steal. In one case (*Bradley v. Ward* 1955), two defendants entered a car intending to steal it, but they got out when the owner unexpectedly came back to the car. According to the Court, the defendants hadn't attempted to steal the car. But under the MPC's "unlawful entry" provision, they wouldn't have been so lucky.

In most states, collecting, possessing, or preparing materials used to commit crimes is preparation, not attempt. So courts have found that buying a gun to murder someone, making a bomb to blow up a house, and collecting tools for a burglary are preparations, not attempts. Although these activities aren't criminal attempts, in many criminal codes it's a crime to possess items and substances like burglary tools, illegal drugs, drug paraphernalia, and concealed weapons (Chapter 3). Under the MPC (ALI 1985, 3:337–46), these possessions can be acts of attempt, but only if they "strongly corroborate" a purpose to commit a crime. Why? Because, according to the MPC's *Reporter*, people who carry weapons and burglary tools with them with the clear intent to commit crimes are dangerous enough to punish.

The MPC provides that bringing weapons, equipment, and other materials to the scene of a crime can qualify as attempt *actus reus*. Examples include bringing guns to a robbery, explosives to an arson, or a ladder to a burglary. But the items have to be plainly instruments of crime. A potential robber who brings a gun to a bank is bringing an instrument of robbery; a would-be forger who brings a ballpoint pen into a bank isn't (ALI 1985, 3:337).

LO 5

Preparation isn't criminal attempt, but some states have created less serious **preparation offenses**. In Nevada, preparing to commit arson is a crime. Preparing to manufacture illegal substances is an offense in other states. These statutes are aimed at balancing the degree of threatening behavior and the dangerousness of persons against the remoteness in time and place of the intended harm (ALI, 1985, 2:344–45).

Our next case excerpt, *Young v. State* (1985), adopts and then applies the MPC's substantial steps test to Raymond Young's acts in leading up to what the prosecution believed was Young's attempt to rob a bank.

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CASE Did He Take Substantial Steps to Rob the Bank?

Young v. State
493 A.2d 352 (Md. 1985)

HISTORY

Raymond Alexander Young, the defendant, was convicted before the Circuit Court for Prince George's County, of attempted armed robbery. He was sentenced to 20 years, and he appealed. The Court of Special Appeals affirmed the conviction and sentence, and Young petitioned for certiorari. The Maryland Court of Appeals (Maryland's highest court) affirmed his conviction.

ORTH, J.

The offense of criminal attempt has long been accepted as a part of the criminal law of Maryland. . . . [The Court defined elements of the offense as:]

1. A specific intent to do a criminal act and
2. Some act in furtherance of that intent going beyond mere preparation.

The sentence of a person who is convicted of an attempt to commit a crime may not exceed the maximum sentence for the crime attempted.

Such was the posture of the law of Maryland regarding criminal attempts when Raymond Alexander Young, also known as Morris Prince Cunningham and Prince Alexander Love, was found guilty by a jury in the Circuit Court for Prince George's County. In imposing sentence the court said:

> Young is 41 years old. He has been [on] a crime wave up and down the East Coast from New York to Tennessee. Now he stopped in Maryland, and look what he did here.
>
> He is a violent criminal. Now I am sorry he doesn't have this consciousness of right or wrong. And I don't understand why he can't learn it, because he has had a chance to reflect in prison. But I have to take him off the street for the safety of people.
>
> It appears from the transcript of the sentencing proceedings that at the time Young was sentenced upon the convictions here reviewed he was also sentenced upon convictions rendered at a separate trial of armed robbery and the use of a handgun in a crime of violence to 20 years and 15 years respectively to run concurrently, but consecutively to the sentences imposed in this case.

FACTS

Several banks in the Oxon Hill–Fort Washington section of Prince George's County had been held up. The Special Operations Division of the Prince George's Police Department set up a surveillance of banks in the area. In the early afternoon of November 26, 1982, the police team observed Young driving an automobile in such a manner as to give rise to a reasonable belief that he was casing several banks. They followed him in his reconnoitering.

At one point when he left his car to enter a store, he was seen to clip a scanner onto his belt. The scanner later proved to contain an operable crystal number frequency that would receive Prince George's County uniform patrol transmissions. At that time Young was dressed in a brown waist-length jacket and wore sunglasses.

Around 2:00 p.m. Young came to rest at the rear of the Fort Washington branch of the First National Bank of Southern Maryland. Shortly before, he had driven past the front of the bank and parked in the rear of it for a brief time. He got out of his car and walked hurriedly beside the bank toward the front door. He was still wearing the brown waist-length jacket and sunglasses, but he had added a blue knit stocking cap pulled down to the top of the sunglasses, white gloves, and a black eye patch. His jacket collar was turned up. His right hand was in his jacket pocket and his left hand was in front of his face. As one of the police officers observing him put it, he was "sort of duck[ing] his head."

It was shortly after 2:00 and the bank had just closed. Through the windows of his office the bank manager saw Young walking on the "landscape" by the side of the bank toward the front door. Young had his right hand in his jacket pocket and tried to open the front door with his left hand. When he realized that the door was locked and the bank was closed, he retraced his steps, running past the windows with his left hand covering his face. The bank manager had an employee call the police.

Young ran back to his car, yanked open the door, got in, and put the car in drive "all in one movement almost," and drove away. The police stopped the car and ordered Young to get out. Young was in the process of removing his jacket; it fell over the car seat and partially onto the ground. The butt of what proved to be a loaded .22-caliber revolver was sticking out of the right pocket of the jacket. On the front seat of the car were a pair of white surgical gloves, a black eye patch, a blue knit stocking cap, and a pair of sunglasses. Young told the police that his name was Morris P. Cunningham. As Young was being taken from the scene, he asked "how much time you could get for attempted bank robbery."

OPINION

A criminal attempt requires specific intent; the specific intent must be to commit some other crime. [The court concluded that the] evidence is most compelling if it is more than legally sufficient to establish beyond a reasonable doubt that Young had the specific intent to commit an armed robbery as charged.

The determination of the overt act which is beyond mere preparation in furtherance of the commission of the intended crime is a most significant aspect of criminal attempts. If an attempt is to be a culpable offense serving as the basis for the furtherance of the important societal interests of crime prevention and the correction of those persons who have sufficiently manifested their dangerousness, the police must be able to ascertain with reasonable assurance when it is proper for them to intervene.

It is not enough to say merely that there must be "some overt act beyond mere preparation in furtherance of the crime" as the general definition puts it. The definition does, however, highlight the problem as to what "proximity to completion a person must achieve before he can be deemed to have attempted to commit a crime." In solving this problem the interest of society and the rights of the individual must be kept in balance. Thus, the importance of the determination of the point at which the police may properly intervene is readily apparent.

There is no dispute that there must be some overt act to trigger police action. Bad thoughts do not constitute a crime, and so it is not enough that a person merely have intended and prepared to commit a crime. There must also be an act, and not any act will suffice.

What act will suffice to show that an attempt itself has reached the stage of a completed crime has persistently troubled the courts. They have applied a number of approaches in order to determine when preparation for the commission of a crime has ceased and the actual attempt to commit it has begun. [The Court surveys here the proximity, probable desistance, unequivocality, and MPC substantial capacity tests discussed in your text just prior to this excerpt.]

Each of these approaches is not without advantages and disadvantages in theory and in application, as is readily apparent from a perusal of the comments of various text writers and of the courts. We believe that the preferable approach is one bottomed on the "substantial step" test as is that of Model Penal Code. We think that using a "substantial step" as the criterion in determining whether an overt act is more than mere preparation to commit a crime is clearer, sounder, more practical and easier to apply to the multitude of differing fact situations which may occur. Therefore, in formulating a test to fix the point in the development of events at which a person goes further than mere unindictable preparation and becomes guilty of attempt, we eliminate from consideration the "Proximity Approach," the "Probable Desistance Approach" and the "Equivocality Approach."

Convinced that an approach based on the "substantial step" test is the proper one to determine whether a person has attempted to commit a crime, and that § 110.00 of the Md. Proposed Criminal Code best expressed it, we adopt the provisions of that section. [With a few modifications, the Court's adoption tracks the excerpted parts of the MPC provision in your text.]

This language follows § 5.01(1)(c) of the Model Penal Code, but eliminates failure to consummate the intended crime as one of the essential elements of a criminal attempt. Thus, the State is not required to prove beyond a reasonable doubt that the crime was not in fact committed. Furthermore, the elimination of failure as a necessary element makes attempt available as a compromise verdict or a compromise charge.

When the facts and circumstances of [this] case are considered in the light of the overt act standard which we have adopted, it is perfectly clear that the evidence was sufficient to prove that Young attempted the crime of armed robbery as charged.

As we have seen, the police did not arrive on the scene after the fact. They had the advantage of having Young under observation for some time before his apprehension.

They watched his preparations. They were with him when he reconnoitered or cased the banks.

His observations of the banks were in a manner not usual for law-abiding individuals and were under circumstances that warranted alarm for the safety of persons or property. Young manifestly endeavored to conceal his presence by parking behind the bank which he had apparently selected to rob. He disguised himself with an eye patch and made an identification of him difficult by turning up his jacket collar and by donning sunglasses and a knit cap which he pulled down over his forehead. He put on rubber surgical gloves. Clipped on his belt was a scanner with a police band frequency. Except for the scanner, which he had placed on his belt while casing the bank, all this was done immediately before he left his car and approached the door of the bank.

As he walked toward the bank he partially hid his face behind his left hand and ducked his head. He kept his right hand in the pocket of his jacket in which, as subsequent events established, he was carrying, concealed, a loaded handgun, for which he had no lawful use or right to transport. He walked to the front door of the bank and tried to enter the premises.

When he discovered that the door was locked, he ran back to his car, again partially concealing his face with his left hand. He got in his car and immediately drove away. He removed the knit hat, sunglasses, eye patch and gloves, and placed the scanner over the sun visor of the car. When apprehended, he was trying to take off his jacket. His question as to how much time he could get for attempted bank robbery was not without significance.

It is clear that the evidence which showed Young's conduct leading to his apprehension established that he performed the necessary overt act toward the commission of armed robbery, which was more than mere preparation. Even if we assume that all of Young's conduct before he approached the door of the bank was mere preparation, on the evidence, the jury could properly find as a fact that when Young tried to open the bank door to enter the premises, that act constituted a "substantial step" toward the commission of the intended crime. It was strongly corroborative of his criminal intention.

One of the reasons why the substantial step approach has received such widespread favor is because it usually enables the police to intervene at an earlier stage than do the other approaches. In this case, however, the requisite overt act came near the end of the line. Indeed, it would qualify as the necessary act under any of the approaches—the proximity approach, the probable desistance approach, or the equivocality approach. It clearly met the requirements of the substantial step approach. Since Young, as a matter of fact, could be found by the jury to have performed an overt act which was more than mere preparation, and was a substantial step toward the commission of the intended crime of armed robbery, it follows as a matter of law that he committed the offense of criminal attempt.

We think that the evidence adduced showed directly, or circumstantially, or supported a rational inference of, the facts to be proved from which the jury could fairly be convinced, beyond a reasonable doubt, of Young's guilt of attempted armed robbery as charged. Therefore, the evidence was sufficient in law to sustain the conviction. We so hold.

JUDGMENTS OF THE COURT OF SPECIAL APPEALS AFFIRMED; COSTS TO BE PAID BY APPELLANT.

QUESTIONS

1. **List all of Young's acts that the Court recites in the excerpt.**
2. **Mark on your list the following points that you believe show:**
   a. When if at all, Young formed the intent to commit the robbery.
   b. When, if at all, Young's preparation began and ended.
   c. When, if at all, Young's acts were enough to satisfy the *actus reus* requirement for attempted armed robbery.

   Explain your answers.
3. **Which of the tests for *actus reus* discussed in the text do Young's acts pass? Back up your answers with the facts you listed in (1).**

EXPLORING FURTHER

Attempt *Actus Reus*

1. Did They Get "Very Near" to Robbing the Clerk?

People v. Rizzo, 158 N.E. 888 (N.Y.App. 1927)

FACTS Charles Rizzo, Anthony J. Dorio, Thomas Milo, and John Thomasello were driving through New York City looking for a payroll clerk they intended to rob. While they were still looking for their victim, the police apprehended and arrested them. They were tried and convicted of attempted robbery. Rizzo appealed. Did their acts add up to attempt *actus reus*?

DECISION The trial court said yes. The New York Court of Appeals (New York's highest court), reversed:

> The Penal Law, § 2, prescribes that:
>
> An act, done with intent to commit a crime, and tending but failing to effect its commission, is "an attempt to commit that crime." The word "tending" is very indefinite. It is perfectly evident that there will arise differences of opinion as to whether an act in a given case is one tending to commit a crime. "Tending"

means to exert activity in a particular direction. Any act in preparation to commit a crime may be said to have a tendency toward its accomplishment.

The procuring of the automobile, searching the streets looking for the desired victim, were in reality acts tending toward the commission of the proposed crime.

The law, however, had recognized that many acts in the way of preparation are too remote to constitute the crime of attempt. The line has been drawn between those acts which are remote and those which are proximate and near to the consummation. The law must be practical, and therefore considers those acts only as tending to the commission of the crime which are so near to its accomplishment that in all reasonable probability the crime itself would have been committed, but for timely interference. The cases which have been before the courts express this idea in different language, but the idea remains the same. The act or acts must come or advance very near to the accomplishment of the intended crime.

2. "Preparation" or "All But the Last Act"?

Commonwealth v. Peaslee, 59 N.E. 55 (Mass. 1901)

FACTS Lincoln Peaslee had made and arranged combustibles in a building he owned so they were ready to be lighted and, if lighted, would have set fire to the building and its contents. He got within a quarter of a mile of the building, but his would-be accomplice refused to light the fire. Did Peaslee attempt to commit arson?

DECISION No, said the Court.

> A mere collection and preparation of materials in a room, for the purpose of setting fire to them, unaccompanied by any present intent to set the fire, would be too remote and not all but "the last act" necessary to complete the crime.

Impossibility: "Stroke of Luck"

LO 6

To avoid paying customs, a man sneaks an antique book past customs. What he doesn't know is there's an exception in the law for antique books. Has he attempted to evade customs laws? A woman stabs her battering husband repeatedly, thinking he's asleep. In fact, he died of a heart attack two hours before she stabs him. Has she committed attempted murder? The would-be customs evader isn't guilty; the battered woman is.

The first scenario is an example of **legal impossibility**.

A legal impossibility occurs when actors intend to commit crimes, and do everything they can to carry out their criminal intent, but the criminal law doesn't ban what they did. So even though he wanted to evade customs laws, and did all he could to commit the crime of tax evasion, it's legally impossible to commit a crime that doesn't exist. If the law were different, he'd be guilty; but it isn't, so legal impossibility is a defense to criminal liability.

Stabbing an already dead victim is an example of **factual impossibility**. A factual impossibility occurs when actors intend to commit a crime and try to but some fact or circumstance—an **extraneous factor**—interrupts them to prevent the completion of the crime. The woman intended to murder her battering husband. She did all she could to commit it by stabbing him; if the facts had been different—that is, if her victim had been alive—she would've murdered him.

Legal impossibility requires a different law to make the conduct criminal; factual impossibility requires different facts to complete the crime. In most jurisdictions, legal impossibility is a defense to criminal attempt; factual impossibility is not. The main reason for the difference is that to convict someone for conduct the law doesn't prohibit, no matter what the actor's intentions, violates the principle of legality—no crime without a law, no punishment without a crime (Chapter 1). Factual impossibility, on the other hand, would allow chance to determine criminal liability. A person who's determined to commit a crime, and who does enough to succeed in that determination,

shouldn't escape responsibility and punishment because of a stroke of good luck (Dutile and Moore 1979, 181).

In our next case excerpt, *State v. Damms* (1960), the Wisconsin Supreme Court affirmed Ralph Damms' conviction for attempting to murder his wife because his unloaded gun was considered a "stroke of luck."

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CASE Was It Factually Impossible to Kill His Wife?

State v. Damms
100 N.W.2d 592 (Wis. 1960)

HISTORY

The defendant, Ralph Damms, was charged by information with the offense of attempt to commit murder in the first degree. The jury found the defendant guilty as charged, and the defendant was sentenced to imprisonment in the state prison at Waupun for a term of not more than ten years. Damms appealed to the Wisconsin Supreme Court. The Supreme Court affirmed the conviction.

CURRIE, J.

FACTS

The alleged crime occurred on April 6, 1959, near Menomonee Falls in Waukesha County. Prior to that date Marjory Damms, wife of the defendant, had instituted an action for divorce against him and the parties lived apart. She was 39 years old and he 33 years of age. Marjory Damms was also estranged from her mother, Mrs. Laura Grant.

That morning, a little before eight o'clock, Damms drove his automobile to the vicinity in Milwaukee where he knew Mrs. Damms would take the bus to go to work. He saw her walking along the sidewalk, stopped, and induced her to enter the car by falsely stating that Mrs. Grant was ill and dying. They drove to Mrs. Grant's home. Mrs. Damms then discovered that her mother was up and about and not seriously ill. Nevertheless, the two Damms remained there nearly two hours conversing and drinking coffee. Apparently, it was the intention of Damms to induce a reconciliation between mother and daughter, hoping it would result in one between himself and his wife, but not much progress was achieved in such direction.

At the conclusion of the conversation, Mrs. Damms expressed the wish to phone for a taxicab to take her to work. Damms insisted on her getting into his car, and said he would drive her to work. They again entered his car, but instead of driving south toward her place of employment, he drove in the opposite direction. Some conversation was had in which he stated that it was possible for a person to die quickly and not be able to make amends for anything done in the past, and he referred to the possibility of "judgment day" occurring suddenly.

Mrs. Damms' testimony as to what then took place is as follows: "When he was telling me about this being judgment day, he pulled a cardboard box from under the seat of the car and brought it up to the seat and opened it up and took a gun out of a paper bag. He aimed it at my side and he said, 'This is to show you I'm not kidding.' I tried to quiet him down. He said he wasn't fooling. I said if it was just a matter of my saying to my mother that everything was all right, we could go back and I would tell her that."

They did return to Mrs. Grant's home and Mrs. Damms went inside and Damms stayed outside. In a few minutes he went inside and asked Mrs. Damms to leave with him. Mrs. Grant requested that they leave quietly so as not to attract the attention of the neighbors. They again got into the car, and this time drove out on Highway 41 toward Menomonee Falls. Damms stated to Mrs. Damms that he was taking her "up north" for a few days, the apparent purpose of which was to effect a reconciliation between them.

As they approached a roadside restaurant, he asked her if she would like something to eat. She replied that she wasn't hungry but would drink some coffee. Damms then drove the car off the highway beside the restaurant and parked it with the front facing, and in close proximity to, the restaurant wall.

Damms then asked Mrs. Damms how much money she had with her and she said "a couple of dollars." He then requested to see her checkbook and she refused to give it to him. A quarrel ensued between them. Mrs. Damms opened the car door and started to run around the restaurant building screaming, "Help!" Damms pursued her with the pistol in his hand.

Mrs. Damms' cries for help attracted the attention of the persons inside the restaurant, including two officers of the state traffic patrol who were eating their lunch. One officer rushed out of the front door and the other the rear door. In the meantime, Mrs. Damms had run nearly around three sides of the building. In seeking to avoid colliding with a child, who was in her path, she turned, slipped, and fell. Damms crouched down, held the pistol at her head, and pulled the trigger, but nothing happened. He then exclaimed, "It won't fire. It won't fire."

Damms testified that at the time he pulled the trigger the gun was pointing down at the ground and not at Mrs. Damms' head. However, the two traffic patrol officers both testified that Damms had the gun pointed directly at her head when he pulled the trigger. The officers placed Damms under arrest. They found that the pistol was unloaded. The clip holding the cartridges, which is inserted in the butt of the gun to load it, was later found in the cardboard box in Damms' car together with a box of cartridges.

That afternoon, Damms was questioned by a deputy sheriff at the Waukesha county jail, and a clerk in the sheriff's office typed out the questions and Damms' answers as they were given. Damms later read over such typed statement of questions and answers, but refused to sign it. In such statement Damms stated that he thought the gun was loaded at the time of the alleged attempt to murder. Both the deputy sheriff and the undersheriff testified that Damms had stated to them that he thought the gun was loaded. To the contrary, though, Damms testified at the trial that he knew at the time of the alleged attempt that the pistol was not loaded.

OPINION

The two questions raised on this appeal are:

(1) Did the fact that it was impossible for the accused to have committed the act of murder because the gun was unloaded preclude his conviction of the offense of attempt to commit murder?

(2) Assuming that the foregoing question is answered in the negative, does the evidence establish the guilt of the accused beyond a reasonable doubt?

Sec. 939.32(2), Stats., provides as follows:

> An attempt to commit a crime requires that the actor have an intent to perform acts and attain a result which, if accomplished, would constitute such crime and that he does acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that he formed that intent and would commit the crime *except for the intervention of* another person or *some other extraneous factor*. (emphasis added)

The issue with respect to the first of the afore stated two questions boils down to whether the impossibility of accomplishment due to the gun being unloaded falls within the statutory words "except for the intervention of some other extraneous factor." We conclude that it does.

An article in 1956 *Wisconsin Law Review*, by Assistant Attorney General Platz, points out that "attempt" [in the Wisconsin statute] is more intelligible fashion than using such tests as "beyond mere preparation," the place at which the actor may repent and withdraw, or "dangerous proximity to success." Quoting the author:

> Emphasis upon the dangerous propensities of the actor as shown by his conduct, rather than upon how close he came to succeeding, is more appropriate to the purposes of the criminal law to protect society and reform offenders or render them temporarily harmless.

Sound public policy would seem to support the majority view that impossibility not apparent to the actor should not absolve him from the offense of attempt to commit the crime he intended. An unequivocal act accompanied by intent should be sufficient to constitute a criminal attempt. Insofar as the actor knows, he has done everything necessary to insure the commission of the crime intended, and he should not escape punishment because of the fortuitous circumstance that by reason of some fact unknown to him it was impossible to effectuate the intended result.

It is our considered judgment that the fact that the gun was unloaded when Damms pointed it at his wife's head and pulled the trigger did not absolve him of the offense charged, if he actually thought at the time that it was loaded.

We do not believe that the further contention raised in behalf of the accused, that the evidence does not establish his guilt of the crime charged beyond a reasonable doubt, requires extensive consideration on our part.

The jury undoubtedly believed the testimony of the deputy sheriff and undersheriff that Damms told them on the day of the act that he thought the gun was loaded. This is also substantiated by the written statement constituting a transcript of his answers given in his interrogation at the county jail on the same day.

The gun itself, which is an exhibit in the record, is the strongest piece of evidence in favor of Damms' present contention that he at all times knew the gun was unloaded. Practically the entire bottom end of the butt of the pistol is open. Such opening is caused by the absence of the clip into which the cartridges must be inserted in order to load the pistol. This readily demonstrates to anyone looking at the gun that it could not be loaded. Because the unloaded gun with this large opening in the

butt was an exhibit which went to the jury room, we must assume that the jury examined the gun and duly considered it in arriving at their verdict.

We are not prepared to hold that the jury could not come to the reasonable conclusion that, because of Damms' condition of excitement when he grabbed the gun and pursued his wife, he so grasped it as not to see the opening in the end of the butt which would have unmistakably informed him that the gun was unloaded. Having so concluded, they could rightfully disregard Damms' testimony given at the trial that he knew the pistol was unloaded.

Judgment affirmed.

DISSENT

DIETERICH, J.

I disagree with the majority opinion in respect to their interpretations and conclusions of sec. 939.32(2), Stats.

The issue raised on this appeal: Could the defendant be convicted of murder, under sec. 939.32(2), Stats., when it was impossible for the defendant to have caused the death of anyone because the gun or pistol involved was unloaded?

Sec. 939.32(2), Stats., provides:

> *An attempt* to commit a crime *requires* that *the actor* have an *intent* to *perform acts* and *attain a result* which, *if accomplished*, would constitute such crime and that *he does acts* toward the commission of the crime which *demonstrate unequivocally*, under all the circumstances, that he *formed* that *intent* and would *commit* the crime *except for the intervention of another person or some other extraneous factor*. (emphasis added)

In view of the statute, the question arising under sec. 939.32(2), is whether the impossibility of accomplishment due to the pistol being unloaded falls within the statutory words "*except for the intervention of . . . or some other extraneous factor*." It does not.

In interpreting the statute we must look to the ordinary meaning of words. Webster's New International Dictionary defines "extraneous" as not belonging to or dependent upon a thing, originated or coming from without. The plain distinct meaning of the statute is: A person must form an intent to commit a particular crime and this intent must be coupled with sufficient preparation on his part and with overt acts from which it can be determined clearly, surely and absolutely the crime would be committed except for the intervention of some independent thing or something originating or coming from someone or something over which the actor has no control.

As an example, if the defendant actor had formed an intent to kill someone, had in his possession a loaded pistol, pulled the trigger while his intended victim was within range and the pistol did not fire because the bullet or cartridge in the chamber was defective or because someone unknown to the actor had removed the cartridges or bullets or because of any other thing happening which happening or thing was beyond the control of the actor, the actor could be guilty under sec. 339.32(2), Stats.

But when as in the present case (as disclosed by the testimony) the defendant had never loaded the pistol, although having ample opportunity to do so, then he had never completed performance of the act essential to kill someone, through the means of pulling the trigger of the pistol. This act, of loading the pistol, or using a loaded pistol, was dependent on the defendant himself. It was in no way an extraneous factor since by definition an extraneous factor is one which originates or comes from without.

Under the majority opinion the interpretations of the statute are if a person points an unloaded gun (pistol) at someone, knowing it to be unloaded and pulls the trigger, he can be found guilty of an attempt to commit murder. This type of reasoning I cannot agree with.

He could be guilty of some offense, but not attempt to commit murder. If a person uses a pistol as a bludgeon and had struck someone, but was prevented from killing his victim because he (the actor) suffered a heart attack at that moment, the illness would be an extraneous factor within the statute and the actor could be found guilty of attempt to commit murder, provided the necessary intent was proved.

In this case, there is no doubt that the pistol was not loaded. The defendant testified that it had never been loaded or fired. The following steps must be taken before the weapon would be capable of killing:

A. To load pistol requires pulling of slide operating around barrel toward holder or operator of pistol.

B. After pulling slide to rear, safety latch is pushed into place by operator of pistol to hold pistol in position for loading.

C. A spring lock is located at one side of opening of magazine located at the bottom grip or butt of gun.

D. This spring is pulled back and the clip is inserted into magazine or bottom of pistol and closes the bottom of the grip or butt of the pistol.

E. The recoil or release of the safety latch on the slide loads the chamber of the pistol and it is now ready to fire or be used as a pistol.

The law judges intent objectively. It is impossible to peer into a man's mind particularly long after the act has been committed. Viewing objectively the physical salient facts, it was the defendant who put the gun, clip and cartridges under the car seat. It was he, same defendant, who took the pistol out of the box without taking clip or cartridges. It is plain he told the truth—he knew the gun would not fire; nobody else knew that so well. In fact his exclamation was "It won't fire. It won't fire."

The real intent showed up objectively in those calm moments while driving around the county with his wife for two hours, making two visits with her at her mother's home, and drinking coffee at the home. He could have loaded the pistol while staying on the outside at his

mother-in-law's home on his second trip, if he intended to use the pistol to kill, but he did not do this required act.

The majority states:

> The gun itself, which is an exhibit in the record, is the strongest piece of evidence in favor of Damms' present contention that he at all times knew the gun was unloaded. Practically the entire bottom end of the butt of the pistol is open. This readily demonstrates to anyone looking at the gun that it could not be loaded.

They are so correct. The defendant had the pistol in his hand several times before chasing his wife at the restaurant and it was his pistol. He, no doubt, had examined this pistol at various times during his period of ownership—unless he was devoid of all sense of touch and feeling in his hands and fingers it would be impossible for him not to be aware or know that the pistol was unloaded. He could feel the hole in the bottom of the butt, and this on at least two separate occasions for he handled the pistol by taking it out of the box and showing it to his wife before he took her back to her mother's home the second time, and prior to chasing her at the restaurant.

Objective evidence here raises reasonable doubt of intent to attempt murder. It negatives [*sic*] intent to kill. The defendant would have loaded the pistol had he intended to kill or murder or used it as a bludgeon. The Assistant Attorney General contends and states in his brief:

> In the instant case, the failure of the attempt was due to lack of bullets in the gun but a loaded magazine was in the car. If defendant had not been prevented by the intervention of the two police officers, or possibly someone else, or conceivably by the flight of his wife from the scene, he could have returned to the car, loaded the gun, and killed her. Under all the circumstances the jury were justified in concluding that that is what he would have done, but for the intervention.

If that conclusion is correct, and juries are allowed to convict persons based on speculation of what *might* have been done, we will have seriously and maybe permanently, curtailed the basic rights of our citizenry to be tried only on the basis of proven facts. I cannot agree with his contention or conclusion.

The total inadequacy of the means (in this case the unloaded gun or pistol) in the manner intended to commit the overt act of murder, precludes a finding of guilty of the crime charged under sec. 939.32(2), Stats.

QUESTIONS

1. **List all the facts relevant to deciding whether Ralph Damms intended to murder Marjory Damms.**
2. **List all the facts relevant to deciding whether Damms had taken enough steps to attempt to murder Marjory Damms according to the Wisconsin statute.**
3. **Summarize the majority's arguments that the unloaded gun was an extraneous factor, a stroke of luck Damms shouldn't benefit from.**
4. **Summarize the dissent's arguments that the unloaded gun was not an extraneous factor but an impossibility that prevents Damms from attempting to murder Marjorie Damms.**
5. **In your opinion, is the majority or dissent right? Explain your answer in terms of what effect impossibility should have on liability for criminal attempt.**
6. **Should it matter why the gun was unloaded? Explain your answer.**
7. **What if Damms knew the gun was unloaded? Should he still be guilty of attempted murder? Explain your answer.**
8. **Is the Wisconsin rule punishing attempts that are about half the actions needed to complete the crime a good idea?**
9. **Some states punish attempts at the same level as completed crimes because people bent on committing crimes shouldn't benefit at all from a stroke of luck. Do you agree? Defend your answer with arguments from the case excerpt and the text.**

EXPLORING FURTHER

Impossibility

1. Was It "Legally Impossible" to Commit "Child Enticement"?

State v. Robins, 646 N.W. 2d 287 (Wis. 2002)

FACTS Beginning on January 31, 2000, Brian Robins, using the screen name "WI4kink," had a series of online conversations with "Benjm13," initially in an Internet chat room known as "Wisconsin M4M." ["M4M" meant either Male for Male or Men for Men.]

Unbeknown to Robins, "Benjm13" was Thomas Fassbender, a 42-year-old DOJ agent posing online as a 13-year-old boy named Benjamin living in Little Chute, Wisconsin. The subject of "Benjamin's" age came up within the first 12 minutes of the first online conversation between Robins and Benjm13. Benjamin told Robins that he was 13 years old.

The initial and subsequent online conversations and emails between Robins and Benjm13 centered on explicit sexual matters (including, among other things, oral sex, masturbation, ejaculation, and penis size) and were recorded by Fassbender. . . . [The court here included several of these communications.]

According to the Wisconsin Criminal Code:

> An attempt to commit a crime requires that the actor have an intent to perform acts and attain a result which, if accomplished, would constitute such crime and that the actor does acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that the actor formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor. (Wis. Stat. § 939.32(3))

Robins moved to dismiss the charge because, he argued, he was being charged with a crime that didn't exist because of a legal impossibility—there was no child. Should the motion to dismiss be granted?

DECISION No, said the Trial Court and the Wisconsin Supreme Court, which was faced with a bunch of child enticement cases with similar facts involving stings catching both older men looking for boys and those looking for girls:

> We reject Robins' argument that the case should be overruled. . . . The extraneous factor that intervened to make the crime an attempted rather than completed child enticement is the fact that "Benjm13" was an adult government agent rather than a 13-year-old boy.
>
> That there may be or could have been other intervening factors does not make this an impermissible prosecution for an "attempt to attempt a crime."
>
> We conclude that the crime of attempted child enticement contrary to Wis. Stat. § 948.07 may be charged where the extraneous factor that intervenes to make the crime an attempted rather than completed child enticement is the fact that, unbeknownst to the defendant, the "child" is fictitious.

1. Was It "Impossible" to Receive a Stolen Harley-Davidson That Wasn't Stolen?

State v. Kordas, 528 N.W.2d 483 (Wis. 1995)

FACTS Michael Kordas was charged with buying a Harley-Davidson motorcycle from an undercover police officer. The police had modified the cycle and made misrepresentations about the cycle to Kordas so that it appeared to be stolen when, in fact, it actually "had been provided to the Milwaukee Police Department for educational purposes."

The undercover officer gave Kordas certain information about the motorcycle that signaled that it was stolen. Specifically, the undercover officer represented that the motorcycle in question was a 1988 Harley DynaGlide, although Harley did not begin making that model until 1991, which Kordas later acknowledged knowing at the time.

In addition, the vehicle identification number on the motorcycle had been altered in an obvious way, again a fact that Kordas later acknowledged knowing at the time he examined the motorcycle prior to purchasing it. Kordas bought the motorcycle, was given what was purported to be title to it, and took it with him in a van before he was stopped and arrested by backup officers working on the undercover operation. The complaint indicates that Kordas made additional admissions to the police upon his arrest indicating his knowledge that the motorcycle was stolen. In fact, however, the motorcycle was not stolen. Did he attempt to receive a stolen Harley-Davidson?

DECISION Yes, according to the Trial Court:

> Here, the allegations are that Kordas had the requisite intent but his actions even after they were fully executed did not constitute the crime and therefore it was an "attempt." But there was no "intervention of another person or some other extraneous factor" which prevented the ultimate commission of the acts which the defendant intended. Instead, the intended acts were completed but the results were not criminal because of the legal status of the property in question.

So the Trial Court dismissed the complaint of attempt to receive stolen property because it was a legal impossibility. The Wisconsin Supreme Court disagreed:

> The trial court based its conclusion on the view that "there was no 'intervention of some other extraneous factor' which prevented the ultimate commission" of receiving stolen property. We disagree. Indeed, an extraneous factor did intervene—the fact, beyond Kordas's knowledge or control, that the motorcycle was not stolen property. But for that factor, Kordas allegedly would have committed the crime of receiving stolen property. Because of that factor, Kordas allegedly committed only the attempt to receive stolen property.
>
> According to the allegations in the amended complaint, Kordas "did in fact possess the necessary criminal intent to commit" the crime of receiving stolen property.

The extraneous factor—that the motorcycle was not stolen—was unknown to him and had no impact on his intent. Thus, the legal "impossibility not apparent to [Kordas] should not absolve him from the offense of attempt to commit the crime he intended." Accordingly, we reverse the order dismissing the amended criminal complaint and remand to the trial court for further proceedings.

Voluntary Abandonment

LO 7

We know from the last section that those bent on committing crimes who've taken steps to carry out their criminal plans can't escape criminal liability just because an outside force or person interrupted them. But what about people who clearly intend to commit crimes, take enough steps to carry out their intent, and then change their mind and voluntarily abandon the scheme? Should the law benefit those who themselves are the force that intercepts the crimes they wanted to commit and are marching toward completing? The answer depends on which jurisdiction they're in.

A little more than half the states and the U.S. government accept the affirmative **defense of voluntary abandonment** to attempt liability (*People v. Kimball* 1981, 347). Recall that *affirmative defense* means defendants have to produce some evidence of abandonment, and then the government has to prove beyond a reasonable doubt that the defendants didn't voluntarily abandon.

Michigan has a typical voluntary abandonment provision:

> It is an affirmative defense . . . that, under circumstances manifesting a voluntary and complete renunciation of his criminal purpose, the actor avoided the commission of the offense attempted by abandoning his criminal effort.
>
> A renunciation is not "voluntary and complete" within the meaning of this chapter if it is motivated in whole or in part by either of the following:
>
> (a) A circumstance which increases the probability of detection or apprehension of the defendant or another participant in the criminal operation or which makes more difficult the consummation of the crime.
>
> (b) A decision to postpone the criminal conduct until another time or to substitute another victim or another but similar objective. (*People v. Kimball*, 346–48)

According to the Model Penal Code, voluntary abandonment means:

> A change in the actor's purpose not influenced by outside circumstances, what may be termed repentance or change of heart. Lack of resolution or timidity may suffice. A reappraisal by the actor of the criminal sanctions hanging over his conduct would presumably be a motivation of the voluntary type as long as the actor's fear of the law is not related to a particular threat of apprehension or detection. (ALI 1985, 3:356)

Supporters of the voluntary abandonment defense favor it for two reasons. First, those who voluntarily renounce their criminal attempts in progress (especially during the first acts following preparation) aren't the dangerous people the law of attempt is designed to punish; they probably weren't even bent on committing the crime in the first place. Second, at the very end of the progress to completing the crime, it prevents what we most want—the harm the completed crime is about to inflict on victims.

This defense encourages would-be criminals to give up their criminal designs by the promise of escaping punishment. Opponents say the defense encourages bad people to take the first steps to commit crimes because they know they can escape punishment (Moriarity 1989, 1).

The court in *Le Barron v. State* rejected David Le Barron's defense that he voluntarily abandoned his plan to rape Jodean Randen.

The court in Le Barron v. State *rejected David Le Barron's defense that he voluntarily abandoned his plan to rape Jodean Randen.*

CASE Did He Voluntarily Abandon His Attempt to Rape?

Le Barron v. State
145 N.W.2d 79 (Wis. 1966)

HISTORY

David Le Barron was convicted of attempted rape and sentenced to not more than 15 years in prison. He appealed. The Wisconsin Supreme Court affirmed the conviction.

CURRIE, J.

FACTS

On March 3, 1965, at 6:55 p.m., the complaining witness, Jodean Randen, a housewife, was walking home across a fairly well-traveled railroad bridge in Eau Claire, Wisconsin. She is a slight woman whose normal weight is 95 to 100 pounds. As she approached the opposite side of the bridge, she passed a man who was walking in the opposite direction.

The man turned and followed her, grabbed her arm, and demanded her purse. She surrendered her purse and at the command of the man began walking away as fast as she could. Upon discovering that the purse was empty, he caught up with her again, grabbed her arm, and told her that if she did not scream he would not hurt her.

He then led her—willingly, she testified, so as to avoid being hurt by him—to the end of the bridge. While walking he shoved her head down and warned her not to look up or do anything and he would not hurt her.

On the other side of the bridge along the railroad tracks there is a coal shack. As they approached the coal shack he grabbed her, put one hand over her mouth, and an arm around her shoulder and told her not to scream or he would kill her. At this time Mrs. Randen thought he had a knife in his hand.

He then forced her into the shack and up against the wall. As she struggled for her breath he said, "You know what else I want," unzipped his pants and started pulling up her skirt. She finally succeeded in removing his hand from her mouth, and after reassuring him that she would not scream, told him she was pregnant and pleaded with him to desist or he would hurt her baby.

He then felt her stomach and took her over to the door of the shack, where in the better light he was able to ascertain that, under her coat, she was wearing maternity clothes. He thereafter let her alone and left after warning her not to scream or call the police, or he would kill her.

OPINION

The material portions of the controlling statutes provide:

> § 944.01(1), Stats. Any male who has sexual intercourse with a female he knows is not his wife, by force and against her will, may be imprisoned not more than 30 years.
>
> § 939.32(2), Stats. An attempt to commit a crime requires that the actor have an intent to perform acts and attain a result which, if accomplished, would constitute such crime and that he does acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that he formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

The two statutory requirements of intent and overt acts which must concur in order to have attempt to rape are as follows:

(1) The male must have the intent to act so as to have intercourse with the female by overcoming or preventing her utmost resistance by physical violence, or overcoming her will to resist by the use of threats of imminent physical violence likely to cause great bodily harm;

(2) the male must act toward the commission of the rape by overt acts which demonstrate unequivocally, under all the circumstances, that he formed the intent to rape and would have committed the rape except for the intervention of another person or some other extraneous factor.

The thrust of defendant's argument, that the evidence was not sufficient to convict him of the crime of attempted rape, is two-fold: first, defendant desisted from his endeavor to have sexual intercourse with complainant before he had an opportunity to form an intent to accomplish such intercourse by force and against her will; and, second, the factor which caused him to desist, viz., the pregnancy of complainant, was intrinsic and not an "extraneous factor" within the meaning of sec. 939.32(2), Stats.

It is difficult to consider the factor of intent apart from that of overt acts since the sole evidence of intent in attempted rape cases is almost always confined to the overt

acts of the accused, and intent must be inferred therefrom. In fact, the express wording of sec. 939.32(2), Stats. recognizes that this is so.

We consider defendant's overt acts, which support a reasonable inference that he intended to have sexual intercourse with complainant by force and against her will, to be these:

(1) He threatened complainant that he would kill her if she refused to cooperate with him;

(2) he forced complainant into the shack and against the wall; and

(3) he stated, "You know what else I want," unzipped his pants, and started pulling up her skirt.

The jury had the right to assume that defendant had the requisite physical strength and weapon (the supposed knife) to carry out the threat over any resistance of complainant.

We conclude that a jury could infer beyond a reasonable doubt from these overt acts of defendant that he intended to have sexual intercourse with defendant by force and against her will. The fact that he desisted from his attempt to have sexual intercourse as a result of the plea of complainant that she was pregnant would permit of the opposite inference. However, such desistance did not compel the drawing of such inference nor compel, as a matter of law, the raising of a reasonable doubt to a finding that defendant had previously intended to carry through with having intercourse by force and against complainant's will.

The argument that the pregnancy which caused defendant's desistance does not qualify as an "extraneous factor" is in conflict with our holding in *State v. Damms*. [See case excerpt under "Impossibility: 'Stroke of Luck.'"]

AFFIRMED.

QUESTIONS

1. **List all the facts relevant to deciding whether Le Barron had the intent to rape Jodean Randen.**
2. **At what point, if any, did his acts cross the line from preparation to the *actus reus* of attempt under Wisconsin law?**
3. **Describe the details surrounding Le Barron's decision to abandon the attempted rape of Randen.**
4. **Why did Le Barron abandon his attempt to rape Randen? Because he believed it was morally wrong to rape a pregnant woman? Or did the pregnancy simply repel him sexually? Does it matter? Explain your answer.**
5. **Is Le Barron equally dangerous, whichever reason led to interrupting the rape? Explain.**
6. **The Court said a jury could have concluded Randen's pregnancy was either an extraneous factor he couldn't benefit from or an intrinsic factor that caused Le Barron to renounce voluntarily his intention to rape. If you were a juror, how would you have voted on whether the pregnancy was an extraneous or an intrinsic factor?**

EXPLORING FURTHER

Abandonment

Did He Voluntarily Abandon His Attempt to Murder?

People v. Johnson 750 P.2d 72 (Colo.App. 1987)

PIERCE, J.

FACTS Following a fight with a friend outside a bar where the two had been drinking, the defendant, Floyd Johnson, walked a mile to his house, retrieved his .22 rifle and ten cartridges, walked back to the bar, and crawled under a pickup truck across the street to wait for the friend. The defendant testified that he, at first, intended to shoot the friend to "pay him back" for the beating he had received in their earlier altercation.

When the owner of the pickup arrived, the defendant obtained his keys, instructed him to sit in the pickup, and gave him one or more bottles of beer. The defendant then crawled back under the pickup to resume his wait for his friend. The police were alerted by a passerby and arrested the defendant before his friend emerged from the bar. There was also testimony that while he was lying under the pickup truck, the defendant sobered up somewhat and began to think through his predicament. He testified that he changed his mind and removed the shells from the rifle, placing them in his pocket. By that time there were two persons in the pickup truck, and he began a discussion with them, telling them his name and address and inviting them to his residence to have a party. The three of them were still there drinking and conversing when the police arrived, at which time the rifle was found to be unloaded and the shells were still in the defendant's pocket.

Did Johnson voluntarily abandon his attempt to murder his friend?

DECISION The Trial Court refused Johnson's request for an instruction on the affirmative defense of abandonment or renunciation. The Court of Appeals reversed and sent the case back to the Trial Court for a new trial:

> Under the circumstances in this case, there was sufficient evidence to warrant an instruction on the affirmative defense of abandonment or renunciation. Had the tendered instruction been given and the defendant's testimony and other evidence been accepted by the jury, the outcome of this trial could well have been otherwise.

ETHICAL DILEMMA

"Should Both Women Be Treated Equally?"

In the heat of an argument, a woman grabs a gun and fires at her spouse, trying to kill him. She misses. Realizing the horror of what she has tried to do, she throws down the gun and embraces her husband. Another woman, also arguing with her spouse, grabs a gun and shoots at him. She, too, misses on the first shot. She fires again and again, a total of four times. Three of the bullets strike her husband and cause serious injury, but he is eventually able to run away from her and escape to safety.

Instructions

1. Go to the website www.cengage.com/criminaljustice/samaha.
2. Read the selection on the defense of voluntary abandonment and the rationales for it.
3. Write a one-page essay explaining why you believe the defense of abandonment as an ethical public policy should apply to both, one, or neither of the women who shot their husbands. Be sure to include the rationales of abandonment that support your answer.

Conspiracy

LO 8

> The core of conspiracy is an agreement to commit a crime. It's this agreement that gives rise to criminal liability, by transforming a lonely criminal thought hatched in the mind of a single, powerless individual into an agreement with another person. I reveal myself as one of those persons who suffer from an abnormal disposition to engage in criminal conduct, by distinguishing myself from those untold millions who harbor criminal thoughts, but never share them with others, nevermind act on them in any way. But my decision to seek out likeminded proto criminals, and to join hands with them in the pursuit of a common criminal goal is symptomatic of my extraordinary dangerousness. By combining forces with another similarly dangerous person, I multiply my already considerable dangerousness through the magic of cooperation. (Dubber 2002, 163)

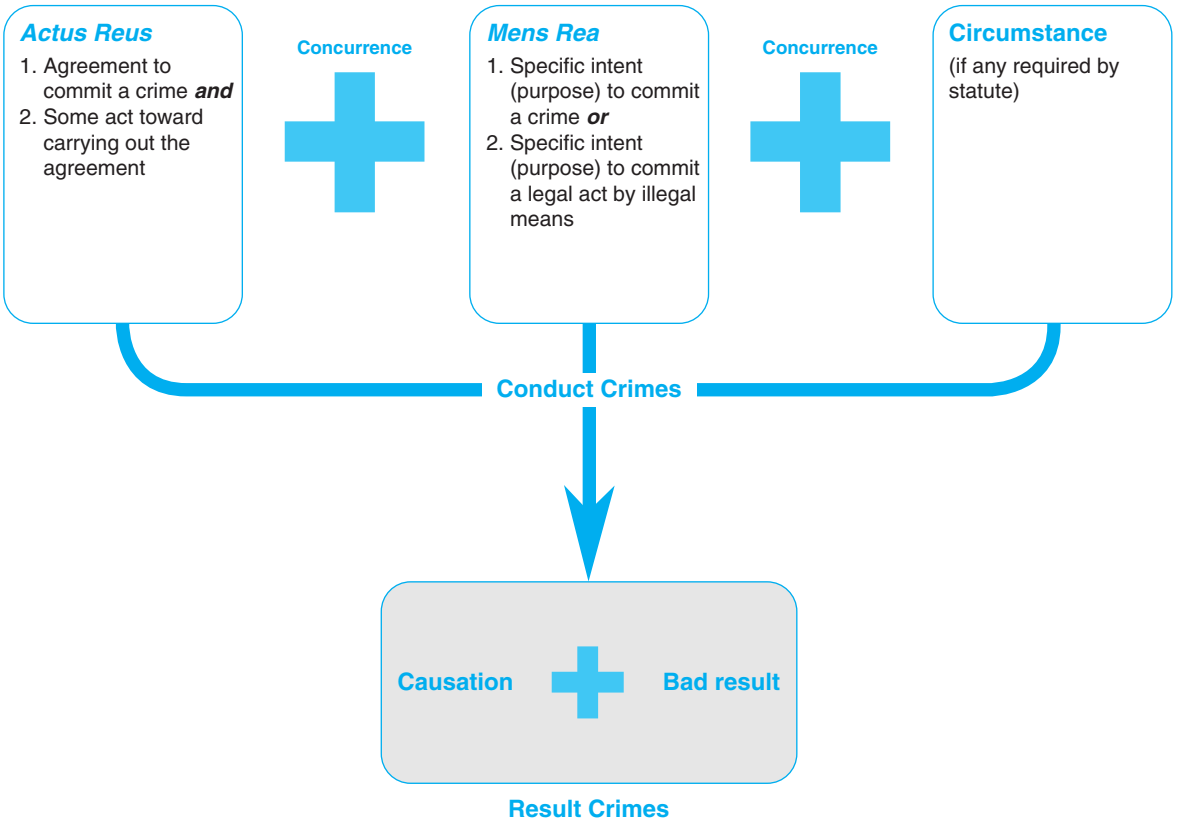
LO 8

Conspiracy, the crime of agreeing with one or more people to commit a crime, is further removed from actually committing a crime than attempts to commit crimes. In fact, "One can become guilty of conspiracy long before his act has come so dangerously near to completion as to make him criminally liable for the attempted crime" (Sayre 1921–22, 399).

There are two public policy justifications for attaching criminal liability to actions further away from completion than attempts:

1. Conspiracy works hand in hand with attempts to nip criminal purpose in the bud.
2. Conspiracy strikes at the special danger of group criminal activity. (ALI 1985, 3:377–78)

Elements of CONSPIRACY



In this section, we'll look at what's necessary to prove the *actus reus* and *mens rea* of conspiracy, how the law treats the parties to conspiracies, how large-scale conspiracies differ, and how the law limits the definition of the criminal objective of a conspiracy.

Conspiracy *Actus Reus*

Conspiracy ***actus reus*** consists of two parts: (1) an agreement to commit a crime (in all states) and (2) an overt act in furtherance of the agreement (in about half the states). Let's look at each part.

The Agreement

The heart of the crime of conspiracy is the act of agreement between two or more people to commit a crime. The agreement doesn't have to be a signed written contract. It's "not necessary to establish that the defendant and his coconspirators signed papers, shook hands, or uttered the words 'we have an agreement'" (*State v. Vargas* 2003, 208–09). Facts and circumstances that point to an unspoken understanding between the conspirators are good enough to prove the conspirators agreed to commit a crime. This rule makes sense because conspirators rarely put their agreements in writing.

The rule may make sense, but it can lead to vague definitions of "agreement" that can lead to injustice. In one famous trial during the Vietnam War, the government tried the well-known baby doctor turned war protestor, Dr. Benjamin Spock, for conspiracy to avoid the draft law. Videotapes showed several hundred spectators clapping while Dr. Spock urged young men to resist the draft. Spurred on by antagonism to antiwar

protestors, the prosecutor in the case made the ridiculous assertion that any person seen clapping on the videotape was a co-conspirator. According to the prosecutor, these people were aiding Spock, and that made them parties to a conspiracy to violate the draft law (Mitford 1969, 70–71).

The Overt Act

In about half the states, the agreement itself satisfies the *actus reus* of conspiracy. The other half and the federal courts require the act of agreeing to commit a crime plus another act to further the agreement; the second act is called the **overt act**. Why the requirement of an "overt act"? To verify the firmness of the agreement. The overt act doesn't have to amount to much. In the words of the American Law Institute's commentator (1985, [3] 387), it may "be of very small significance." And according to the U.S. Supreme Court Justice Oliver Wendell Holmes (*Hyde v. U.S.* 1912):

> If the overt act is required, it does not matter how remote the act may be from accomplishing the [criminal] purpose, if done to effect it; that is, I suppose, in furtherance of it in any degree. (388)

The U.S. Ninth Circuit Court of Appeals found the agreement plus an overt act missing in a charge that Cody Garcia, a member of the "Bloods" gang, conspired to assault three rival "Crips" with a deadly weapon and that there was no evidence Garcia fired.

The U.S. Ninth Circuit Court of Appeals found the agreement plus an overt act missing in a charge that Cody Garcia, a member of the "Bloods" gang, conspired to assault three rival "Crips" with a deadly weapon and that there was no evidence Garcia fired.

CASE Did He "Agree" to Assault Three Crips Members with a Deadly Weapon?

U.S. v. Garcia
151 F.3d 1243 (CA9 1998)

HISTORY

Leon Garcia, also known as Cody Garcia, the defendant, was convicted in the U.S. District Court for the District of Arizona of conspiracy to assault with a dangerous weapon and was sentenced to 60 months in prison. The defendant appealed. The Court of Appeals reversed and remanded.

REINHARDT, J.

One evening, a confrontation broke out between rival gangs at a party on the Pasqua Yaqui Indian reservation. The resultant gunfire injured four young people, including appellant Cody Garcia. Two young men involved in the shooting, Garcia and Noah Humo, were charged with conspiracy to assault three named individuals with dangerous weapons. A jury acquitted Humo but convicted Garcia. Because there is no direct evidence of an agreement to commit the criminal act that was the alleged object of the conspiracy, and because the circumstances of the shootings do not support the existence of an agreement, implicit or explicit, the government relied heavily on the gang affiliation of the participants to show the existence of such an agreement. We hold that gang membership itself cannot establish guilt of a crime, and a general agreement, implicit or explicit, to support one another in gang fights

does not provide substantial proof of the specific agreement required for a conviction of conspiracy to commit assault. The defendant's conviction therefore rests on insufficient evidence, and we reverse.

FACTS

The party at which the shootings occurred was held in territory controlled by the Crips gang. The participants were apparently mainly young Native Americans. Although many of the attendees were associated with the Crips, some members of the Bloods gang were also present. Appellant Cody Garcia arrived at the party in a truck driven by his uncle, waving a red bandanna (the Bloods claim the color red and the Crips the color blue) out the truck window and calling out his gang affiliation: "ESPB Blood!" Upon arrival, Garcia began "talking smack" to (insulting) several Crips members. Prosecution witnesses testified that Garcia's actions suggested that he was looking for trouble and issuing a challenge to fight to the Crips at the party.

Meanwhile, Garcia's fellow Bloods member Julio Baltazar was also "talking smack" to Crips members, and Blood Noah Humo bumped shoulders with one Crips member and called another by a derogatory Spanish term. Neither Baltazar nor Humo had arrived with Garcia, nor is there any indication that they had met before the party to discuss plans or that they were seen talking together during the party.

At some point, shooting broke out. Witnesses saw both Bloods and Crips, including Garcia and Humo, shooting at one another. Baltazar was seen waving a knife or trying to stab a Crip. The testimony at trial does not shed light on what took place immediately prior to the shooting, other than the fact that one witness heard Garcia ask, "Who has the gun?" There is some indication that members of the two gangs may have "squared off" before the shooting began. No testimony establishes whether the shooting followed a provocation or verbal or physical confrontation.

Four individuals were injured by the gunfire: the defendant, Stacy Romero, Gabriel Valenzuela, and Gilbert Baumea. Stacy Romero who at the time was 12 years old was the cousin both of Garcia's co-defendant Humo and his fellow Blood, Baltazar. No evidence presented at trial established that any of the injured persons was shot by Garcia, and he was charged only with conspiracy. The government charged both Garcia and Humo with conspiracy to assault Romero, Valenzuela, and Baumea with dangerous weapons under 18 U.S.C. §§ 371, 113(a)(3) and 1153.

After a jury trial, Garcia was convicted of conspiracy to assault with a dangerous weapon and sentenced to 60 months in prison. He appealed on the ground that there was insufficient evidence to support his conviction.

OPINION

In order to prove a conspiracy, the government must present sufficient evidence to demonstrate both an overt act and an agreement to engage in the specific criminal activity charged in the indictment. While an implicit agreement may be inferred from circumstantial evidence, proof that an individual engaged in illegal acts with others is not sufficient to demonstrate the existence of a conspiracy. Both the existence of and the individual's connection to the conspiracy must be proven beyond a reasonable doubt. Even though a defendant's connection to the conspiracy may be slight, the connection must nonetheless be proven beyond a reasonable doubt.

The government claims that it can establish the agreement to assault in two ways: first, that the concerted provocative and violent acts by Garcia, Humo and Baltazar are sufficient to show the existence of a prior agreement; and second, that by agreeing to become a member of the gang, Garcia implicitly agreed to support his fellow gang members in violent confrontations.

However, no inference of the existence of any agreement could reasonably be drawn from the actions of Garcia and other Bloods members on the night of the shooting. An inference of an agreement is permissible only when the nature of the acts would logically require coordination and planning.

The government presented no witnesses who could explain the series of events immediately preceding the shooting, so there is nothing to suggest that the violence began in accordance with some prearrangement. The facts establish only that perceived insults escalated tensions between members of rival gangs and that an ongoing gang-related dispute erupted into shooting. Testimony presented at trial suggests more chaos than concert. Such evidence does not establish that parties to a conspiracy worked together understandingly, with a single design for the accomplishment of a common purpose.

Given that this circumstantial evidence fails to suggest the existence of an agreement, we are left only with gang membership as proof that Garcia conspired with fellow Bloods to shoot the three named individuals. The government points to expert testimony at the trial by a local gang unit detective, who stated that generally gang members have a "basic agreement" to back one another up in fights, an agreement which requires no advance planning or coordination. This testimony, which at most establishes one of the characteristics of gangs but not a specific objective of a particular gang—let alone a specific agreement on the part of its members to accomplish an illegal objective—is insufficient to provide proof of a conspiracy to commit assault or other illegal acts.

Recent authority in this circuit establishes that "membership in a gang cannot serve as proof of intent, or of the facilitation, advice, aid, promotion, encouragement or instigation needed to establish aiding and abetting." In overturning the state conviction of a gang member that rested on the theory that the defendant aided and abetted a murder by "fanning the fires of gang warfare," . . . *Mitchell v. Prunty*, 107 F.3d. 1337, expressed concern that allowing a conviction on this basis would "smack of guilt by association." The same concern is implicated when a

conspiracy conviction is based on evidence that an individual is affiliated with a gang which has a general rivalry with other gangs, and that this rivalry sometimes escalates into violent confrontations.

Acts of provocation such as "talking smack" or bumping into rival gang members certainly does not prove a high level of planning or coordination. Rather, it may be fairly typical behavior in a situation in which individuals who belong to rival gangs attend the same events. At most, it indicates that members of a particular gang may be looking for trouble, or ready to fight. It does not demonstrate a coordinated effort with a specific illegal objective in mind.

Conspiracy requires proof of both an intention and agreement to accomplish a specific illegal objective. The fact that gang members attend a function armed with weapons may prove that they are prepared for violence, but without other evidence it does not establish that they have made plans to initiate it. And the fact that more than one member of the Bloods was shooting at rival gang members also does not prove a prearrangement—the Crips, too, were able to pull out their guns almost immediately, suggesting that readiness for a gunfight requires no prior agreement. Such readiness may be a sad commentary on the state of mind of many of the nation's youth, but it is not indicative of a criminal conspiracy.

Finally, allowing a general agreement among gang members to back each other up to serve as sufficient evidence of a conspiracy would mean that any time more than one gang member was involved in a fight it would constitute an act in furtherance of the conspiracy and all gang members could be held criminally responsible—whether they participated in or had knowledge of the particular criminal act, and whether or not they were present when the act occurred. Indeed, were we to accept fighting the enemy as an illegal objective, all gang members would probably be subject to felony prosecutions sooner rather than later, even though they had never personally committed an improper act. This is contrary to fundamental principles of our justice system. There can be no conviction for guilt by association.

Because of these concerns, evidence of gang membership cannot itself prove that an individual has entered a criminal agreement to attack members of rival gangs. Moreover, here the conspiracy allegation was even more specific: the state charged Garcia with conspiracy to assault three specific individuals—Romero, Baumea and Valenzuela—with deadly weapons. Even if the testimony presented by the state had sufficed to establish a general conspiracy to assault Crips, it certainly did not even hint at a conspiracy to assault the three individuals listed in the indictment. Of course, a more general indictment would not have solved the state's problems in this case. In some cases, when evidence establishes that a particular gang has a specific illegal objective such as selling drugs, evidence of gang membership may help to link gang members to that objective. However, a general practice of supporting one another in fights, which is one of the ordinary characteristics of gangs, does not constitute the type of illegal objective that can form the predicate for a conspiracy charge.

Because the government introduced no evidence from which a jury could reasonably have found the existence of an agreement to engage in any unlawful conduct, the evidence of conspiracy was insufficient as a matter of law. A contrary result would allow courts to assume an ongoing conspiracy, universal among gangs and gang members, to commit any number of violent acts, rendering gang members automatically guilty of conspiracy for any improper conduct by any member. We therefore reverse Garcia's conviction and remand to the district court to order his immediate release. As a result of this decision, Garcia is not subject to retrial. He has already served over a year in prison.

REVERSED AND REMANDED.

QUESTIONS

1. **State the two parts of the element of agreement in conspiracy, according to the Court of Appeals.**
2. **Summarize the government's evidence and arguments that supports the conclusion that Garcia was part of an agreement to assault Romero, Valenzuela, and Baumea with dangerous weapons.**
3. **Summarize the reasons the Court rejected the government's arguments and ordered that Garcia should go free.**
4. **In your opinion, was there an agreement to assault Romero, Valenzuela, and Baumea with dangerous weapons? Back up your answer with relevant facts and arguments from the case excerpt.**
5. **According to the Court, what "fundamental principle of our justice system" would the government's definition of "agreement" violate? Do you agree? Explain your answer.**

Conspiracy *Mens Rea*

Conspiracy *mens rea* wasn't defined clearly at common law, and most modern legislatures haven't made it any clearer. This leaves the courts to define it. The courts in turn have taken imprecise, widely divergent, and inconsistent approaches to the *mens*

rea problem. According to former Supreme Court Justice Robert Jackson, "The modern crime of conspiracy is so vague that it almost defies definition" (*Krulewitch v. U.S.* 1949, 445–46).

Authorities frequently call conspiracy a specific-intent crime. But what does that mean? Does it mean that conspiracy involves intent to enter an agreement to commit a crime? Or does conspiracy also have to include an intent to attain a specific *criminal objective*? A **criminal objective** is the criminal goal of an agreement to commit a crime. For example, if two men agree to burn down a building, they intend to commit arson. But if they don't intend to hurt anyone and someone dies, did they also conspire to commit murder? Not if the conspiracy *mens rea* means the specific intent to achieve a particular criminal objective. This example demonstrates an important distinction between, on one hand, the intent to make agreements and, on the other hand, the intent to achieve a criminal objective. If the objective is to commit a specific crime, it has to satisfy that crime's *mens rea*. So conspiring to take another's property isn't conspiring to commit larceny unless the conspirators intended to deprive permanently the owner of possession (Chapter 11).

Courts further complicate conspiracy *mens rea* by not clarifying whether it requires purpose. Consider cases involving suppliers of goods and services, such as doctors who order drugs from pharmaceutical companies that they then use or sell illegally. At what point do the suppliers become co-conspirators, even though they haven't agreed specifically to supply drugs for illegal distribution?

Do prosecutors have to prove the suppliers agreed specifically to further the buyers' criminal purposes? Most courts say yes, even though that kind of proof is difficult to obtain, because as we've already seen, conspirators aren't foolish enough to put proof of their crimes in writing. So purpose has to be inferred from circumstances surrounding the agreement, such as quantities of sales, the continuity of the supplier-recipient relationship, the seller's initiative, a failure to keep records, and the relationship's clandestine nature. Some argue that knowing, or conscious, wrongdoing ought to satisfy the conspiracy *mens rea* (*Direct Sales Co. v. U.S.* 1943).

Parties

The traditional definition of "conspiracy" includes the attendant circumstance element that agreements involve "two or more parties agreeing or combining to commit a crime" (ALI 1985, 3:398). Most modern statutes have replaced this traditional definition with a **unilateral approach** that doesn't require that all conspirators agree—or even know—the other conspirators. For example, if one of two conspirators secretly has no intention to go through with the agreement, the other conspirator is still a party.

When there's more than one party, failure to convict one party doesn't prevent conviction of other parties to the conspiracy. Typically, statutes are similar to the Illinois Criminal Code (*Illinois Criminal Law and Procedure* 1988), which provides:

> It shall not be a defense to conspiracy that the person or persons with whom the accused is alleged to have conspired
>
> 1. Has not been prosecuted or convicted, *or*
> 2. Has been convicted of a different offense, *or*
> 3. Is not amenable to justice, *or*
> 4. Has been acquitted, *or*
> 5. Lacked the capacity to commit an offense. (chap. 38, § 8-4)

Large-Scale Conspiracies

The relationship of parties to conspiracies can get intricate, particularly when they involve large operations. Most of these large-scale conspiracies fall into two major patterns: "wheel" and "chain" conspiracies. In **wheel conspiracies**, one or more defendants participate in every transaction. These participants make up the hub of the wheel conspiracy. Others participate in only one transaction; they are the spokes in the wheel. In **chain conspiracies**, participants at one end of the chain may know nothing of those at the other end, but every participant handles the same commodity at different points, such as manufacture, distribution, and sale.

Chain conspiracies often involve the distribution of some commodity, such as illegal drugs. In one famous old case still relevant today, *U.S. v. Bruno* (1939), smugglers brought narcotics into New York, middlemen purchased the narcotics, and two groups of "retailers" (one operating in New York and the other in Louisiana) bought narcotics from middlemen.

Criminal Objective

Conspiracy is an agreement but an agreement to do what? In the old days, the criminal objective was defined to cover a broad spectrum. The objective could be as narrow as an agreement to commit a felony or as broad as agreements to

- Commit "any crime."
- Do "anything unlawful."
- Commit "any act injurious to the public health, or for the perversion of or obstruction of justice, or due administration of the laws" (ALI 1985, 3:395).
- Do even "lawful things by unlawful means."

In most modern statutes, the criminal objective is almost always limited to agreements to commit crimes.

The often vague definitions of the elements in conspiracy offer considerable opportunity for prosecutorial and judicial discretion. At times, this discretion borders on abuse, leading to charges that conspiracy law is unjust. First, a general criticism is that conspiracy law punishes conduct too far remote from the actual crime. Second, labor organizations, civil liberties groups, and large corporations charge that conspiracy is a weapon against their legitimate interests of, respectively, collective bargaining and strikes, dissent from accepted points of view and public policies, and profit making.

Critics say that when prosecutors don't have enough evidence to convict for the crime itself, they turn, as their last hope, to conspiracy. Conspiracy's vague definitions greatly enhance the chance for a guilty verdict. Not often mentioned, but extremely important, is that intense media attention to conspiracy trials can lead to abuse. This happened in the conspiracy trials of Dr. Benjamin Spock, the Chicago Eight, and others involving radical politics during the 1960s.

It also occurred in the Watergate conspiracy trials involving President Nixon's associates during the 1970s, in the alleged conspiracies surrounding the sale of arms to Iran for hostages and the subsequent alleged diversion of funds during the 1980s, and in the early 2000s' alleged conspiracy of Osama bin Laden's chauffer and the various alleged conspiracies of officials in the White House.

Several states have made efforts to overcome these criticisms by defining conspiracy elements more narrowly. The definitions of "agreement or combination" (two or more parties combining to commit crimes) are no longer as vague as they once were.

The Model Penal Code has adopted the overt act requirement (acts in furtherance of the act of agreement), and about half the states are following that lead. Those states have refined *mens rea* to include only purposeful conduct—that is, a specific intent to carry out the objective of the agreement or combination. Knowledge, recklessness, and negligence are increasingly attacked as insufficient culpability for an offense as remote from completion as conspiracy. Furthermore, most recent legislation restricts conspiratorial objectives to criminal ends. Phrases such as "unlawful objects," "lawful objects by unlawful means," and "objectives harmful to public health, morals, trade, and commerce" are increasingly regarded as too broad and, therefore, unacceptable.

On the other hand, the Racketeer Influenced and Corrupt Organizations Act (RICO) (Chapter 11) demonstrates the continued vitality of conspiracy law. RICO reflects the need for effective means to meet the threat posed by organized crime. It imposes enhanced penalties for "all types of organized criminal behavior, that is, enterprise criminality—from simple political to sophisticated white collar schemes to traditional Mafia-type endeavors" (Blakely and Gettings 1980, 1013–14).

Racketeering activity includes any act chargeable under state and federal law, including murder, kidnapping, bribery, drug dealing, gambling, theft, extortion, and securities fraud. Among other things, the statute prohibits using income from a "pattern of racketeering activity" to acquire an interest in or establish an enterprise affecting interstate commerce; conducting an enterprise through a pattern of racketeering; or conspiring to violate these provisions.

RICO's drafters intended the statute to "break the back of organized crime." According to conservative columnist William Safire (1989), the racketeers they had in mind were "loan sharks, drug kingpins, prostitution overlords, and casino operators who hired murderers and arsonists to enforce and extort—you know, the designated bad guys who presumably did not deserve the rights of due process that should protect all of us" (19). Now, however, aggressive prosecutors use RICO against white-collar crime. Rudolf Giuliani, when he was a U.S. Attorney, for example, caused Drexel Burnham Lambert to plead guilty to several counts of securities violations to avoid RICO prosecution, which would not only have resulted in harsher legal penalties for these white-collar criminals but also attached the label of "racketeer" to them (19).

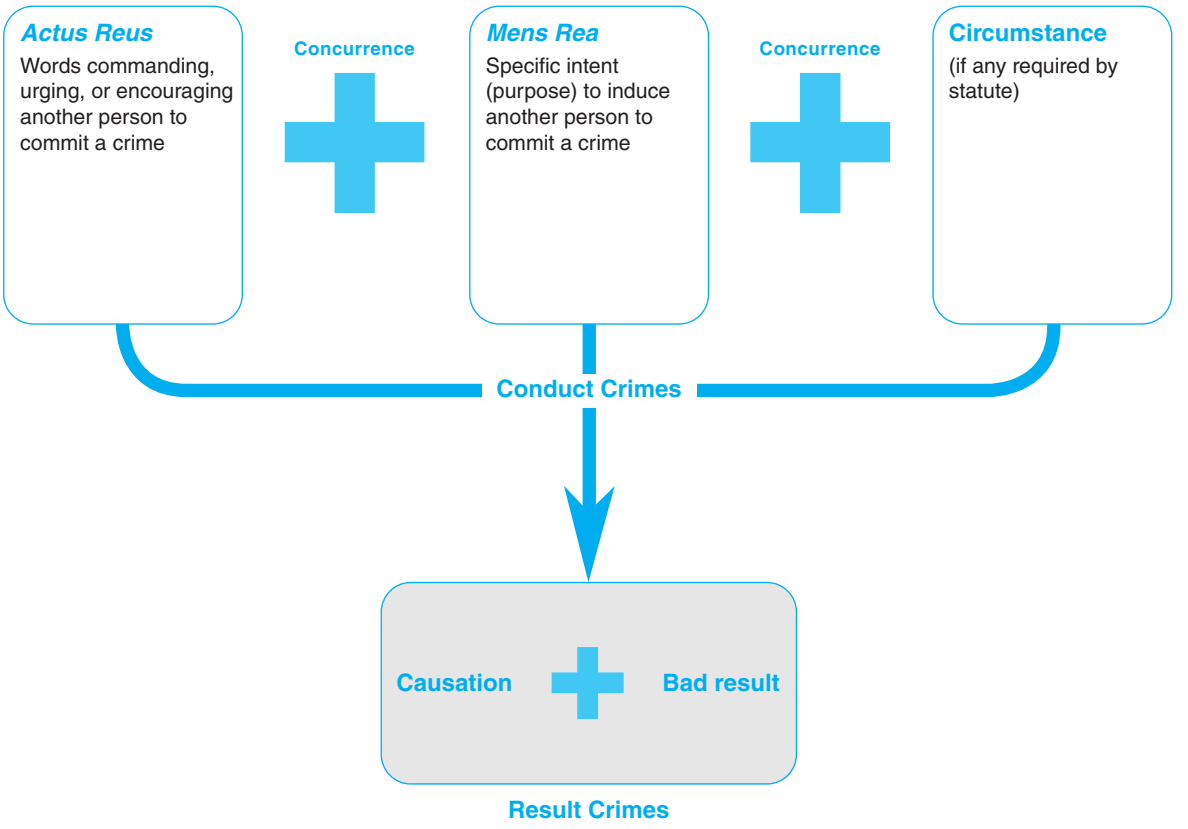
Solicitation

Suppose I want to murder my wife, but I'm afraid to do it. If I ask a friend to kill her and she does, we're both murderers. If she tries to kill her and fails because her gun isn't loaded, then we've committed attempted murder. If she agrees to kill her and buys the gun but doesn't follow through, we've committed conspiracy to commit murder.

But what if I try to get my friend to kill my wife by offering her $5,000, and she turns me down? That's a crime, too—**solicitation**, the crime of trying to get someone else to commit a crime. There's disagreement about whether solicitation to commit a crime is dangerous enough to be a crime.

Those in the "not dangerous enough" group make two arguments to support their position. First, solicitation isn't dangerous enough conduct because an independent moral agent (the person solicited) stands between solicitors and their criminal objectives. Second, solicitors aren't dangerous enough people. They prove it by turning to someone else to do what they're too timid to do themselves.

ELEMENTS OF SOLICITATION



LO 8

Those in the "dangerous enough" group have their own arguments. First, they say solicitation is just another form of the danger created by group participation in crime (Chapter 7), only more removed from the completed crime than conspiracy—kind of like an attempted conspiracy. Second, solicitors are intelligent, artful masters at manipulating others to do their dirty work.

We'll look at the elements of solicitation—the *actus reus*, *mens rea*, and the attendant circumstance of the criminal objective of the solicitation.

Solicitation *Actus Reus*

The criminal act in criminal solicitation consists of words, but the law only imprecisely tells us what words qualify as **solicitation *actus reus***. Courts agree that statements that merely favor committing a crime aren't enough to qualify as criminal acts. So someone who says, "I think it'd be great if someone killed that terrorist" hasn't solicited murder.

There has to be some kind of inducement to commit a crime. The typical words we see in the statutes and court opinions are like the ones we saw in accomplice liability (Chapter 7): "advises," "commands," "counsels," "encourages," "entices," "entreats," "importunes," "incites," "induces," "instigates," "procures," "requests," "solicits," or "urges." In other words, the criminal act in solicitation consists of the *effort* to get another to commit a crime, whether or not the solicitation ever ripens into a completed crime (LaFave and Scott 1986, 419).

Does the solicitor have to address the words to precise individuals? Not necessarily. Soliciting audiences is precise enough. One speaker was convicted for urging his audience to commit murder and robbery. Even the inducement that doesn't reach its

object qualifies. So if I send a letter to my hoped-for collaborator, offering her $30,000 to kill my enemy, I've solicited murder even if the letter gets lost in the mail (*State v. Schleifer* 1923).

Solicitation *Mens Rea*

Solicitation is a specific-intent crime; that is, it's a crime of purpose. The **solicitation *mens rea*** requires words that convey that their purpose is to get someone to commit a specific crime. If I urge my friend who works in an expensive jewelry shop to take a gold chain for me, I've solicited her to steal the chain. If, on the other hand, I ask another friend who works in a clothing shop to get a coat for me to use for the evening, and I plan to return the coat the next morning before anyone knows it's missing, I haven't solicited her to steal the coat because I don't intend to steal the coat, only to use it for the night (Chapter 11).

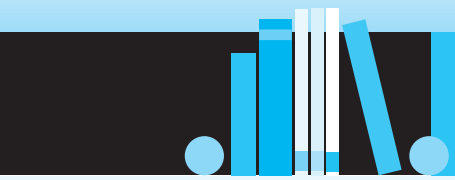
Criminal Objective

Some statutes restrict the circumstance element of the criminal objective to committing *felonies*—in some cases, to committing *violent* felonies. In other jurisdictions, it's a crime to solicit another to commit *any* crime, whether it's a felony, misdemeanor, or violation.

Furthermore, solicitation doesn't have to include an inducement to commit a *criminal* act at all. For example, suppose a robber urges a friend to borrow money and lend it to him for a plane ticket to escape from the jurisdiction. The robber has solicited escape or aiding and abetting a robbery. Although borrowing money isn't a crime, and lending money to a robber isn't by itself a crime, both escape and aiding and abetting robbers are crimes. Someone who urges another to commit those crimes has committed the crime of solicitation.

The New Mexico Court of Appeals dealt with criminal solicitation in *State v. Cotton* (1990).

The New Mexico Court of Appeals dealt with criminal solicitation in* State v. Cotton *(1990).



CASE Did He Solicit His Wife to Bribe or Intimidate a Witness?

State v. Cotton
790 P.2d 1050 (N.M.App. 1990)

HISTORY

James Cotton, the defendant, was convicted in the District Court, Eddy County, of criminal solicitation, and he appealed. The Court of Appeals reversed and remanded.

DONNELLY, J.

FACTS

In 1986, the defendant, together with his wife Gail, five children, and a stepdaughter, moved to New Mexico. A few months later, the defendant's wife and children returned to Indiana. Shortly thereafter, the defendant's fourteen-year-old stepdaughter moved back to New Mexico to reside with him. In 1987, the Department of Human Services investigated allegations of misconduct involving

the defendant and his stepdaughter. Subsequently, the District Court issued an order awarding legal and physical custody of the stepdaughter to the Department of Human Services, and she was placed in a residential treatment facility in Albuquerque.

In May 1987, the defendant was arrested and charged with multiple counts of criminal sexual penetration of a minor and criminal sexual contact of a minor. While in the Eddy County Jail awaiting trial on those charges the defendant discussed with his cellmate, James Dobbs, and Danny Ryan, another inmate, his desire to persuade his stepdaughter not to testify against him. During his incarceration the defendant wrote numerous letters to his wife; in several of his letters he discussed his strategy for defending against the pending criminal charges.

On September 23, 1987, the defendant addressed a letter to his wife. In that letter he requested that she assist him in defending against the pending criminal charges by persuading his stepdaughter not to testify at his trial. The letter also urged his wife to contact the stepdaughter and influence her to return to Indiana or to give the stepdaughter money to leave the state so that she would be unavailable to testify. After writing this letter the defendant gave it to Dobbs and asked him to obtain a stamp for it so that it could be mailed later.

Unknown to the defendant, Dobbs removed the letter from the envelope, replaced it with a blank sheet of paper, and returned the sealed stamped envelope to him. Dobbs gave the original letter written by the defendant to law enforcement authorities, and it is undisputed that the defendant's original letter was never in fact mailed nor received by the defendant's wife.

On September 24 and 26, 1987, the defendant composed another letter to his wife. He began the letter on September 24 and continued it on September 26, 1987. In this letter the defendant wrote that he had revised his plans and that this letter superseded his previous two letters. The letter stated that he was arranging to be released on bond; that his wife should forget about his stepdaughter for a while and not come to New Mexico; that the defendant would request that the Court permit him to return to Indiana to obtain employment; that his wife should try to arrange for his stepdaughter to visit her in Indiana for Christmas; and that his wife should try to talk the stepdaughter out of testifying or to talk her into testifying favorably for the defendant. The defendant also said in the letter that his wife should "warn" his stepdaughter that if she did testify for the state "it won't be nice . . . and she'll make [New Mexico] news," and that, if the stepdaughter was not available to testify, the prosecutor would have to drop the charges against the defendant.

The defendant secured his release on bail on September 28, 1987, but approximately twenty-four hours later was rearrested on charges of criminal solicitation. . . . At the time the defendant was rearrested, law enforcement officers discovered and seized from the defendant's car two personal calendars and other documents written by the defendant. It is also undisputed that the second letter was never mailed to the defendant's wife.

Following a jury trial, the defendant was convicted on two counts of criminal solicitation. A third count of criminal solicitation was dismissed by the state prior to trial.

OPINION

The charges of criminal solicitation were alleged to have occurred on or about September 23, 1987. Count I of the amended criminal information alleged that defendant committed the offense of criminal solicitation by soliciting another person "to engage in conduct constituting a felony, to-wit: Bribery or Intimidation of a Witness (contrary to Sec. 30-24-3, NMSA 1978)." Count II alleged that defendant committed the offense of criminal solicitation by soliciting another "to engage in conduct constituting a felony, to-wit: Custodial Interference (contrary to Sec. 30-4-4, NMSA 1978)."

The offense of criminal solicitation as provided in NMSA 1978, Section 30-28-3 (Repl. Pamp. 1984), is defined in applicable part as follows:

> A. Except as to bona fide acts of persons authorized by law to investigate and detect the commission of offenses by others, a person is guilty of criminal solicitation if, with the intent that another person engage in conduct constituting a felony, he solicits, commands, requests, induces, employs or otherwise attempts to promote or facilitate another person to engage in conduct constituting a felony within or without the state.

Defendant contends that the record fails to contain the requisite evidence to support the charges of criminal solicitation against him because defendant's wife, the intended solicitee, never received the two letters. In reviewing this position, the focus of our inquiry necessarily turns on whether or not the record contains proper evidence sufficient to establish each element of the alleged offenses of criminal solicitation beyond a reasonable doubt.

On appeal, we view the testimony and evidence in the light most favorable to the state, resolving all conflicts therein and indulging all permissible inferences therefrom in favor of the verdict. The evidence may be direct or circumstantial. However, evidence supporting a criminal conviction must be based on logical inference and not upon surmise or conjecture.

The state's brief-in-chief states that "neither of these letters actually reached Mrs. Cotton, but circumstantial evidence indicates that other similar letters did reach her during this period." The state also argues that under the express language of Section 30-28-3(A), where defendant is shown to have the specific intent to commit such offense and "otherwise attempts" its commission, the offense of criminal solicitation is complete. The state reasons that even in the absence of evidence indicating that the solicitations were actually communicated to or received by the solicitee, under our statute, proof of defendant's acts

of writing the letters, attempts to mail or forward them, together with proof of his specific intent to solicit the commission of a felony constitutes sufficient proof to sustain a charge of criminal solicitation. We disagree.

The offense of criminal solicitation, as defined in Section 30-28-3 by our legislature, adopts in part language defining the crime of solicitation as set out in the Model Penal Code promulgated by the American Law Institute. As enacted by our legislature, however, Section 30-28-3 specifically omits that portion of the Model Penal Code subsection declaring that an uncommunicated solicitation to commit a crime may constitute the offense of criminal solicitation. The latter omission, we conclude, indicates an implicit legislative intent that the offense of solicitation requires some form of actual communication from the defendant to either an intermediary or the person intended to be solicited, indicating the subject matter of the solicitation.

Defendant's convictions for solicitation are reversed and the cause is remanded with instructions to set aside the convictions for criminal solicitation.

QUESTIONS

1. **State the elements of solicitation according to the New Mexico statute.**
2. **List all the facts relevant to deciding whether James Cotton satisfied the act and mental elements of solicitation according to the statute.**
3. **In your opinion, should solicitation include an attendant circumstance element requiring that the solicitation be communicated to the person being solicited? Explain your answer, taking into account the arguments for and against having a crime of solicitation.**

SUMMARY

LO 1

- Each inchoate offense has some of its own elements, but they all share two elements: the *mens rea* of purpose or specific intent and the *actus reus* of taking some steps toward accomplishing the criminal purpose—but not enough steps to complete the intended crime.

LO 2

- Incomplete criminal conduct poses a dilemma: whether to punish someone who's done no harm or to set free someone who's determined to commit a crime.

LO 3, LO, 4 LO 5

- Liability for criminal attempt offenses is based on two old and firmly entrenched rationales. One focuses on dangerous acts *(actus reus)*, the other on dangerous persons *(mens rea)*. Attempt *actus reus* is based on two theories of attempt: the social harm from dangerous conduct and the social harm from dangerous people.

LO 6

- A legal impossibility occurs when actors intend to commit crimes, and do everything they can to carry out their criminal intent, but the criminal law doesn't ban what they did. A factual impossibility occurs when actors intend to commit a crime and try to but some fact or circumstance—an extraneous factor—interrupts them to prevent the completion of the crime.

LO 7

- A little more than half the states and the U.S. government accept the affirmative defense of voluntary abandonment to attempt liability. According to the Model Penal Code, voluntary abandonment means: a change in the actor's purpose not influenced by outside circumstances, what may be termed "repentance" or "change of heart."

LO 8

- Conspiracy, the crime of agreeing with one or more people to commit a crime, is further removed from actually committing a crime than attempts to commit crimes. In fact, one can become guilty of conspiracy long before his act has come so dangerously near to completion as to make him criminally liable for the attempted crime.

LO 8

- Conspiracy *actus reus* consists of two parts: (1) an agreement to commit a crime (in all states); and (2) an overt act in furtherance of the agreement (in about half the states).

LO 8

- Conspiracy *mens rea* isn't clearly defined in modern legislation, and courts have taken imprecise, widely divergent, and inconsistent approaches to the *mens rea* problem.

LO 8

- Solicitation is the crime of trying to get someone else to commit a crime. The *actus reus* of solicitation requires words that actually try to get someone to commit a crime. *Mens rea* requires purpose or specific intent to get someone to commit a crime.

KEY TERMS

criminal attempts, p. 235
criminal conspiracy, p. 235
criminal solicitation, p. 235
inchoate offenses, p. 236
offenses of general application, p. 236
dangerous act rationale, p. 237
dangerous person rationale, p. 237
general attempt statute, p. 238
specific attempt statutes, p. 238
attempt *mens rea*, p. 239
attempt *actus reus*, p. 241
last proximate act rule, p. 241
proximity tests, p. 242
dangerous proximity to success test/physical proximity test, p. 243
indispensable element test, p. 243
unequivocality test/*res ipsa loquiter* test ("the act speaks for itself"), p. 243
probable desistance test, p. 244
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WEB RESOURCES

To prepare for exams, visit the *Criminal Law* companion website at www.cengage.com/criminaljustice/samaha, which features essential review and study tools such as flashcards, a glossary of terms, tutorial quizzes, and Supreme Court updates.

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9

Nancy Niedzielski, left, looks on in Woodinville, Washington, as Debra Chaput, right, of Kirkland, Washington, signs a ballot petition in support of an initiative that would make Washington the second state in the nation to allow physicians to help terminally ill patients end their lives.

LEARNING OBJECTIVES

1 Understand that criminal homicide is different from all other crimes because of the finality of its result: the death of the victim.

2 Appreciate that most of the law regarding criminal homicide is about grading the seriousness of the offense. Grading murder into first and second degree is important because only first-degree murder qualifies for the death penalty.

3 Appreciate that the meaning of "person" is integral to homicide law and understand how that presents problems at both ends of the life cycle.

4 Understand how degrees of murder developed through history and their relation to capital punishment.

5 Understand how most criminal homicide statutes apply to corporations, but prosecutions are rare.

6 Understand that the heart of voluntary manslaughter is an intentional, sudden killing triggered by an adequate provocation.

7 Know that provocation is not an excuse for criminal homicide; it only reduces the seriousness of the crime and the punishment to allow for human frailty.

8 Know that the central elements in involuntary manslaughter are its *actus reus* (voluntary act or omission) and its *mens rea* (unintentional killing); causing the criminal harm of death.

9 Understand that criminal negligence homicide statutes cover a wide field, the most common, unintentional deaths caused by operating vehicles and firearms, but also practicing medicine, handling explosives, delivering dangerous drugs, allowing vicious animals to run free, failing to care for a sick child, and not providing fire exits in businesses.

Crimes Against Persons I

Murder and Manslaughter

CHAPTER OUTLINE

Did He Murder His Wife?

Schnopps and his wife were having marital problems. Among the problems was that his wife was having an affair with a man at work. Schnopps found out about the affair. Mrs. Schnopps moved out of the house, taking their children with her. Schnopps asked his wife to come to their home and talk over their marital difficulties. Schnopps told his wife that he wanted his children at home and that he wanted the family to remain intact. Schnopps cried during the conversation and begged his wife to let the children live with him and to keep their family together. His wife replied, "No, I am going to court, you are going to give me all the furniture, you are going to have to get the Hell out of here, you won't have nothing." Then, pointing to her crotch, she said, "You will never touch this again, because I have got something bigger and better for it." On hearing those words, Schnopps claims that his mind went blank and that he went "berserk." He went to a cabinet and got out a pistol he had bought and loaded the day before, and he shot his wife and himself. Schnopps survived the shooting, but his wife died.

(Commonwealth v. Schnopps, 1983)

LO 1

"Death is different," the U.S. Supreme Court said about capital punishment. Killing is different, too—it's the most serious of all crimes. In 1769, Blackstone, the great eighteenth-century commentator on the criminal law, introduced his chapter on homicide with words that are pretty close to describing the crimes you'll be learning about in this chapter:

> Of crimes injurious to persons, the most important is the offence of taking away that life, which is the immediate gift of the great creator; and which therefore no man can be entitled to deprive another of. The subject therefore of the present chapter will be, the offense of homicide or destroying the life of man, in its several stages of guilt, arising from the particular circumstances of mitigation or aggravation. (4:177)

Of course, raping, assaulting, and kidnapping harm people, too; but however awful they may be, they leave their victims alive (Chapter 10). And crimes against homes and property (Chapter 11)—crimes against public order and morals—also hurt their victims and society (Chapter 12), but these are injuries to worldly things. According to the distinguished professor of criminal law George P. Fletcher (1978):

> Killing another human being is not only a worldly deprivation; in the Western conception of homicide, killing is an assault on the sacred, natural order. In the Biblical view, the person who slays another was thought to acquire control over the blood—the life force—of the victim. The only way that this life force could be returned to God, the origin of all life, was to execute the slayer himself. In this conception of crime and punishment, capital execution for homicide served to expiate the desecration of the natural order. (235–36)

Criminal Homicide in Context

To put criminal homicide in the context of the crimes you'll be studying throughout the rest of the book, they're rare events. In 2007, there were 16,929 murders reported to the FBI compared with 1,408,337 total violent felonies. The total number of all crimes in the FBI index of serious crimes (homicide, forcible rape, robbery, aggravated assault, burglary, theft, motor vehicle theft, and arson) was 9,843,481 (FBI 2008).

These numbers aren't meant to diminish the seriousness of killing another person—an act that stands alone in its awfulness. But there are more reasons why we study criminal homicide. Much of what you've learned in the earlier chapters grew out of the law of criminal homicide. This is especially true of the mental element, or *mens rea*, and the justification of self-defense. But there's more: the three-step analysis of criminal liability—(1) criminal conduct, (2) without justification, and (3) excuse—grew out of the great work on the law of criminal homicide written by the principal drafter of the Model Penal Code (MPC), Professor Herbert Wechsler at Columbia Law School (Michael and Wechsler 1937; Dubber and Kelman 2005, 846).

LO 2

Most of the law of homicide is devoted to answering questions like: Is this murder first or second degree? Is that killing murder or manslaughter? Is this manslaughter voluntary or involuntary? Students ask: "Does it really matter?" Certainly not to the victim—who's already and always dead! But it does make a big practical difference. Why? Because the punishment for criminal homicide depends on the degree of murder or the type of manslaughter committed.

Three elements of criminal homicide—*actus reus*, *mens rea*, and special mitigating and aggravating circumstances—are used to define the kinds and grade the seriousness of the criminal homicides you'll learn about in this chapter. Defining what kind of criminal homicide a particular killing is and grading its seriousness will make you think about deep philosophical questions regarding crime and punishment. This is good and proper.

But there's more than a philosophical question here. There's the practical question of the kind and amount of punishment to inflict on people who kill other people. Should we kill them? Lock them up for the rest of their lives? Lock them up for a certain number of years? Fine them? All of these are provided for in the state and federal criminal codes. And they vary not only from one criminal homicide to another but also from state to state, sometimes drastically. For the most striking example, first-degree murder is the only crime you can die for, and in non–death penalty states, it's the only crime for which you can get life in prison without a chance of parole.

As you read the chapter, keep in focus both the moral or ethical dimension and the practical dimension of criminal homicide and their importance in shaping the definition, grading, and punishment of how and why one person kills another.

In this chapter, we'll look at murder and manslaughter. We'll examine the history of murder law; the elements of murder and manslaughter—namely, the (1) *actus reus*, (2) the *mens rea*, and (3) the circumstance elements; and how the elements affect the punishment of the various kinds of murder and manslaughter. Then, we'll turn to the lesser offense of criminally negligent homicide, or manslaughter. Before we do, we'll look at the important preliminary question: What does "person" or "human being" mean in criminal homicide law.

The Meaning of "Person" or "Human Being"

LO 3

Killing another "person" is central to criminal homicide liability because it defines who's a victim. "Person" seems like a simple concept to understand. However, it raises deep philosophical questions and hot controversy. We won't get deeply into the broad controversy, except as a preliminary matter to understanding the elements of criminal homicide. The definition of "person" for purposes of criminal homicide presents problems at both ends of the life cycle—when life begins and when it ends. When life begins tells us when a potential victim becomes a real victim; when life ends tells us when a real victim is no longer a victim.

When Does Life Begin?

LO 3

Throughout most of its history, homicide law has followed the **born-alive rule**. According to that rule, to be a person, and therefore a homicide victim, a baby had to be "born alive" and capable of breathing and maintaining a heartbeat on its own. There have been only a few exceptions to the rule; *People v. Chavez* (1947) was one.

Josephine Chavez, an unmarried woman about 21 years old, was charged with murdering her second newborn during its birth. She "knew the baby was going to be born" while she was sitting on the toilet. She didn't call for help. "It came out rather slow. Next, the head was out, and it sort of dropped out real fast." She knew from her first baby's

birth that the placenta had to be removed and so, after the baby was in the toilet "a little while," she expelled the placenta by putting pressure on her stomach. She didn't notice whether the baby's head was under water, because the afterbirth fell over its head. It took two to three minutes for the placenta to come out.

Then, she removed the baby from the toilet, picking it up by the feet, and cut the cord with a razor blade. She testified that the baby was limp and made no cry; that she thought it was dead; and that she made no attempt to tie the cord as she thought there was no use. She then laid the baby on the floor and proceeded to take further care of herself and clean up the room.

The baby remained on the floor about fifteen minutes, after which she wrapped it in a newspaper and placed it under the bathtub to hide it from her mother. She then returned to bed and the next day went about as usual, going to a carnival that evening. On the next day, April 1, her mother discovered the body of the infant under the bathtub (92–95).

Chavez was convicted of manslaughter. She appealed to the California Court of Appeals. According to the Court, in the opinion affirming the conviction:

> A viable child in the process of being born is a human being within the meaning of the homicide statutes, whether or not the process has been fully completed. . . . It would be a mere fiction to hold that a child is not a human being because the process of birth has not been fully completed, when it has reached that state of viability when the destruction of the life of its mother would not end its existence and when, if separated from the mother naturally or by artificial means, it will live and grow in the normal manner.
>
> We have no hesitation in holding that the evidence is sufficient here to support the implied finding of the jury that this child was born alive and became a human being within the meaning of the homicide statutes. The evidence is sufficient to support a finding, beyond a reasonable doubt, that a live child was actually born here, and that it died because of the negligence of the appellant in failing to use reasonable care in protecting its life, having the duty to do so. This baby was completely removed from its mother and even the placenta was removed. (94–95)

But in *Keeler v. Superior Court* (1970, discussed in Chapter 1), the California Supreme Court refused to push back the definition of "person" to include fetuses before the birth process. Keeler was convicted of manslaughter for causing the death of his wife's unborn fetus by kicking her in the stomach.

Some states that follow the "born alive" common law rule have held that deaths due to prenatal injuries can be prosecuted as criminal homicide if the fetus dies after it's born alive. For example, in *State v. Cotton* (2000), Lawrence Cotton accidentally shot his girlfriend, L. W., in the back of the head. L. W. was eight and a half months pregnant at the time. Although L. W. died shortly after arriving at the hospital, her daughter was delivered alive. But the fatal injury to L. W. had so decreased the blood supply to the baby that the infant died the following day (920).

Cotton was convicted on two counts of reckless homicide, one for L. W. and one for the infant. Cotton argued that the cause of death, his accidental shot that killed his girlfriend, occurred before the fetus was born. The Arizona Court of Appeals rejected Cotton's argument:

> That the shooting in this case occurred while the infant was in utero does not preclude her post-birth status as a "person" for purposes of Arizona's homicide statutes. While the homicide statutes require that the victim be a "person," they do not limit the nature or timing of the injury that causes the death of the "person." (922)

> . . . Because the infant here was undeniably a "person" at the time of her death a day after the shooting, it is irrelevant that the injuries that led to her death were inflicted while she was still in utero. (923)

About half the states have filled the gap in the "born alive" rule by passing two types of statutes. One type revises existing homicide statutes to include persons and fetuses as potential homicide victims. California passed this kind of statute to overturn *Keeler* by adding just three words to its murder statute, which before *Keeler* read "Murder is the unlawful killing of a human being with malice aforethought." Since *Keeler* it reads, "Murder is the unlawful killing of a human being, *or a fetus*, with malice aforethought" (emphasis added; California Penal Code 2006, § 187(a)).

Other state legislatures have created the new crime of **feticide**, specifically directed at the killing of fetuses. These statutes vary as to when in the development of the fetus criminal liability attaches. Some say it's at viability; some say at "quickening"; some specify the number of weeks. Seven states say criminal liability attaches at "conception" or "fertilization" (LaFave 2003a, 729).

When Does Life End?

LO 3

It used to be easy to define "death": when the heart and breathing stop. Not anymore. Determining when life ends has become increasingly complex as organ transplants and sophisticated artificial life support mechanisms make it possible to maintain vital life signs. Still, to kill a dying person, to accelerate a person's death, or to kill a "worthless" person is clearly homicide under current law. In *State v. Fiero* (1979, 77–78) a doctor who removed a vital organ too soon committed criminal homicide. And anyone who kills another by purposely disconnecting a respirator has also committed criminal homicide.

The concept of brain death has complicated the simple definition as when the heart and breathing stop. This complication has implications not just for medicine and morals but also for criminal law. If artificial supports alone maintain breathing and the heartbeat while brain waves remain minimal or flat, brain death has occurred. The Uniform Brain Death Act provides that an individual who has suffered irreversible cessation of all brain functions, including those of the brain stem, is dead (ALI 1985, 2:1, 10–11).

More difficult cases involve individuals with enough brain functions to sustain breathing and a heartbeat but nothing more, such as patients in a deep coma. They may breathe and their hearts may beat on their own, but are they alive according to the criminal law? Troubling cases arise in which patients in a deep coma have been described by medical specialists as "vegetables" but regain consciousness and live for a considerable time afterward, such as the Minneapolis police officer who was shot and written off for dead after more than a year in a deep coma. He regained consciousness and lived for several more years.

Doctor-Assisted Suicide

LO 3

> Whoever no longer wishes to live shall state his reasons to the Senate [ancient Greek government], and after having received permission shall abandon life. If your existence is hateful to you, die; if you are overwhelmed by fate, drink the hemlock.

> If you are bowed with grief, abandon life. Let the unhappy man recount his misfortune, let the magistrate supply him with the remedy, and his wretchedness will come to an end.
>
> *Libanius, ancient Greek philosopher, quoted in Messinger (1993, 183)*

> It would seem unlawful to kill any living thing. For the Apostle says (Romans 13:2): "They that resist the ordinance of God purchase to themselves damnation." Now Divine providence has ordained that all living things should be preserved, according to Psalm 146:8–9, "Who maketh grass to grow on the mountains . . . Who giveth to beasts their food." Therefore it seems unlawful to take the life of any living thing.
>
> *St. Thomas Aquinas,* Summa Theologica *(1265–68)*

> The sick they see to with great affection, and let nothing at all pass concerning either physic or good diet whereby they may be restored again to their health. Them that be sick of incurable diseases they comfort with sitting by them, with talking with them, and to be short, with all manner of helps that may be.
>
> But if the disease be not only incurable, but also full of continual pain and anguish; then the priests and the magistrates exhort the man, seeing his is not able to do any duty of life, and by outliving his own death is noisome and irksome to others and grievous to himself, that he will determine with himself no longer to cherish that pestilent and painful disease.
>
> And seeing his life is to him but a torment, that he will not be unwilling to die, but rather take a good hope to him, and either dispatch himself out of that painful life, as out of a prison, or a rack of torment, or else suffer himself willingly to be rid of it by others. And in so doing they tell him he shall do so wisely, seeing by his death he shall lose no commodity, but end his pain. But they cause none such to die against his will, nor they use no less diligence and attendance about him, believing this to be an honorable death.
>
> *Sir Thomas More,* Utopia *(1518)*

> Medical jurisprudence is subordinate to medical ethics which expresses the moral order willed by God. Medical jurisprudence cannot, therefore, in any circumstances permit a doctor or patient to carry out euthanasia directly, nor may a doctor ever perform it upon himself or anyone else.
>
> *Pope Pius XII (1956)*

As the opening quotes make clear, the subject of helping others die has confronted societies throughout history with "the troubling dilemma of defining the meaning of death and the value of life" (Messinger 1993, 175). In our time, we call helping others die (assisted suicide) **"euthanasia."** The *Oxford English Dictionary*'s (2009) eloquent definition: "a gentle and easy death" or "the means of bringing about a gentle and easy death" hides the deep, emotional, and irreconcilable division over helping others die. *Black's Law Dictionary*'s (2004, 594) more specific definition focuses on legal and ethical issues, and the appropriate (and inappropriate) surrounding it:

> The act or practice of killing or bringing about the death of a person who suffers from an incurable disease or condition, especially a painful one, for reasons of mercy.

Kinds of Euthanasia

Euthanasia occurs in various forms. It can be passive (failing to take any extraordinary measures to keep someone alive) or active (deliberate acts to cause death). It can be voluntary whereby a dying person can make a rational request and be examined to guarantee the validity of the request, or involuntary. Involuntary euthanasia can be beneficient (a family and court decision with good intentions) or malevolent (purposeful disregard of legal process or by co-opting the legal process (Messinger 1993, 180–81). We concentrate on active voluntary euthanasia as it works out in doctor-assisted suicide.

Arguments Against Doctor-Assisted Suicide

There are two primary arguments against doctor-assisted suicide: First, it's intrinsically immoral and wrong; second, unacceptable consequences will follow from it ("the slippery slope" argument) Messinger 1993, 215). Let's look at each.

Intrinsic Immorality

This argument stems from the Judeo-Christian heritage asserting the immorality of bringing about "premature" death. The Sixth Commandment, "Thou shalt not kill," leaves no doubt where the Judeo-Christian God stands on the issue. Humans are banned from killing in all circumstances. Why? The sanctity of human life and the merits of suffering. Either obey the divine will or take the consequences. In other words, divine will trumps human suffering, no matter how extreme that suffering is (Messinger 1993, 214–15).

"Slippery Slope" Argument

Honest mistakes and malevolent motives can happen, and we can't control them. The potential for wrong diagnoses and the threat of nonmercy killings are too great to justify any exceptions to a total ban on doctor-assisted suicides. In addition, society's interest, not just the individual, are at stake. When it runs amok, it can wreak great havoc, such as the Nazi atrocities, opponents point out (Messinger 1993, 215).

Mary Senender of the Anti-Euthanasia Task Force, makes this argument for the impact on society:

> If you want to commit suicide, you can do that. It's not illegal. If you want to hang yourself with a velvet cord from the rafters of your garage—I'm not recommending it and I wish you wouldn't—you *can* do that. If you want to blow your brains out with diamond-studded pistol—I hope you won't, for your sake and for your family's—you can *do* that. If you want to save up pills and poison yourself—I'd try to talk you out of it—you *could* do it. But what you're asking for—what proponents of euthanasia are demanding—is *my approval* and *acceptance* of your actions. What's more you expect—and proponents of "aid dying" demand—someone *else* to help.
>
> When you ask for social and legal approval of killing, you're asking ME to participate in YOUR death, to share a communal responsibility and burden. And guilt. And blame. And I *won't do it*! Now, you're meddling with MY choices and MY conscience. Don't expect me to be silent when those issues of public policy are debated; I have my rights too. (Senander 1988)

Arguments in Favor of Doctor-Assisted Suicide

Darkling I listen; and for many a time
I have been half in love with easeful Death,
Call'd him soft names in many a mused rhyme,
To take into the air my quiet breath;
Now more than ever seems it rich to die,
To cease upon the midnight with no pain . . .

John Keats (1819) "Ode to a Nightingale"

Supporters say that the argument for doctor-assisted suicide isn't so much an argument *for* euthanasia; it's an argument *against* "insufferable and unending pain; in a word, its about compassion" (Messinger 1993, 223). But, they don't stop with compassion. They maintain that there's a constitutional right to assisted suicide.

Constitutional Right to Doctor-Assisted Suicide

According to proponents of the right to doctor-assisted suicide, the "right" is closely linked to the principle of personal autonomy embodied in the Court-created and controversial right to privacy (Chapter 2). Resting the right to assisted suicide on the shaky controversial right to privacy has led proponents to look elsewhere and rely on a **"presumption of bodily integrity."** This argument relies on the English philosopher John Stuart Mill's statement that a state can't exercise power over individual members of society except to prevent harm to others (Messinger 1993, 236). While the right to privacy is controversial, the right to bodily integrity is difficult to raise technically because of the judicial restrictions on "creating" law and rights (Chapters 1 and 2).

Others have argued that the "liberty interest" guaranteed in due process clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution includes the right to die and to seek assistance in exercising the right. But the U.S. Supreme Court has upheld Washington State's ban on assisting another to commit suicide because recognizing a right to doctor-assisted suicide would require the reversal of "centuries of legal doctrine and practice" [*Washington v. Glucksberg* (1997), 723].

Washington v. Gluckserg leaves to state legislatures the decision to criminalize doctor-assisted suicide. In a decisive Washington State ballot initiative on election day 2008, three out of five Washington State voters approved an initiative to decriminalize doctor-assisted suicide. Washington used as its model Oregon's Death with Dignity Act, which allows individuals to get a doctor to help them commit suicide (Figure 9.1) and which the U.S. Supreme Court approved in *Gonzalez v. Oregon* (2005).

Doctor-Assisted Suicide and the Criminal Law

To justify doctor-assisted suicide runs up against the subject of this chapter—criminal homicide. The law of criminal homicide makes it difficult to distinguish doctor-assisted suicide from first-degree murder. Proponents argue that murder is condemned because it both violates a person's interest in continuing to live and is a destructive force in society. Neither of these is present in doctor-assisted suicide. The disruption to society has already taken place by the loss of a productive member of society. And violation of the right to live is obviously lacking—the person has decided she doesn't want to live (Messinger 1993, 237–38).

FIGURE 9.1 Oregon Death with Dignity Act

Written Request for Medication to End One's Life in a Humane and Dignified Manner
127.805 s.2.01. Who may initiate a written request for medication.

(1) An adult who is capable, is a resident of Oregon, and has been determined by the attending physician and consulting physician to be suffering from a terminal disease, and who has voluntarily expressed his or her wish to die, may make a written request for medication for the purpose of ending his or her life in a humane and dignified manner in accordance with ORS 127.800 to 127.897.
(2) No person shall qualify under the provisions of ORS 127.800 to 127.897 solely because of age or disability. [1995 c.3 s.2.01; 1999 c.423 s.2]

127.897 s.6.01. Form of the request.

A request for a medication as authorized by ORS 127.800 to 127.897 shall be in substantially the following form:

Request for Medication to End My Life in a Humane and Dignified Manner

I, _____, am an adult of sound mind.

I am suffering from _____ , which my attending physician has determined is a terminal disease and which has been medically confirmed by a consulting physician.

I have been fully informed of my diagnosis, prognosis, the nature of medication to be prescribed and potential associated risks, the expected result, and the feasible alternatives, including comfort care, hospice care and pain control.

I request that my attending physician prescribe medication that will end my life in a humane and dignified manner.

Initial one:

_____ I have informed my family of my decision and taken their opinions into consideration.

_____ I have decided not to inform my family of my decision.

_____ I have no family to inform of my decision.

I understand that I have the right to rescind this request at any time.

I understand the full import of this request and I expect to die when I take the medication to be prescribed. I further understand that although most deaths occur within three hours, my death may take longer and my physician has counseled me about this possibility.

I make this request voluntarily and without reservation, and I accept full moral responsibility for my actions.

Signed: _____

Dated: _____

(*Continued*)

FIGURE 9.1 Oregon Death with Dignity Act (*Continued*)

Declaration of Witnesses

We declare that the person signing this request:

(a) Is personally known to us or has provided proof of identity;

(b) Signed this request in our presence;

(c) Appears to be of sound mind and not under duress, fraud or undue influence;

(d) Is not a patient for whom either of us is attending physician.

_____ Witness 1/Date

_____ Witness 2/Date

NOTE: One witness shall not be a relative (by blood, marriage or adoption) of the person signing this request, shall not be entitled to any portion of the person's estate upon death and shall not own, operate or be employed at a health care facility where the person is a patient or resident. If the patient is an inpatient at a health care facility, one of the witnesses shall be an individual designated by the facility.

It should be clear that the positions on doctor-assisted suicide are irreconcilable because they reflect opposing strongly held beliefs about the meaning of life. Professor Thane Josef Messinger (1993) wrote words still applicable today:

> People view "life" as either sacrosanct, in which case any infinitesimally minute portion always has positive value, or as relative, in which case life can become negative at some variable point in the future, the only question being when. (224)

Public Opinion and Doctor-Assisted Suicide

The public, like the criminal law, is divided on the question of doctor-assisted suicide. The key finding of the 2007 Gallup annual Values and Beliefs poll reflect this division. Even so, 56 percent of respondents answered yes and 38 percent answered no to the question: "When a person has a disease that cannot be cured and is living in severe pain, do you think doctors should or should not be allowed by law to assist the patient to commit suicide if the patient requests it?" (Carroll 2007).

Murder

LO 4

The common law divided homicides into two kinds, and so do modern criminal codes, the MPC, and this chapter. The two kinds are:

1. **Murder** Killing a person with "malice aforethought," which we'll define and discuss in this section
2. **Manslaughter** Killing a person without malice aforethought, which we'll discuss in the "Manslaughter" section

ETHICAL DILEMMA

Should Doctor-Assisted Suicide Be Considered Murder?

Just hours before they died, Miller, Wantz, and family members met with Kevorkian at the home of Sherry Miller's parents on October 22, 1991. Miller, 43, had advanced multiple sclerosis and had approached Kevorkian a year earlier. She kept pursuing him and told her story several times on television. Marjorie Wantz, 58, also had sought Kevorkian's help for years. Although not terminally ill, she suffered excruciating pain after many surgeries to remove benign vaginal tumors. She had tried to kill herself several times. Psychiatrists said she was depressed and suicidal and some felt her pain was psychosomatic. (Later, when the medical examiner conducted her autopsy he found no physical cause for her pain.) The day after this interview, they committed suicide in a rustic cabin. Wantz used a machine Kevorkian invented, which injected a fatal substance; Miller inhaled carbon monoxide because her veins were too weak for a needle.

He called the machine the Thanatron—"death machine" in Greek. It was devised so that the patient could pull the trigger. It started with an intravenous drip of saline solution. Then the patient would press a button starting a device that stopped the saline solution and started releasing a drug of thiopental with a 60-second timer. This would put the patient into a deep coma. Finally, the timer's click would begin a lethal dose of potassium chloride, which, in minutes, would stop the heart. The patient would die of a heart attack while asleep.

The Thanatron was made from odd bits and pieces of household tools and toy parts, magnets, and electrical switches. It had an electric clock motor with a pulley axle, and a chain and two coils acting as electric bar magnets. Kevorkian showed it off, including an appearance on *The Donahue Show*. He called it "dignified, humane, and painless, and the patient can do it in the comfort of their own home at any time they want."

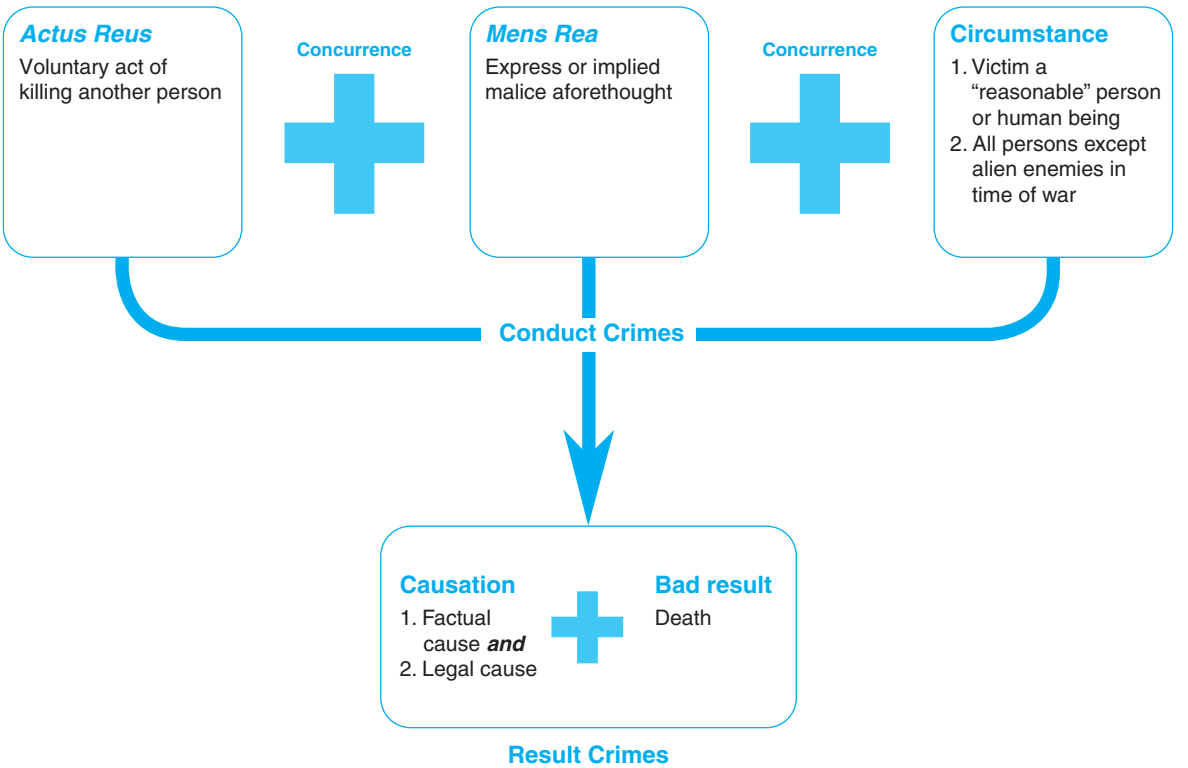
Everyone who has known Jack Kevorkian first talks about his brain. "He could tell you any major league baseball player's batting average," his boyhood chum Richard Dakesian told me, his voice tinged with awe. "He probably could have graduated from high school when he was 13 or 14. He's the smartest man I ever knew. I think he was born ahead of his time."

Instructions

1. Go to the website www.cengage.com/criminaljustice/samaha.
2. Read the selections from the Frontline video "The Kevorkian Verdict" and Oregon's "Death with Dignity Act."
3. Write an essay answering the question "Is it ethical public policy to make doctor-assisted suicide, criminal homicide?" Support your answer with points made in the selected readings.

According to Blackstone, writing in 1769, malice aforethought was the "grand criterion, which now distinguishes murder from other killing" (188–89). These two divisions were in turn divided into several kinds of murder and manslaughter, and, eventually, some special kinds of homicide, such as vehicular homicide (which we'll discuss later in the chapter), were added.

ELEMENTS OF COMMON LAW MURDER



A long history of criminal homicides preceded the publication of Blackstone's classic work in 1769; we'll look at a little bit of it in this section. We'll also examine the elements of murder, the kinds and degrees of murder, first-degree murder, second-degree murder, and corporation murder.

The History of Murder Law

LO 4

Our modern law of criminal homicide took centuries to develop. Over several centuries, the English common law judges had developed two broad kinds of homicide, criminal and noncriminal. By the 1550s, the common law judges, with the help of a growing number of statutes, had further divided criminal homicide into murder and manslaughter and noncriminal homicide into justifiable and excusable homicide (Chapters 5 and 6).

By 1700, the English common and statute laws of homicide and the American colonies' law recognized three kinds of homicide:

1. **Justifiable homicide** Self-defense (Chapter 5), capital punishment, and law enforcement use of deadly force
2. **Excusable homicide** Killings done by someone "not of sound memory and discretion" (insane and immature) (Chapter 6)
3. **Criminal homicide** All homicides that are neither justified nor excused

Eventually, these laws further divided criminal homicide into murder and manslaughter. We'll examine manslaughter later in the chapter. For now, let's concentrate on murder.

> In the early 1600s, Sir Edward Coke wrote that common-law murder occurred when a person, of sound memory and discretion, unlawfully killeth any reasonable creature in being and under the king's peace, with malice aforethought, either express or implied. (Blackstone 1769, 4:195, quoting from Coke 1628 Institutes, 3:47)

Let's look at how Blackstone defined those elements of common law murder in 1769:

1. *Sound memory and discretion* excused "lunatics and infants" from criminal liability.
2. *"Unlawfully"* meant killing without justification (Chapter 5) or excuse (Chapter 6).
3. *Killeth* included causing death by "poisoning, striking, starving, drowning, and a thousand other forms of death, by which human nature may be overcome" (196).
4. *Reasonable creature in being* was someone already born alive and breathing at the time of the killing (198).
5. *Under the king's peace* meant "to kill an alien, a Jew, or an outlaw, who are all under the king's protection, is as much murder as to kill the most regular Englishman; except he be an alien enemy in time of war" (198).
6. *With malice aforethought, express or implied*.

Let's look more closely at the mental element—killing with **malice aforethought**. At first, "malice" meant with specific intent or killing on purpose, and probably with some amount of spite, hate, or bad will. "Aforethought" meant the acts were planned in advance of the killing. The English homicide statutes in the 1550s defined "murder" as killing someone intentionally by "poison" or "lying in wait," classic examples of acts planned in advance. So the only kind of murder was intentional, premeditated killing—in other words, killing with malice aforethought.

After that, the judges invented new kinds of murder. First, they added intentional (malicious) killings that weren't premeditated. These included sudden killings during the heat of passion, "unreasonably" provoked by the victim's conduct. We'll discuss "unreasonably" provoked when we get to voluntary manslaughter, but it's enough for now to think of it this way: if a reasonable person would've cooled off between the provocation and the killing, the killing was murder even though it wasn't premeditated. For example, suppose someone doesn't like casual touching. As she's leaving her criminal law class, a student in the class comes up, puts his arm around her, and says, "Boring class, huh?" Very offended, she pulls away, saying "Back off, jerk." He responds with, "Oh, come on, I'm just being friendly" and approaches her again. She pulls out her gun and shoots him; he dies. She was "unreasonably" provoked.

Next, the judges added unintended killings if they occurred during the commission of felonies. For example, an arsonist set fire to a house when she believed no one was at home. Unfortunately, someone was at home, and he burned to death. She didn't intend to kill him, and because she didn't intend to kill him, obviously she couldn't have planned to kill him before she set fire to the house.

Then came **depraved heart murder**, defined as extremely reckless killings. Recall here the definition of "recklessness" (Chapter 4): knowingly creating a substantial and unjustifiable risk. In the case of a depraved heart murder, the risk is of death. For example, a roofer on a tall building, without bothering to look, throws a heavy board onto a busy street below; the board kills three people. He didn't intend to kill them, but he knew he was creating a high risk that the board would kill someone, and he threw it anyway. These are extremely reckless killings, or depraved heart murders.

The judges took one last step further away from the premeditated, intentional killing requirement. They created **intent to cause serious bodily injury murder**. No intent to kill was required when a victim died following acts triggered by the intent to inflict serious bodily injury short of death. Suppose a parent has a 17-year-old son who regularly drinks heavily, cuts school, and steals to buy alcohol; he's just generally out of control. Talking to him, grounding him, taking away his car, sending him to counseling—nothing works. So his father, angry and frustrated, decides to "beat him within an inch of his life." He does, and his son dies. He commits an intent to cause serious bodily injury murder.

"Serious bodily injury" has a technical meaning. Some states define it by statute. Here's Tennessee's (Tennessee Criminal Code 2005, 39-11-106(a)(34)) definition, which is similar to other states' definitions:

"Serious bodily injury" means bodily injury that involves:

(A) A substantial risk of death;

(B) Protracted unconsciousness;

(C) Extreme physical pain;

(D) Protracted or obvious disfigurement; or

(E) Protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty.

Throughout the centuries when judges were expanding the definition of "murder" to include these very different kinds of killings, they continued to call all of them by the same name—"killing another with malice aforethought." But they added the critical phrase "express or implied." **"Express" malice aforethought** was reserved for killings that fit the original meaning of "murder"—intentional killings planned in advance. According to Blackstone (1769):

> Express malice is when one, with a sedate deliberate mind and formed design, doth kill another, which formed design is evidenced by external circumstances discovering that inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm. (199)

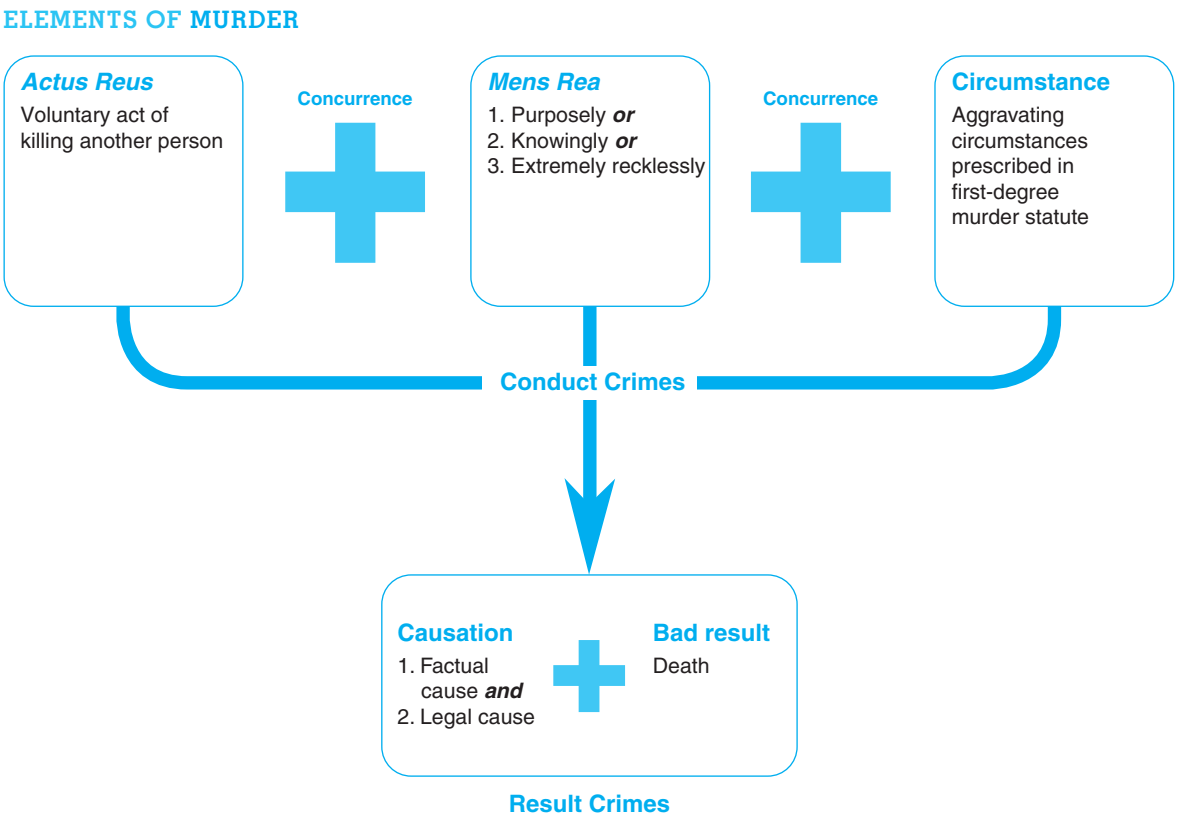
"Implied" malice aforethought referred to the four additional kinds of murder we just discussed:

1. Intentional killings without premeditation or reasonable provocation;
2. Unintentional killings during the commission of felonies;
3. Depraved heart killings; and
4. Intent to inflict grievous bodily harm killings.

The Elements of Murder

Murder is a result crime. Recall that result crimes consist of criminal conduct that causes a criminal harm (Chapter 3). Therefore, proving murder requires proof beyond a reasonable doubt of these elements:

1. *Actus reus*, the act of killing
2. *Mens rea*, purpose or knowledge, or extreme recklessness
3. Causation, the act caused



4. Death
5. Attendant circumstances, if there are any

Before we go any further, it's important for you to keep in mind throughout the following discussion that the required criminal acts, mental attitudes, tests of causation, and attendant circumstances vary from state to state. So if you're interested in finding out what the elements of murder (or any of the specific kinds of homicide or any of the crimes in the rest of the book) are in your state, you can find them online free. (One of the several links to your state's code is www.law.cornell .edu/topics/state_statutes2.html#criminal_code.)

Now, let's turn to the elements of murder. We won't discuss causation here because Chapter 4 and the "Doctor-Assisted Suicide" sections earlier in this chapter cover all you need to know about it. As for the result, the death of a person, we said all that was necessary in the "The Meaning of 'Person' or 'Human Being'" section earlier. And we'll leave the discussion of the circumstance element to the places in the text where there is a circumstance. Let's look at how the general principles of *actus reus* and *mens rea* apply to the criminal act and mental attitude elements of criminal homicide.

Murder Actus Reus

"Killing" or "causing death" is the heart of **murder *actus reus***, and it's easy to define. We can't improve much on Blackstone's (1769) words here: "The killing may be by poisoning, striking, starving, drowning, and a thousand other forms by which human nature can be overcome" (196). It can also result from failures to act—such as a husband who stands by and watches his blind wife, whom he hates, walk off the edge of

a cliff—or by words—such as a wife who sneaks up behind her husband, whom she hates, who is standing at the edge of the Grand Canyon and yells, "Boo!" causing him to fall over the edge.

Notice that how the murderer kills someone doesn't matter in most cases. But it can be a circumstance element in first-degree murder or an aggravating circumstance in death penalty cases. Even though there were no degrees of murder at the time, Blackstone teaches us that it's murder if "one beats another in a cruel and unusual manner":

> As when a park keeper tied a boy, that was stealing wood, to a horse's tail and dragged him along the park; when a master corrected his servant with an iron bar; and a school master stamped on his scholar's belly, so that each of the sufferers died. These were justly held to be murders because, the correction being excessive and such as could not proceed but from a bad heart, it was equivalent to an act of slaughter. (199–200)

Murder Mens Rea

Murder *mens rea* can include every state of mind included in the concept of malice aforethought (discussed in the last section). In the language of the Model Penal Code (discussed in Chapter 4), purpose, knowledge, and recklessness can qualify as the mental element in murder. We'll have more to say about the mental element in each of the degrees of murder, which we'll turn to now.

The Kinds and Degrees of Murder

The English judges never *formally* divided murder into degrees. All murders, in fact all felonies, except theft of less than 12 pence, were capital offenses. But the judges had enormous discretion to free all convicted felons by means of "benefit of clergy," a practice that began with a rule that allowed priests to be tried only in ecclesiastical courts. To get transferred from the common law to the ecclesiastical courts, priests had to prove they were clerics by reading a passage from the Bible. This was a reliable test because only clerics could read. Eventually, "reading the book" became a pure formality; the passage in the "book" convicted felons had to "read" was always the same few words, and the ability to read spread beyond the clergy.

This was a formality the judges manipulated to mitigate *informally* the harshness of the common law, which mandated that all felons, from cold-blooded murderers to petty thieves, should hang. By the reign of Henry VIII (1509–37), successful pleas of clergy were so widely granted by the judges that Parliament enacted a form of mandatory sentencing to curb judicial discretion; it banned the plea in all cases of premeditated murder (Samaha 1974). The list of "nonclergyable" offenses would grow in the centuries that followed.

Dividing murder into degrees was a continuation of the idea that not all felons—in this case, not all murderers—should be executed. In the new United States, degrees of murder were created, not by judges but by legislatures. Pennsylvania was the first state to depart from the common law, enacting a statute in 1794 that divided murder into first and second degrees. The Pennsylvania statute provided that

> all murder, which shall be perpetrated by means of poison, lying in wait, or by any other kind of willful, deliberate or premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery or burglary shall be deemed murder in the first degree; and all other kinds of murder shall be deemed murder in the second degree. (Pennsylvania Laws 1794, chap. 257, §§ 1–2)

So under the statute, premeditated intent to kill murders and some felony murders were capital offenses, just as they were under the old common law. And they still are. All other murders (depraved heart and intent to cause serious bodily injury) were second-degree murders, just as they were under the old law. *Sometimes*, they still are. The MPC doesn't use the degrees, but, since its publication in 1960, state criminal codes have increasingly used the MPC's scheme of dividing murder according to mental attitude—purpose, knowing, and extreme recklessness.

Most states quickly followed Pennsylvania's example. Behind this quick adoption of the statutes was the first of many waves of opposition to the death penalty throughout U.S. history. Three results followed, results which profoundly influenced the criminal law you're studying in this book:

(1) The gradual peeling away of layers of criminal homicides that were thought not to deserve the death penalty;

(2) the emergence of more detailed grading schemes placing various types of criminal homicide along the spectrum of available criminal punishments; and

(3) the development of various justifications and excuses making certain homicides non-criminal. (Low 1990, 335)

Today, most states divide homicide into two degrees, and a few divide it into three degrees. We'll look at first-degree and second-degree murder.

First-Degree Murder

Almost all states that divide murder into degrees establish two kinds of **first-degree murder**: (1) premeditated, deliberate, intent to kill murders and (2) felony murders. First-degree murder is the only crime today in which the death penalty can be imposed (Chapter 2). Because of a series of U.S. Supreme Court cases, death penalty cases are complicated proceedings. So we need to look at first-degree murder and the death penalty before we go further.

The Death Penalty

The death penalty is discretionary in all states in which the penalty is authorized. To guide judges' and juries' decisions whether to execute or sentence to life in prison a person convicted of first-degree murder, the U.S. Supreme Court, in a series of decisions since the 1970s, has completely revised the procedures for imposing capital punishment. The matter is highly complicated, and the Court's cases haven't always made it clear just what's required, but here's a list of the main practices the Constitution bans, requires, and allows:

1. *Mandatory death sentences* are banned. States can't require the death penalty in *all* first-degree murders.
2. *Unguided discretionary death penalty* decisions are banned. Judges and juries can't impose the death penalty without a list of specific criteria for and against the death penalty to guide their decision.
3. *Mitigating factors are required*. States can't limit the range of mitigating factors that might favor life imprisonment instead of death.
4. *Additional aggravating factors* are allowed. Jurors and/or judges are allowed to consider factors in favor of death not specifically included in statutory lists of aggravating factors.

Most states have adopted the MPC's two recommended procedures—bifurcation and the criteria for guiding the decision to impose the death sentence in **capital cases**. (We define "capital cases" as death penalty cases in death penalty states and "mandatory life sentence without parole" cases in non–death penalty states.) **Bifurcation** mandates that the death penalty decision be made in two phases: a trial to determine guilt and a second separate proceeding, after a finding of guilt, to consider the aggravating factors for, and mitigating factors against, capital punishment. At the penalty phase, prosecutors get the opportunity to present evidence not presented at the trial phase, and defendants can offer evidence in mitigation.

The **criteria for decision** must be limited by the criteria established and announced *before* the decision to sentence the defendant to death. Juries, or judges where state law authorizes judges to decide, have to consider aggravating and mitigating factors before making their decision. They can't actually impose the death penalty unless they find

> one of the aggravated circumstances and further finds that there are no mitigating circumstances sufficiently substantial to call for leniency. (ALI 1985, Art. 210.6)

The list of aggravating circumstances includes:

1. The murder was committed by a convict under sentence of imprisonment.
2. The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person.
3. At the time the murder was committed, the defendant also committed another murder.
4. The defendant knowingly created a great risk of death to many persons.
5. The murder was committed while the defendant was engaged or was an accomplice in the commission, or an attempt to commit, or flight after committing or attempting to commit, robbery, rape, or deviant sexual intercourse by force or threat of force, arson, burglary, or kidnapping.
6. The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody.
7. The murder was committed for pecuniary gain.
8. The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity.

The list of mitigating factors includes:

1. The defendant has no significant history of criminal activity.
2. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
3. The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
4. The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.
5. The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.
6. The defendant acted under duress or under the domination of another person.

7. At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication.
8. The defendant was a young age at the time of the crime.

First-Degree Murder Mens Rea

"All murder which is perpetrated by . . . willful, deliberate, and premeditated killing . . . is murder of the first degree" (California Penal Code 2006, ß 189). This is a broad, even vague, definition of "first-degree murder" often found in criminal codes.

Most courts say that "premeditated" and "deliberate" mean something more than the intent to kill. In other words, they refine the mental attitude of the MPC's "purposely" and "knowingly" and the common law's "specific intent." Judges understand that the purpose of the refinement is to distinguish between murders so awful that they deserve the harshest punishment the law allows from murders that don't deserve the worst punishment.

But just what the refinement consists of varies greatly, and there's often disagreement, sometimes among judges on the same court, not just on the definitions but whether they apply to the facts of the case they're deciding. Unfortunately, some courts blur the line between intentional killings and the more refined deliberate, premeditated intentional killings. The result is that there's no meaningful difference between first- and second-degree murder. This is serious business, not just theoretically but practically, too; it could mean, literally, the difference between life and death.

"Willful" rarely comes up in the appellate cases today, so we can fairly assume it means what one judge instructing the jury in a murder trial just after the Civil War said: "Many cases have been decided under this clause, in all of which it has been held that the intention to kill is the essence of the offense. Therefore, if an intention to kill exists, it is willful" (*Commonwealth v. Drum* 1868, 6).

The same isn't true of "deliberate" and "premeditated." They're frequently issues in the cases, and the courts define them differently, sometimes radically so. We can start with a few simple definitions just to give you the general idea of what "willful, deliberate, premeditated killing" means. Professor LaFave (2003a) describes the thought process the mental attitude refers to:

> It has been suggested that for premeditation the killer asks himself the question, "Shall I kill him?" The intent to kill aspect of the crime is found in the answer, "Yes I shall." The deliberation part of the crime requires a thought like, "Wait, what about the consequences? Well, I'll do it anyway." (766)

Professor LaFave acknowledges what the cases amply demonstrate:

> It is not easy to give a meaningful definition to the words "premeditate" and "deliberate" as they are used in connection with first degree murder. Perhaps the best that can be said of "deliberation" is that it requires a cool mind that is capable of reflection, and of "premeditation" that it requires that one with the cool mind did in fact reflect, at least for a short period of time, before killing. (766–67)

Justice Agnew of the Supreme Court of Pennsylvania summed up the mental attitude about as well as any in his colorful instruction to the jury in the murder trial of a youth,

William Drum, who fatally stabbed another youth, David Mohigan, who had attacked Drum the week before the fatal stabbing (*Commonwealth v. Drum* 1868).

> A life has been taken. The unfortunate David Mohigan has fallen into an untimely grave; struck down by the hand of violence; and it is for you to determine whose was that hand, and what its guilt. The prisoner is in the morning of life; as yet so fresh and fair. As you sat and gazed into his youthful face, you have thought, no doubt, most anxiously thought, is his that hand? Can he, indeed, be a murderer? This, gentlemen, is the solemn question you must determine upon the law and the evidence. . . . (5)
>
> In this case we have to deal with that kind of murder in the first degree described as "willful, deliberate, and premeditated." Many cases have been decided under this clause, in all of which it has been held that the intention to kill is the essence of the offence.
>
> Therefore, if an intention to kill exists, it is willful; if this intention be accompanied by such circumstances as evidence a mind fully conscious of its own purpose and design, it is deliberate; and if sufficient time be afforded to enable the mind fully to frame the design to kill, and to select the instrument, or to frame the plan to carry this design into execution, it is premeditated.
>
> The law fixes upon no length of time as necessary to form the intention to kill, but leaves the existence of a fully formed intent as a fact to be determined by the jury, from all the facts and circumstances in the evidence. (6)
>
> "It is equally true both in fact and from experience, that no time is too short for a wicked man to frame in his mind his scheme of murder, and to contrive the means of accomplishing it" (6).
>
> But this expression must be qualified, lest it mislead. It is true that such is the swiftness of human thought, that no time is so short in which a wicked man may not form a design to kill, and frame the means of executing his purpose; yet this suddenness is opposed to premeditation, and a jury must be well convinced upon the evidence that there was time to deliberate and premeditate.
>
> The law regards, and the jury must find, the actual intent; that is to say, the fully formed purpose to kill, with so much time for deliberation and premeditation, as to convince them that this purpose is not the immediate offspring of rashness and impetuous temper, and that the mind has become fully conscious of its own design. If there be time to frame in the mind, fully and consciously, the intention to kill, and to select the weapon or means of death, and to think and know beforehand, though the time be short, the use to be made of it, there is time to deliberate and to premeditate.

Blackstone (1769) called "willful, premeditated, deliberate killings" the "grand criterion" of murder because they reflect "the dictate of a wicked, depraved, and malignant heart" (199). Modern court opinions display a far broader spectrum of definitions. At one extreme are those that fit the definitions of the original "grand criterion"—killings planned in advance and then committed in "cold blood" that we've just reviewed.

A good example is *People v. Anderson* (1968).

> We have repeatedly pointed out that the legislative classification of murder into two degrees would be meaningless if "deliberation" and "premeditation" were construed as requiring no more reflection than may be involved in the mere formation of a specific intent to kill. A verdict of murder in the first degree (on a theory of a willful, deliberate, and premeditated killing) is proper only if the slayer killed as a result of careful thought and weighing of considerations; as a deliberate judgment or plan; carried on coolly and steadily. (948)

States that adopt this **specific intent plus real premeditation deliberation** definition rely on three categories of evidence to prove murders really were premeditated and deliberate:

Category 1. Facts about how and what defendant did prior to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing—what may be characterized as planning activity;

Category 2. Facts about the defendant's prior relationship and/or conduct with the victim from which the jury could reasonably infer a "motive" to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of "a pre-existing reflection and careful thought and weighing of considerations rather than mere unconsidered or rash impulse hastily";

Category 3. Facts about the nature of the killing from which the jury could infer that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a preconceived design to take his victim's life in a particular way for a reason which the jury can reasonably infer from facts of type (1) or (2). (949)

Table 9.1 highlights cases that demonstrate each of the three categories.

At the other extreme are courts that define "willful, premeditated, deliberate" killing as the equivalent of the specific intent to kill. A good example is *Macias v. State* (1929):

> There need be no appreciable space of time between the intention to kill and the act of killing. They may be as instantaneous as successive thoughts of the mind. It is only necessary that the act of killing be preceded by a concurrence of will, deliberation, and premeditation on the part of the slayer, and, if such is the case, the killing is murder in the first degree. (715)

There's considerable criticism in court decisions and among commentators that this **equivalent of specific intent** definition renders the difference between first- and second-degree murder meaningless. That's serious because it means there's no real difference between capital murder that can lead to execution in death penalty states or to life in prison without the chance of parole in non–death penalty states.

TABLE 9.1 Proving Premeditated, Deliberate Intent

Category 1	Category 2	Category 3
• *U.S. v. Blue Thunder* (1979). Brought the murder weapon, a knife, to the murder scene • *People v. Kemp* (1961). Entered the house through a bedroom window • *U.S. v. Downs* (1995). Arranged to meet the victim at home when no one would be home	• *State v. Crawford* (1996). Prior threats to kill the victim • *State v. Thomas* (1999). Starving the child to death would conceal a prior killing • *State v. Hamlet* (1984). Victim had bragged about knocking out the defendant in a prior fight	• *U.S. v. Treas-Wilson* (1993) Precise and fatal injury; 4-inch incision severing • *People v. Steele* (2002). Stabbed victim eight times in the chest • *State v. Taylor* (2002). Eight blows to the head with a heavy object

In our next case excerpt, *Byford v. State* (2000), the Nevada Supreme Court affirmed 20-year-old Robert Byford's death sentence because he intentionally, with premeditation and deliberation, killed Monica Wilkins and because the aggravating circumstance outweighed the mitigating circumstances present in the case.

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CASE Was He Guilty of Capital Murder?

Byford v. State
994 P.2d 700 (Nev. 2000)

HISTORY

Robert Byford, the defendant, and a codefendant were convicted in the Eighth Judicial District Court, Clark County, of first-degree murder with the use of a deadly weapon and were sentenced to death, and they appealed. The Supreme Court reversed and remanded for retrial. On remand, the defendant was again convicted in the Eighth Judicial District Court, Clark County, of first-degree murder with the use of a deadly weapon and was again sentenced to death. The defendant appealed. The Supreme Court affirmed.

SHEARING, J.

FACTS

Byford, Williams, and two teenage girls were visiting Smith at his parents' residence in Las Vegas on March 8, 1991. Byford was 20 years old, Williams 17, and Smith 19. Monica Wilkins, who was 18, called and told Smith she would pay him for a ride home from a local casino. Smith drove his jeep to pick Wilkins up, accompanied by Williams and one of the girls. After Smith picked up Wilkins and her friend, Jennifer Green, he asked Wilkins for gas money. Wilkins had Smith stop at a Burger King so that she could get some money. Williams went inside the store to see what was taking her so long, and Wilkins told him that she had gotten another ride. Smith and Williams were upset with Wilkins, and after they drove away, Williams fired a handgun out the window of the jeep.

Smith testified that Wilkins had angered him, Williams, and Byford before because she had invited them to her apartment to party but then left with other men. Byford and Williams had talked about "getting rid of her" because she was always "playing games with our heads." Smith participated in the talk but took the threats as jokes.

Later that night, Smith, Williams, and Byford were together at Smith's house when Wilkins called again for a ride home. Accompanied by Byford and Williams, Smith drove to pick her up. Smith then drove all four of them to the desert outside of town to find a party that Byford heard was taking place. Wilkins told the other three that she had taken LSD earlier and was hallucinating. Smith drove to the usual area for parties, but they found no party. They then stopped so that everyone could urinate. Wilkins walked up a ravine to do so.

Smith testified to the following. As Wilkins finished, Byford handed Williams a handgun and said he "couldn't do it." Smith asked Byford what he was doing with the gun, and Byford told Smith to "stay out of it." Williams then shot Wilkins in the back three to five times. She screamed and fell to the ground. Wilkins got up, walked to Williams, and asked him why he had shot her. He told her that he had only shot around her. Wilkins walked up out of the ravine but then felt the back of her neck, saw that she was bleeding, and again confronted Williams.

Williams told her that he shot her because she was "a bitch." He then walked behind her and shot her again repeatedly. Wilkins screamed and fell to the ground again. Byford then took the gun from Williams, said that he would "make sure the bitch is dead," and fired two shots into her head. Byford then got a can of gasoline from

the jeep and poured it on Wilkins. Byford tried to hand a lighter to Smith and get him to light the gasoline, but Smith refused. Byford called him a "wussie" and lit the body. As it burned, the three drove off. As they returned to Las Vegas, Byford pointed the handgun at Smith and threatened to kill him if he ever told anyone.

Smith further testified that about a week after the murder, Byford and Williams had him drive them back to the desert to bury the body. An inmate who was incarcerated in jail with Byford and Williams after their arrest also testified that the two told him about this trip back to the body. They told the inmate that the body was decomposing and had maggots on it. Byford and Williams rolled the corpse into the ravine and partly covered it with a few shovelfuls of dirt.

After about two more weeks, the body was discovered by target shooters. Las Vegas Metropolitan Police Department investigators collected 16 .25-caliber shell casings at the site; ballistic testing showed that all were fired from the same weapon. Ten .25-caliber bullets were recovered; five were in the body. Three bullets were in the chest and abdomen, and two were in the head. Either of the bullets in the head would have been fatal. The body was partly eaten by coyotes or wild dogs. Other bullets could have been lost from the body due to this eating or the burning and decomposition of the body. The burning appeared to be postmortem.

In mid-April 1991, Byford's friend, Billy Simpson, was visiting Byford's residence. When the two came upon a dead rabbit covered with maggots, Byford told Simpson that he had seen maggots on a human body before. That same night, Simpson and his brother Chad observed Byford and Williams engage in "play acting" in which Williams acted as if he shot Byford with a gun, Byford fell and then stood back up, and Williams opened his eyes wide and pretended to reload and shoot him again. Byford and Williams explained that they had shot and killed Wilkins in the desert and then burned her body.

In the spring or summer of 1991, Byford conversed with two girls in a city park. He admitted to them that he and Williams had shot and killed a girl in the desert and then burned her body. He told them that he wanted to see what would happen when someone under the influence of "acid" was shot. In August 1991, Byford told another friend that he was a "bad person" and "had done evil things" because he had shot and killed someone in order to know what it felt like to kill someone.

After the police investigation led to Byford and Williams, Byford asked his girlfriend to provide an alibi for him by telling the police that on the night of the murder they had been on the phone all night.

Neither Byford nor Williams testified. However, Williams introduced, over Byford's objection, Byford's testimony from the first trial. The gist of that prior testimony was that Smith and Wilkins were boyfriend and girlfriend, that they argued that night, that Smith shot Wilkins, and that Byford and Williams only aided Smith in concealing the crime. The testimony also included Byford's admission that he had a prior felony conviction for attempted possession of a stolen vehicle. In closing argument, the prosecutor referred to Byford as a convicted felon.

The jury found Byford and Williams guilty of first-degree murder with the use of a deadly weapon.

At the penalty hearing, the State called Marian Wilkins, the mother of the victim, to testify on the impact of losing her daughter. A probation officer testified that Byford had violated his probation conditions in 1991 and been placed under house arrest. Byford violated house arrest in 1992 by removing his transmitter bracelet and absconding. The officer also described Byford's juvenile record, which included burglary in 1984 and carrying a concealed weapon in 1987. A detention officer testified that in 1994 Byford was disciplined for fighting with another inmate at the Clark County Detention Center; the officer considered Byford to be a behavioral problem for the center.

Two of Byford's aunts testified to Byford's good character growing up, as did his sister. Byford's mother also testified on his behalf and described him as a good boy and a caring son. Byford and his father had often gotten in conflicts, and his father was "heavy-handed" in disciplining him. Byford was very close to his grandfather. When his grandfather died, he became angry and withdrawn and quit attending church. Byford's mother was raising Byford's son. Byford talked with his son on the phone and was a good influence on him.

Thomas Kinsora, a Ph.D. in clinical neuropsychology, testified for Byford. Byford was diagnosed with attention deficit disorder as a child. He had conflicts with and anger toward his father for the latter's abuse of alcohol and emotional distance. Byford lost interest in school and immersed himself in alcohol and marijuana after his grandfather's death. He later used methamphetamines heavily for a time. After testing Byford, Dr. Kinsora concluded that the results were largely unremarkable and that Byford was not psychopathic.

Byford spoke briefly in allocution and said that he was sorry for his part in Wilkins' death.

In Byford's case, jurors found one mitigating circumstance: possible substance abuse. The jury found two aggravating circumstances: the murder was committed by a person under sentence of imprisonment and involved torture or mutilation of the victim. Byford received a sentence of death. In Williams' case, jurors found six mitigating circumstances. One aggravating circumstance was found: the murder involved torture or mutilation of the victim. Williams received a sentence of life imprisonment without possibility of parole.

OPINION

The Instructions Defining the Mens Rea *Required for First-Degree Murder*

We conclude that the evidence in this case is clearly sufficient to establish deliberation and premeditation on Byford's part. Byford and Williams had talked of "getting rid" of the victim on prior occasions. On the night of the

murder, Byford handed the gun to Williams, saying that he (Byford) "couldn't do it" and told Smith to "stay out of it." Thus, it is evident that Byford and Williams discussed shooting the victim before doing so.

Williams and Byford then calmly and dispassionately shot the victim in the absence of any provocation, confrontation, or stressful circumstances of any kind. Williams first shot her several times and then, after a passage of some time, shot her several more times. Byford watched this transpire, and when the victim was helpless on the ground, he took the gun from Williams, said that he would make sure she was dead, and shot her in the head twice.

This evidence was sufficient for the jurors to reasonably find that before acting to kill the victim Byford weighed the reasons for and against his action, considered its consequences, distinctly formed a design to kill, and did not act simply from a rash, unconsidered impulse.

The Kazalyn instruction, however, does raise a concern that we will now consider. NRS 200.030(1)(a) provides in relevant part that murder perpetrated by "willful, deliberate and premeditated killing" is first-degree murder. In this regard, "willful" means intentional. Therefore, willful first-degree murder requires that the killer actually intend to kill. Not every murder requires an intent to kill. For example, murder can also exist when a killer acts with a reckless disregard for human life amounting to "an abandoned and malignant heart." However, such a murder would not constitute willful first-degree murder.

In addition to willfulness, the statutory provision in question requires deliberation and premeditation. These are the truly distinguishing elements of first-degree murder under this provision. But the jurisprudence of Nevada, like that of other states, has shown a trend toward a confusion of premeditation and deliberation. We therefore take this opportunity to adhere to long-established rules of law and abandon the modern tendency to muddle the line between first- and second-degree murder.

It is clear from the statute that all three elements, willfulness, deliberation, and premeditation, must be proven beyond a reasonable doubt before an accused can be convicted of first-degree murder. In order to establish first-degree murder, the premeditated killing must also have been done deliberately, that is, with coolness and reflection.

Accordingly, we set forth the following instructions for use by the district courts in cases where defendants are charged with first-degree murder based on willful, deliberate, and premeditated killing.

> Murder of the first degree is murder which is perpetrated by means of any kind of willful, deliberate, and premeditated killing. All three elements—willfulness, deliberation, and premeditation—must be proven beyond a reasonable doubt before an accused can be convicted of first-degree murder.
>
> Willfulness is the intent to kill. There need be no appreciable space of time between formation of the intent to kill and the act of killing.
>
> Deliberation is the process of determining upon a course of action to kill as a result of thought, including weighing the reasons for and against the action and considering the consequences of the action.
>
> A deliberate determination may be arrived at in a short period of time. But in all cases the determination must not be formed in passion, or if formed in passion, it must be carried out after there has been time for the passion to subside and deliberation to occur. A mere unconsidered and rash impulse is not deliberate, even though it includes the intent to kill.
>
> Premeditation is a design, a determination to kill, distinctly formed in the mind by the time of the killing.
>
> Premeditation need not be for a day, an hour, or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the act follows the premeditation, it is premeditated.
>
> The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances.
>
> The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder of the first degree.

The Aggravating Circumstance of Torture or Mutilation

NRS 200.033(8) provides as an aggravating circumstance that "the murder involved torture or the mutilation of the victim." Establishing either torture or mutilation is sufficient to support the jury's finding of this aggravating circumstance.

In discussing torture, we have held that NRS 200.033(8) requires that the murderer must have intended to inflict pain beyond the killing itself. Evidence indicated that Byford and Williams resented Wilkins because of perceived slights they had received from her. Thus revenge of a sort appears to have been their primary reason for shooting her. After shooting her in the back, Williams lied to Wilkins—who was under the influence of LSD—denying that he had shot her and telling her that he had only shot around her. When she realized she had been shot and asked why, he said because she was "a bitch" and then walked behind her and shot her again repeatedly.

We conclude that the jury could have reasonably found that this behavior had a vengeful, sadistic purpose and was intended to inflict pain beyond the killing itself

and therefore constituted torture. Byford, of course, was equally culpable of this torture: a person who aids and abets an act constituting an offense is a principal and subject to the same punishment as one who directly commits the act. This conclusion is consistent with the statutory language. Although a victim who has died cannot be tortured, mutilation can occur after death. By including both terms as a basis for the aggravator, the statute penalizes egregious behavior whether it occurs before or after a victim's death. We agree with the State's assertion that the legislative intent in making mutilation an aggravating circumstance "was to discourage the desecration of a fellow human being's body." We therefore take this opportunity to expressly hold that mutilation, whether it occurs before or after a victim's death, is an aggravating circumstance under NRS 200.033(8).

Postmortem mutilation occurred here when Byford set the body on fire. Therefore, the evidence in this case supports a finding of both torture and mutilation.

Review of the Death Sentence under NRS 177.055

Byford contends that his death sentence is excessive, arguing as follows. Smith's testimony was the State's primary evidence of the murder, and that testimony showed that Williams was more culpable in murdering Wilkins. The penalty hearing evidence also showed that Williams had caused a great deal of trouble while in prison between the first and second trials. Byford asserts that he has been "an exemplary prisoner" during his years of imprisonment and was only twenty at the time of the murder. Yet he was sentenced to death while Williams received a sentence less than death.

The record indeed shows that Williams took the initiative in murdering Wilkins and has caused worse disciplinary problems as an inmate. But Byford overlooks the fact that his criminal record prior to the murder was worse than Williams's. Because Byford was on probation at the time of the murder, the jury found an additional aggravating circumstance in his case, for a total of two, versus one for Williams. And the jury found only one mitigating circumstance in Byford's case, versus six for Williams. One was Williams's youth: he was younger than Byford, only seventeen, at the time of the murder. Finally, the evidence showed that Byford fired two fatal shots into the victim's head when she was completely helpless, threatened to kill Smith if he told, and took the initiative in concealing the crime. Thus, Byford's culpability in the murder was comparable to Williams's.

We conclude that Byford's death sentence is not excessive and that there is no evidence it was imposed under the influence of passion, prejudice, or any arbitrary factor. We affirm Byford's conviction and sentence of death.

QUESTIONS

1. **How does the Court define the terms "willful," "deliberate," and "premeditated"?**
2. **Sort and arrange the facts of the case according to the definitions of the three terms in (1).**
3. **Nevada's criminal code defines first-degree murder as killing "perpetrated by means of poison, lying in wait or torture, or by any other kind of willful, deliberate and premeditated killing." In your opinion, did Robert Byford commit first-degree murder?**
4. **Assuming Byford is guilty of first-degree murder, should he be sentenced to death? Consider the list of aggravating and mitigating circumstances in the "The Death Penalty" section (page 289). Nevada has a similar list. Which items on the list might apply to him? Explain your answer, based on the facts in the case.**

EXPLORING FURTHER

First-Degree Murder

1. Did He Premeditate and Deliberately Kill Her?

State v. Snowden, 313 P.2d 706 (Idaho State Historical Society)

FACTS Ray Snowden had been playing pool and drinking in a Boise poolroom early in the evening. With a companion, one Carrier, he visited a club near Boise, then went to nearby Garden City. There the two men visited a number of bars, and the defendant had several drinks. Their last stop was the HiHo Club. Witnesses related that while the defendant was in the HiHo Club he met and talked to Cora Lucyle Dean. The defendant himself said he hadn't been acquainted with Mrs. Dean prior to that time, but he had "seen her in a couple of the joints up town." He danced with Mrs. Dean while at the HiHo Club. Upon departing from the tavern, the two left together.

In statements to police officers, that were admitted in evidence, defendant Snowden said after they left the club Mrs. Dean wanted him to find a cab and take her back to Boise, and he refused because he didn't feel he should pay her fare. After some words, he related: "She got mad at me so I got pretty hot and I don't know whether I backhanded her there or not. And we got calmed down and decided to walk across to the gas station and call a cab."

They crossed the street, and began arguing again. The defendant said, "She swung and at the same time she kneed me again. I blew my top." The defendant said he pushed the woman over beside a pickup truck that was standing near a business building. There he pulled his knife—a pocket knife with a two-inch blade—and cut her throat.

The body, which was found the next morning, was viciously and sadistically cut and mutilated. An autopsy surgeon testified the voice box had been cut and that this would have prevented the victim from making any

intelligible outcry. There were other wounds inflicted while she was still alive—one in her neck, one in her abdomen, two in the face, and two on the back of the neck. The second neck wound severed the spinal cord and caused death.

There were other wounds all over her body, and her clothing had been cut away. The nipple of the right breast was missing. There was no evidence of a sexual attack on the victim; however, some of the lacerations were around the breasts and vagina of the deceased. A blood test showed Mrs. Dean was intoxicated at the time of her death.

The defendant took the dead woman's wallet. He hailed a passing motorist and rode back to Boise with him. There he went to a bowling alley and changed clothes. He dropped his knife into a sewer and threw the wallet away. Then he went to his hotel and cleaned up again. He put the clothes he had worn that evening into a trash barrel.

Did Snowden premeditate and deliberately kill Cora Dean?

DECISION Yes, said the Idaho Supreme Court:

> The principal argument of the defendant pertaining to premeditation is that the defendant did not have sufficient time to develop a desire to take the life of the deceased, but rather this action was instantaneous and a normal reaction to the physical injury which she had dealt him.
>
> In the present case, the trial court had no other alternative than to find the defendant guilty of willful, deliberate, and premeditated killing with malice aforethought in view of the defendant's acts in deliberately opening up a pocket knife, next cutting the victim's throat, and then hacking and cutting until he had killed Cora Lucyle Dean and expended himself. The full purpose and design of defendant's conduct was to take the life of the deceased.
>
> The trial court could have imposed life imprisonment, or, as in the instant case, sentenced the defendant to death. To choose between the punishments of life imprisonment and death there must be some distinction between one homicide and another. This case exemplifies an abandoned and malignant heart and sadistic mind, bent upon taking human life.

Not everyone agrees that premeditated, deliberate killings, even if they're truly planned and committed in cold blood, are the worst kind of murders. According to the nineteenth-century English judge and criminal law reformer James F. Stephen (1883):

> As much cruelty, as much indifference to the life of others, a disposition at least as dangerous to society, probably even more dangerous, is shown by sudden as by premeditated murders. The following cases appear to me to set this in a clear light. A man, passing along the road, sees a boy sitting on a bridge over a deep river and, out of mere wanton barbarity, pushes him into it and so drowns him. A man makes advances to a girl who repels him. He deliberately but instantly cuts her throat. A man civilly asked to pay a just debt pretends to get the money, loads a rifle and blows out his creditor's brains. In none of these cases is there premeditation unless the word is used in a sense as unnatural as "aforethought" in "malice aforethought," but each represents even more diabolical cruelty and ferocity than that which is involved in murders premeditated in the natural sense of the word. (94)

First-Degree Murder Actus Reus

As you've already learned, how a murderer kills doesn't matter most of the time. As Blackstone taught us in 1769 (in the quote earlier): "The killing may be by poisoning, striking, starving, drowning, and a thousand other forms by which human nature can be overcome." But first-degree murder *actus reus* can be critical when it comes to deciding whether to sentence a person convicted of first-degree murder to death—or to prison for life without parole in states without the death penalty or to a lesser penalty. Killing by means of "heinous, atrocious, or cruel" acts, meaning especially brutal murders or torture murders intended to cause lingering death, appears on the list of aggravating factors that qualifies a murderer for the death penalty.

The Florida Supreme Court applied the state's "heinous, atrocious, or cruel" aggravating circumstance provision to approve the death penalty for Lloyd Duest, who was convicted of first-degree murder in a "gay bashing" killing during a robbery in our next case excerpt, *Duest v. State* (1985).

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CASE Was the Murder Heinous, Atrocious, or Cruel?

Duest v. State
462 So.2d 446 (Fla. 1985)

HISTORY

Lloyd Duest (the defendant) was convicted in the Circuit Court, Broward County, Patricia W. Cocalis, J., of first-degree murder, for which the sentence of death was imposed, and the defendant appealed. The Supreme Court, Adkins, J., held that evidence was sufficient to support the conviction; and evidence was sufficient to support the findings on challenged aggravating circumstances.

ADKINS, J.

BOYD, C.J., and OVERTON, ALDERMAN, McDONALD, EHRLICH and SHAW, JJ., concur.

FACTS

On February 15, 1982, the defendant was seen by witnesses carrying a knife in the waistband of his pants. Subsequently, he told a witness that he was going to a gay bar to "roll a fag." The defendant was later seen at a predominantly gay bar with John Pope, the victim. The two of them then left the bar in Pope's gold Camaro. Several hours later, Pope's roommate returned home and found the house unlocked, the lights on, the stereo on loud, and blood on the bed. The sheriff was contacted. Upon arrival, the deputy sheriff found Pope on the bathroom floor in a pool of blood with multiple stab wounds. The defendant was found and arrested on April 18, 1982.

OPINION

Defendant contends that there was insufficient evidence of premeditated murder to convict him as charged in the indictment. Premeditation, like other factual circumstances, may be established by circumstantial evidence. Such circumstantial evidence must not only be consistent with the defendant's guilt, but must also be inconsistent with any reasonable hypothesis of innocence.

The record reflects that defendant had stated he gets his money by "rolling gay guys" and that he intended to do the same on the day that the victim was murdered. Defendant was seen with the victim at a gay bar immediately prior to the murder and was seen leaving the bar with the victim in the victim's car. Shortly thereafter, defendant was seen driving the victim's car alone. At that time, witnesses saw blood stains on the sleeve of his jogging suit. The victim's stolen jewelry case was also seen in the car, which was being driven by defendant after the murder. Moreover, on the day of the murder, defendant had in his possession a seven-inch knife. The cause of death in this case was multiple stab wounds. We find that there was sufficient circumstantial evidence to sustain defendant's conviction of premeditated murder.

Defendant objects to the trial court's findings with respect to the aggravating and mitigating circumstances. The trial court found the following aggravating circumstances:

1) the defendant had been previously convicted of armed robbery and assault with intent to commit murder, section 921.141(5)(b);
2) the capital felony was committed while the defendant was engaged in the commission of a robbery, section 921.141(5)(d);
3) the capital felony was committed for pecuniary gain, section 921.141(5)(f);
4) the capital felony was especially heinous, atrocious, or cruel, section 921.141(5)(h);
5) the capital felony was a homicide which was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, section 921.141(5)(i).

The trial court considered circumstances 2 and 3 as one circumstance because of overlapping facts and legal definitions. Therefore, four aggravating circumstances were applicable. As to mitigating circumstances, none were applied to this case.

Defendant only challenges two of the aggravating circumstances. He asserts that the murder was not particularly heinous, atrocious or cruel. We disagree with the defendant. The evidence presented at trial shows that the victim received eleven stab wounds, some of which were inflicted in the bedroom and some inflicted in the bathroom. The medical examiner's testimony revealed that the victim lived some few minutes before dying.

This case is similar to *Morgan v. State*, 415 So.2d 6 (Fla.1982), where the evidence showed that the death was caused by one or more of ten stab wounds. In that case, this Court approved the finding that the homicide was especially heinous, atrocious, or cruel. Under the totality of the circumstances and applying our previous decisions to the facts of the instant case, we find that trial court properly applied this aggravating circumstance.

Defendant also challenges the finding that the homicide was committed in a cold, calculated, and premeditated manner. In finding that this aggravating circumstance applied, the trial court found:

> Evidence adduced at trial indicated that defendant informed witness Demezio some two days prior to the murder that he brings homosexuals back to their apartments, beats them up, and takes their money or jewelry. Defendant on the day of the murder went to his temporary residence with the victim, went into the closet where Demezio kept a dagger and left the residence with John Pope, Jr., the victim. The dagger was later discovered missing, and John Pope, Jr. was later discovered at his home, dead. His car and jewelry box were missing.

We find that the evidence supports the finding that the homicide was committed in a cold, calculated, and premeditated manner.

In the instant case, even if we were to find that one or two of the aggravating circumstances found by the trial judge, was inapplicable, it would still be appropriate to maintain the death penalty.

For the reasons expressed, we affirm the defendant's conviction and the imposition of the death sentence.

It is so ordered.

QUESTIONS

1. **How does the Court define "heinous, atrocious, or cruel"?**
2. **List the facts in the case that are relevant to deciding whether this was a "heinous, atrocious, or cruel" murder.**
3. **Summarize the arguments in favor of and against classifying this as a "heinous, cruel, and atrocious" murder.**

EXPLORING FURTHER

First-Degree Murder *Actus Reus*

1. Was Beating Him to Death with a Baseball Bat Atrocious First-Degree Murder?

Commonwealth v. Golston, 249, 366 N.E.2d 744 (Mass. 1977)

FACTS About 2:00 p.m. on Sunday, August 24, 1975, a white man about 34 years old came out of a store and walked toward his car. Siegfried Golston, a 19-year-old African American man, tiptoed up behind the victim and hit him on the head with a baseball bat. A witness testified to the sound made by Golston's blow to the victim's head: "Just like you hit a wet, you know, like a bat hit a wet baseball; that's how it sounded." Golston then went into a building, changed his clothes, and crossed the street to the store, where he worked. When asked why he had hit the man, Golston replied, "For kicks." The victim later died. Was this "atrocious murder," a form of first-degree murder that qualified Golston for the death penalty?

DECISION According to the Court, it was:

> There was evidence of great and unusual violence in the blow, which caused a four-inch cut on the side of the skull. There was also evidence that after he was struck the victim fell to the street, and that five minutes later he tried to get up, staggered to his feet and fell again to the ground. He was breathing very hard and a neighbor wiped vomit from his nose and mouth. Later, according to the testimony, the defendant said he did it, "For kicks." There is no requirement that the defendant know that his act was extremely atrocious or cruel, and no requirement of deliberate premeditation. A murder may be committed with extreme atrocity or cruelty even though death results from a single blow. Indifference to the victim's pain, as well as actual knowledge of it and taking pleasure in it, is cruelty; and extreme cruelty is only a higher degree of cruelty.

Second-Degree Murder

As you learned earlier in the chapter, the reason for creating first- and second-degree murders, beginning with Pennsylvania in 1794, was to separate murders that deserved the death penalty from those that didn't. The point was to limit capital punishment without eliminating it. But dividing murders into capital and noncapital murders wasn't, and still isn't, the only way to divide murders between first-, second-, and in a few states, third-degree murder.

Another way to divide murder is between intentional and unintentional murders. Unintentional murders, which are **second-degree murders**, include the "implied malice" crimes created by the common law judges that still exist in common law states and by statute: felony murders, intent to inflict serious bodily injury murders, and depraved heart murders. Intent to inflict serious bodily injury murders are indistinguishable from depraved heart murders; in fact, they're treated as a subset of depraved heart murders, so we won't discuss them. We'll concentrate on depraved heart and felony murders.

Depraved Heart Murders

Depraved heart murders are unintentional but extremely reckless murders. Recall that the reckless mental attitude consists of consciously creating a substantial risk of criminal harm, in this case death. (There are also reckless manslaughters, which are difficult to distinguish from depraved heart murders. You'll encounter some in the "Manslaughter" section.) For now, let's put the difference crudely: reckless manslaughter is killing very recklessly, and reckless murder is killing very, very, very recklessly.

In addition to unintentional second-degree felony murders (there are first-degree felony murders, too), which we'll discuss later, there are other second-degree murders. Sometimes, second-degree murder is treated as a default murder category, meaning it includes all murders that aren't first-degree murders. Some state statutes make this default definition explicit. Michigan's statute (Michigan Criminal Code 2006, § 750.317) is a good example. After defining first-degree murder, the Michigan second-degree murder section provides:

> All other kinds of murder shall be murder of the second degree, and shall be punished by imprisonment in the state prison for life, or any term of years, in the discretion of the court trying the same.

Other states have specific depraved heart second-degree murder statutes. California's provision reads, "Malice is implied, when the circumstances attending the killing show an abandoned and malignant heart" (quoted in *People v. Protopappas* 1988, 922). In our next case excerpt, *People v. Thomas,* the Michigan Court of Appeals interpreted Michigan's second-degree murder statute to include Daniel Thomas' conduct.

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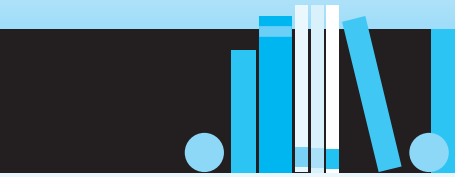


CASE Did He Commit Second-Degree Murder?

People v. Thomas
272 N.W.2d 157 (Mich.App. 1978)

HISTORY

Charged with second-degree murder, M.C.L. s 750.317; M.S.A. s 28.549, Daniel Lindley Thomas, (the defendant), was convicted by a jury of involuntary manslaughter, M.C.L. s 750.321; M.S.A. s 28.553. Thereafter, sentenced to a prison term of 5 to 15 years, the defendant appeals as of right. The Court of Appeals affirmed.

HOLBROOK, PJ., and BURNS and VanVALKENBURG, JJ. HOLBROOK, J.

FACTS

The victim, a 19-year-old male "catatonic schizophrenic," was at the time of his death a resident of Oak Haven, a religious practical training school. When it appeared he was not properly responding to ordinary treatment, the defendant, the work coordinator at Oak Haven, obtained permission from the victim's parents to discipline him if such seemed necessary. Thereafter the defendant, together with another supervisor at Oak Haven, took decedent to the edge of the campus, whereupon decedent's pants were taken down, following which he was spanked with a rubber hose. Such disciplinary session lasted approximately 15 to 30 minutes. During a portion thereof the decedent's hands were tied behind his back for failure to cooperate.

Following the disciplinary session, the defendant testified that the young man improved for a while but then commenced to backslide. The defendant again received permission from the decedent's parents to subject him to further discipline. On September 30, 1976, the defendant again took the decedent to the approximate same location, removed his pants, bound his hands behind him with a rope looped over a tree limb, and proceeded to beat him with a doubled-over rubber hose. This beating lasted approximately 45 minutes to an hour. While the evidence conflicted, it appears that the victim was struck between 30 to 100 times. The beating resulted in severe bruises ranging from the victim's waist to his feet. The decedent's roommate testified that the decedent had open bleeding sores on his thighs. On the date of death, which was nine days after the beating, the decedent's legs were immobile. At no time did the defendant obtain medical attention for the victim.

The defendant admitted he had exercised poor judgment, after seeing the bruises, in continuing the discipline. He further testified that in the two days following the discipline, the decedent seemed to be suffering from the flu, but by Sunday was up and walking and was in apparent good health until one week following the beating, when the decedent became sick with nausea and an upset stomach. These symptoms continued for two days, when the decedent died.

As a result of the autopsy, one Dr. Clark testified that the bruises were the result of a trauma and that the decedent was in a state of continuous traumatization because he was trying to walk on his injured legs. Dr. Clark testified that the decedent's legs were swollen to possibly twice their normal size. He further testified that the actual cause of death was acute pulmonary edema, resulting from the aspiration of stomach contents. Said aspiration caused a laryngeal spasm, causing the decedent to suffocate on his own vomit. Although pulmonary edema was the direct cause of death, Dr. Clark testified that said condition usually had some underlying cause and that, while there were literally hundreds of potential underlying causes, it was his opinion that in the instant case the underlying cause was the trauma to the decedent's legs. In explaining how the trauma ultimately led to the pulmonary edema, Dr. Clark testified that the trauma to the legs produced "crush syndrome" or "blast trauma," also known as "tubular necrosis."

"Crush syndrome" is a condition caused when a part of the body has been compressed for a long period of time and then released. In such cases, there is a tremendous amount of tissue damage to the body part that has been crushed. When the compression is relieved, the tissues begin to return to their normal position, but due to the compression, gaps appear between the layers of tissues, and these areas fill up with blood and other body fluids, causing swelling. In the present case, Dr. Clark estimated that about 10 to 15 percent of the decedent's entire body fluids were contained in the legs, adding an additional ten pounds in weight to the normal weight of the legs and swelling them to twice their normal size. This extra blood and body fluid decreased the amount of blood available for circulation in the rest of the body and would cause the person to become weak, faint, and pass out if he attempted to sit up or do other activities. The decedent was sitting up when he died. It was Dr. Clark's opinion that the causal connection between the trauma and death was more than medically probable and that it was "medically likely." He further testified he could say with a reasonable degree of medical certainty that the trauma to the legs was the cause of death.

One Agatha Thrash, a pathologist called by the defense, offered testimony to refute that of Dr. Clark, although she did admit that pulmonary edema could have been the final cause of death and that Dr. Clark was correct in finding acute tubular necrosis. She concluded that death was probably caused by "encephalo myocarditas," which is an acute swelling of the brain and heart.

OPINION

Appellant claims that the prosecution failed to establish the malice element of second-degree murder. We disagree. Malice or intent to kill may be inferred from the acts of the defendant. The intent to kill may be implied where the actor actually intends to inflict great bodily harm or the natural tendency of his behavior is to cause death or great bodily harm. In the instant case defendant's savage and brutal beating of the decedent is amply sufficient to establish malice. He clearly intended to beat the victim and the natural tendency of defendant's behavior was to cause great bodily harm.

Next defendant claims that the trial court erred by allowing evidence of the first beating to be admitted. We hold such to have been properly admitted as a like act tending to show defendant's motive, intent, the absence of mistake or accident on defendant's part.

Affirmed.

QUESTIONS

1. **List all the facts relevant to proving Daniel Thomas' mental attitude.**

2. **According to the Court, what's the mental element required for depraved heart murder?**

3. **Recall the mental attitudes discussed in Chapter 4: purposely, knowingly, recklessly, and negligently. Which one does the California depraved heart statute, as defined by the Court, most closely resemble? Explain your answer.**
4. **In your opinion, is Thomas guilty of murder? If so, what degree—first or second degree? Explain your answer.**
5. **If he's not guilty, should he be guilty of some lesser degree of criminal homicide? Give a preliminary answer now; then, when we get to manslaughter, you can give a more informed answer.**

Felony Murder

Unintentional deaths that occur during the commission of some felonies are called **felony murder** in most states. What felonies? States vary widely, but the most common are criminal sexual conduct, kidnapping, robbery, arson, and burglary. What degree of murder is this? Here, too, states vary. In some states, it's first degree; in others, it's second degree. For example, Maryland's felony murder statute (Maryland Criminal Code 2006, § 2-201) provides:

(a) A murder is in the first degree if it is:

(4) committed in the perpetration of or an attempt to perpetrate:

(i) arson in the first degree;

(ii) burning a barn, stable, tobacco house, warehouse, or other outbuilding that:

1. is not parcel to a dwelling; and
2. contains cattle, goods, wares, merchandise, horses, grain, hay, or tobacco;

(iii) burglary in the first, second, or third degree;

(iv) carjacking or armed carjacking;

(v) escape in the first degree from a State correctional facility or a local correctional facility;

(vi) kidnapping . . . ;

(vii) mayhem;

(viii) rape;

(ix) robbery . . . ;

(x) sexual offense in the first or second degree;

(xi) sodomy;

(b) (1) A person who commits a murder in the first degree is guilty of a felony and on conviction shall be sentenced to:

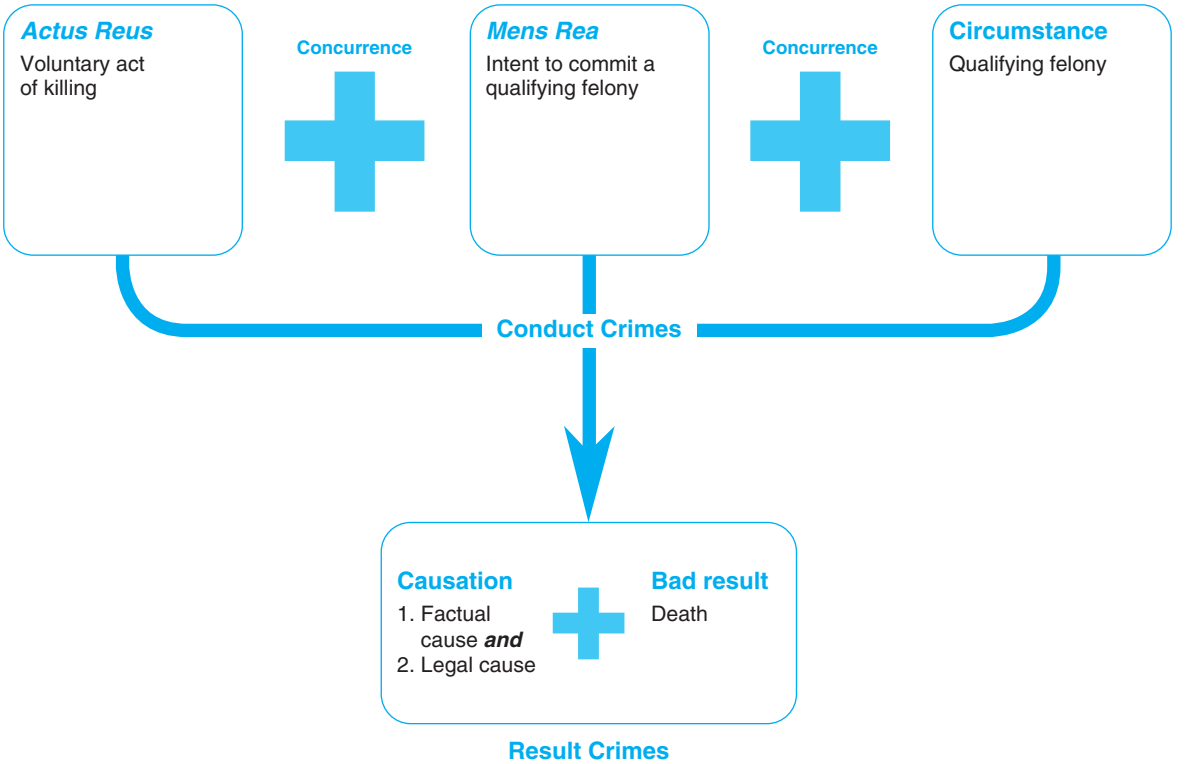
(i) death;

(ii) imprisonment for life without the possibility of parole; or

(iii) imprisonment for life.

Let's look briefly at felony murder *mens rea*, rationales for felony murder statutes, third-party exceptions to these rules, and the dangerous-to-life circumstance element of felony murder.

ELEMENTS OF FELONY MURDER



Felony Murder Mens Rea

Felony murder doesn't require the intent either to kill or to inflict serious bodily harm. In fact, most felony murderers don't want to kill or injure their victims (not necessarily because they're nice people but because they don't want to qualify for the death penalty or some other severe penalty for murder).

How can these unintended deaths be murder? One answer is that the specific intent to commit the underlying felony substitutes for the intent to kill. Why? Take this example. If a robber fires a gun during the robbery and kills a convenience store clerk without the intent to kill, the intent to rob is blameworthy enough to satisfy the *mens rea* of felony murder.

Another answer, and probably the most common, is that felony murder is a strict liability crime, so it doesn't require a fault-based state of mind. This is an inaccurate and misleading answer. If you go back to our discussion of states of mind in Chapter 4, you'll find that most felony murders turn out to be at least negligent, or more likely reckless, with respect to causing death. Most of the actual felony murder cases bear this out.

Even without reading a lot of cases, just ask yourself how many robbers don't know they're creating a substantial risk of killing their victims, and of those few remaining who don't actually know they're creating the high risk, shouldn't they be aware of it? So, the best way to put it is that most felony murderers specifically intend ("purposely," or "with the conscious object" in MPC language) to commit the underlying felony, knowing full well they're creating substantial and unjustifiable risks that someone will die while they're committing that felony (Simons 1997, 1121–22).

Rationales for Felony Murder

Felony murder laws have three rationales:

1. *Deter offenders* The added threat of a murder conviction is supposed to prevent would-be felons from committing felonies that can lead to death.
2. *Reduce violence* The threat of a murder conviction is intended to curtail the use of violence during the commission of felonies by inducing felons to act more carefully during robberies and other felonies with risks of injury and death.
3. *Punish wrongdoers* People who intentionally commit felonies connected with high risks of death or injury deserve the most punishment available.

Empirical research hasn't demonstrated that the rule either deters dangerous felons or reduces the number of deaths during the commission of felonies. Four states—Ohio, Hawaii, Michigan, and Kentucky—have abolished felony murder.

Other states have restricted felony murder to deaths that were foreseeable during the commission of the underlying felony. In our next case excerpt, *People v. Hudson*, the Court upheld Lavelle Hudson's first-degree felony murder conviction when a police officer shot and killed Hudson's partner in robbery, even though Hudson's gun was unloaded.

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CASE Did He Commit First-Degree Felony Murder?

People v. Hudson
856 N.E.2d 1078 (Ill. 2006)

HISTORY

Lavelle Hudson (the defendant) was convicted following a jury trial in the Circuit Court, Cook County, of first-degree murder under a felony murder theory, and the defendant appealed. The Appellate Court affirmed, and the defendant appealed.

FITZGERALD, J.

FACTS

On July 30, 1998, the 15-year-old defendant's fellow gang members Chrispin Thomas and another man also named Lavelle picked up the defendant in a maroon two-door Oldsmobile Cutlass Sierra. They told the defendant that they were taking him to what they called a "lick," to rob the Fresh Barbershop, located at 259 East 115th Street in Chicago. At approximately 4:45 p.m. that day, eight or nine people were in the barbershop: five barbers and three or four customers. One of the customers receiving a haircut was an off-duty police officer, Ricky Bean, who sat in a chair under a barber's smock while in possession of his service revolver.

The defendant and Thomas entered the barbershop carrying guns, although the defendant's was inoperable because the trigger had been removed. While the defendant remained near the front door, Thomas walked to the back of the barbershop. Thomas pointed his revolver at chest level and waved it from side to side in the air and announced, "This is a stick-up, throw your money on the floor." After the barbers and patrons initially threw money on the floor, Thomas said "that's not enough money" and continued waving and pointing the gun and again saying, "Hurry up, throw the money on the floor." As the victims complied, the defendant reached to pick money off the floor.

Bean did not initially throw his wallet on the floor because the wallet contained his badge. When Thomas

turned his back, and the defendant was retrieving money from the floor, Bean pulled out his service revolver, yelling "Police, drop the gun, police," and "Freeze, police," multiple times. Thomas turned and pointed his revolver at Bean from two feet away. Bean fired, striking Thomas in the upper right arm. Thomas transferred his gun from his right hand to his left hand. Bean moved closer and placed his gun on Thomas' chest and said, "Man, drop the gun. Police. Drop the gun."

Thomas tried to point his gun at Bean and the officer fired two more times at Thomas' chest. He again told Thomas to drop the gun, and this time, Thomas complied. Bean then grabbed Thomas' right arm to maintain control of him and make sure he would not try to pick the gun back up. Meanwhile, the defendant continued to retrieve money from the floor. Bean said, "Police, drop the gun." The defendant stood up and pointed the gun at the officer. Bean fired once at the defendant, striking him in the leg. The defendant turned and ran out of the barbershop. Thomas died of multiple gunshot wounds.

The defendant was later apprehended at Roseland Hospital and later admitted to a substantially similar version of events in both an oral and written statement. The defendant was charged with multiple offenses, including first-degree murder and attempted armed robbery. Prior to trial, the state nol-prossed [declined to prosecute] all counts except for first-degree murder. The defendant confirmed the events in the barbershop during his testimony at trial and also admitted to guilty pleas on two other convictions for armed robberies of barbershops that occurred in the weeks prior to the incident at Fresh Barbershop.

Both parties submitted modified versions of Illinois Pattern Jury Instructions, Criminal, No. 7.01 (4th ed. 2000) (IPI Criminal 4th) at the jury instructions conference.

Defendant submitted the following instruction:

> A person commits the offense of first degree murder when he commits the offense of attempt [to commit] armed robbery and during the commission of that offense, the death of an individual is [the] direct and foreseeable consequence of the commission or attempt to commit that offense, and the defendant contemplated or should have contemplated that his actions could result in death.

The instruction submitted by the state read:

> A person commits the offense of first degree murder when he commits the offense of attempt [to commit] armed robbery, and during the course of the commission of the offense of attempt [to commit] armed robbery[,] he sets in motion a chain of events which cause the death of an individual.
>
> It is immaterial whether the killing in such a case is intentional or accidental, or committed by a confederate without the connivance of the defendant or even by a third person trying to prevent the commission of the felony.

The trial court used the state's instruction as to proximate causation. After the jury returned a verdict of guilty on the sole count of first-degree murder, the trial court sentenced the defendant to 22 years' imprisonment.

OPINION

Defendant contends that his conviction for felony murder should be reversed because the trial court abused its discretion by improperly instructing the jury as to the causation element of the felony-murder count. Specifically, according to defendant, the instructions did not refer to an essential element of proximate causation—namely, foreseeability. Because the instruction excluded any mention of foreseeability, defendant claims his due process rights were violated because the State was not required to prove beyond a reasonable doubt every element of the crime of felony murder. The State responds that the trial court did not abuse its discretion in submitting the instruction to the jury because the instruction adequately stated the law. We agree with the State.

We determine whether the trial court's instruction submitted to the jury properly stated the law. Whether the court has abused its discretion in giving a particular non-IPI instruction will depend on whether that instruction was an accurate, simple, brief, impartial, and nonargumentative statement of the applicable law.

In general, Illinois law provides that a defendant may be charged with murder pursuant to the "proximate cause" theory of felony murder. The term "proximate cause" describes two distinct requirements: cause in fact and legal cause. Causal relation is the universal factor common to all legal liability. Legal cause "is essentially a question of foreseeability"; the relevant inquiry is "whether the injury is of a type that a reasonable person would see as a likely result of his or her conduct." Foreseeability is added to the cause-in-fact requirement because "even when cause in fact is established, it must be determined that any variation between the result intended and the result actually achieved is not so extraordinary that it would be unfair to hold the defendant responsible for the actual result.

The parties do not dispute that the instruction adequately stated the cause-in-fact requirement, as the submitted instruction included the phrase "he sets in motion a chain of events which cause the death of an individual." As for whether the instruction indicated that the cause must also be "proximate," a review of the law in this state concerning proximate cause since 1935 demonstrates that the disputed language in the instant case—it is immaterial whether the killing in such a case is intentional or accidental or committed by a confederate without the connivance of the defendant or even by a third person trying to prevent the commission of the felony—has long been integral to this state's felony-murder proximate cause jurisprudence.

We return to the instructions which were tendered by the parties to the trial court regarding proximate causation. At the jury instruction conference, both parties

submitted modified versions of IPI Criminal 4th No. 7.01. Defendant submitted the following instruction [see jury instructions in the FACTS section earlier].

Following argument, the trial court chose to give the State's instructions.

As we have repeatedly held, this concept has been part and parcel of our felony-murder jurisprudence on proximate cause since 1935. The jury was not instructed that a mere chain reaction was sufficient to convict, but rather that a killing by a third party resisting the robbery could also be a proximate cause. Therefore, the trial court did not abuse its discretion in so instructing the jury. Accordingly, defendant's due process rights were not violated, as the State was required to prove beyond a reasonable doubt all the elements of the offense.

For the foregoing reasons, we affirm the judgment of the appellate court affirming the judgment of the trial court.

Affirmed.

DISSENT

McMORROW, J.

After a jury trial, 15-year-old defendant Lavelle Hudson was convicted of first degree murder based on the commission of a felony (felony murder). The charge of murder was premised on the death of Chrispin Thomas, who was shot and killed by an off-duty police officer who happened to be a customer in the barbershop that defendant and Thomas attempted to rob. The issue on appeal is whether the jury was properly instructed regarding proximate cause in relation to felony murder. The majority affirms defendant's conviction, finding that the State's proffered non-IPI jury instruction correctly states the law. I disagree.

I maintain that where a cofelon is killed by a third party, the most direct cause of the death is the *cofelon's* participation in the felony, not the defendant's acts. Accordingly, under the proximate cause theory of liability for felony murder, a cofelon may not be held liable for murder when a third party kills an active coparticipant in the underlying felony. In my view, the felony-murder doctrine simply does not apply to render a surviving felon guilty of murder where a cofelon is killed by a nonparticipant in the felony.

Here, the notion that the cofelon's own participation in the felony is the most direct cause of his death is made particularly apparent by the facts. In the case at bar, defendant and Thomas entered a barbershop with the intent to commit a robbery therein. Both carried guns, although defendant's gun was inoperable. Inside the barbershop, Thomas took charge and demanded that the customers throw their money on the floor.

When Thomas was not looking, an off-duty police officer, who happened to be a customer in the shop, drew his service revolver and announced, "Police, drop the gun" or "Freeze, police." Despite repeated warnings, Thomas pointed his gun at the officer, who responded by shooting Thomas in the right arm. Thomas, however, was not dissuaded. He transferred his gun to his left arm and tried to point it at the officer. The officer walked up to Thomas and, placing his gun on Thomas' chest, ordered Thomas to "Drop the gun, man." Thomas still refused to comply. Instead, Thomas tried to point his gun at the officer. Only after the officer shot Thomas in the chest twice, at point-blank range, did Thomas drop the gun. Thomas died as a result of his injuries from these gunshots.

It is abundantly clear from the above facts that Thomas' conduct, *not defendant's*, "set in motion" the chain of events which proximately caused Thomas' death at the hands of the officer. While it is true that defendant participated in the underlying felony of armed robbery, nothing he did during the course of the felony led to the death of his cofelon. In my view, the public policy reasons for holding the felon criminally liable for murder are inapplicable in these circumstances. Thus, I would hold that a conviction for murder in these cases is fundamentally unjust. For this reason, I dissent.

QUESTIONS

1. **List all of the relevant facts necessary to determine whether Lavelle Hudson is guilty of first-degree felony murder.**
2. **Summarize the defendant's and the prosecutions proposed jury instructions.**
3. **Summarize the majority opinion's arguments backing up its judgment that Lavelle Hudson was guilty of first-degree murder when a police officer shot and killed his partner in robbery when Hudson's gun was unloaded.**
4. **Summarize the dissent's arguments backing up his conclusion that Hudson should not be accountable for a felony murder for the death of his partner in robbery.**
5. **In your opinion, was Lavelle Hudson guilty of felony murder in the first degree? Back up your answer with the relevant facts of the case, and the majority and dissenting opinions.**

EXPLORING FURTHER

Felony Murder

1. Was Fraud a Felony "Inherently Dangerous to Human Life"?

People v. Phillips, 414 P.2d 353 (Cal. 1966)

FACTS Linda Epping died on December 29, 1961, at the age of 8, from a rare and fast-growing form of eye cancer.

Linda's mother first observed a swelling over the girl's left eye in June of that year. The doctor whom she consulted recommended that Linda be taken to Dr. Straatsma, an ophthalmologist at the UCLA Medical Center.

On July 10 Dr. Straatsma first saw Linda; on July 17 the girl, suffering great pain, was admitted to the center. Dr. Straatsma performed an exploratory operation and the resulting biopsy established the nature of the child's affliction. Dr. Straatsma advised Linda's parents that her only hope for survival lay in immediate surgical removal of the affected eye. The Eppings were loath to permit such surgery, but on the morning of July 21 Mr. Epping called the hospital and gave his oral consent. The Eppings arrived at the hospital that afternoon to consult with the surgeon.

While waiting they encountered a Mrs. Eaton, who told them that the defendant had cured her son of a brain tumor without surgery. Mrs. Epping called the defendant at his office. According to the Eppings, the defendant repeatedly assured them that he could cure Linda without surgery. They testified that the defendant urged them to take Linda out of the hospital, claiming that the hospital was "an experimental place," that the doctors there would use Linda as "a human guinea pig" and would relieve the Eppings of their money as well.

The Eppings testified that in reliance upon the defendant's statements they took Linda out of the hospital and placed her under the defendant's care. They stated that if the defendant had not represented to them that he could cure the child without surgery and that the UCLA doctors were only interested in experimentation, they would have proceeded with the scheduled operation. The prosecution introduced medical testimony that tended to prove that if Linda had undergone surgery on July 21 her life would have been prolonged or she would have been completely cured.

The defendant treated Linda from July 22 to August 12, 1961. He charged an advance fee of $500 for three months' care as well as a sum exceeding $200 for pills and medicines.

On August 13 Linda's condition had not improved; the Eppings dismissed the defendant. Later the Eppings sought to cure Linda by means of a Mexican herbal drug known as yerba mansa and, about September 1, they placed her under the care of the Christian Science movement. They did not take her back to the hospital for treatment. . . . Was Phillips guilty of felony murder?

DECISION The jury said yes. No, ruled the California Supreme Court:

> Only such felonies as are in themselves "inherently dangerous to human life" can support the application of the felony murder rule. We have ruled that in assessing such peril to human life inherent in any given felony "we look to the elements of the felony in the abstract, not the particular 'facts' of the case."
>
> We have thus recognized that the felony murder doctrine expresses a highly artificial concept that deserves no extension beyond its required application. Indeed the rule itself has been abandoned by the courts of England, where it had its inception. It has been subjected to severe and sweeping criticism. No case to our knowledge in any jurisdiction has held that because death results from a course of conduct involving a felonious perpetration of a fraud, the felony murder doctrine can be invoked. . . .

Corporation Murder

LO 5

Can corporations commit murder? Yes, according to a few prosecutors who've prosecuted corporations for murder (Cullen, Maakestad, and Cavender 1987). Probably the most publicized corporate murder case involved the deaths of three young women who were killed on an Indiana highway in 1978 when their Ford Pinto exploded after being struck from behind by another vehicle.

The explosion followed several other similar incidents involving Pintos that led to grisly deaths. Published evidence revealed that Ford may have known that the Pinto gas tanks weren't safe but took the risk that they wouldn't explode and injure or kill anyone. Following the three young women's deaths, the state of Indiana indicted Ford Motor Company for reckless homicide, charging that Ford had recklessly authorized, approved, designed, and manufactured the Pinto and allowed the car to remain in use with defectively designed fuel tanks. These tanks, the indictment charged, killed the three young women in Indiana. For a number of reasons not related directly to whether corporations can commit murder, the case was later dismissed.

In another case that drew wide public attention during the 1980s, Autumn Hills Convalescent Centers, a corporation that operated nursing homes, went on trial for

charges that it had murdered an 87-year-old woman by neglect. David Marks, a Texas assistant attorney general, said, "From the first day until her last breath, she was unattended to and allowed to lie day and night in her own urine and waste."

The case attracted attention because of allegations that as many as sixty elderly people had died from substandard care at the Autumn Hills nursing home near Galveston, Texas. The indictment charged that the company had failed to provide nutrients, fluids, and incontinent care for the woman, Mrs. Breed, and neglected to turn and reposition her regularly to combat bedsores. One prosecution witness testified that Mrs. Breed's bed was wet constantly and the staff seldom cleaned her. The corporation defended against the charges, claiming that Mrs. Breed had died from colon cancer, not improper care (Reinhold 1985, 17).

Most state criminal codes apply to corporate criminal homicide in the same way that they apply to other crimes committed for the corporation's benefit. Specifically, both corporations and high corporate officers acting within the scope of their authority and for the benefit of a corporation can commit murder. In practice, however, prosecutors rarely charge corporations or their officers with criminal homicide, and convictions rarely follow.

The reluctance to prosecute corporations for murder, or for any homicide requiring the intent to kill or inflict serious bodily injury, is due largely to the hesitation to view corporations as persons. Although, theoretically, the law clearly makes that possible, in practice, prosecutors and courts have drawn the line at involuntary manslaughter, a crime whose *mens rea* is negligence and occasionally recklessness.

As for corporate executives, the reluctance to prosecute stems from vicarious liability and the questions it raises about culpability (see Chapter 4). It has been difficult to attribute deaths linked with corporate benefit to corporate officers who were in charge generally but didn't order or authorize a killing, didn't know about it, or even didn't want it to happen.

Only in outrageous cases that receive widespread public attention, such as the Pinto and nursing home cases, do prosecutors risk acquittal by trying corporations and their officers for criminal homicide. In these cases, prosecutors aren't hoping to win the case in traditional terms, meaning to secure convictions. Business law professor William J. Maakestad says, "At this point, success of this type of corporate criminal prosecution is defined by establishing the legitimacy of the case. If you can get the case to trial, you have really achieved success" (Lewin 1985, D2).

In our next case excerpt, *People v. O'Neil* (1990), a jury convicted corporate and individual officers of murder, but the Appellate Court reversed their convictions.

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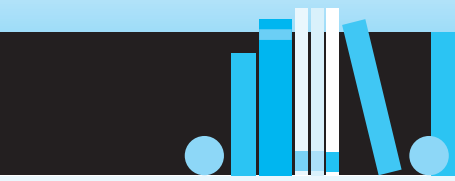


CASE Did They "Murder" Their Employee?

People v. O'Neil
550 N.E.2d 1090 (Ill.App. 1990)

HISTORY

Following a joint bench trial [trial by a judge without a jury], Steven O'Neil, Charles Kirschbaum, and Daniel Rodriguez, agents of Film Recovery Systems, Inc. (Film Recovery), were convicted of the murder of Stefan Golab, a Film Recovery employee, from cyanide poisoning stemming from conditions in Film Recovery's plant in Elk Grove Village, Illinois. Corporate defendants Film Recovery and its sister corporation Metallic Marketing Systems, Inc. (Metallic Marketing), were convicted of involuntary manslaughter in the same death.

O'Neil, Kirschbaum, and Rodriguez each received sentences of 25 years' imprisonment for murder. O'Neil and Kirschbaum were also each fined $10,000 with respect to the murder convictions. Corporate defendants Film Recovery and Metallic Marketing were each fined $10,000 with respect to the convictions for involuntary manslaughter.

The defendants appealed, and the Appellate Court reversed the convictions.

LORENZ, J.

FACTS

In 1982, Film Recovery occupied premises at 1855 and 1875 Greenleaf Avenue in Elk Grove Village. Film Recovery was there engaged in the business of extracting, for resale, silver from used X-ray and photographic film. Metallic Marketing operated out of the same premises on Greenleaf Avenue and owned 50 percent of the stock of Film Recovery. The recovery process was performed at Film Recovery's plant located at the 1855 address and involved "chipping" the film product and soaking the granulated pieces in large open bubbling vats containing a solution of water and sodium cyanide. The cyanide solution caused silver contained in the film to be released. A continuous flow system pumped the silver-laden solution into polyurethane tanks, which contained electrically charged stainless steel plates to which the separated silver adhered. The plates were removed from the tanks to another room where the accumulated silver was scraped off. The remaining solution was pumped out of the tanks and the granulated film, devoid of silver, shoveled out.

On the morning of February 10, 1983, shortly after he disconnected a pump on one of the tanks and began to stir the contents of the tank with a rake, Stefan Golab became dizzy and faint. He left the production area to go rest in the lunchroom area of the plant. Plant workers present on that day testified that Golab's body had trembled and he had foamed at the mouth. Golab eventually lost consciousness and was taken outside of the plant. Paramedics summoned to the plant were unable to revive him. Golab was pronounced dead upon arrival at Alexian Brothers Hospital.

The Cook County medical examiner performed an autopsy on Golab the following day. Although the medical examiner initially indicated that Golab could have died from cardiac arrest, he reserved final determination of death pending examination of results of toxicological laboratory tests on Golab's blood and other body specimens. After receiving the toxicological report, the medical examiner determined that Golab died from acute cyanide poisoning through the inhalation of cyanide fumes in the plant air.

The defendants were subsequently indicted by a Cook County grand jury. The grand jury charged defendants O'Neil, Kirschbaum, Rodriguez, Pett, and Mackay with murder, stating that, as individuals and as officers and high managerial agents of Film Recovery, they had, on February 10, 1983, knowingly created a strong probability of Golab's death.

The indictment stated the individual defendants failed to disclose to Golab that he was working with substances containing cyanide and failed to advise him about, train him to anticipate, and provide adequate equipment to protect him from, attendant dangers involved.

The grand jury charged Film Recovery and Metallic Marketing with involuntary manslaughter stating that, through the reckless acts of their officers, directors, agents, and others, all acting within the scope of their employment, the corporate entities had, on February 10, 1983, unintentionally killed Golab. Finally, the grand jury charged both individual and corporate defendants with reckless conduct as to 20 other Film Recovery employees based on the same conduct alleged in the murder indictment, but expanding the time of that conduct to "on or about March 1982 through March 1983."

Proceedings commenced in the circuit court in January 1985 and continued through the conclusion of trial in June of that year. In the course of the 24-day trial, evidence from 59 witnesses was presented, either directly or through stipulation of the parties. That testimony is contained in over 2,300 pages of trial transcript. The parties also presented numerous exhibits including photographs, corporate documents, and correspondence, as well as physical evidence.

On June 14, 1985, the trial judge pronounced his judgment of the defendants' guilt. The trial judge found that "the mind and mental state of a corporation is the mind and mental state of the directors, officers and high managerial personnel because they act on behalf of the corporation for both the benefit of the corporation and for themselves." Further, "If the corporation's officers, directors and high managerial personnel act within the scope of their corporate responsibilities and employment for their benefit and for the benefit of the profits of the corporation, the corporation must be held liable for what occurred in the work place." The defendants filed timely notices of appeal, the matters were consolidated for review, and arguments were had before this court in July 1987. . . .

OPINION

The Criminal Code of 1961 defines murder as follows:

> A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death: He knows that such acts create a strong probability of death or great bodily harm to that individual. (Ill.Rev.Stat.1981, ch. 38, par.9-1(a)(2).)

Involuntary manslaughter is defined as:

> A person who unintentionally kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly. (Ill.Rev.Stat.1981, ch. 38, par. 9-3(a).)

Reckless conduct is defined as:

> A person who causes bodily harm to or endangers the bodily safety of an individual by any means, commits reckless conduct if he performs recklessly the acts which cause the harm or endanger safety, whether they otherwise are lawful or unlawful. (Ill.Rev.Stat.1981, ch. 38, par. 12-5(a).)

In Illinois, a corporation is criminally responsible for offenses "authorized, requested, commanded, or performed by the board of directors or by a high managerial agent acting within the scope of his employment." A high managerial agent is defined as "an officer of the corporation, or any other agent who has a position of comparable authority for the formulation of corporate policy or the supervision of subordinate employees in a managerial capacity" (Ill.Rev.Stat. 1981, ch. 38, par. 5-4(c)(2)). Thus, a corporation is criminally responsible whenever any of its high managerial agents possess the requisite mental state and is responsible for a criminal offense while acting within the scope of his employment.

Evidence at trial indicated Golab died after inhaling poisonous cyanide fumes while working in a plant operated by Film Recovery and its sister corporation Metallic Marketing where such fumes resulted from a process employed to remove silver from used X-ray and photographic film. The record contains substantial evidence regarding the nature of working conditions inside the plant. Testimony established that air inside the plant was foul smelling and made breathing difficult and painful. Plant workers experienced dizziness, nausea, headaches, and bouts of vomiting.

There is evidence that plant workers were not informed they were working with cyanide. Nor were they informed of the presence of, or danger of breathing, cyanide gas. Ventilation in the plant was poor. Plant workers were given neither safety instruction nor adequate protective clothing.

Finally, testimony established that defendants O'Neil, Kirschbaum, and Rodriguez were responsible for operating the plant under those conditions. For purposes of our disposition, we find further elaboration on the evidence unnecessary.

Moreover, although we have determined evidence in the record is not so insufficient as to bar retrial, our determination of the sufficiency of the evidence should not be in any way interpreted as a finding as to defendants' guilt that would be binding on the court on retrial.

Reversed and remanded.

QUESTIONS

1. **List all the evidence for and against the corporations' and the individuals' liability for murder and involuntary manslaughter.**
2. **Why did the Court reverse and remand the case?**
3. **On remand, would you find the defendants guilty of murder? Explain your answer.**
4. **Do you agree that it's inconsistent to find that the corporation had one state of mind and the individuals another?**
5. **Consider the following remarks made after the convictions in the original trial (Greenhouse 1985, 1):**
   a. Following the conviction in the original trial, then attorney Richard M. Daley said the verdicts meant that employers who knowingly expose their workers to dangerous conditions leading to injury or even death can be held criminally responsible for the results of their actions.
   b. Ralph Nader, consumer advocate lawyer, said, "The public is pretty upset with dangerously defective products, bribery, toxic waste, and job hazards. The polls all show it. The verdict today will encourage other prosecutors and judges to take more seriously the need to have the criminal law catch up with corporate crime."
   c. Professor John Coffee, Columbia Law School, said, "When you threaten the principal adequately, he will monitor the behavior of his agent."
   d. A California deputy district attorney put it more bluntly: "A person facing a jail sentence is the best deterrent against wrongdoing."
   e. Joseph E. Hadley Jr., a corporate lawyer who specializes in health and safety issues, said the decision would not send shockwaves through the corporate community: "I don't think corporate America should be viewed as in the ballpark with these folks. This was a highly unusual situation, but now people see that where the egregious situation occurs, there could be a criminal remedy."
   f. Robert Stephenson, a lawyer defending another corporation, said, "I don't believe these statutes [murder and aggravated battery] were ever meant to be used in this way."
   g. Utah's governor, Scott M. Matheson, refused to extradite Michael T. McKay, a former Film Recovery vice president then living in Utah, because he was an "exemplary citizen who should not be subjected to the sensational charges in Illinois."

   Which of the statements best describes what you think is proper policy regarding prosecutions of corporate executives for murder? Defend your answer.

Manslaughter

Manslaughter, like murder, is an ancient common law crime created by judges, not by legislators. According to the eighteenth-century commentator Blackstone (1769):

> Manslaughter is the unlawful killing of another which may be either voluntarily upon a sudden heat, or involuntarily where one had no intent to do another any personal mischief. (191–92)

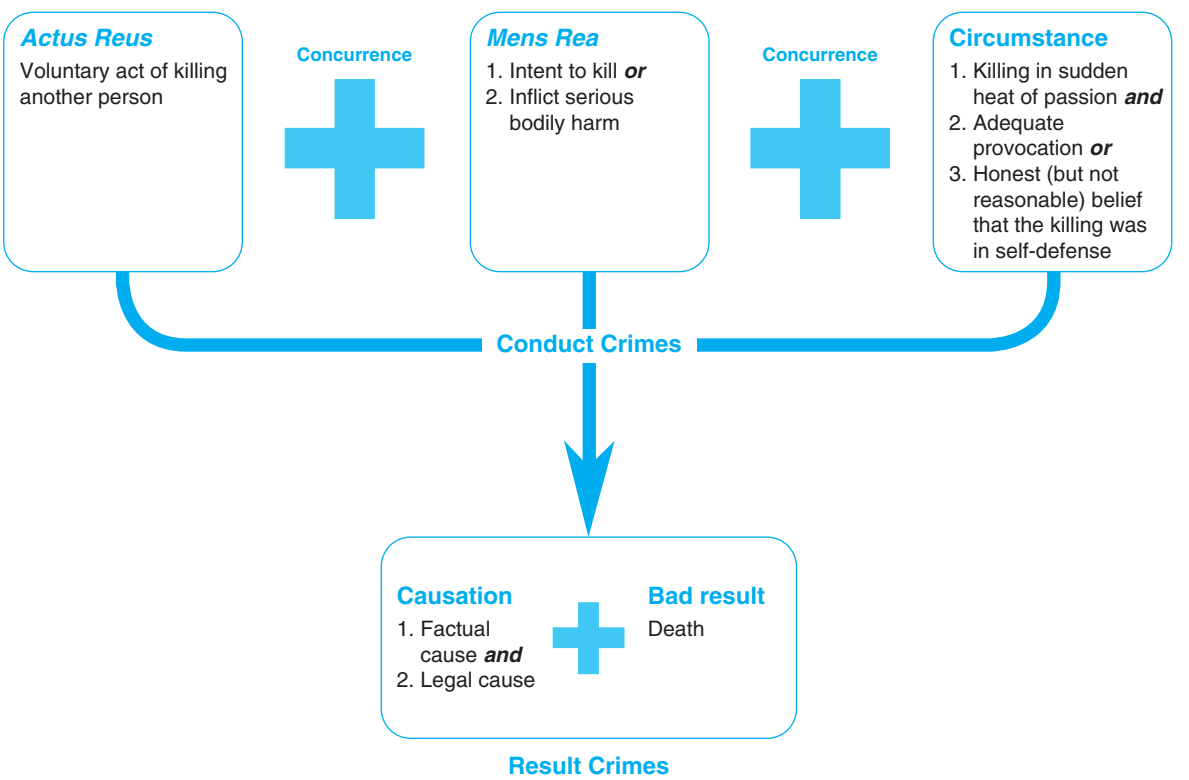
Blackstone's definition is more than three centuries old, but it goes straight to *mens rea*—the heart of manslaughter, as it is in most murder classifications: "Was it intentional (voluntary) or unintentional (involuntary)?

Voluntary Manslaughter

LO 6, LO 7

> If upon a sudden quarrel two persons fight, and one of them kills the other, this is [voluntary] manslaughter. And, so it is, if they upon such an occasion go out and fight in a field, for this is one continued act of passion and the law pays that regard to human frailty, as not to put a hasty and a deliberate act upon the same footing with regard to guilt. So also a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kills the aggressor,

ELEMENTS OF VOLUNTARY MANSLAUGHTER



> though this is not excusable, since there is no absolute necessity for doing so to preserve himself, yet neither is it murder for there is no previous malice. (Blackstone 1769, 191)

Blackstone's description of voluntary manslaughter in the late 1700s is an excellent way to begin our discussion of voluntary manslaughter. Voluntary manslaughter is about letting your anger get the better of you in the worst possible way—killing another person. Criminal law aims to bridle passions and build self-control, but it also recognizes the frailty of human nature.

The law of voluntary manslaughter takes into account both the seriousness of this felony and human frailty. So although a sudden intentional killing in anger is a very serious felony, it's not the most serious; that's reserved for murder. Let's be clear that the law of voluntary manslaughter doesn't reward individuals who give in to their rages by letting them walk; it punishes them severely, but it punishes them less than they'd get for murder.

Adequate Provocation

Voluntary manslaughter (like all criminal homicides) consists of the elements of *actus reus, mens rea*, causation, and death. But it has one element not present in murder, and one we haven't discussed; this is the circumstance element of **adequate provocation**. In voluntary manslaughter, adequate provocation is the trigger that sets off the sudden killing of another person.

But not everyone who flies into a rage and suddenly kills someone has committed voluntary manslaughter instead of murder. Adequate provocation has to be both objective and subjective. First, the defendant herself must be provoked; that's the subjective aspect. Second, the provocation has to be reasonable; that's the objective aspect.

The Maryland Court of Appeals puts it this way:

> For a provocation to be "adequate," it must be "calculated to inflame the passion of a reasonable person and tend to cause *that person* to act for the moment from passion rather than reason." (emphasis added)

The Maryland Court describes one aspect of "adequacy." There is another, which flows from the requirement that the passion be that of a reasonable person; the provocation must be one the law is prepared to recognize as minimally sufficient, in proper circumstances, to overcome the restraint normally expected from reasonable persons. There are many "slings and arrows of outrageous fortune" that people either must tolerate or find an alternative way, other than homicide, to redress (*Dennis v. State* 1995, 695).

The thinking is that *reasonable* persons, however great the provocation, would never kill someone except in self-defense (Chapter 4). That's why voluntary manslaughter isn't a justifiable homicide; it's only a lesser version of intentional murder. Professor LaFave (2003a), in his treatise widely cited in Appellate Court cases like the ones you're reading in the case excerpts, recommends that we call reasonable provocation, **understandable provocation**:

> What is really meant by "reasonable provocation" is provocation which causes a reasonable man to lose his normal self-control; and although a reasonable man who had thus lost control over himself would not kill, yet his homicidal reaction is at least understandable. Therefore, one who reacts to the provocation should not be guilty of murder. But neither should he be not guilty at all. So, his conduct falls into the intermediate category of voluntary manslaughter. (777)

The common law (and many states today) recognized four reasonable provocations:

1. Mutual combat (fighting)
2. Assault and battery (Chapter 10)
3. Trespass (Chapter 11)
4. Adultery

Only serious fights qualify as adequate provocation; scuffles don't. Some batteries—but not all offensive touching (see Chapter 10)—are adequate provocation. Being pistol whipped on the head, being struck hard in the face by fists, or enduring "staggering" body blows qualify. Being slapped or shoved doesn't.

Assault without body contact is sometimes adequate provocation. In *Beasley v. State* (1886), a man shot at Beasley and missed him. Beasley was so enraged he shot his attacker in the back as the assailant ran away. The Court ruled the shot in the back wasn't justified as self-defense, but the initial incident was provocative enough to reduce murder to manslaughter.

Insulting gestures by themselves aren't adequate provocation, but if they indicate an intent to attack with deadly force, they are. So "flipping someone the bird" isn't adequate provocation, but waving a gun around in a threatening manner can be.

Trespassing is adequate provocation only if the trespassers invade a home and threaten someone with death.

"Sudden Heat of Passion" with No "Cooling Off" Period

Voluntary manslaughter requires killing in the "sudden heat of passion" with no "cooling off" period (Perkins and Boyce 1982, 95–96). Whether the actual time between the provocation and the killing—seconds, hours, or even days—qualifies as the "sudden heat of passion" depends upon the facts of the individual case. Courts apply an **objective test of cooling-off time**; that is, would a reasonable person under the same circumstances have had time to cool off? If defendants have a reasonable time for their murderous rages to subside, the law views their killings as murders even if they'd taken place immediately following the provocations.

Blackstone (1769, 191) applied the objective test to this example (given earlier): if two persons "upon a sudden quarrel" start fighting indoors, it's voluntary manslaughter "if they upon such an occasion go out and fight in a field, for this is one continued act of passion and the law pays that regard to human frailty, as not to put a hasty and a deliberate act upon the same footing with regard to guilt."

Using the same objective test, the time for cooling off may be considerable. In a famous old case, *State v. Flory* (1929), Flory's wife told him her father had raped her. The Court ruled that Flory's passion hadn't reasonably cooled even after he walked all night to his father-in-law's house and killed him the next day! The Court said the heinous combination of incest and rape was more than enough to keep a reasonable person in a murderous rage for at least several days.

Causation

To prove voluntary manslaughter, the prosecution has to prove that the provocation caused the passion and the killing. Suppose Sonny intends to kill his wife Carly because she lied to him. He goes to her bedroom, finds her in bed with his worst enemy, and shoots her to death. Is it voluntary manslaughter or murder? It's murder, because Carly's lie, not her adultery, provoked Sonny to kill her.

Provocation by Words

It's often said that words are never adequate provocation. That was true when the rule was created in the days of the common law. It's still the rule in most states but not everywhere. For example, Section 609.20 of the Minnesota Criminal Code provides:

> 609.20 Manslaughter in the first degree
>
> Whoever does any of the following is guilty of manslaughter in the first degree and may be sentenced to imprisonment for not more than 15 years or to payment of a fine of not more than $30,000, or both:
>
> (1) intentionally causes the death of another person in the heat of passion provoked by such words or acts of another as would provoke a person of ordinary self-control under like circumstances, provided that the crying of a child does not constitute provocation.

There are signs, besides the Minnesota, that the **bright-line rule, "words can never provoke,"** isn't as bright as it used to be. Some cases are adopting a more flexible rule that "words can sometimes amount to adequate provocation" (LaFave 2003a, 780–81). A few states, such as California and Pennsylvania, have adopted the "**last-straw" rule** (also called **"long smoldering" or "slow burn" rule**) of adequate provocation. It's defined as "a smoldering resentment or pent-up rage resulting from earlier insults or humiliating events culminating in a triggering event that, by itself, might be insufficient to provoke the deadly act" (*Dennis v. State* 1995, 689).

Probably the most significant development is the adoption by several states of the Model Penal Code (MPC) **extreme mental or emotional disturbance** manslaughter provision:

> Section 210.3 Manslaughter
>
> 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 such explanation or excuse shall be determined from the viewpoint of the person in the actor's situation under the circumstances as he believes them to be. (ALI 1985, Model Penal Code)

Other states, probably most, continue to follow the words-can-never-provoke rule. Maryland is one. In *Dennis v. State* (1995), for example, the Maryland Court of Appeals rejected the last-straw rule. John Patrick Dennis married his high school sweetheart Robin, when she became pregnant with their child. According to Dennis, he worked hard to support his family, but they ran into money problems because of Robin's illegal drug use and spending habits. Robin moved out of their house and in with her boyfriend, Dantz. After learning that Robin and Dantz did drugs in front of their son, Dennis became really agitated. He went to confront them at Dantz's. When he got there, he saw Robin and Dantz through the window; they were hugging and maybe getting "sexual." Dennis claims to have blacked out at that point. Robin called the police, screaming that Dantz was dead (690).

Dennis was convicted of voluntary manslaughter. The trial court rejected his claim that he was adequately provoked. He appealed. The Court of Appeals affirmed, rejecting the last-straw rule, and held that "rejected taunts and verbal assaults" aren't "adequate provocation, even when taking on their humiliating and enraging character from antecedent events" (689).

Provocation by Intimates

According to the **common law paramour rule**, a husband who caught his wife in the act of adultery had adequate provocation to kill: "There could be no greater provocation than this." Some state statutes went further than the common law rule; they called paramour killings justifiable homicide. In the early days, the rule was only available to husbands. Today, it applies to both.

Many cases have held that it's voluntary manslaughter for a spouse to kill the adulterous spouse, the paramour, or both, if the killing took place in the first heat of passion following the sight of the adultery.

Many voluntary manslaughter cases in states that have adopted these reforms, which are aimed at expanding the reach of common law "adequate" provocation to include the definitions we've just discussed, don't involve "sordid affairs and bedside confrontations." According to Professor Victoria Nourse (1997), significant numbers of cases in her empirical study of states who've adopted the MPC extreme mental or emotional disturbance manslaughter provision (quoted earlier)

> involved no sexual infidelity whatsoever, but only the desire of the killer's victim to leave a miserable relationship. Reform has permitted juries to return a manslaughter verdict in cases where the defendant claims passion because the victim left, moved the furniture out, planned a divorce, or sought a protective order (1332).
>
> Even infidelity has been transformed under reform's gaze into something quite different from the sexual betrayal we might expect—it is the infidelity of a fiancé who danced with another, of a girlfriend who decided to date someone else, and of the divorcee found pursuing a new relationship months after the final decree. (1332–33)

Commonwealth v. Schnopps (1983), our next case excerpt, involved dancing, an affair, and a spouse who wanted to leave. The Court wasn't "reform" minded; it rejected the spouse's arguments of adequate provocation and upheld his conviction for first-degree murder.

Commonwealth v. Schnopps *(1983), our next case excerpt, involved dancing, an affair, and a spouse who wanted to leave.*

CASE Did He Commit First-Degree Murder?

Commonwealth v. Schnopps
459 N.E.2d 98 (Mass. 1983)

HISTORY

George Schnopps, the defendant, was convicted before the Superior Court, Berkshire County, Massachusetts, of first-degree murder of his estranged wife and of unlawfully carrying a firearm. At a retrial, the defendant, Schnopps, again was convicted of first-degree murder, and he appealed again. The Massachusetts Supreme Judicial Court affirmed.

ABRAMS, J.

FACTS

On October 13, 1979, George Schnopps fatally shot his wife of 14 years. The victim and Schnopps began having marital problems approximately six months earlier when Schnopps became suspicious that his wife was seeing another man. Schnopps and his wife argued during this period over his suspicion that she had a relationship with a particular man, whom Schnopps regarded as a "bum." On a few occasions Schnopps threatened to harm his wife with scissors, with a knife, with a shotgun, and with a plastic pistol.

A few days prior to the slaying, Schnopps threatened to make his wife suffer as "she had never suffered before." However, there is no evidence that Schnopps physically harmed the victim prior to October 13.

On October 12, 1979, while at work, Schnopps asked a coworker to buy him a gun. He told the coworker he had been receiving threatening telephone calls. After work, Schnopps and the coworker went to Pownal, Vermont, where the coworker purchased a .22-caliber pistol and a box of ammunition for the defendant. Schnopps purchased a starter pistol to scare the caller if there was an attempted break-in. Schnopps stated he wanted to protect himself and his son, who had moved back with him.

Schnopps and his coworker had some drinks at a Vermont bar. The coworker instructed Schnopps in the use of the .22-caliber pistol. Schnopps paid his coworker for the gun and the ammunition. While at the bar Schnopps told the coworker that he was "mad enough to kill." The coworker asked Schnopps "if he was going to get in any trouble with the gun." Schnopps replied that "a bullet was too good for her, he would choke her to death." Schnopps testified that his wife had left him three weeks prior to the slaying. He claims that he first became aware of problems in his 14-year marriage at a point about six months before the slaying. According to Schnopps, on that occasion he took his wife to a club to dance, and she spent the evening dancing with a coworker.

On arriving home, Schnopps and his wife argued over her conduct. She told him that she no longer loved him and that she wanted a divorce. Schnopps became very upset. He admitted that he took out his shotgun during the course of this argument, but he denied that he intended to use it.

During the next few months, Schnopps argued frequently with his wife. Schnopps accused her of seeing another man, but she steadfastly denied the accusations. On more than one occasion Schnopps threatened his wife with physical harm. He testified he never intended to hurt his wife but only wanted to scare her so that she would end the relationship with her coworker.

One day in September 1979, Schnopps became aware that the suspected boyfriend used a "signal" in telephoning Schnopps' wife. Schnopps used the signal, and his wife answered the phone with "Hi, Lover." She hung up immediately when she recognized Schnopps' voice. That afternoon she did not return home. Later that evening, she informed Schnopps by telephone that she had moved to her mother's house and that she had the children with her. On that day she moved to her mother's home and took their three children with her. (The children were two daughters, age thirteen and age four, and a son, age eleven.)

On October 6, the son returned to his father's home. She told Schnopps she would not return to their home. Thereafter she "froze me out" and would not talk to him. During this period, Schnopps spoke with a lawyer about a divorce and was told that he had a good chance of getting custody of the children due to his wife's "desertion and adultery."

On the day of the slaying, Schnopps told a neighbor he was going to call his wife and have her come down to pick up some things. He said he was thinking of letting his wife have the apartment. This was the first time Schnopps indicated he might leave the apartment. He asked the neighbor to keep the youngest child with her if his wife brought her so he could talk with his wife.

Schnopps told his wife that he wanted his children at home and that he wanted the family to remain intact. Schnopps cried during the conversation, and begged his wife to let the children live with him and to keep their family together.

His wife replied, "No, I am going to court, you are going to give me all the furniture, you are going to have to get the Hell out of here, you won't have nothing." Then, pointing to her crotch, she said, "You will never touch this again, because I have got something bigger and better for it."

Schnopps said that these words "cracked" him. He explained that everything went "around" in his head, that he saw "stars." He went "toward the guns in the dining room." He asked his wife, "Why don't you try" (to salvage the marriage). He told her, "I have nothing more to live for," but she replied, "Never, I am never coming back to you."

The victim jumped up to leave and Schnopps shot her. He was seated at that time. He told her she would never love anyone else. After shooting the victim, Schnopps said, "I want to go with you," and he shot himself.

Shortly before 3:00 p.m., Schnopps called a neighbor and said he had shot his wife and also had tried to kill himself. Schnopps told the first person to arrive at his apartment that he shot his wife "because of what she had done to him."

Neighbors notified the police of the slaying. On their arrival, Schnopps asked an officer to check to see if his wife had died. The officer told him that she had, and he replied, "Good." A police officer took Schnopps to a hospital for treatment of his wounds. The officer had known Schnopps for 29 years. Schnopps said to the officer that he would not hurt a fly. The officer advised Schnopps not to say anything until he spoke with a lawyer.

Schnopps then said, "The devil made me do it." The officer repeated his warning at least three times. Schnopps said that he "loved his wife and his children." He added, "Just between you and I, I did it because she was cheating on me." The victim died of three gunshot wounds to the heart and lungs. Ballistic evidence indicated that the gun was fired within two to four feet of the victim. The evidence also indicated that one shot had been fired while the victim was on the floor.

The defense offered evidence from friends and coworkers who noticed a deterioration in Schnopps' physical and emotional health after the victim had left Schnopps. Schnopps wept at work and at home; he did

not eat or sleep well; he was distracted and agitated. On two occasions, he was taken home early by supervisors because of emotional upset and agitation. He was drinking.

Schnopps was diagnosed at a local hospital as suffering from a "severe anxiety state." He was given Valium. Schnopps claimed he was receiving threatening telephone calls.

Schnopps and the Commonwealth each offered expert testimony on the issue of criminal responsibility.

Schnopps' expert claimed Schnopps was suffering from a "major affective disorder, a major depression," a "psychotic condition," at the time of the slaying. The expert was of the opinion Schnopps was not criminally responsible.

The Commonwealth's expert claimed that Schnopps' depression was a grief reaction, a reaction generally associated with death. The expert was of the opinion Schnopps was grieving over the breakup of his marriage, but that he was criminally responsible.

The judge instructed the jurors on every possible verdict available on the evidence. The jurors were told they could return a verdict of murder in the first degree on the ground of deliberately premeditated malice aforethought; murder in the second degree; manslaughter; not guilty by reason of insanity; or not guilty.

OPINION

On appeal, Schnopps does not now quarrel with that range of possible verdicts nor with the instruction which the trial court gave to the jury. Nor does Schnopps now dispute that there may be some view of some of the evidence which might support the verdict returned in this matter.

Rather, Schnopps claims that his case is "not of the nature that judges and juries, in weighing evidence, ordinarily equate with murder in the first degree." Schnopps therefore concludes that this is an appropriate case in which to exercise our power under G.L. c. 278, § 33E. We do not agree.

Pursuant to G.L. c. 278, § 33E, we consider whether the verdict of murder in the first degree was against the weight of the evidence, considered in a large or nontechnical sense. Our power under § 33E is to be used with restraint.

Moreover, "We do not sit as a second jury to pass anew on the question of Schnopps's guilt." Schnopps argues that the evidence as a whole demonstrates that his wife was the emotional aggressor, and that her conduct shattered him and destroyed him as a husband and a father. Schnopps points to the fact that he was not a hoodlum or gangster, that he had no prior criminal record, and that he had a "good relationship" with his wife prior to the last six months of their marriage. Schnopps concludes these factors should be sufficient to entitle him to a new trial or the entry of a verdict of a lesser degree of guilt.

The Commonwealth argues that the evidence is more than ample to sustain the verdict. The Commonwealth points out that at the time of the killing there was not a good relationship between the parties; that Schnopps had threatened to harm his wife physically on several occasions; and that he had threatened to kill his wife. Schnopps obtained a gun and ammunition the day before the killing.

Schnopps arranged to have his younger child cared for by a neighbor when his wife came to see him. The jury could have found that Schnopps lured his wife to the apartment by suggesting that he might leave and let her live in it with the children. The evidence permits a finding that the killing occurred within a few minutes of the victim's arrival at Schnopps's apartment and before she had time to take off her jacket.

From the facts, the jury could infer that Schnopps had planned to kill his wife on October 13, and that the killing was not the spontaneous result of the quarrel but was the result of a deliberately premeditated plan to murder his wife almost as soon as she arrived.

Ballistic evidence indicated that as the victim was lying on the floor, a third bullet was fired into her. From the number of wounds, the type of weapon used, as well as the effort made to procure the weapon, the jurors could find that Schnopps had "a conscious and fixed purpose to kill continuing for a length of time." If conflicting inferences are possible, "it is for the jury to determine where the truth lies." There was ample evidence which suggested the jurors' conclusion that Schnopps acted with deliberately premeditated malice aforethought.

On appeal, Schnopps complains that the prosecutor's summation, which stressed that premeditated murder requires "a thought and an act," could have confused the jurors by suggesting that if "at any time earlier Schnopps merely thought about killing that person," that was sufficient to constitute deliberately "premeditated malice aforethought."

We do not read the prosecutor's argument as suggesting that conclusion. The prosecutor focused on the Commonwealth's evidence of deliberately premeditated malice aforethought throughout his argument. There was no error.

In any event, the argument, read as a whole, does not create a "substantial likelihood of a miscarriage of justice." Schnopps's domestic difficulties were fully explored before the jury. The jurors rejected Schnopps's claim that his domestic difficulties were an adequate ground to return a verdict of a lesser degree of guilt. The degree of guilt, of course, is a jury determination. The evidence supports a conclusion that Schnopps, angered by his wife's conduct, shot her with deliberately premeditated malice aforethought.

The jurors were in the best position to determine whether the domestic difficulties were so egregious as to require a verdict of a lesser degree of guilt. We conclude, on review of the record as a whole, that there is no reason for us to order a new trial or direct the entry of a lesser verdict.

Judgment affirmed.

QUESTIONS

1. **If you were a juror, could you in good conscience say that Schnopps was adequately provoked? Explain your answer, relying on the facts in the case, the Court's opinion, and the text prior to the excerpt.**
2. **If so, was it the adultery that provoked him or the provocative words his wife used to describe her adulterous relationship?**
3. **Do you think the prohibition against provocative words makes sense?**
4. **If you were writing a voluntary manslaughter law, state the elements of the offense as you believe they should be.**

EXPLORING FURTHER

Provocation

Who's a "Reasonable Person"?

People v. Washington (1976)

FACTS Merle Francis Washington shot his gay partner following a lover's quarrel brought on by the victim's unfaithfulness. The jury was instructed that to reduce the homicide from murder to manslaughter upon the ground of sudden quarrel or heat of passion, the conduct must be tested by the ordinarily reasonable man test. Washington argued that the instruction was in error because

> homosexuals are not at present a curiosity or a rare commodity. They are a distinct third sexual class between that of male and female, are present in almost every field of endeavor, and are fast achieving a guarded recognition not formerly accorded them. The heat of their passions in dealing with one another should not be tested by standards applicable to the average man or the average woman, since they are aberrant hybrids, with an obvious diminished capacity.

Washington argued that since the evidence showed that

> he was acting as a servient homosexual during the period of his relationship with the victim, that his heat of passion should have been tested, either by a standard applicable to a female, or a standard applicable to the average homosexual, and that it was prejudicial error to instruct the jury to determine his heat of passion defense by standards applicable to the average male.

DECISION The Court disagreed:

> In the present condition of our law it is left to the jurors to say whether or not the facts and circumstances in evidence are sufficient to lead them to believe that the defendant did, or to create a reasonable doubt in their minds as to whether or not he did, commit his offense under a heat of passion.
>
> The jury is further to be admonished and advised by the court that this heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances, and that, consequently, no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man.
>
> Thus no man of extremely violent passion could so justify or excuse himself if the exciting cause be not adequate, nor could an excessively cowardly man justify himself unless the circumstances were such as to arouse the fears of the ordinarily courageous man. Still further, while the conduct of the defendant is to be measured by that of the ordinarily reasonable man placed in identical circumstances, the jury is properly to be told that the exciting cause must be such as would naturally tend to arouse the passion of the ordinarily reasonable man.

LO 8

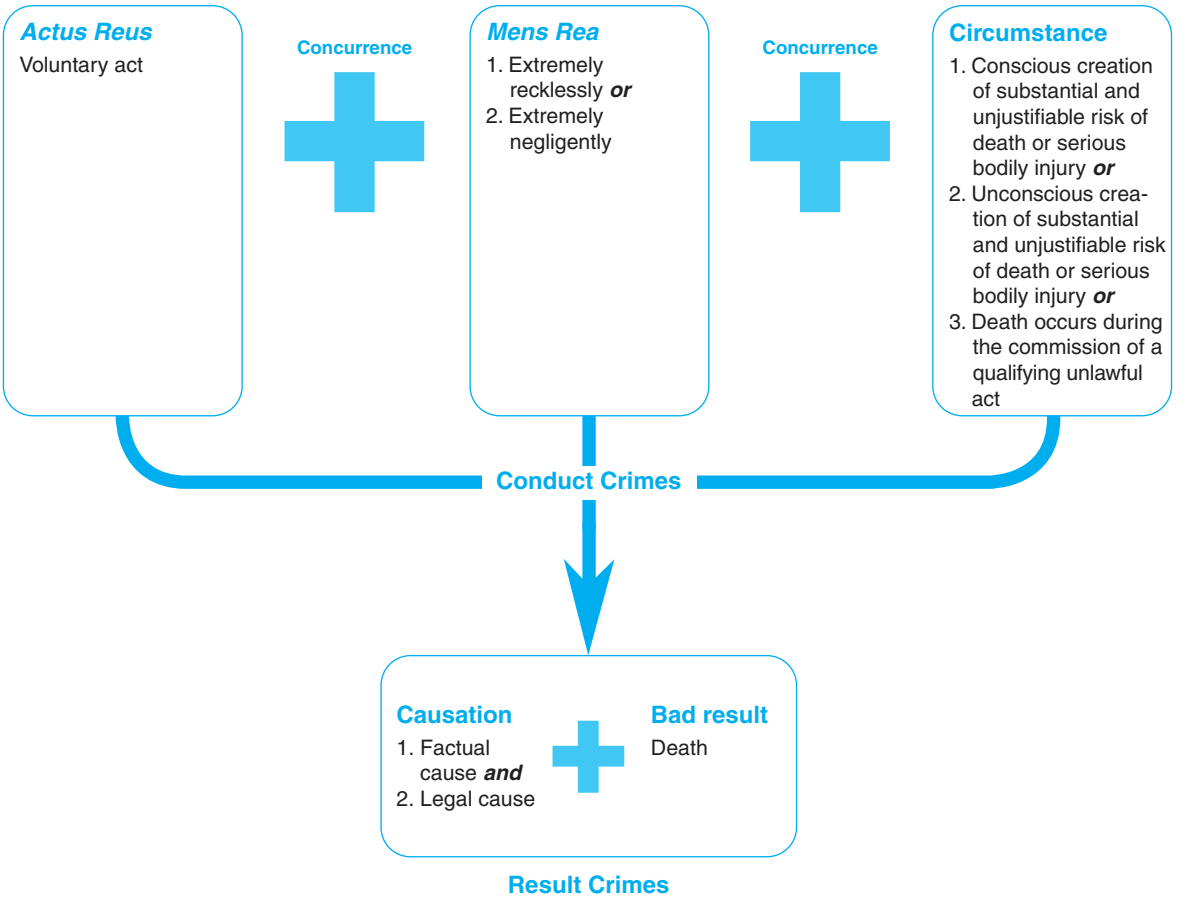
Involuntary Manslaughter

The central elements in **involuntary manslaughter** are its *actus reus* (voluntary act or omission) and its *mens rea* (unintentional killing). Of course, as in all crimes of criminal conduct causing criminal harm, involuntary manslaughter also includes the elements of causation and resulting harm (death). We won't repeat our discussion of causation from Chapter 4 here.

We'll examine two kinds of involuntary manslaughter:

1. *Criminal negligence manslaughter* Despite its name, it includes the mental elements of both recklessness and negligence.
2. *Unlawful act manslaughter (also called misdemeanor manslaughter)* This is for deaths that occur during the commission of unlawful acts.

ELEMENTS OF INVOLUNTARY MANSLAUGHTER



Criminal Negligence/Vehicular/Firearms/Manslaughter

LO 9

Although it goes by the name of **criminal negligence manslaughter** in some statutes and cases, in reality, criminal negligence manslaughter consists of two elements:

1. *Actus reus* The defendant's acts create a high (substantial and unjustifiable) risk of death or serious bodily injury.
2. *Mens rea* The defendant is aware the risk of death or serious bodily injury is high but commits the acts anyway.

Recall that when you're acting recklessly, you know you're creating a high risk of harm; when you're acting negligently, you should, but don't, know you're creating the risk. There may be confusion in the labels, and in the minds of legislators and judges, but the reality is that most of the time, the mental element is recklessness. So if you find it difficult to keep the difference clear in your mind, you have company in high places. When there's a doubt about the meaning, criminal negligence probably means criminal recklessness in involuntary manslaughter.

Criminal negligence statutes cover a wide field. Most of the cases involve unintentional deaths caused by operating vehicles and firearms. But they also include practicing medicine, handling explosives, delivering dangerous drugs, allowing vicious animals to run free, failing to care for a sick child, and not providing fire exits in businesses. In this case excerpt, *State v. Mays* (2000), the Ohio Court of Appeals applied its vehicular homicide statute to 19-year-old Nicholas Mays, who killed his victim when he "messed with" him by "nudging" him with his car.

In this case excerpt, State v. Mays (2000), the Ohio Court of Appeals applied its vehicular homicide statute to 19-year-old Nicholas Mays, who killed his victim when he "messed with" him by "nudging" him with his car.

CASE Did He Commit Aggravated Vehicular Homicide?

State v. Mays
743 N.E.2d 447 (OhioApp. 2000)

HISTORY

Upon convictions entered pursuant to guilty pleas, Nicholas Mays, the defendant, was sentenced by the Hamilton County Court of Common Pleas to five years' incarceration for aggravated vehicular homicide. He appealed. The Ohio Court of Appeals affirmed in part, and reversed and remanded in part.

DOAN, J.

FACTS

On August 19, 1999, 19-year-old Mays was operating an automobile in which his cousin was a passenger. At approximately 1:45 a.m., they saw a pedestrian, later identified as Michael Boumer, in a grocery store parking lot. According to Mays, Boumer appeared to be intoxicated. (Investigating officers confirmed that Boumer had consumed some alcohol. However, the record also indicates that Boumer was mentally handicapped.) The two young men decided that they would "mess with" Boumer by appearing to offer him a ride. Mays intended to nudge Boumer with the vehicle and then drive away.

Mays did drive the vehicle in the direction of Boumer, but instead of merely nudging him, he inadvertently ran over him, causing him fatal injuries. Upon seeing that Boumer was injured, Mays drove to another location and called for emergency aid. He then went to a car wash, where he cleaned the vehicle to remove evidence of the fatal collision.

On the day after the incident, Mays took a planned trip to Florida, during which his mother convinced him that he should report his involvement in the crime. Mays did so, returning to Cincinnati and giving a full confession to the police.

OPINION

The Ohio Revised Code vehicular homicide statute (Section 2903.06) reads in part:

(A) No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall cause the death of another or the unlawful termination of another's pregnancy in any of the following ways:

. . . (2) Recklessly;

(3) Negligently;

(1) Whoever violates division (A) (2) of this section is guilty of aggravated vehicular homicide and shall be punished as provided in divisions (B)(1) (b) of this section.

. . . (b) Except as otherwise provided in this division, aggravated vehicular homicide committed in violation of division (A)(2) of this section is a felony of the third degree. In addition to any other sanctions imposed, the court shall suspend the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege for a definite period of three years to life.

(2) Whoever violates division (A)(3) of this section is guilty of vehicular homicide. Except as otherwise provided in this division, vehicular homicide is a misdemeanor of the first degree.

Mays first argues that the court erred in imposing terms of incarceration greater than the minimum. To impose a prison term more than the minimum for the offender's first prison term, the court must find that the minimum sentence would demean the seriousness of the offense or not adequately protect the public from future crime. Here, the trial court found both to be applicable.

We hold that the trial court's finding with respect to the seriousness of the offenses is supported by the record. Mays conceded that his intention was to "mess with" a person whom he perceived to be impaired in some way, and in doing so, he deprived the thirty-nine-year-old victim of his life. Mays did not immediately seek help for Boumer, but instead thought first of his own interest in evading detection for the crime. His

concealment of the crime was compounded when he washed the car and left the jurisdiction. Under these circumstances, the trial court reasonably concluded that the minimum term would demean the seriousness of the offenses. Because the trial court's finding with respect to the seriousness of the offenses was proper, we need not address Mays's argument concerning the adequate protection of the public.

In his second argument, Mays claims that the trial court erred in imposing the maximum sentence for aggravated vehicular homicide. Before imposing the maximum term of incarceration for an offense, the court must find that the offender has committed the worst form of the offense, poses the greatest likelihood of recidivism, or is of a certain class of repeat offenders. In the case at bar, the court found that Mays had committed the worst form of aggravated vehicular homicide. We disagree.

In past cases, this court has grappled with the somewhat vague concept of what constitutes the "worst form" of an offense. And while the concept is difficult to define in concrete terms, we hold that Mays's conduct in the case at bar did not constitute the worst form of aggravated vehicular homicide. Though the evidence certainly indicates that Mays exercised extremely poor judgment in carrying out his wish to "mess with" Boumer, there is no indication that he harbored any malice toward the victim.

Instead, the record indicates that Mays's conduct started as a reckless, poorly conceived prank and ended in tragedy. And while we in no way wish to minimize the loss of a human life or to condone Mays's actions, this is not the type of conduct for which the legislature has reserved the maximum sentence.

Furthermore, although he admittedly thought of his own interests before seeking help for Boumer, Mays did take steps to ensure that emergency personnel were notified promptly. His actions therefore did not reflect an utter lack of concern for Boumer or otherwise demonstrate a perversity of character that would justify the imposition of the maximum sentence.

Further, there is no indication that the victim suffered for a prolonged period of time before he died or suffered to a greater degree than any other victim of a vehicular homicide.

Finally, Mays surrendered to authorities and confessed to the crimes. Under these circumstances, we cannot say that Mays committed the worst form of the offense within the meaning of R.C. 2929.14(C). We therefore hold that the trial court erred in imposing the maximum term for that offense.

Mays next argues that the trial court erred in imposing consecutive sentences. To impose consecutive terms of imprisonment, the court must find that consecutive sentences are necessary to protect the public from future crime and that consecutive sentences are not disproportionate to the offender's conduct and to the danger the offender poses to the public.

The trial court must also find one of the following:

(1) that the offenses occurred while the offender was under community control;

(2) that the harm caused was great or unusual; or

(3) that the offender's criminal history requires consecutive sentences.

Of the latter factors, the court in the instant case found that the harm caused was unusual or great.

We agree with Mays that the trial court's findings with respect to consecutive sentences are not supported by the record. Concerning the protection of the public from future crime, Mays's criminal record included no adult convictions and only one juvenile delinquency adjudication. Thus, there is little indication that Mays is likely to recidivate.

Also, the trial court revoked Mays's operator's license, thereby reducing the likelihood that future vehicular offenses would occur.

Further, as to the finding that consecutive terms were not disproportionate to Mays's conduct and to the danger that he posed to the public, we have already noted that Mays's conduct, while reckless and ill-conceived, was not the product of malice.

Given the revocation of Mays's license, his confession, and his demonstrated remorse, the conduct also appears not likely to be repeated. The investigating officers and the author of the presentence-investigation report indicated that Mays was genuinely remorseful.

Finally, the harm caused by the offense, while senseless and tragic, was not greater than the harm caused in every other aggravated-vehicular-homicide case. Under these circumstances, we hold that the trial court erred in imposing consecutive sentences.

Having held that the trial court erred in imposing the maximum sentence for the aggravated vehicular homicide and in otherwise imposing consecutive sentences, we hereby reverse those parts of the trial court's judgment and remand the cause for resentencing in accordance with law.

Judgment affirmed in part, reversed in part and cause remanded.

DISSENT

HILDEBRANDT, P.J.

Mays senselessly took the life of the victim because he wished to "mess with" him. The wantonness of that conduct alone could have justified the trial court in imposing the maximum sentence. However, Mays compounded his misconduct by leaving the scene of the collision, thereby making it clear that he valued his own interest in evading detection above the life of Boumer. The majority concedes as much, yet persists in holding that Mays did not commit the worst form of the offense. His eventual call for emergency aid and his subsequent remorse for his actions did not erase the fact that his conduct was egregious and deserving of the greatest punishment.

For many of the same reasons, I believe that the imposition of consecutive sentences was proper. The utter lack of regard for human life that Mays exhibited by using his automobile to "mess with" a person whom he believed to be impaired provided ample support for the trial court's conclusion that consecutive sentences were necessary to prevent future crimes and to protect the public. Moreover, the fact that death is caused in all aggravated-vehicular-homicide cases should not prevent a finding that the harm caused in the instant case was great or unusual. Mays's taking of a life in such a wanton manner justified the court in finding that the harm done was great or unusual. . . . In my view, nine years of incarceration is not excessive when weighed against the taking of a human life under these circumstances. I therefore respectfully dissent in part.

QUESTIONS

1. **How does the Ohio statute define "vehicular homicide"?**
2. **Relying on the evidence in the case and referring to the Ohio provision, explain why Nicholas Mays was guilty of aggravated vehicular homicide.**
3. **How would you define "vehicular homicide"? Defend your definition.**
4. **Do you agree with the majority opinion's reasons for reversing the sentence? Or do the dissent and the trial court have the better arguments? Back up your answer.**

Unlawful Act Manslaughter

In 1260, long before the division between murder and manslaughter was created by the common law judges, the great jurist Bracton wrote that unintended deaths during unlawful acts are criminal homicides (in the language of today's statutes and court opinions, **unlawful act manslaughter** or **misdemeanor manslaughter**). Sometime after the judges created the offense of manslaughter, unlawful act manslaughters became a form of involuntary manslaughter. In modern times, statutes have restricted unlawful act manslaughter because it's considered too harsh. In fact, there's a trend to abolish unlawful act manslaughter, leaving criminal negligent manslaughter as the only kind of involuntary manslaughter.

Unlawful acts taken literally could include everything, including felonies, misdemeanors, and even traffic violations, city ordinances, administrative crimes, and noncriminal wrongs, such as civil trespass and other torts (Chapter 1). Misdemeanors are certainly included among these possibly unlawful acts; that's why the unlawful act manslaughter is often called "misdemeanor manslaughter." The most common misdemeanors that come up in the cases are speeding and drunk driving. Another is ordinary battery, mostly hitting someone who dies from the blow. This is what happened in *People v. Datema* (1995). Greg and Pamela Datema were sitting around in their living room with friends talking, smoking pot, and drinking.

The conversation turned to their previous romances. Pam and Greg started arguing about the people they'd slept with. Pam claimed she'd had sex with some of her paramours in front of their sons. Greg slapped her in the face—once. Pam slumped back; the other three thought she'd passed out. After 10 minutes, they got worried. When they shook her and she didn't wake up, they called for an ambulance. Pam never regained consciousness.

The medical examiner found that Pam Datema had a blood-alcohol level between 0.03 and 0.05 percent. He stated that death was caused by a tear in an artery in the head that occurred as a result of Greg's slap:

> Most people, when slapped, reflexively stiffen their necks and avoid serious injury. Occasionally, however, when a person is intoxicated, the reflexes do not react quickly enough, and a blow could result in a tearing. Generally, a higher blood-alcohol level is necessary, but the ingested marijuana, which was not able to be tested, was undoubtedly a contributing factor. (274)

There's a trend toward abolishing unlawful act manslaughter; about half of the states have already done so (LaFave 2003a, 801). Where it still exists, the states have placed limits on it. Most states limit the underlying offense to *mala in se* offenses. Recall mala in se offenses are ones that are inherently evil—for example, the battery in *People v. Datema* and the "nudge" in *State v. Mays*. To count an offense as a **malum prohibitum crime**, death has to be a foreseeable consequence of the unlawful act. In *Todd v. State* (1992), Todd ran off with the church collection plate. A congregation member jumped in his car and pursued the thief. He suffered a heart attack, hit a tree, and died of cardiac arrest. The Court held this wasn't a case of unlawful act manslaughter because death is not a foreseeable risk in petty theft.

SUMMARY

LO 1
- Criminal homicide is the most serious of all crimes. Criminal homicides are also very rare events.

LO 2
- Most of the law of homicide is devoted to answering the questions: Is killing first- or second-degree murder? Is killing murder or manslaughter? Is manslaughter voluntary or involuntary?

LO 1
- First-degree murder is the only crime you can be executed for, and in non–death penalty states, it's the only crime for which you can get life in prison, without a chance of parole.

LO 3
- Killing another "person" is central to criminal homicide liability because it defines who's a victim. The definition of "person" for purposes of criminal homicide presents problems at both ends of the life cycle—when life begins and when it ends.

LO 2, LO 4
- The reason for creating first- and second-degree murders was to separate murders that deserved the death penalty from those that didn't. The death penalty is discretionary in all states in which the penalty is authorized.

LO 2
- First-degree murder *mens rea* includes willful, deliberate, and premeditated killing.

LO 2
- Killing by means of "heinous, atrocious, or cruel" acts appears on the list of aggravating factors that qualifies a murderer for the death penalty.

LO 2
- Felony murders are unintentional deaths that occur during the commission of some felonies.

LO 5
- Most state criminal codes apply to corporate criminal homicide in the same way that they apply to other crimes committed for the corporation's benefit.

LO 6, LO 7
- Voluntary manslaughter has one circumstance element not present in murder: the adequate provocation that triggers the sudden killing of another person.

LO 8
- The central elements in involuntary manslaughter are its *actus reus* (voluntary act or omission) and its *mens rea* (unintentional killing).

LO 9
- Criminal negligence homicide statutes cover a wide field. The most common are unintentional deaths caused by operating vehicles and firearms, but the statutes also include unintentional deaths caused by practicing medicine, handling explosives, delivering dangerous drugs, allowing vicious animals to run free, failing to care for a sick child, and not providing fire exits in businesses.

KEY TERMS

born-alive rule, p. 275
feticide, p. 277
euthanasia, p. 278
presumption of bodily integrity, p. 280
murder, p. 282
manslaughter, p. 282
justifiable homicide, p. 284
excusable homicide, p. 284
criminal homicide, p. 284
malice aforethought, p. 285
depraved heart murder, p. 285
intent to cause serious bodily injury murder, p. 286
"express" malice aforethought, p. 286
"implied" malice aforethought, p. 286
murder *actus reus*, p. 287
murder *mens rea*, p. 288
first-degree murder, p. 289
capital cases, p. 290
bifurcation, p. 290
criteria for decision, p. 290
specific intent plus real premeditation deliberation, p. 293
equivalent of specific intent, p. 293
second-degree murder, p. 301
felony murder, p. 303
voluntary manslaughter, p. 313
adequate provocation (voluntary manslaughter), p. 313
understandable provocation, p. 313
objective test of cooling-off time (voluntary manslaughter), p. 314
bright-line rule "words can never provoke," p. 315
last-straw rule/long smoldering or slow burn rule, p. 315
extreme mental or emotional disturbance (voluntary manslaughter), p. 315
common law paramour rule, p. 316
involuntary manslaughter, p. 320
criminal negligence manslaughter, p. 320
unlawful act manslaughter (misdemeanor manslaughter), p. 323
malum prohibitum crime, p. 324

WEB RESOURCES

To prepare for exams, visit the *Criminal Law* companion website at www.cengage.com/criminaljustice/sahama, features essential review and study tools such as flashcards, a glossary of terms, tutorial quizzes, and Supreme Court updates.

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Evangelist Tony Alamo, left, was escorted from the Federal Court House in Texarkana, Arkansas, on Thursday, July 23, 2009. Followers of Alamo funneled all their earnings back into his ministry, building a multimillion-dollar empire that continues even to this day without a trace of the preacher's fingerprints. Now, after Alamo's conviction on federal sex-crime charges, testimony at that trial could be used to pick apart the financial apparatus that allowed him to prey on young girls.

LEARNING OBJECTIVES

1 Know that crimes against persons boil down to four types: taking a life; unwanted sexual invasions; bodily injury; and personal restraint.

2 Appreciate that voluntary and knowing consensual sexual behavior between two adults is legal, healthy, and desired.

3 Understand that the vast majority of rape victims are raped by men they know.

4 Know that during the 1970s and 1980s, sexual assault reform changed the face of criminal sexual assault law.

5 Understand that force beyond the degree required to complete sexual penetration or contact is not always required to satisfy the force requirement in rape.

6 Know that rape is a general-intent crime.

7 Remember that statutory rape is a strict liability crime in most states.

8 Know that assault and battery are two separate crimes.

9 Appreciate that since the early 1970s, domestic violence crimes have been transformed from a private concern to a criminal justice problem.

10 Remember that stalking, although an ancient practice, is a new crime.

11 Know that kidnapping and false imprisonment violate the right of locomotion.

Crimes Against Persons II

Criminal Sexual Conduct, Bodily Injury, and Personal Restraint

CHAPTER OUTLINE

Did He Rape Her?

A college student left her class, went to her dormitory room where she drank a martini, and then went to a lounge to wait for her boyfriend. When her boyfriend didn't show up, she went to another dormitory to find a friend, Earl Hassel. She knocked on the door, but no one answered. She tried the doorknob and, finding it unlocked, went in and found a man sleeping on the bed. At first, she thought the man was Hassel, but he turned out to be Hassel's roommate, Robert Berkowitz. Berkowitz asked her to stay for a while and she agreed. He asked for a backrub and she turned him down. He suggested that she sit on the bed, but she said no and sat on the floor instead.

Berkowitz moved to the floor beside her, lifted up her shirt and bra, and massaged her breasts. He then unfastened his pants and unsuccessfully attempted to put his penis in her mouth. They both stood up, and he locked the door. He came back, pushed her onto the bed, and removed her undergarments from one leg. He then penetrated her vagina with his penis.

After withdrawing and ejaculating on her stomach, he stated, "Wow, I guess we just got carried away," to which she responded, "No, we didn't get carried away, you got carried away."

(Commonwealth v. Berkowitz, 1994)

LO 1

Rape is second only to murder in being regarded by law and society as the most serious crime. This isn't just true today. From colonial times until 1977, when the U.S. Supreme Court declared it was cruel and unusual punishment (Chapter 2; *Coker v. Georgia* 1977), rape was punishable by death in several states. Rape is a serious crime even if victims suffer no physical injury, not even minor cuts and bruises. That's because rape violates intimacy and autonomy in a way that physical injuries can't. Even less-invasive sexually generated touching, such as pinching buttocks or fondling breasts, is treated as a serious felony.

LO 2

Rape and other sexual assaults are different from all other felonies in one very important respect. Under other circumstances, the behaviors connected with them aren't just legal, they're healthy and desired. One of the most critical problems in sex offenses is to distinguish flirting and seduction from sexual assault. In prosecuting the grave crimes against individual autonomy and violence involved in these offenses, we don't want to inhibit the healthy pursuit of consensual, desirable, healthy, legal sexual activity.

In addition to the elements of rape and other sexual assaults, you'll learn about the elements of two other kinds of crimes against persons—nonsexual assaults and bodily injury (battery, its close relative assault, and stalking)—particularly as they relate to domestic violence—and criminal restraints on liberty (kidnapping and false imprisonment). Most of these crimes can be result crimes, in which case, they include elements of causing a result as well as act, state of mind, and attendant circumstance elements. As we did in homicide, we'll leave discussion of the elements of causation and result to what you've already learned in the "Causation" section of Chapter 4. Here, we'll concentrate on the act or omission, the state of mind, and frequently the attendant circumstance elements.

Sex Offenses

Originally, the criminal law recognized only two sex offenses—rape and sodomy. **Common law rape** was strictly limited to intentional, forced, nonconsensual, heterosexual vaginal penetration. It was aimed at the traditional view of rape: a male stranger leaps from the shadows at night and sexually attacks a defenseless woman. Legally, men couldn't rape their wives. **Common law sodomy** meant anal intercourse between two males.

LO 4

Modern court opinions have relaxed the strict definitions of "rape," and **sexual assault**, or **criminal sexual conduct**, statutes enacted in the 1970s and the 1980s (discussed later) have expanded the definition of "sex offenses" to embrace a wide range of nonconsensual penetrations and contacts, even if they fall far short of violent. Statutes and cases refer to "sex offenses" as either "sexual assault" or "criminal sexual conduct." In the text, we'll use the terms interchangeably.

LO 3

These reforms in sex offense law were brought about because of a dirty secret finally made public: the vast majority of rape victims are raped by men they know. In this chapter, we'll distinguish between two kinds of rape: (1) **aggravated rape**—rape by strangers or men with weapons who physically injure their victims—and **unarmed acquaintance rape**—nonconsensual sex between "dates, lovers, neighbors, co-workers, employers, and so on" (Bryden 2000, 318).

The criminal justice system deals fairly well with aggravated rapes, but it has failed miserably when it comes to unarmed acquaintance rapes. Why? Several reasons, including:

- Victims aren't likely to report unarmed acquaintance rapists, or they don't recognize them as rapes.
- When victims do report them, the police are less likely to believe the victims than they are the victims of aggravated rape.
- Prosecutors are less likely to charge unarmed acquaintance rapists.
- Juries are less likely to convict unarmed acquaintance rapists.
- Unarmed acquaintance rapists are likely to escape punishment if their victims don't follow the rules of middle-class morality.

According to Professor David P. Bryden's excellent article "Redefining Rape" (2000):

> An acquaintance rapist is most likely to escape justice if his victim violated traditional norms of female morality and prudence: for example, by engaging in casual sex, drinking heavily, or hitchhiking. When the victim is a norm-violating woman, people often blame her rather than the rapist. (318)

LO 3

The criminal justice system's poor performance in dealing with unarmed acquaintance rapes would be a serious problem in any case, but it's made worse by the social reality that the overwhelming number of rapes are acquaintance rapes. In one survey of women who didn't report rapes to the police, more than 80 percent of the women said they were raped by men they knew (Williams 1984). In three separate surveys of college women, one in five reported being "physically forced" to have sexual intercourse by her date (Foreman 1986, 27).

Another aspect of the social reality of rape is the substantial number of rapes committed against men (McMullen 1990). It's almost impossible to get details about male rape victims. The FBI's Uniform Crime Reports, the most widely cited statistics of crimes reported to the police, doesn't break down the numbers of rape victims by gender. The National Crime Victim Survey, the most thorough government victimization survey, reports that about 8 percent of sexual assault victims are males, but it includes no further details. A few scattered numbers from rape counseling and rape crisis centers report that between 8 and 10 percent of their clients are men (Rochman n.d.).

To learn more about how the law treats rape, in this section we'll study the history of rape law; statutes defining criminal sexual conduct; the elements of modern rape law; statutory rape; and how the law grades the seriousness of sex offenses and the penalties it prescribes for them.

The History of Rape Law

As early as the year 800, rape was a capital offense in Anglo-Saxon England. In 1769, William Blackstone, the leading eighteenth-century authority on the common law in both England and the colonies, defined "common-law rape" as the "carnal knowledge of a woman [sexual intercourse] forcibly and against her will" (210). This definition boiled down to four elements:

1. Sexual intercourse by force or a threat of severe bodily harm (*actus reus*)
2. Intentional vaginal intercourse (*mens rea*)

3. Intercourse between a man and a woman who wasn't his wife (attendant circumstance)
4. Intercourse without the woman's consent (attendant circumstance)

The common law required proof beyond a reasonable doubt of all four elements because, as Lord Hale, the highly regarded seventeenth-century lawyer and legal scholar of the criminal law, noted:

> It is true that rape is a most detestable crime, and therefore ought severely and impartially to be punished; but it must be remembered, that it is an accusation easy to be made, hard to be proved, and harder to be defended by the party accused, though innocent.
>
> The heinousness of the offence many times transporting the judge and jury with so much indignation, that they are overhastily carried to the conviction of the person accused thereof, by the confident testimony of sometimes false and malicious witnesses. (Blackstone 1769, 215)

In common law trials, rape victims were allowed to testify against accused rapists; it was up to the jury to decide whether to believe them. But the victim's credibility depended on three conditions, always difficult (and often impossible) to satisfy:

1. Her chastity
2. Whether she promptly reported the rape
3. Whether other witnesses corroborated the rape

Blackstone (1769) talked tough enough when he asserted that even prostitutes could be of good fame, but he undermined his own words when he added this warning about victim witnesses:

> If the ravished be of evil fame, and stand unsupported by others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place where the fact was alleged to be committed, was where it was possible she might have been heard, and she made no outcry; these and the like circumstances carry a strong, but not conclusive, presumption that her testimony is false or feigned. (213–14)

Criminal Sexual Conduct Statutes

LO 4

The 1970s and 1980s were a time of major reform of sex offense laws. First, states changed rape prosecution procedures that had been in effect since the 1600s. Many states abolished the **corroboration rule** that required the prosecution to back up rape victims' testimony with that of other witnesses (rarely possible to obtain). Also, most states passed **rape shield statutes**, which banned the prosecution from introducing evidence of victims' past sexual conduct. Many states also relaxed the **prompt-reporting rule** that banned prosecution unless women promptly reported rapes.

States also changed the definition of "rape." For example, all but a few states did away with the **marital rape exception**, the old common law rule that husbands couldn't rape their wives.

Sexual assault statutes have also shifted the emphasis away from whether there was consent by the victim to the unwanted advances by the perpetrator. For example, the Pennsylvania Superior Court, in *Commonwealth v. Mlinarich* (1985),

ruled that the common law emphasis on lack of consent had "worked to the unfair disadvantage of the woman who, when threatened with violence, chose quite rationally to submit to her assailant's advances rather than risk death or serious bodily injury."

The MPC (ALI 1985 2:279–81) eliminated consent as an element in rape because of its "disproportionate emphasis upon objective manifestations by the woman." But the drafters of the code also recognized that a complex relationship exists between force and consent. Unlike the acts in all other criminal assaults, under ordinary, consensual circumstances victims may desire the physical act in rape—sexual intercourse:

> This unique feature of the offense requires drawing a line between forcible rape on the one hand and reluctant submission on the other, between true aggression and desired intimacy. The difficulty in drawing this line is compounded by the fact that there will often be no witness to the event other than the participants and that their perceptions may change over time. The trial may turn as much on an assessment of the motives of the victim as of the actor. (281)

The most far-reaching reforms in the definition of "rape" are included in the sexual assault statutes of the 1970s and the 1980s, which consolidated the sex offenses into one comprehensive statute. They expanded the definition of "rape" and other sex offenses to include all sexual *penetrations*: vaginal, anal, and oral. Then, they created less serious crimes of sexual *contacts*—such as offensive touching of breasts and buttocks. Finally, they made sex offenses gender-neutral; men can sexually assault men or women, and women can sexually assault women or men (Minnesota Criminal Code 2005, § 341).

The seriousness of sex offenses under the new codes is graded according to several criteria:

1. Penetrations are more serious than contacts.
2. Forcible penetrations and contacts are more serious than simple nonconsensual penetrations and contacts.
3. Physical injury to the victim aggravates the offense.
4. Rapes involving more than one rapist, "gang rapes," are more serious than those involving a single rapist.

One of the earliest and best known of the new sexual assault laws is Michigan's statute, which incorporated language defining unwanted sexual conduct in 1974 (Michigan Criminal Code 2005, § 750.520). It provides:

> *First degree* This consists of "sexual penetration," defined as sexual intercourse, cunnilingus, fellatio, anal intercourse, "or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body." In addition one of the following must have occurred:
>
> 1. The defendant must have been armed with a weapon.
> 2. Force or coercion was used, and the defendant was aided by another person.
> 3. Force or coercion was used, and personal injury to the victim was caused.
>
> *Second degree* This consists of "sexual contact," defined as the intentional touching of the victim's or actor's personal parts or the intentional touching of the clothing covering the immediate area of the victim's intimate parts for purposes of sexual arousal or gratification.

> "Intimate parts" is defined as including the primary genital area, groin, inner thigh, buttock, or breast. In addition, one of the circumstances required for first-degree criminal sexual conduct must have existed.

Third degree This consists of sexual penetration accomplished by force or coercion.
Fourth degree This consists of sexual contact accomplished by force or coercion.

Despite these advances in rape law, keep in mind Professor David Bryden's (2000) assessment of the reality of current sexual assault law:

> Most legislatures and courts still define rape narrowly. In acquaintance rape cases, in most states, nonconsensual sex is not rape unless the perpetrator employs force or a threat of force, or the victim is unconscious, badly drunk, underage, or otherwise incapacitated. Even if the victim verbally declines sex, the encounter is not rape in most states unless the man employs "force." Sex obtained by nonviolent threats ("you'll lose your job," etc.), or by deception, usually is not a crime. (321)

The Elements of Modern Rape Law

Most traditional rape statutes, and the newer criminal sexual assault laws, define **"rape"** as intentional sexual *penetration* by force without consent. There are many variations in the statutes, but in *most* jurisdictions, rape today boils down to three elements:

1. *Actus reus* Sexual penetration by force or threat of force
2. *Mens rea* Intentional sexual penetration
3. *Circumstance* Nonconsent by the victim

Let's look at each of these elements.

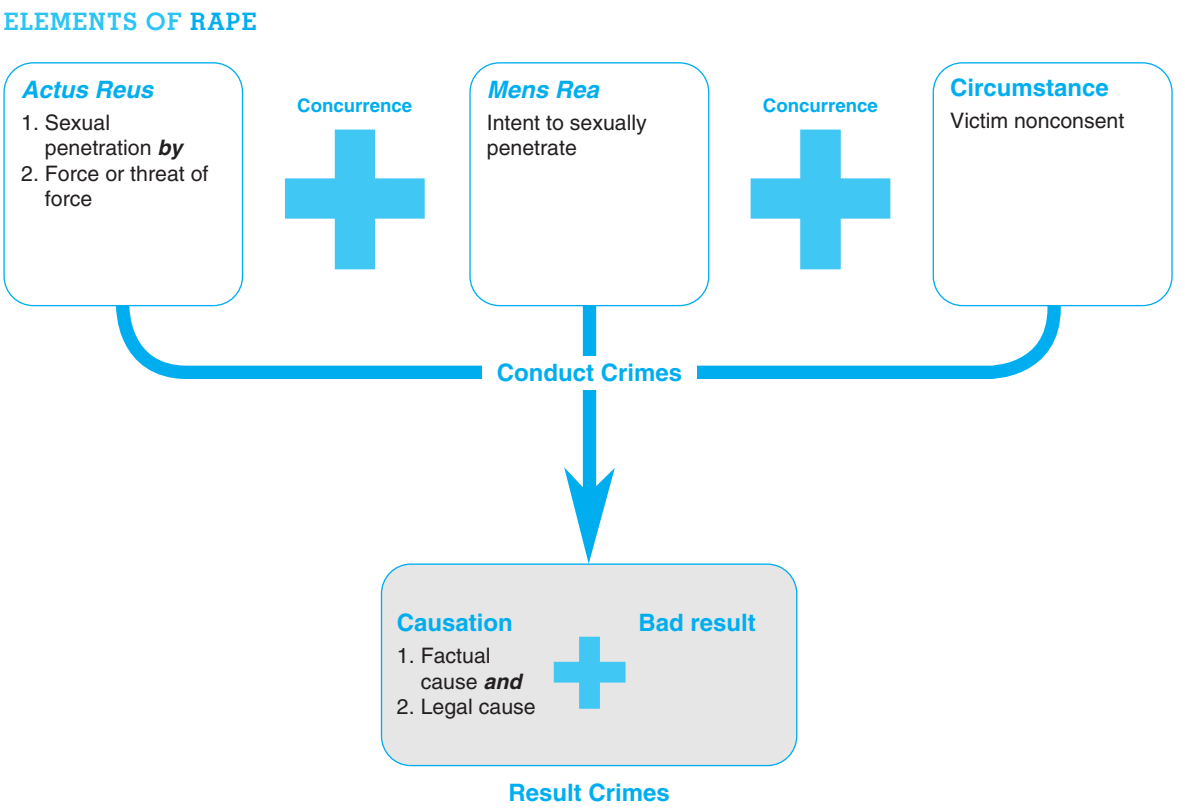
Rape *Actus Reus*: The Force and Resistance Rule

LO 5

Rape is a crime of violence; its ***actus reus*** is sexual intercourse by force. For most of its history, rape *actus reus* was governed by the **force and resistance rule**. The "force" part of the rule wasn't satisfied if victims consented to sexual intercourse. In practice, the prosecution didn't have to prove that victims consented; victims had to prove they *didn't* consent. This is where the "resistance" part of the rule comes in. Victims had to prove they didn't consent by proving they resisted the force of the accused rapist.

> According to an early frequently cited case, *Reynolds v. State* (1889): Voluntary submission by the woman, while she has power to resist, no matter how reluctantly yielded, removes from the act an essential element of the crime of rape if the carnal knowledge was with the consent of the woman, no matter how tardily given, or how much force had theretofore been employed, it is not rape. (904)

Proof of nonconsent by resistance is peculiar to the law of rape. In no other crime where lack of consent is an element of the crime does the law treat passive acceptance as consent. Robbery requires taking someone's property by force or threat of force, but it's outrageous even to think that the element of force puts the burden on victims



to prove they resisted. Entering an unlocked apartment house without consent to commit a crime is burglary, but it would be absurd to demand that residents prove they didn't consent to the entry. The same is true of theft. According to Lani Anne Remick (1993):

> A common defense to a charge of auto theft is that the car's owner consented to the defendant's use of the vehicle. A mere showing that the owner never gave the defendant permission to take the car is enough to defeat this defense; no showing that the owner actually told the defendant not to take the car is necessary.
>
> In rape law, however, the "default" position is consent. Proof of the absence of affirmative indications by the victim is not enough to defeat a consent defense; instead, the prosecution must show that the alleged victim indicated to the defendant through her overt actions and/or words that she did not wish to participate in sexual activity with him.
>
> Thus, "the law presumes that one will not give away that which is his to a robber, but makes no similar presumption as to the conduct of women and rapists." In fact, quite the opposite is true: in the context of sexual activity the law presumes consent. For example, proving both that a woman did not verbally consent and that her actions consist of lying still and not moving does not raise a presumption of nonconsent but of consent. Only through evidence of some sort of overt behavior such as a verbal "no" or an attempt to push away the defendant can the prosecution meet its burden of proving nonconsent. (1111)

Factors that have influenced the Courts' view of nonconsent include the amount of resistance the victim offered, the threat of force, and the danger to the victim if she resisted. We'll look at each of these and exceptions to the force and resistance rule.

The Amount of Resistance

LO 5

The amount of resistance required to prove lack of consent has changed over time. From the 1800s until the 1950s, the **utmost resistance standard** prevailed. According to the standard, to show they didn't consent, victims had to resist with all the physical power they possessed. In *Brown v. State* (1906), a 16-year-old virgin testified that her neighbor grabbed her, tripped her to the ground, and forced himself on her.

> I tried as hard as I could to get away. I was trying all the time to get away just as hard as I could. I was trying to get up; I pulled at the grass; I screamed as hard as I could, and he told me to shut up, and I didn't, and then he held his hand on my mouth until I was almost strangled. (538)

The jury convicted the neighbor of rape, but, on appeal, the Wisconsin Supreme Court reversed, deciding the victim hadn't resisted enough:

> Not only must there be entire absence of mental consent or assent, but there must be the most vehement exercise of every physical means or faculty within the woman's power to resist the penetration of her person, and this must be shown to persist until the offense is consummated. (538)

In *Casico v. State* (1947), the Nebraska Supreme Court described resistance in even tougher terms:

> The general rule is that a mentally competent woman must in good faith resist to the utmost with the most vehement exercise of every physical means or faculty naturally within her power to prevent carnal knowledge, and she must persist in such resistance as long as she has the power to do so until the offense is consummated. (900)

In the 1950s, most courts softened the utmost resistance definition to the **reasonable resistance rule**, the rule followed in almost all states today. According to the rule, the amount of resistance depends on the totality of circumstances in each case. For example, in *Jones v. State* (1984), Marvin Jones ran N. M. off the road while she was on the way to a fast-food store with her daughters. Jones opened the door, grabbed her arm, choked her, and forced her toward his car.

Fearing for her life, M. S. got into the car with her daughters. Jones drove to a secluded spot, threatened her, and forced her to commit oral sodomy. Then, he took her out on the road and raped her. At his first-degree rape and oral sodomy trial, Jones argued that N. M. consented. He was convicted and sentenced to 50 years in prison. He appealed, arguing there wasn't enough evidence that N. M. submitted because of "the threat of immediate and great bodily harm." The Oklahoma Court of Criminal Appeals affirmed his conviction and sentence:

> In Oklahoma, a woman threatened with rape is not required to resist to the uttermost; instead, she is not required to do more than her age, strength, and the surrounding circumstances make reasonable. In light of the facts of this case, as recited above, we find that there was more than ample evidence to establish that the prosecutrix submitted due to the threats of great bodily harm. (757)

Many new rape and sexual assault statutes have dropped the resistance requirement entirely—at least in formal law. This has little or no effect in practice in stranger rape cases because it's pretty clear that these rapists use force against victims they don't know.

Unarmed acquaintance rapes are a different matter; evidence of reasonable resistance is often critical. In practical terms, force means resistance. This is because acquaintance rapists don't use force unless victims resist their advances. In other words, force and resistance are two sides of the same coin; if force is an element, then so is resistance (Bryden 2000, 356).

Jones v. State (1992) illustrates this close, often inseparable connection between force and reasonable resistance in acquaintance rape. The victim, 26-year-old C. L., lived in the same home with Jones, Jones' wife and child, and C. L.'s foster mother. One night, when Jones had been drinking, he came into C. L.'s bedroom and asked her to have sex with him. She said "no" and asked him why he didn't have intercourse with his wife.

He asked her again to have intercourse; she refused again "because it wouldn't be fair to his wife and child." He asked her a third time and C. L. testified that she "just let him have it, you know." She was lying on her side, and he turned her over and had sexual intercourse with her. She testified he told her not to tell anyone, particularly not to tell his wife.

She said she didn't give him permission to have sexual intercourse with her. She didn't yell out or cry for help because she was afraid. She testified on cross-examination that she was afraid of Jones, his wife, and her own foster mother; that it was difficult to tell her foster mother; that Jones didn't have a weapon; and that she didn't think to hit him (242).

In the trial court, Jones was convicted of rape under Indiana's rape statute, which defined a "rapist" as someone who "knowingly or intentionally has sexual intercourse with a member of the opposite sex when the other person is compelled by force or imminent threat of force.…" The Indiana Supreme Court reversed the conviction:

> There was no evidence that Jones used any force or threats to encourage C. L. to engage in sexual intercourse. He asked her three times, and on the third time she "just let him have it." There was no evidence of any previous threats or force against C. L. from which the trier of fact could infer a fear of force or threats on this occasion. The circumstances do not lead to an inference of constructive or implied force. C. L. stated she was afraid to yell for help, but there was no evidence she was afraid because Jones had forced her to do anything or threatened her. There are reasons a person might be afraid to attract attention other than fear of forced activity. (243)

The Court didn't mention the word "resistance." It didn't have to; the implication was clear that resistance was an implied requirement. Otherwise, how could the Court have concluded that this was a consensual case? You might think of it this way: If Jones had been a stranger, is there any doubt that this would be rape?

LO 5

Courts today have adopted either of two definitions of "force":

1. **Extrinsic force** Requires some act of force in addition to the muscular movements needed to accomplish penetration. The amount of force required varies according to the circumstances of particular cases.
2. **Intrinsic force** Requires only the amount of physical effort necessary to accomplish penetration.

We'll use the next two case excerpts to show you how important the facts in each case are in applying the extrinsic and intrinsic force requirements to acquaintance rape. We look first at the Pennsylvania Supreme Court's application of the extrinsic force standard to the facts of *Commonwealth v. Berkowitz* (1994).

In the following case excerpt, the Pennsylvania Supreme Court applied the extrinsic force standard to the facts of Commonwealth v. Berkowitz.

CASE Did He Have Sexual Intercourse by Force?

Commonwealth v. Berkowitz
609 A.2d 1338 (Pa.Sup. 1992)
641 A.2d 1161 (Pa. 1994)

HISTORY

Robert Berkowitz, the defendant, was convicted in the Court of Common Pleas, Monroe County, of rape and indecent assault and he appealed. The Superior Court, Philadelphia, reversed the rape conviction. The Pennsylvania Supreme Court affirmed the Superior Court's reversal of the conviction.

FACTS

609 A.2d 1338 (Pa.Sup. 1992)

PER CURIAM

In the spring of 1988, Robert Berkowitz and the victim were both college sophomores at East Stroudsburg State University, ages 20 and 19 years old, respectively. They had mutual friends and acquaintances. On April 19 of that year, the victim went to the appellant's dormitory room. What transpired in that dorm room between the appellant and the victim thereafter is the subject of the instant appeal.

During a one-day jury trial held on September 14, 1988, the victim gave the following account during direct examination by the Commonwealth. At roughly 2:00 on the afternoon of April 19, 1988, after attending two morning classes, the victim returned to her dormitory room. There, she drank a martini to "loosen up a little bit" before going to meet her boyfriend, with whom she had argued the night before. Roughly 10 minutes later she walked to her boyfriend's dormitory lounge to meet him. He had not yet arrived.

Having nothing else to do while she waited for her boyfriend, the victim walked up to Berkowitz's room to look for Earl Hassel, Berkowitz's roommate. She knocked on the door several times but received no answer. She therefore wrote a note to Mr. Hassel, which read, "Hi Earl, I'm drunk. That's not why I came to see you. I haven't seen you in a while. I'll talk to you later, [Victim's name]." She did so, although she had not felt any intoxicating effects from the martini, "for a laugh."

After the victim had knocked again, she tried the knob on Berkowitz's door. Finding it open, she walked in. She saw someone lying on the bed with a pillow over his head, whom she thought to be Earl Hassel. After lifting the pillow from his head, she realized it was Berkowitz. She asked him which dresser was his roommate's. He told her, and the victim left the note.

Before the victim could leave Berkowitz's room, however, he asked her to stay and "hang out for a while." She complied because she "had time to kill" and because she didn't really know Berkowitz and wanted to give him "a fair chance." Berkowitz asked her to give him a back rub but she declined, explaining that she did not "trust" him. He then asked her to have a seat on his bed. Instead, she found a seat on the floor, and conversed for a while about a mutual friend. On cross-examination, the victim testified that during this conversation she had explained she was having problems with her boyfriend. No physical contact between the two had, to this point, taken place.

Thereafter, however, the appellant moved off the bed and down on the floor, and "kind of pushed [the victim] back with his body. It wasn't a shove, it was just kind of a leaning-type of thing." Next Berkowitz "straddled" and started kissing the victim. The victim responded by saying, "Look, I gotta go. I'm going to meet [my boyfriend]." Then Berkowitz lifted up her shirt and bra and began fondling her. The victim then said "no."

After roughly 30 seconds of kissing and fondling, Berkowitz "undid his pants and he kind of moved his body up a little bit." The victim was still saying "no" but "really couldn't move because Berkowitz was shifting her body so he was over me." Berkowitz then tried to put his penis in her mouth. The victim did not physically resist, but rather continued to verbally protest, saying "No, I gotta go, let me go," in a "scolding" manner.

Ten or 15 more seconds passed before the two rose to their feet. Berkowitz disregarded the victim's continual complaints that she "had to go," and instead walked two feet away to the door and locked it so that no one from the outside could enter. The victim testified that she realized at the time that the lock was not of a type that could lock people inside the room.

Then, in the victim's words, "He put me down on the bed. It was kind of like—he didn't throw me on the bed.

It's hard to explain. It was kind of like a push but no…." She did not bounce off the bed. "It wasn't slow like a romantic kind of thing, but it wasn't a fast shove either. It was kind of in the middle."

Once the victim was on the bed, Berkowitz began "straddling" her again while he undid the knot in her sweatpants. He then removed her sweatpants and underwear from one of her legs. The victim did not physically resist in any way while on the bed because Berkowitz was on top of her, and she "couldn't like go anywhere." She did not scream out at anytime because "it was like a dream was happening or something."

Berkowitz then used one of his hands to "guide" his penis into her vagina. At that point, after Berkowitz was inside her, the victim began saying "no, no to him softly in a moaning kind of way because it was just so scary." After about 30 seconds, Berkowitz pulled out his penis and ejaculated onto the victim's stomach.

Immediately thereafter, Berkowitz got off the victim and said, "Wow, I guess we just got carried away." To this the victim retorted, "No, we didn't get carried away, you got carried away." The victim then quickly dressed, grabbed her school books, and raced downstairs to her boyfriend who was by then waiting for her in the lounge. Once there, the victim began crying. Her boyfriend and she went up to his dorm room where, after watching the victim clean off Berkowitz's semen from her stomach, he called the police.

Defense counsel's cross-examination elicited more details regarding the contact between Berkowitz and the victim before the incident in question. The victim testified that roughly two weeks prior to the incident, she had attended a school seminar entitled, "Does 'no' sometimes means 'yes'?" Among other things, the lecturer at this seminar had discussed the average length and circumference of human penises. After the seminar, the victim and several of her friends had discussed the subject matter of the seminar over a speaker-telephone with Berkowitz and his roommate, Earl Hassel. The victim testified that during that telephone conversation, she had asked Berkowitz the size of his penis. According to the victim, Berkowitz responded by suggesting that the victim "come over and find out." She declined.

When questioned further regarding her communications with Berkowitz prior to the April 19, 1988, incident, the victim testified that on two other occasions, she had stopped by Berkowitz's room while intoxicated. During one of those times, she had laid down on his bed. When asked whether she had asked Berkowitz again at that time what his penis size was, the victim testified that she did not remember.

Berkowitz took the stand in his own defense and offered an account of the incident and the events leading up to it which differed only as to the consent involved. According to Berkowitz, the victim had begun communication with him after the school seminar by asking him of the size of his penis and of whether he would show it to her. Berkowitz had suspected that the victim wanted to pursue a sexual relationship with him because she had stopped by his room twice after the phone call while intoxicated, laying down on his bed with her legs spread and again asking to see his penis. He believed that his suspicions were confirmed when she initiated the April 19, 1988, encounter by stopping by his room (again after drinking) and waking him up.

Berkowitz testified that, on the day in question, he did initiate the first physical contact, but added that the victim warmly responded to his advances by passionately returning his kisses. He conceded that she was continually "whispering no's," but claimed that she did so while "amorously … passionately" moaning. In effect, he took such protests to be thinly veiled acts of encouragement. When asked why he locked the door, he explained that "that's not something you want somebody to just walk in on you doing."

According to Berkowitz, the two then laid down on the bed, the victim helped him take her clothing off, and he entered her. He agreed that the victim continued to say "no" while on the bed, but carefully qualified his agreement, explaining that the statements were "moaned passionately." According to Berkowitz, when he saw a "blank look on her face," he immediately withdrew and asked "is anything wrong, is something the matter, is anything wrong." He ejaculated on her stomach thereafter because he could no longer "control" himself. Berkowitz testified that after this, the victim "saw that it was over and then she made her move. She gets right off the bed … she just swings her legs over and then she puts her clothes back on." Then, in wholly corroborating an aspect of the victim's account, he testified that he remarked, "Well, I guess we got carried away," to which she rebuked, "No, we didn't get carried, you got carried away."

OPINION

641 A.2d 1161 (Pa. 1994)

CAPPY, J.

The crime of rape is defined as follows:

> *§ 3121. Rape*
>
> A person commits a felony of the first degree when he engages in sexual intercourse with another person not one's spouse:
>
> (1) by forcible compulsion;
>
> (2) by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution;
>
> (3) who is unconscious; or
>
> (4) who is so mentally deranged or deficient that such person is incapable of consent.
>
> The victim of a rape need not resist.

> The force necessary to support a conviction of rape need only be such as to establish lack of consent and to induce the victim to submit without additional resistance. The degree of force required to constitute rape is relative and depends on the facts and particular circumstance of the case.

In regard to the critical issue of forcible compulsion, the complainant's testimony is devoid of any statement which clearly or adequately describes the use of force or the threat of force against her. In response to defense counsel's question, "Is it possible that [when Appellee lifted your bra and shirt] you took no physical action to discourage him," the complainant replied, "It's possible." When asked, "Is it possible that Berkowitz was not making any physical contact with you aside from attempting to untie the knot in the drawstrings of complainant's sweatpants," she answered, "It's possible." She testified that "He put me down on the bed. It was kind of like—He didn't throw me on the bed. It's hard to explain. It was kind of like a push but not—I can't explain what I'm trying to say."

She concluded that "it wasn't much" in reference to whether she bounced on the bed, and further detailed that their movement to the bed "wasn't slow like a romantic kind of thing, but it wasn't a fast shove either. It was kind of in the middle." She agreed that Appellee's hands were not restraining her in any manner during the actual penetration, and that the weight of his body on top of her was the only force applied.

She testified that at no time did Berkowitz verbally threaten her. The complainant did testify that she sought to leave the room, and said "no" throughout the encounter. As to the complainant's desire to leave the room, the record clearly demonstrates that the door could be unlocked easily from the inside, that she was aware of this fact, but that she never attempted to go to the door or unlock it. As to the complainant's testimony that she stated "no" throughout the encounter with Berkowitz, we point out that, while such an allegation of fact would be relevant to the issue of consent, it is not relevant to the issue of force. Where there is a lack of consent, but no showing of either physical force, a threat of physical force, or psychological coercion, the "forcible compulsion" requirement under 18 Pa.C.S. § 3121 is not met.

The degree of physical force, threat of physical force, or psychological coercion required under 18 Pa.C.S. § 3121 must be sufficient to prevent resistance by a person of reasonable resolution, but the "peculiar situation" of the victim and other subjective factors should be considered by the court in determining "resistance," "assent," and "consent."

Reviewed in light of the above described standard, the complainant's testimony simply fails to establish that the Appellee forcibly compelled her to engage in sexual intercourse as required under 18 Pa.C.S. § 3121. Thus, even if all of the complainant's testimony was believed, the jury, as a matter of law, could not have found Appellee guilty of rape. Accordingly, we hold that the Superior Court did not err in reversing Appellee's conviction of rape.

Accordingly, the order of the Superior Court reversing the rape conviction is affirmed.

QUESTIONS

1. **Explain how the Court came to the conclusion that the Pennsylvania rape statute required extrinsic force.**
2. **List all the facts relevant to deciding whether Robert Berkowitz's actions satisfy the extrinsic force requirement.**
3. **Assume you're the prosecutor, and argue that Robert Berkowitz did use extrinsic force to achieve sexual penetration.**
4. **Now, assume you're the prosecutor, and argue that Robert Berkowitz did *not* use extrinsic force to achieve sexual penetration.**

Now, let's look at how the New Jersey Supreme Court applied the intrinsic force standard in *State in the Interest of M.T S.* (1992).

In our next case excerpt, the New Jersey Supreme Court applied the intrinsic force standard in* State in the Interest of M.T.S., *a juvenile.

CASE Did He Have Sexual Intercourse by Force?

State in the Interest of M.T.S.
609 A.2d 1266 (N.J. 1992)

HISTORY

The trial court determined that M.T.S., a juvenile, was delinquent for committing a sexual assault. The Appellate Division reversed. The New Jersey Supreme Court granted the state's petition for certification to review the law regarding the element of force in rape, and reversed.

HANDLER, J.

FACTS

On Monday, May 21, 1990, 15-year-old C.G. was living with her mother, her three siblings, and several other people, including M.T.S. and his girlfriend. A total of 10 people resided in the three-bedroom town home at the time of the incident. M.T.S., then age 17, was temporarily residing at the home with the permission of C.G.'s mother; he slept downstairs on a couch. C.G. had her own room on the second floor.

At approximately 11:30 p.m. on May 21, C.G. went upstairs to sleep after having watched television with her mother, M.T.S., and his girlfriend. When C.G. went to bed, she was wearing underpants, a bra, shorts, and a shirt. At trial, C.G. and M.T S. offered very different accounts concerning the nature of their relationship and the events that occurred after C.G. had gone upstairs. The trial court did not credit fully either teenager's testimony.

C.G. stated that earlier in the day, M.T.S. had told her three or four times that he "was going to make a surprise visit up in her bedroom." She said that she had not taken M.T.S. seriously and considered his comments a joke because he frequently teased her. She testified that M.T.S. had attempted to kiss her on numerous other occasions and at least once had attempted to put his hands inside of her pants, but that she had rejected all of his previous advances.

C.G. testified that on May 22, at approximately 1:30 a.m., she awoke to use the bathroom. As she was getting out of bed, she said, she saw M.T.S., fully clothed, standing in her doorway. According to C.G., M.T.S. then said that "he was going to tease [her] a little bit." C.G. testified that she "didn't think anything of it"; she walked past him, used the bathroom, and then returned to bed, falling into a "heavy" sleep within 15 minutes.

The next event C.G. claimed to recall of that morning was waking up with M.T.S. on top of her, her underpants and shorts removed. She said "his penis was into her vagina." As soon as C.G. realized what had happened, she said, she immediately slapped M.T.S. once in the face, then "told him to get off [her], and get out." She did not scream or cry out. She testified that M.T.S. complied in less than one minute after being struck; according to C.G., "He jumped right off of [her]." She said she did not know how long M.T.S. had been inside of her before she awoke.

C.G. said that after M.T.S. left the room, she "fell asleep crying" because "she couldn't believe that he did what he did to her." She explained that she did not immediately tell her mother or anyone else in the house of the events of that morning because she was "scared and in shock." According to C.G., M.T.S. engaged in intercourse with her "without [her] wanting it or telling him to come up [to her bedroom]." By her own account, C.G. was not otherwise harmed by M.T.S.

At about 7:00 a.m., C.G. went downstairs and told her mother about her encounter with M.T.S. earlier in the morning and said that they would have to "get [him] out of the house." While M.T.S. was out on an errand, C.G.'s mother gathered his clothes and put them outside in his car; when he returned, he was told that "[he] better not even get near the house." C.G. and her mother then filed a complaint with the police.

According to M.T.S., he and C.G. had been good friends for a long time, and their relationship "kept leading on to more and more." He had been living at C.G.'s home for about five days before the incident occurred; he testified that during the three days preceding the incident they had been "kissing and necking" and had discussed having sexual intercourse. The first time M.T.S. kissed C.G., he said, she "didn't want him to, but she did after that." He said C.G. repeatedly had encouraged him to "make a surprise visit up in her room." M.T.S. testified that at exactly 1:15 a.m. on May 22, he entered C.G.'s bedroom as she was walking to the bathroom.

He said C.G. soon returned from the bathroom, and the two began "kissing and all," eventually moving to the bed. Once they were in bed, he said, they undressed each other and continued to kiss and touch for about five minutes. M.T.S. and C.G. proceeded to engage in sexual intercourse.

According to M.T.S., who was on top of C.G., he "stuck it in" and "did it [thrust] three times, and then the fourth time he stuck it in," that's when she "pulled him off" of her. M.T.S. said that as C.G. pushed him off, she said "stop, get off," and he "hopped off right away." According to M.T.S., after about one minute, he asked C.G. what was wrong; she replied with a backhand to his face. He recalled asking C.G. what was wrong a second time, and her replying, "How can you take advantage of me or something like that."

M.T.S. said that he proceeded to get dressed and told C.G. to calm down, but that she then told him to get away

from her and began to cry. Before leaving the room, he told C.G., "I'm leaving. I'm going with my real girlfriend; don't talk to me. I don't want nothing to do with you or anything; stay out of my life; don't tell anybody about this, it would just screw everything up." He then walked downstairs and went to sleep.

On May 23, 1990, M.T.S. was charged with conduct that if engaged in by an adult would constitute second-degree sexual assault of the victim, contrary to N.J.S.A. 2C:142c(1).

Following a two-day trial on the sexual assault charge, M.T.S. was adjudicated delinquent. After reviewing the testimony, the Court concluded that the victim had consented to a session of kissing and heavy petting with M.T.S. The trial court did not find that C.G. had been sleeping at the time of penetration, but nevertheless found that she had not consented to the actual sexual act. Accordingly, the Court concluded that the State had proven second-degree sexual assault beyond a reasonable doubt.

On appeal, following the imposition of suspended sentences on the sexual assault and the other remaining charges, the Appellate Division determined that the absence of force beyond that involved in the act of sexual penetration precluded a finding of second-degree sexual assault. It therefore reversed the juvenile's adjudication of delinquency for that offense.

OPINION

Under New Jersey law a person who commits an act of sexual penetration using physical force or coercion is guilty of second-degree sexual assault. The sexual assault statute does not define the words "physical force." The question posed by this appeal is whether the element of "physical force" is met simply by an act of nonconsensual penetration involving no more force than necessary to accomplish that result.

That issue is presented in the context of what is often referred to as "acquaintance rape." The record in the case discloses that the juvenile, a seventeen-year-old boy, engaged in consensual kissing and heavy petting with a fifteen-year-old girl and thereafter engaged in actual sexual penetration of the girl to which she had not consented.

Pre-reform rape law in New Jersey, with its insistence on resistance by the victim, greatly minimized the importance of the forcible and assaultive aspect of the defendant's conduct. Rape prosecutions turned then not so much on the forcible or assaultive character of the defendant's actions as on the nature of the victim's response. That the law put the rape victim on trial was clear.

The New Jersey Code of Criminal Justice reformed the law of rape in 1978. The Code does not refer to force in relation to "overcoming the will" of the victim, or to the "physical overpowering" of the victim, or the "submission" of the victim. It does not require the demonstrated nonconsent of the victim.

In reforming the rape laws, the Legislature placed primary emphasis on the assaultive nature of the crime, altering its constituent elements so that they focus exclusively on the forceful or assaultive conduct of the defendant.

We conclude, therefore, that any act of sexual penetration engaged in by the defendant without the affirmative and freely given permission of the victim to the specific act of penetration constitutes the offense of sexual assault.

Today the law of sexual assault is indispensable to the system of legal rules that assures each of us the right to decide who may touch our bodies, when, and under what circumstances. The decision to engage in sexual relations with another person is one of the most private and intimate decisions a person can make. Each person has the right not only to decide whether to engage in sexual contact with another, but also to control the circumstances and character of that contact.

Notwithstanding the stereotype of rape as a violent attack by a stranger, the vast majority of sexual assaults are perpetrated by someone known to the victim. Contrary to common myths, perpetrators generally do not use guns or knives and victims generally do not suffer external bruises or cuts. Although this more realistic and accurate view of rape only recently has achieved widespread public circulation, it was a central concern of the proponents of reform in the 1970s.

We acknowledge that cases such as this are inherently fact sensitive and depend on the reasoned judgment and common sense of judges and juries. The trial court concluded that the victim had not expressed consent to the act of intercourse, either through her words or actions. We conclude that the record provides reasonable support for the trial court's disposition.

Accordingly, we reverse the judgment of the Appellate Division and reinstate the disposition of juvenile delinquency for the commission of second-degree sexual assault.

QUESTIONS

1. **List all of the evidence relevant to determining whether M.T.S.'s actions satisfied the intrinsic force element of the New Jersey sexual assault statute.**
2. **Summarize the reasons the Court gives for adopting the intrinsic force standard.**
3. **Taking into account the evidence, decision, and reasoning of *Commonwealth v. Berkowitz*, which do you think is the better approach to the force requirement—intrinsic or extrinsic force? Defend your answer.**
4. **Should legislatures or courts decide whether to adopt the intrinsic or extrinsic force standard? Defend your answer.**
5. **Study Table 10.1, "Antioch College, Sexual Offense Policy." Do you agree with this critic (Crichton et al. 1993) of the policy?**

Deep among the cornfields and pig farms of central Ohio in the town of Yellow Springs, Antioch prides itself on being "A Laboratory for Democracy." The dress code is grunge and black; multiple nose rings are de rigueur, and green and blue hair are preferred (if you have hair). Seventy percent of the student body are womyn (for the uninitiated, that's women—without the dreaded m-e-n). And the purpose of the Sexual Offense Policy is to empower these students to become equal partners when it comes time to mate with males.

The goal is 100 percent consensual sex, and it works like this: it isn't enough to ask someone if she'd like to have sex, as an Antioch women's center advocate told a group of incoming freshmen this fall. You must obtain consent every step of the way. "If you want to take her blouse off, you have to ask. If you want to touch her breast, you have to ask. If you want to move your hand down to her genitals, you have to ask. If you want to put your finger inside her, you have to ask" (52).

How silly this all seems; how sad. It criminalizes the delicious unexpectedness of sex—a hand suddenly moves to here, a mouth to there. What is the purpose of sex if not to lose control? (To be unconscious, no.) The advocates of sexual correctness are trying to take the danger out of sex, but sex is inherently dangerous. It leaves one exposed to everything from euphoria to crashing disappointment. That's its great unpredictability. But of course, that's sort of what we said when we were all made to use seat belts.

What is implicit in the new sex guidelines is that it's the male who does the initiating and the woman who at any moment may bolt. Some young women rankle at that. "I think it encourages wimpy behavior by women and [the idea] that women need to be handled with kid gloves," says Hope Segal, 22, a fourth-year Antioch student. Beware those boys with their swords, made deaf by testosterone and, usually, blinded by drink. (54)

TABLE 10.1 The Antioch College Sexual Offense Policy

All sexual contact and conduct on the Antioch College campus and/or occurring with an Antioch community member must be consensual. . .

Consent

1. For the purpose of this policy, "consent" shall be defined as follows: the act of willingly and verbally agreeing to engage in specific sexual contact or conduct.
2. If sexual contact and/or conduct is not mutually and simultaneously initiated, then the person who initiates sexual contact/conduct is responsible for getting the verbal consent of the other individual(s) involved.
3. Obtaining consent is an ongoing process in any sexual interaction. Verbal consent should be obtained with each new level of physical and/or sexual contact/conduct in any given interaction, regardless of who initiates it. Asking "Do you want to have sex with me?" is not enough. The request for consent must be specific to each act.
4. The person with whom sexual contact/conduct is initiated is responsible to express verbally and/or physically her/his willingness or lack of willingness when reasonably possible.
5. If someone has initially consented but then stops consenting during a sexual interaction, she/he should communicate withdrawal verbally and/or through physical resistance. The other individual(s) must stop immediately.
6. To knowingly take advantage of someone who is under the influence of alcohol, drugs, and/or prescribed medication is not acceptable behavior in the Antioch community.
7. If someone verbally agrees to engage in specific contact or conduct, but it is not of her/his own free will due to any of the circumstances stated in (a) through (d) below, then the person initiating shall be considered in violation of this policy if:
   a. the person submitting is under the influence of alcohol or other substances supplied to her/him by the person initiating;
   b. the person submitting is incapacitated by alcohol, drugs, and/or prescribed medication;
   c. the person submitting is asleep or unconscious;
   d. the person initiating has forced, threatened, coerced, or intimidated the other individual(s) into engaging in sexual contact and/or sexual conduct.

Source: David S. Hall 1998.

Threat of Force

LO 5

The *actual* use of force isn't required to satisfy the force requirement. The threat of force is enough. To satisfy the **threat-of-force requirement**, the prosecution has to prove the victim experienced two kinds of fear:

1. *Subjective fear* The victim honestly feared imminent and serious bodily harm.
2. *Objective fear* The fear was reasonable under the circumstances.

Brandishing a weapon satisfies the requirement. So do verbal threats—such as threats to kill, seriously injure, or kidnap. But the threat doesn't have to include showing weapons or using specifically threatening words. Courts can consider all of the following in deciding whether the victim's fear was reasonable (Edwards 1996, 260–61):

- The respective ages of the perpetrator and the victim
- The physical sizes of the perpetrator and the victim
- The mental condition of the perpetrator and the victim
- The physical setting of the assault
- Whether the perpetrator had a position of authority, domination, or custodial control over the victim

Resistance and Danger to the Victim

Some empirical research from the late 1970s and early 1980s reported that resistance "may threaten rape victims' lives" (Schwartz 1983, 577). Fifty-five percent of rapists in one widely publicized study reported "getting more violent, sometimes losing control" when their victims resisted (579). Another study, funded by the U.S. Department of Justice, found that 66 percent of victims who resisted were injured compared to 34 percent who didn't (580).

More recent studies from the 1990s have uncovered shortcomings in these earlier findings. For one thing, stranger rapes were overrepresented because it's easier to study convicted rapists, who are overwhelmingly violent stranger rapists. As you've already learned, acquaintance rapists far outnumber stranger rapists.

Let's add some details about acquaintance rape that are helpful in understanding the effect of victim resistance. First, victims usually resist unwanted advances because they're not afraid men they know will hurt them. Second, and important, they're right: resistance usually succeeds.

According to Patricia Dooze and her colleagues, "Most rapes are attempted but not completed and the woman succeeds in escaping with little or no injury" (Bryden 2000, 366, n. 196). As to injuries, the National Victim Center's report, *Rape in America*, reported that 4 percent of acquaintance rape victims reported serious injuries, 24 percent reported minor injuries, and 70 percent reported no injuries (Bryden 2000, 367, n. 198).

Finally, the most sophisticated empirical studies of the 1990s found that it's not initial victim resistance that provokes rapists to injure their victims. It's the other way around; initial rapist violence provokes victim resistance (Bryden 2000, 367).

Exceptions to the Force and Resistance Rule

LO 5

The law has never required physical resistance in all cases. No resistance is required if victims were incapacitated at the time of the assault by intoxication, mental deficiency, or insanity.

Also, deception (fraud) can substitute for force. These cases involve doctors who trick their patients into having sexual intercourse. These cases fall into two categories, fraud in the fact and fraud in the inducement. **Fraud in the fact** consists of tricking the victim into believing the act she consented to wasn't sexual intercourse. This type of intercourse is rape. In a famous old case still cited, *Moran v. People* (1872), Dr. Moran told a patient he needed to insert an instrument into her vagina for treatment. She consented. In fact, the doctor was engaging in intercourse. The Court rejected the argument that his victim consented, and the Appeals Court upheld the doctor's rape conviction.

Intercourse obtained by **fraud in the inducement** is *not* rape. For example, "Dr. Feelgood" in the 1980s had sexual assault charges against him dropped, but he didn't benefit from his victims' consent, because his fraud was in the benefits he promised his victims, not in the act of intercourse. Daniel Boro, posing as "Dr. Feelgood," tricked several women into believing he could cure their fatal blood disease by having sexual intercourse with him. He convinced them that they had two choices: they could undergo an extremely painful and expensive surgery or have intercourse with a donor (Boro, of course) who'd been injected with a special serum. The Court ruled the women consented even though Boro used fraud to induce them to have intercourse with them (*Boro v. Superior Court* 1985).

Finally, sexual intercourse with a minor who consented is rape because the law doesn't recognize the consent of minors. You'll learn more about statutory rape later in the chapter.

Rape *Mens Rea*

LO 6

Rape is a **general-intent crime**. Recall from Chapter 4 that one common meaning of "general intent" is that defendants intended to commit the act defined in the crime—in the case of rape, the act is forcible sexual penetration. This, of course, doesn't mean there can't be a different state of mind regarding circumstance elements, specifically nonconsent. These circumstance elements center around mistakes—mistakes about age in the cases involving underage victims or mistakes about the consent to sexual penetration by competent adult victims.

It's impossible to purposely, or even knowingly, make a mistake. That leaves three possibilities: reckless mistakes, negligent mistakes, or no-fault mistakes (strict liability). The states are divided as to which mental element to require.

At one extreme are states that adopt strict liability. An example of strict liability regarding consent is *Commonwealth v. Fischer* (1998). Kurt Fischer and another Lafayette College freshman gave "grossly divergent" stories regarding their encounter in Fischer's dorm room. The victim testified that when they went to his room, Fischer locked the door, pushed her onto the bed, straddled her, held her wrists above her head, and forced his penis into her mouth. She struggled through the whole encounter, warned him that "someone would find out," told him she had to be at a class, and didn't want to have sex with him. Fischer ignored all this, forced his hands inside a hole in her jeans, pushed his penis through the hole, removed it, and ejaculated on her face, hair, and sweater (1112–13).

Fischer testified that when they got to his room, the victim told him it would have to be a "quick one." Fischer admitted he held the victim's arms above her head, straddled her, and put his penis in her mouth, and said, "I know you want my dick in your mouth." When she replied, "no," Fischer said, "no means yes." After Fischer insisted again that she

"wanted it," and she replied, "No, I honestly don't," he stopped trying. Then they just lay on the bed fondling and kissing each other (1113).

The jury found Fischer guilty of involuntary deviate sexual intercourse and aggravated indecent assault; he was sentenced to five years in prison. On appeal, Fischer argued that he honestly, but mistakenly, believed the victim consented. The Pennsylvania Superior Court expressed approval of an **honest and reasonable mistake rule**—that is, a negligence mental element—because of changing sexual habits, particularly on college campuses (1114).

Nevertheless, the Court ruled, it didn't have the authority to replace the state's strict liability rule with a negligence rule on its own. Quoting from a rape case involving two Temple University students, the Court said the reasonable and honest mistake of fact rule regarding consent

> is not now and has never been the law of Pennsylvania. When one individual uses force or the threat of force to have sexual relations with a person not his spouse and without the person's consent he has committed the crime of rape. *If the element of the defendant's belief as to the victim's state of mind is to be established as a defense to the crime of rape then it should be done by the legislature which has the power to define crimes and defenses. We refuse to create such a defense*. (1114) (emphasis in original)

Several states have adopted the negligence standard that the Court in *Commonwealth v. Fischer* referred to favorably. A frequently cited example is *People v. Mayberry* (1975). Booker T. Mayberry and "Miss B." gave conflicting stories of what happened. Miss B. testified that Mayberry repeatedly hit her and threatened to hurt her if she didn't come to his apartment for sex. Mayberry testified that she came voluntarily to his apartment where she willingly engaged in sexual intercourse with him.

The trial court refused Mayberry's request that the judge instruct the jury as to mistake of fact regarding Mayberry's belief that Miss B. consented to the intercourse. The California Supreme Court reversed the conviction. Although the statute said nothing about the mental attitude required for consent, the Court read into the statute the requirement that Mayberry's mistake as to Miss B.'s consent had to be negligent:

> The severe penalty imposed for rape and the serious loss of reputation following conviction make it extremely unlikely that the legislature intended to exclude the element of wrongful intent. If a defendant entertains a reasonable and bona fide belief that a prosecutrix voluntarily consented to accompany him and to engage in sexual intercourse, it is apparent he does not possess the wrongful intent that is a prerequisite to a conviction of rape by means of force or threat. (1345)

A few courts have adopted a **recklessness requirement**, requiring that the defendant has to be aware that there's a risk the victim hasn't consented to sexual intercourse. The most famous example of requiring recklessness is the controversial English case, *Regina v. Morgan* (1975), which the Court with great understatement, called "somewhat bizarre." The case generated enormous attention and great criticism, not just in the United Kingdom but in the United States.

William Morgan, an officer in the RAF was out drinking with Robert McDonald, Robert McClarty, and Michael Parker, three other RAF men, much younger and junior in rank to Morgan. The four men weren't just drinking; they were looking for women. When they couldn't find any women to have sex with, Officer Morgan suggested that they go back to his house and have sex with his wife, Daphne. The younger men were complete

strangers to Mrs. Morgan and at first didn't take their superior's suggestion seriously. But they realized Morgan was serious when he told them stories about Mrs. Morgan's "sexual aberrations" and then gave them condoms to wear.

Morgan told the men to expect his wife to resist but not to take her resistance seriously, "since it was a mere pretense whereby she stimulated her own sexual excitement." The men went to Morgan's house; Mrs. Morgan did resist. All four men overcame her resistance, and each had sexual intercourse with Mrs. Morgan while the others watched.

Daphne Morgan's account of what happened was that

> she was awakened from sleep in a single bed in a room which she shared with one of her children. Her husband and the other men in part dragged and in part carried her out on to a landing and thence into another room which contained a double bed. She struggled and screamed and shouted to her son to call the police, but one of the men put a hand over her mouth. Once on the double bed the defendants had intercourse with her in turn, finishing with her husband. During intercourse with the other three she was continuously being held, and this, coupled with her fear of further violence, restricted the scope of her struggles, but she repeatedly called out to her husband to tell the men to stop.

McDonald, McClarty, and Parker were charged with and convicted of rape. Officer Morgan was charged with and convicted of aiding and abetting the rapes by the younger men. (The marital rape exception prevented charging Morgan with rape.) They appealed. Their case eventually reached England's highest court, the House of Lords, where they argued that their convictions should be overturned because they believed Mrs. Morgan consented to the rape.

There was long and detailed argument about mistake and consent. It centered on whether a negligent mistake regarding Daphne Morgan's consent was enough to satisfy the *mens rea* requirement or whether recklessness was required. After more than 50 pages of analysis, the Lords decided on recklessness and reversed the convictions. Lord Hailsham put it succinctly:

> In rape the prohibited act is intercourse without the consent of the victim and the mental element lies in the intention to commit the act willy-nilly or not caring whether the victim consents or not. A failure to prove this element involves an acquittal, because an essential ingredient is lacking and it matters not that it is lacking because of a belief not based on reasonable ground.

Critics argue that rape is too serious a charge and the penalties are too severe to allow convictions based on a negligent or even a reckless mistake. They demand that defendants have to *know* their victims didn't consent before they can be subjected to the stigma of such a heinous crime and such severe punishment.

Law professor Susan Estrich (1987), a rape law scholar and herself a rape victim, disagrees:

> If inaccuracy or indifference to consent is "the best that this man can do" because he lacks the capacity to act reasonably, then it might well be unjust and ineffective to punish him for it. More common is the case of the man who could have done better but did not; heard her refusal or saw her tears, but decided to ignore them.
>
> The man who has the inherent capacity to act reasonably but fails to has, through that failure, made a blameworthy choice for which he can justly be punished. The law has long punished unreasonable action which leads to the loss of

human life as manslaughter—a lesser crime than murder, but a crime nonetheless. The injury of sexual violation is sufficiently great, the need to provide that additional incentive pressing enough, to justify negligence liability for rape as for killing. (97–98)

Statutory Rape

LO 7

Statutory rape consists of having sex with minors. Statutory rapists don't have to use force; the victim's immaturity takes the place of force. Furthermore, nonconsent isn't an element, nor is consent a defense, because minors can't legally consent to sex. In other words, statutory rape is a strict liability crime in most states.

A few states, such as California and Alaska, however, do permit the defense of **reasonable mistake of age**. In those states, the defense applies if a man reasonably believes his victim is over the age of consent. In other words, negligence is the required *mens rea* regarding the circumstance element of age.

Grading the Degrees of Rape

Most statutes divide rape into two degrees: **simple (second-degree) rape** and aggravated (first-degree) rape. **Aggravated rape** involves at least one of the following circumstances:

- The victim suffers serious bodily injury.
- A stranger commits the rape.
- The rape occurs in connection with another crime.
- The rapist is armed.
- The rapist has accomplices.
- The victim is a minor and the rapist is several years older.

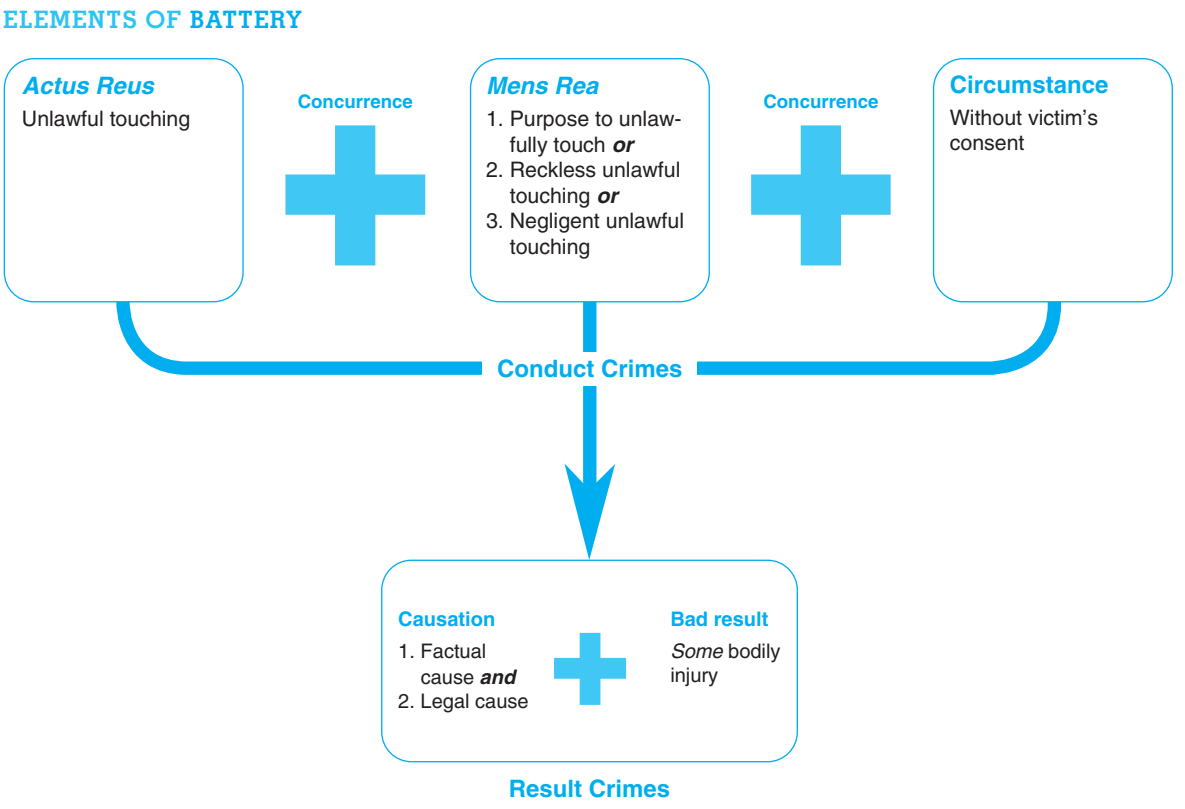
All other rapes are "simple" rapes, for which the penalties are less severe. The criminal sexual conduct statutes comprise a broad range of criminal sexual penetrations and contacts that grades penetrations more seriously than contacts but also takes into account the aggravating circumstances just listed.

Bodily Injury Crimes

LO 8

Assault and battery, although combined in many modern statutes, are two separate crimes. A **battery** is an unwanted and unjustified offensive touching. Body contact is central to the crime of battery. An **assault** is either an attempted or a threatened battery, depending on how the statute defines it. The essential difference between assault and battery is that assault requires no physical contact; an assault is complete before the offender touches the victim. **Stalking** involves intentionally scaring another person by following, tormenting, or harassing him or her.

In this section, we'll look at bodily injury crimes involving battery, assault, and stalking.



Battery

The *actus reus* of battery is unlawful touching, but not every offensive physical contact is unlawful. Spanking children is offensive, at least to the children, but it's not battery. Why? Because the law recognizes it as the *lawful* act of disciplining children. Unlawful touching includes a broad spectrum of acts but usually means any unjustified touching without consent. Some courts have even included spitting in the face of someone you want to insult (*State v. Humphries* 1978).

Statutes don't always spell out the battery *mens rea*. At common law, battery was an intentionally inflicted injury. Modern courts and statutes extend battery *mens rea* to include reckless and negligent contacts. The MPC (ALI 1953, no. 11) defines "battery *mens rea*" as "purposely, recklessly, or negligently causing bodily injury," or "negligently causing bodily injury … with a deadly weapon."

Some state statutes call this expanded offense by a different name. Louisiana (Louisiana Statutes Annotated 1974, 17-A, 14.39), for example, provides that "inflicting any injury upon the person of another by criminal negligence" is "negligent injuring."

Battery requires *some* injury. Batteries that cause minor physical injury or emotional injury are misdemeanors in most states. Batteries that cause serious bodily injury are felonies. Some code provisions are directed at injuries caused by special circumstances.

For example, injuries caused by pit bulls prompted the Minnesota legislature (Minnesota Statutes Annotated 1989, § 609.26) to enact the following provision:

> Section 609.26. A person who causes great or substantial bodily harm to another by negligently or intentionally permitting any dog to run uncontrolled off the owner's premises, or negligently failing to keep it properly confined is guilty of a petty misdemeanor.…
>
> Subd. 3. If proven by a preponderance of the evidence, it shall be an affirmative defense to liability under this section that the victim provoked the dog to cause the victim's bodily harm.

Injuries and deaths resulting from drug abuse led the same legislature to enact this provision:

> 609.228 Whoever proximately causes great bodily harm by, directly or indirectly, unlawfully selling, giving away, bartering, delivering, exchanging, distributing, or administering a controlled substance … may be sentenced to imprisonment for not more than ten years or to payment of a fine of not more than $20,000, or both.

The MPC grades bodily harm offenses as follows:

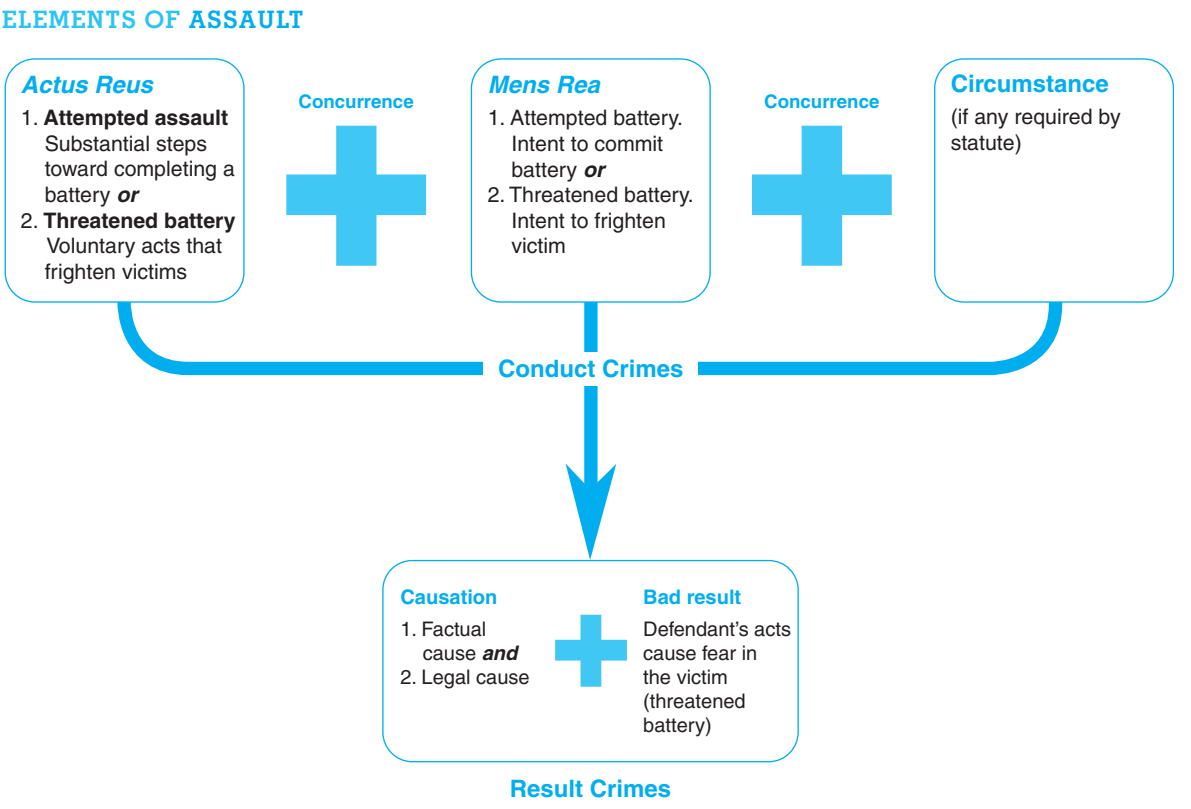
> *§ 211.1 2.*
>
> Bodily injury is a felony when
>
> a. such injury is inflicted purposely or knowingly with a deadly weapon; or
> b. serious bodily injury is inflicted purposely, or knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life.
> c. except as provided in paragraph (2), bodily injury is a misdemeanor, unless it was caused in a fight or scuffle entered into by mutual consent, in which case it is a petty misdemeanor.

Assault

Assaults are either attempted batteries or threatened batteries, depending on the state. (Notice both kinds are complete crimes without touching the victim.) **Attempted battery assault** consists of having the specific intent to commit a battery and taking substantial steps toward carrying it out without actually completing the attempt. **Threatened battery assault**, sometimes called the crime of "**intentional scaring**," requires only that actors intend to frighten their victims, thus expanding assault beyond attempted battery. Threatened battery doesn't require actually having the intent to injure their victims physically; the intent to frighten victims into believing the actor will hurt them is enough.

Victims' awareness is critical to proving threatened battery assault. Specifically, victims' fear of an immediate battery has to be reasonable. Words alone aren't assaults; threatening gestures have to accompany them. But this requirement isn't always fair. For example, what if an assailant approaches from behind a victim, saying, "Don't move, or I'll shoot!" These words obviously are reasonable grounds to fear imminent injury, but they aren't assault because they are, after all, only words.

Conditional threats aren't enough either because they're not immediate. The conditional threat "I'd punch you out if you weren't a kid" isn't immediate because it depends on the victim's age. In a few jurisdictions, a present ability to carry out the



threat has to exist. But in most, even a person who approaches a victim with a gun she knows is unloaded, points the gun at the victim, and pulls the trigger (intending only to frighten her victim) has committed threatened battery (*Encyclopedia of Crime and Justice* 1983, 1:89).

Attempted and threatened battery assaults address separate harms. Attempted battery assault deals with an incomplete physical injury. Threatened battery assault is directed at a present psychological or emotional harm—namely, putting a victim in fear.

So in attempted battery assault, a victim's awareness doesn't matter; in threatened battery assault, it's indispensable.

The MPC deals with threatened and attempted battery assaults as follows:

> *§ 211.1 Simple Assault*
>
> A person is guilty of assault if he:
> a. attempts to cause . . . bodily injury to another; or
> b. attempts by physical menace to put another in fear of imminent serious bodily harm.
>
> Simple assault is a misdemeanor unless committed in a fight or scuffle entered into by mutual consent, in which case the assault is a petty misdemeanor. (ALI 1985)

Historically, all assaults were misdemeanors. However, modern statutes have created several aggravated or felonious assaults. Most common are assaults with the intent to commit violent felonies (murder, rape, and robbery, for example), assaults with deadly weapons (such as guns and knives), and assaults on police officers.

The MPC includes a comprehensive assault and battery statute that integrates, rationalizes, and grades assault and battery. It takes into account *actus reus, mens rea*, circumstance elements, and intended harm. Note the careful attention paid to these elements:

> *§ 211.2*
>
> A person is guilty of aggravated assault if he:
>
> a. attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or
> b. attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon.
>
> Aggravated assault under paragraph (a) is a felony of the second degree; aggravated assault under paragraph (b) is a felony of the third degree.
>
> *§ 211.3*
>
> A person commits a misdemeanor if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury. Recklessness and danger shall be presumed where a person knowingly points a firearm at or in the direction of another, whether or not the actor believed the firearm to be loaded. (ALI 1985)

Domestic Violence Crimes

LO 9

> Since the early 1970s, violence in the family has been transformed from a private concern to a criminal justice problem. Violence in intimate relationships is extensive and is not limited to one socioeconomic group, one society, or one period of time. Every type and form of family and intimate relationship has the potential of being violent. (Gelles 2002, 671)

Numerous case excerpts in earlier chapters show how pervasive domestic violence is in the cases in this book: Chapter 4 (*mens rea* of purpose, knowing, recklessness, and negligence); Chapter 5 (justifications, domestic violence, and self-defense; domestic violence and consent); Chapter 6 (excuse of post-traumatic stress syndrome); Chapter 7 (accomplice to murder, mother and son, vicarious liability of parents for their children's crimes); Chapter 8 (attempted murder, husband and wife); Chapter 9 (voluntary manslaughter, husband and wife). We'll see it again in Chapter 11 (burglary and identity theft).

Here, we concentrate on the effects of specific domestic violence statutes on the law of assault and battery. We'll use the Ohio Domestic Violence statute as an example. The statute provides:

> *2919.25 Domestic Violence.*
>
> (A) No person shall knowingly cause or attempt to cause physical harm to a family or household member.

(B) No person shall recklessly cause serious physical harm to a family or household member.

(C) No person, by threat of force, shall knowingly cause a family or household member to believe that the offender will cause imminent physical harm to the family or household member.

(D) (1) Whoever violates this section is guilty of domestic violence, and the court shall sentence the offender as provided in divisions (D)(2) to (6) of this section.

(2) A violation of division (C) of this section is a misdemeanor of the fourth degree, and a violation of division (A) or (B) of this section is a misdemeanor of the first degree (up to 6 months in jail and/or up to $1,000 fine).

(3) If the offender previously has pleaded guilty to or been convicted of domestic violence, or any offense of violence if the victim of the offense was a family or household member at the time of the commission of the offense, a violation of division (A) or (B) of this section is a felony of the fourth degree (6–18 months incarceration and/or a fine up to $5,000), and a violation of division (C) of this section is a misdemeanor of the second degree.

(4) If the offender previously has pleaded guilty to or been convicted of two or more offenses of domestic violence, a violation of division (A) or (B) of this section is a felony of the third degree (1–5 years in prison and a fine up to $10,000), and a violation of division (C) of this section is a misdemeanor of the first degree.

[(E) is irrelevant for our discussion.]

(F) As used in this section and sections 2919.251 and 2919.26 of the Revised Code:

(1) "Family or household member" means any of the following:

(a) Any of the following who is residing or has resided with the offender:

(i) A spouse, a person living as a spouse, or a former spouse of the offender;

(ii) A parent or a child of the offender, or another person related by consanguinity or affinity to the offender;

(iii) A parent or a child of a spouse, person living as a spouse, or former spouse of the offender, or another person related by consanguinity or affinity to a spouse, person living as a spouse, or former spouse of the offender.

(b) The natural parent of any child of whom the offender is the other natural parent or is the putative other natural parent.

(2) "Person living as a spouse" means a person who is living or has lived with the offender in a common law marital relationship, who otherwise is cohabiting with the offender, or who otherwise has cohabited with the offender within five years prior to the date of the alleged commission of the act in question.

Effective Date: 11-09-2003; 2008 HB280 04-07-2009

FELONY PUNISHMENTS

Degree	Prison Time	Maximum Fine
1st	3–10 years	$20,000
2nd	2–8 years	$15,000
3rd	1–5 years	$10,000
4th	6–18 months	$5,000
5th	6–12 months	$2,500

MISDEMEANOR PUNISHMENTS

Degree	Maximum Jail Time	Maximum Fine
1st	6 months	$1,000
2nd	90 days	$750
3rd	60 days	$500
4th	30 days	$250
5th	No jail	$150

Source: www.jdrlaw.com/ohiocriminalattorney/criminal-sentencing-in-ohio.html (visited June 30, 2009).

In *Hamilton v. Cameron* (1997), our next case excerpt, the Ohio Court of Appeals overturned a trial court's guilty verdict because the state failed to prove the elements of domestic violence.

In Hamilton v. Cameron (1997), our next case excerpt, the Ohio Court of Appeals overturned a trial court's guilty verdict because the state failed to prove the elements of domestic violence.

CASE Was He Guilty of Capital Murder?

Hamilton v. Cameron
700 N.E.2d 336 (Ohio App.3d 1997)

HISTORY

Bobby J. Cameron (the defendant) was found guilty in the Municipal Court, Hamilton County, of committing domestic violence. The Municipal Court judge sentenced the appellant for a violation of "R.C. 2919.25." The appellant was fined $50 plus court costs, and the appellant's shotguns were confiscated. The defendant appealed. The Court of Appeals, Walsh, J., held that the defendant did not commit domestic violence by telling his wife "I'd probably have to blow your head off to get you to shut up," and reversed the Municipal Judge's decision.

WALSH, J.

The appellant and his wife, Darlene Cameron ("Darlene"), had an argument on February 22, 1996. Darlene wanted to discuss matters involving their 12-year-old son. Darlene testified that the appellant did not want to discuss the matters at the time and that she continued to "push the issue." During the argument, the appellant claims that he said, "I'd probably have to blow your head off to get you to shut up." Darlene testified, "He was telling me to shut up. He said something about blowing my head off that would necessitate, be necessary in order for that to occur, to get me to shut up." Deputy Michael Jacobs testified that Darlene told him that the appellant said that he was going to blow her head off.

After the argument had finished, Darlene went into another room of the house and called her mother because she was "still upset and angry." Darlene told her mother about the argument with the appellant. After the call, Darlene's mother called Darlene's sister, and then Darlene's sister called the police and reported that the appellant had threatened to shoot Darlene.

Officers arrived at the appellant's home approximately 45 minutes after the argument and found no disturbance at the home. The officers found the appellant in the living room working on a computer with their 12-year-old son, and Darlene in the back bedroom watching their 6-year-old son play Nintendo. The officers noticed a shotgun on a gun rack in the home and asked if the appellant had any more weapons. The appellant told the officers that there was another shotgun in the closet. Both of the shotguns were loaded.

A complaint was filed against the appellant, which was signed by Darlene. The complaint states that the appellant violated R.C. 2919.25(A)(B) by threatening "to shoot his wife, Darlene, with a shotgun. Two shot guns were loaded and in reach of the couple's children." On the back of the complaint was a written statement that reads: "Mr. Cameron did threaten to shoot his wife, Darlene, with a shotgun. Two shotguns were loaded and available and in reach of couple's children." During the appellant's trial, Darlene testified as to why she signed the complaint against the appellant.

Q. Did you then subsequently come down [to the police station] and sign a complaint?

A. After the fact, [the appellant] and I [were] talking together, we were told someone had to go. There was I guess [a] new law because I had read it in the journal. But like, if they are called on a domestic violence call, someone gets arrested. We were told that someone had to go and I heard my husband say in the living room, "No, I don't want to sign a complaint against my wife." So, I know one officer came in and asked [Officer] Jacobs will she sign a complaint, and he said yes. I said nothing.

Q. And you subsequently ended up signing it?

A. I did, but I didn't know I had the choice between doing it and not doing it.

Q. Did your complaint say that he threatened to shoot you with a loaded shotgun on February 22, 1996, at 9:30 p.m.?

A. Yes it does.

Q. That is your signature on the bottom of that correct?

A. That is my signature.

Q. You read that both the front and back where you signed that complaint twice with the same allegations?

A. Actually, I didn't read it. It was prepared. I believe that was the desk sergeant at the police station next door. My children and I waited in the lobby for over an hour and a half. We were very tired, very thirsty. Very upset, everyone. The kids, because of their tiredness. They were very testy. And when I [was] finally call[ed] in to sign it, I can recall the person who presented it to me saying that he just wrote down what was in the report. I just signed it. I just wanted to go home. I knew [what] I was there for and I just signed it. I didn't read it.

Darlene also testified that she signed a restraining order against the appellant because "I was just thinking separation, distance at my control. If that's what it took, then I wanted time to think. I just wanted time." Darlene testified that at the time she was not in fear of the appellant and that he never made a movement toward the shotgun on the gun rack.

Darlene did not testify that she believed that the appellant intended to carry out the threat of shooting her, or that she believed that she was in imminent physical harm. No evidence was presented of prior acts by the appellant showing that he had harmed or had threatened to harm Darlene before the incident. The appellant claims that he did not make the statement intending to threaten Darlene.

OPINION

Appellant presents one assignment of error: "The trial court erred to the prejudice of the defendant-appellant in finding the defendant-appellant guilty of domestic violence when an essential element of the crime is lacking."

Appellant argues that an essential element of the crime he was charged with is lacking. We agree. An appellate court will not disturb the decision of a trial court unless the appellate court finds that reasonable minds could not reach the conclusion reached by the trier of facts. Moreover, the relevant inquiry does not involve how the appellate court might interpret the evidence. Rather, the inquiry is, after viewing the evidence in the light most favorable to the prosecution,

whether any reasonable trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.

The complaint against appellant charges him with a violation of "R.C. 2919.25(A)(B)." The motion for a temporary protection order uses language similar to R.C. 2919.25(A) and (B). The judgment entry states that appellant violated "R.C. 2919.25." R.C. 2919.25 reads as follows:

(A) No person shall knowingly cause or attempt to cause physical harm to a family or household member.

(B) No person shall recklessly cause serious physical harm to a family or household member.

(C) No person, by threat of force, shall knowingly cause a family or household member to believe that the offender will cause imminent physical harm to the family or household member.

The elements of the crime of domestic violence (R.C. 2919.25[A]) are that a charged defendant must have "knowingly caused, or attempted to cause, physical harm to a family or household member." Physical harm is defined as "any injury, illness, or other physiological impairment, regardless of its gravity or duration" R.C. 2901.01(C). After reviewing the record, we cannot find any evidence that appellant caused physical harm to Darlene, or even an allegation by Darlene that she had been physically harmed.

A violation of R.C. 2919.25(A) can also be demonstrated by a showing that appellant attempted to commit physical harm. The evidence in the record shows that the only act appellant committed was the statement "I'd probably have to blow your head off to get you to shut up." No evidence was presented to show that appellant knowingly attempted to carry out the threat. Accordingly, we hold that the trial court erred in finding appellant had committed domestic violence by violating R.C. 2919.25(A) or (B). R.C. 2919.25(B) substitutes the culpable mental state of "recklessly" for "intentionally" as described in paragraph (A). The analysis of the harm element is the same.

Although the complaint does not state that appellant had violated R.C. 2919.25(C), the language of the complaint does state one of the elements of R.C. 2919.25(C) by stating that appellant "threatened to shoot his wife." However, in order to show that a person violated R.C. 2919.25(C), it must be shown by the prosecution that "the victim believed the offender would cause her imminent physical harm at the time the incident took place." The state of mind of the victim is an essential element of this crime. While it is true that victims may change their testimony to protect a spouse, there must be some evidence either that a victim stated, or that from other evidence it could be inferred, that the victim thought that the accused would cause imminent physical harm.

Under the facts of this case, we find no violation of R.C. 2919.25(C). The record shows that Darlene did not call the police and that she remained in the house. Further, when the police arrived, Darlene was watching the six-year-old play Nintendo, and the twelve-year-old was with appellant. The only evidence presented is that appellant uttered a statement which could at best be described as a conditional threat, and that the means to carry out the threat were available to appellant. No evidence was presented that appellant ever made a motion toward a shotgun, or that he took any other action or made any other statement in furtherance of the threat which would cause the victim to believe she would suffer imminent physical harm. The victim in fact stated that she did not believe the threat.

Further, R.C. 2919.25(C) is not a lesser offense of R.C. 2919.25(A) or (B) because R.C. 2919.25(A) or (B) can be violated without the victim believing that the offender "will cause imminent physical harm." Because R.C. 2919.25(C) is not a lesser offense of R.C. 2919.25(A) or (B), the complaint against appellant cannot be amended to show a violation of R.C. 2919.25(C) because it would change the identity of the crime, and would be a violation of Crim.R. 7(D). Id. at 628, 656 N.E.2d at 373-374. The court's order is hereby vacated.

Accordingly, the judgment of the trial court is reversed. All fines paid and/or property confiscated is to be returned to appellant. Judgment is entered for appellant.

Judgment reversed.

DISSENT

POWELL, J.

I must respectfully dissent. The record in this case shows simply that the defendant threatened to blow his wife's head off to get her to shut up; that the threat worked and the victim "shut up"; that the victim called her family, who in turn called the police; that the police arrived at the victim's home forty-five minutes later and found the victim in the bedroom with her child, still "visibly shaken"; that the officers found loaded firearms in the room with the defendant; that defendant acknowledged making the statement; and that the victim signed the complaint and the restraining order so she would have time to think.

Applying the standard advanced by the Ohio Supreme Court, I feel that there is ample evidence upon which the trial court could rely to find the essential elements of the crime proven beyond a reasonable doubt. The trial court judge is the fact finder, not this court. The trial judge clearly did not believe the victim's testimony that would protect her spouse, but rather chose to believe the disinterested police officer's testimony as to the victim's state when they found her still "visibly shaken" forty-five minutes later. This evidence is sufficient for the fact finder to infer that the victim thought that the accused would cause her imminent physical harm.

ETHICAL DILEMMA

Is Criminal Law the Best Response to Promote Ethical Domestic Violence Public Policy?

On the night of June 23, 1993, John Wayne Bobbitt arrived at the couple's Manassas, Virginia, apartment highly intoxicated after a night of partying and, according to testimony by Lorena Bobbitt in a 1994 court hearing, raped his wife. (John was tried and acquitted for this alleged spousal rape in 1994; he was prosecuted by the same district attorney who prosecuted Lorena for allegedly attacking John.) Afterward, Lorena Bobbitt got out of bed and went to the kitchen for a drink of water. According to an article in the *National Women's Studies Association Journal*, in the kitchen she noticed a carving knife on the counter and "memories of past domestic abuses raced through her head." Grabbing the knife, Lorena Bobbitt entered the bedroom where John was asleep, and she proceeded to cut off more than half of his penis.

After assaulting her husband, Lorena left the apartment with the severed penis. After driving a short while, she rolled down the car window and threw the penis into a field. Realizing the severity of the incident, she stopped and called 911. After an exhaustive search, the penis was located, packed in ice, and brought to the hospital where John was located. The two-and-a-half-inch penis was reattached by Dr. David Berman during a nine-and-a-half-hour operation.

Lorena was taken into custody. During the trial, the couple revealed details of their volatile relationship and the events leading up to the assault. Lorena stated that John sexually, physically, and emotionally abused her during their marriage. She also stated that John flaunted his infidelities and forced her to have an abortion. Several witnesses provided testimony supporting Lorena's claims. Lorena's defense attorneys maintained that John's constant abuse caused Lorena to eventually "snap" as she was suffering from clinical depression and a possible bout of post-traumatic stress disorder due to the abuse.

John denied the allegations of abuse. However, when he was cross-examined, his statements often conflicted with known facts, severely weakening the prosecution's case. After seven hours of deliberation, the jury found Lorena "not guilty" due to insanity causing an irresistible impulse to sexually wound her husband. As a result, she could not be held liable for her actions. Under state law, the judge ordered Lorena to undergo a 45-day evaluation period at a mental hospital, after which she would be released.

Instructions

1. Go to the website www.cengage.com/criminaljustice/samaha.
2. Watch "Lorena Bobbitt, 15 Years Later" and read the selections concerning the response to domestic violence that best promotes the best ethical public policy.
3. Based on the video and readings, write an essay that (a) lists and briefly describes the criminal and noncriminal responses described and discussed on the video and in the articles and (b) takes a position on which most effectively promotes the best ethical public policy.

Stalking Crimes

LO 10

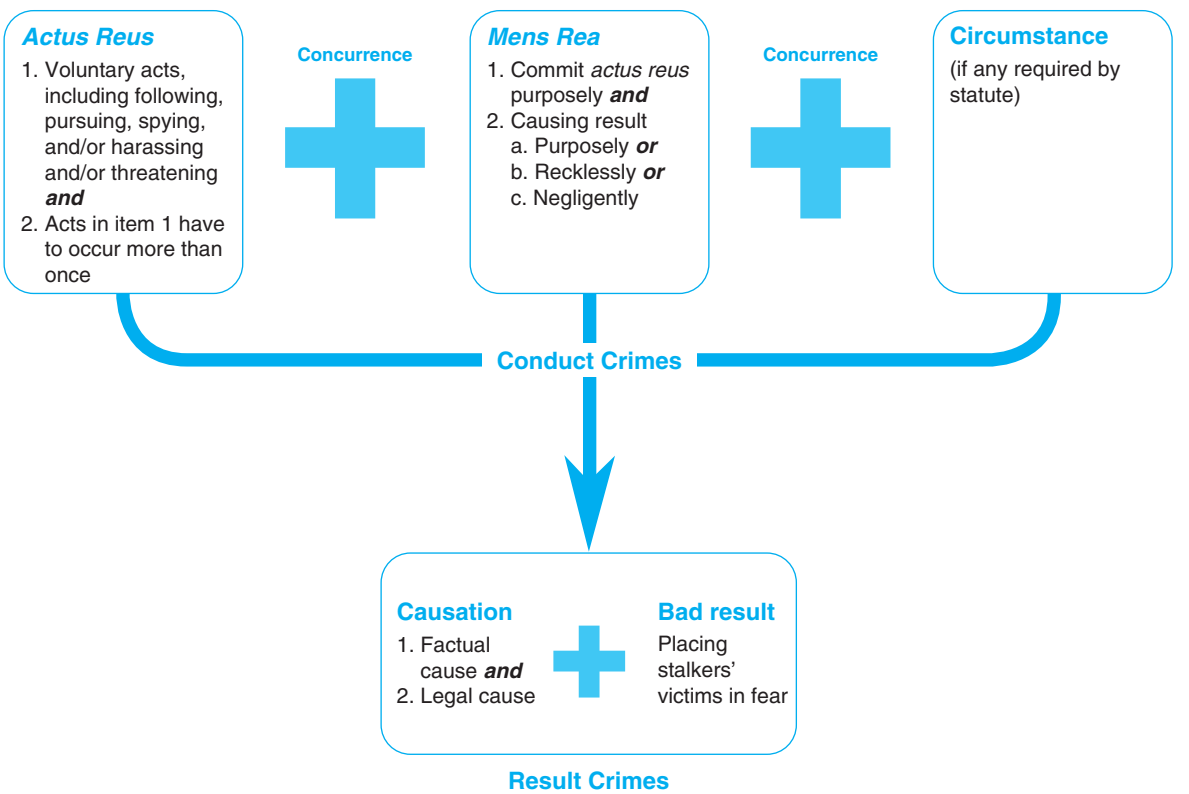
Stalking is an ancient practice but only a modern crime; it involves intentionally scaring another person by following, tormenting, or harassing him or her. Statutes criminalizing stalking "intended to fill gaps in the law by criminalizing conduct that fell short of assault or battery … by insuring that victims did not have to be injured or threatened with death before stopping a stalker's harassment" (*Curry v. State* 2002).

Statutes making stalking a crime began in California, after actress Rebecca Schaeffer was murdered at her Los Angeles apartment by an obsessed fan who stalked her for two years. Within a five-week period, four other women in Orange County were murdered by their stalkers—*after* they got restraining orders against them (Bradfield 1998, 243–44). California enacted its path-breaking antistalking statute in 1990.

Other states quickly followed California's example; today every state and the U.S. government have stalking statutes. The laws reflect widespread concern over the "stalking phenomenon" (LaFave 2003a, 828–29). Although many victims are celebrities like Rebecca Schaeffer and other prominent individuals, the vast majority are "ordinary" people, most of them women. Nearly 1.5 million people are stalked every year. Seventy-five to 80 percent involve men stalking women. Stalking has major negative effects on its victim, including depression, substance abuse, phobias, anxiety, obsessive-compulsive behaviors, and dissociative disorders (829).

We'll look more closely at antistalking statutes, the *actus reus* and the *mens rea* of stalking, the bad result in stalking, and cyberstalking.

ELEMENTS OF STALKING



Antistalking Statutes

The antistalking statutes vary enormously from state to state and the U.S. statute. Let's begin with the National Criminal Justice Association's model stalking law. It was commissioned by the U.S. Department of Justice's National Institute of Justice, resulting from considerable effort. Many states have adopted parts of it:

Section 1

For purposes of this code:

(a) "Course of conduct" means repeatedly maintaining a visual or physical proximity to a person or repeatedly conveying verbal or written threats or threats implied by conduct or a combination thereof directed at or toward a person;
(b) "Repeatedly" means on two or more occasions; and
(c) "Immediate family" means a spouse, parent, child, sibling, or any other person who regularly resides in the household or who within the past six months regularly resided in the household.

Section 2

Any person who

(a) Purposely engages in a course of conduct directed at a specific person that would cause a reasonable person to fear bodily injury to himself or herself or a member of his or her immediate family or to fear the death of himself or herself or a member of his or her immediate family; and
(b) Has knowledge or should have knowledge that the specific person will be placed in reasonable fear of bodily injury to himself or herself or a member of his or her immediate family or to fear the death of himself or herself or his or her immediate family; and
(c) Whose acts induce fear in the specific person of bodily injury to himself or herself or a member of his or her immediate family or induce fear in the specific individual of the death of himself or herself or a member of his or her immediate family; is guilty of stalking.

Stalking *Actus Reus*

Despite great diversity from state to state, the stalking statutes all share some common requirements when it comes to the criminal act of stalking. First, as in the model code, all 50 states require that the act happen more than once (LaFave 2003a, 831). Some codes use the word "repeatedly"; others, as in the model code, say there has to be a "course of conduct."

As to the *kind* of conduct that has to be repeated, all states require some variation of the model code's "maintaining a visual or physical proximity." These acts include following, pursuing, spying, and/or harassing. About half the states require some kind of threat, including the model code's "verbal or written threats or threats implied by conduct," "threat," "terroristic threat," or "credible threat" (LaFave 2003a, 832).

Other statutes list very specific acts, including one or more of the following: interfering with the victim; approaching or confronting the victim; appearing at the victim's job or home; placing objects on the victim's property; causing damage to the victim's pet; calling the victim on the phone, or sending letters or e-mail to the victim (832).

Stalking *Mens Rea*

Stalking is a result crime. All statutes require a specific intent to commit the acts discussed in the *actus reus* section. They also require some mental attitude causing the bad result, but the exact mental attitude varies considerably among the states (836).

Slightly more than half the states require some level of *subjective fault;* recall that "subjective fault" refers to purpose, knowledge, or recklessness. Most of these states require that the actor's purpose was to cause the bad result. A few of these subject fault states require either that stalkers know their acts will cause the bad result or that they act recklessly; that is, they know their acts create a substantial and unjustifiable risk of causing the bad result (837).

About one-third of the states require only *objective fault*—namely, negligence. In other words, the requirement is objective reasonableness: actors don't *know* their acts are creating a substantial and unjustifiable risk of causing the bad result, but they *should* know. The remaining states require no mental attitude; they provide for strict liability. The only requirement is a voluntary act (837).

Stalking Bad Result

The bad result in stalking is placing stalkers' victims in fear. States take four different approaches to the fear caused. Most states adopt a subjective and objective fear test. The model code is a good example. The defendant's acts "induce fear in the specific person"; this is **subjective fear**. It also requires objective fear; that is, the defendant's acts "would cause a reasonable person to fear." The second is the **subjective fear only test**: the victim was actually afraid. The third is the **objective fear only test**; a reasonable person would be afraid. The fourth is the **intent to instill fear test**. Here, the actor's intent to instill fear is enough, whether the acts actually caused fear or would've caused fear in a reasonable person (LaFave 2003a, 835–36).

Cyberstalking

The Internet is a "fertile ground for stalking" (Merschman 2001, 275). This "dark side of the Web" provides cyberstalkers with cheap and powerful tools for instilling fear in their victims—mostly e-mail but also chat rooms and bulletin boards. **Cyberstalking** is defined as "the use of the Internet, e-mail or other electronic communications devices to stalk another person through threatening behavior" (Mishler 2000, 117). In 1999, the Los Angeles and Manhattan District Attorneys reported that 20 percent of its stalking victims were cyberstalked (Attorney General 1999).

Cyberstalking reaches victims in their homes, where they feel safest; what's worse, stalkers can stalk from the comfort of *their* homes. "Make no mistake: this kind of stalking can be as frightening and as real as being followed and watched in your neighborhood or in your home" (Mishler 2000, 117).

Ted Hoying, in our next case excerpt, *State v. Hoying* (2005), insisted his endless e-mails didn't cause his coworker Kelly Criswell either physical or mental harm. He also argued that he wasn't aware that Criswell believed he'd caused her any harm. Hoying also objected to the severity of his sentence. This excerpt gives you a chance to see how the Court applies the elements of stalking in a cyberstalking setting and to consider the degree and purposes of the sentence.

In the following case excerpt, State v. Hoying, *the Court applied the elements of stalking in a cyberstalking setting.*

CASE Did He Cyberstalk Her?

State v. Hoying
2005 WL 678989 (OhioApp.)

HISTORY

Theodore Hoying, the defendant, was convicted by a jury in the Court of Common Pleas, of menacing by stalking and intimidation of a victim. He was sentenced to a total of six and one-half years in prison. The defendant appealed. The Ohio Court of Appeals affirmed.

BROGAN, J.

FACTS

Ted Hoying met the victim, Kelly Criswell, when they both worked at a local restaurant. In June 2002, Hoying asked Criswell for a date and became quite angry when she declined. When Hoying persisted in contacting Ms. Criswell after she left her employment with the restaurant, Ms. Criswell obtained a civil protection order against Hoying in February 2003. Subsequently, between August 15, 2003, and September 7, 2003, Hoying sent 105 e-mails to Ms. Criswell in violation of the protection order.

In the first e-mail, which is dated August 15, 2003, Hoying acknowledged that he could get in trouble for writing. He then asked Ms. Criswell to remove the civil protection order. Ms. Criswell did not reply to any of Hoying's e-mails, which became increasingly agitated.

The first threatening e-mail is dated August 16. This e-mail states, "Maybe I still have your picture and I will post it on the Net. Fair is fair. Ted." Subsequently, Hoying wrote, "Why don't you tell the authorities I shot three boxes of shells at clay birds yesterday? I'm going to do that the rest of my life at least once a week. I don't give a rat's ass what number eight says on that civil protection order. Ted." That e-mail is also dated August 16, 2003.

In another e-mail dated August 16, 2003, Hoying threatened to come to Ms. Criswell's place of employment unless she met with him. The same day, in another e-mail message, Hoying indicated that he would persist in sending e-mails until Ms. Criswell agreed to talk to him.

In an e-mail dated August 17, 2003, Hoying made a significant threat to Ms. Criswell. Specifically, he said:

> Kelly, set me free. I'm no longer a man. I'm shackled like a beast. What is a man if he is not free? Let me take away your freedom and you feel the sting. Also, it's not pleasant. Set me free. Ted H.

In another e-mail written on the same day, Hoying again threatened to go to Ms. Criswell's place of employment. He reiterated that threat in another e-mail, which was also written on August 17, 2003.

As a result of receiving these e-mails, Ms. Criswell filed charges in Xenia Municipal Court, alleging that Hoying had violated the civil protection order. Hoying acknowledged receiving the charge in an e-mail dated August 28, 2003. In that e-mail, Hoying said, "Kelly, why did you do that at Xenia? All I wanted was for things to be normal. I thought you could be nice." The same day, Hoying threatened to file criminal charges against Ms. Criswell's boyfriend, whom Hoying thought was named "Grinstead."

Subsequently, on August 30, 2003, Hoying sent Ms. Criswell another message. In that e-mail, Hoying threatened that "If the stuff in Xenia is not handled then some things are going to happen." The next day, Hoying sent a message, which said:

> Ms. Criswell, tell your old man to get rid of the Xenia stuff or the hammer is going to fall heavy on him. It will take three years to get all of this stuff straightened out. If not, remember you are going to be subpoenaed for the thefts since you supplied some of the info, so you might as well say good bye to your job. I've been nice to you. I don't deserve to be paid back like this. I don't want to hurt you, but if you choose their side then that is that. This is such high school shit. I'm not coming to court anyway. I have an important doctor's appointment. My life is just as important as yours. If it is not handled and they come for me, they better bring an army. Ted.

As a result of the e-mails, Ms. Criswell changed her address, changed her license plate, changed employment, and eventually moved away. (Ms. Criswell's current living arrangement was not revealed in court, for her protection.) Ms. Criswell also testified that she could possibly need psychiatric or psychological assistance in the future because of everything Hoying had done.

OPINION

Hoying claims that his conviction for menacing by stalking was based on insufficient evidence. As support for this contention, Hoying notes that he did not cause physical harm to Ms. Criswell and she did not seek professional help for mental distress. He also notes a lack of evidence that he was aware that Ms. Criswell believed he would cause her physical harm or mental distress.

The essential elements of menacing by stalking are found in R.C. 2903.211, which provides, in pertinent part, that:

(A) No person by engaging in a pattern of conduct shall knowingly cause another person to believe that the offender will cause physical harm to the other person or cause mental distress to the other person.…

(B) Whoever violates this section is guilty of menacing by stalking.

(2) Menacing by stalking is a felony of the fourth degree if any of the following applies:

(g) At the time of the commission of the offense, the offender was the subject of a protection order issued under section 2903.213 or 2903.214 of the Revised Code, regardless of whether the person to be protected under the order is the victim of the offense or another person.

After reviewing the evidence, we agree with the State that a reasonable jury could have inferred from the content of the e-mails that Hoying knew Ms. Criswell would consider the messages to be a threat to her physical safety or to that of her father. A reasonable jury could also have found that the messages would cause Ms. Criswell mental distress. The fact that Ms. Criswell previously sought a civil protection order was some evidence that she was afraid of the defendant, and the e-mails were sent after the protection order was issued to the defendant. Ms. Criswell also testified that she was "scared to death" of Hoying and that he had caused her much mental distress.

As an additional matter, Hoying's conduct in court did not help his case, as he interrupted Ms. Criswell's testimony several times with inappropriate comments, including calling her a liar. In one outburst, Hoying made what could be interpreted as a threat, stating, "She'd better start telling the truth and quit lying, that's for sure."

Hoying did not present any evidence to counteract the victim's testimony, or to prove that she was lying. Accordingly, any rational trier of fact had more than an ample basis for finding Hoying guilty of menacing by stalking.

Hoyer also challenges the trial court's action in sentencing Hoying to the maximum term for the conviction of menacing by stalking, which is a fourth-degree felony, at least under the circumstances of this case. See R.C. 2903.211(B)(2)(g). Although community control sanctions are available for fourth-degree felonies, Hoying admits that they are not guaranteed. Hoying further concedes that he probably forfeited the ability to obtain community control by his conduct during trial and the sentencing hearing, and by his refusal to participate in the presentence investigation process. Having reviewed the record, we fully agree with that statement.

Nonetheless, Hoying contends that he should not have received the maximum sentence for menacing by stalking because the record does not support a finding that he poses the greatest likelihood of recidivism. We disagree.

Under R.C. 2929.14(A)(4), the potential term for a fourth-degree felony is six to eighteen months. R.C. 2929.14(C) additionally states that:

> Except as provided in division (G) of this section or in Chapter 2925. of the Revised Code, the court imposing a sentence upon an offender for a felony may impose the longest prison term authorized for the offense pursuant to division (A) of this section only upon offenders who committed the worst forms of the offense, upon offenders who pose the greatest likelihood of committing future crimes, upon certain major drug offenders under division (D)(3) of this section, and upon certain repeat violent offenders in accordance with division (D)(2) of this section.

When a trial court imposes maximum sentences, it must state its findings and reasoning at the sentencing hearing. Also, when a trial court states its reasons for imposing a maximum sentence, it must connect those reasons to the finding which the reason supports. The court cannot merely pronounce causes that objectively may be its reasons. The court must also identify which of those causes are the particular reasons for each of the statutory findings that the court made.

In the present case, the trial court complied with the requirement of making findings at the sentencing hearing. The court also adequately connected its reasons for imposing a maximum sentence to the finding that the reason supported. At the sentencing hearing, the court stated that it found that Hoying had the greatest likelihood to re-offend, and that Hoying had committed the worst form of the offense.

Before reciting the court's specific reasons for these findings, we should note that the very night the jury verdict was issued, Hoying attempted to contact the victim. According to the State, Hoying attempted to contact Ms. Criswell five times. Hoying denied making five attempts, but did admit that he tried to contact the victim after the verdict to ask for help with his appeal. In view of the nature of the crime (menacing by stalking) and the jury verdict of "guilty," an attempt to contact the victim of the crime shows either a disconnection from reality or an obstinate refusal to submit to the authority of the law.

Hoying also refused to cooperate in any way with the presentence investigation. In addition, Hoying disrupted the sentencing process, showering foul language and abuse on the victim, her family, and even the court, to the point that Hoying eventually had to be removed from the courtroom. Ultimately, in discussing the length of the sentence, the trial court specifically connected the following reasons to its findings, by stating that:

> when the victim in this case testified, the Defendant's conduct as to her testimony was absolutely parallel to the conduct of the crime in which he was charged, beginning with his sense of enjoyment of the presence of the victim as she testified, and as her testimony became less beneficial to the Defendant, he proceeded to become more aggravated and agitated, writing notes,

> ultimately basically yelling at the victim during the course of that testimony, clearly, giving an indication as to his attitude and conduct toward the victim in this matter which brought this case forward in the first place.

For that reason, the Court finds that the shortest prison term would not protect the public from future crimes, and the court has the greatest fear for Kelly Criswell, which the record will reflect, has moved from the immediate area and has taken extraordinary steps to prevent her location from being identified by this Defendant.

The Court notes for the record that testimony in this case and the information subsequently received indicates that the particular victim in this case had no relationship whatsoever with the Defendant, can't even suggest there ever was a scintilla of a relationship, yet the Defendant's attitude toward her is just a classic stalking attitude, and the harm caused to her is so significant that it is necessary to take extreme measures so the Court can protect her, as well as others from future crime.

The Court clearly feels the Defendant's conduct as demonstrated at his arrest, at his arraignment, during the conduct of this matter, the trial, and the sentencing here demonstrates an attitude on his part of failure to comply with authority, the failure to respect the integrity of other individuals, and quite candidly, makes this Defendant a very dangerous individual.

The shortest prison term will demean the seriousness of the Defendant's conduct.

The Court further finds based upon the facts stated herein and the information provided, which will be made a part of the record in this matter, that the Defendant's conduct has, to a great degree, established the worst form of the offense. I do not discount Counsel's statement that a first time offender is one in which there is an indication from the legislature that the least restrictive setting should apply; however, this Court can say unequivocally, in all the time that I've been on the Bench, I've never seen a Defendant that I'm more sure of is a serious threat to society and to the public.

The Court also finds the Defendant clearly poses the greatest likelihood to commit future crimes in this matter, and as such, the Court makes reference particularly to the competency report prepared earlier this year where the Defendant indicated in his evaluation, quote, I know I'm not crazy. I knew what I was doing when I contacted her knowing I was violating the order, end quote.

We find that the above discussion by the trial court fully complies with requirements for imposing maximum sentences. We also agree with the trial court that a maximum sentence was warranted. The record in this case is quite troubling, since it portrays an individual who either has no remorse for his actions, or refuses to admit he needs mental health treatment. Even though Hoying was found competent to stand trial, that does not mean that he is free of mental health problems that should be addressed, hopefully while he is in the prison system.

[Hoyer was also convicted of the separate crime of intimidation, not discussed here. The trial court sentenced him to consecutive sentences, amounting to a total of six and one-half years in prison. He objected to imposition of consecutive sentences.]

> Consecutive sentences may be imposed for convictions of multiple offenses, if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
>
> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender. R.C. 2929.14(E)(4).

In imposing consecutive sentences, the trial court relied on R.C. 2929.14(E)(4)(b) and(c). Specifically, the court commented that:

> a consecutive term would be appropriate in this case because it's necessary to protect the public from future crime by this Defendant, and I believe that the evidence presented in the trial in this matter, the Defendant's behavior during the trial, his failure to comply with the simplest matters of completing the presentence investigation clearly indicates that the Defendant's desire to not follow authority is quite clear. In fact, the Court would go so far as to make that finding beyond a reasonable doubt.
>
> The Court further finds that consecutive sentences would be appropriate to punish the offender for the conduct he committed, and consecutive sentences in this case are not disproportionate to the seriousness of the Defendant's conduct and to the danger the Defendant clearly and unequivocally poses to the victim in this case and to the public generally.
>
> The Court further finds that the harm caused in this case is so great that no single sentence would adequately reflect the seriousness of the Defendant's conduct, and the information received by the Prosecuting Attorney, which was made a part of the record in this case, indicating that the Defendant,

even after his arrest, attempted to make continued contact with the victim, likewise dictates the Court's finding in this particular regard.

[Hoyer objected that the Court used the same reasons to support the maximum sentence for both crimes.]

One factor in imposing maximum sentences is whether an offender has committed the worst form of an offense. Similarly, a factor in deciding if consecutive sentences are warranted is whether the harm caused by two or more of the multiple offenses is "so great or unusual that no single prison term for any of the offenses … adequately reflects the seriousness of the offender's conduct." R.C. 2929.14(E)(4)(b). As merely one way in which these factors can overlap, we note that the harm caused by a particular offense will certainly bear on the determination of whether an offender has committed the worst form of the offense. . . . We see nothing wrong with a court using the same or similar reasons for more than one finding.

The judgment of the trial court is affirmed.

QUESTIONS

1. **State the elements of stalking according to the Texas stalking statute.**
2. **List all the facts relevant to deciding whether the prosecution proved each of the elements.**
3. **Assume you're the prosecutor. Relying on the facts of the case and the reasoning of the trial and Appellate Court, argue that Hoying was guilty of stalking.**
4. **Assume you're Hoying's attorney. Relying on the facts of the case and Hoying's arguments, argue that Hoying wasn't guilty of stalking.**
5. **In your opinion, do the facts support a guilty verdict? Was the six-and-one-half-year sentence too harsh? Explain your answers.**

Personal Restraint Crimes

LO 11

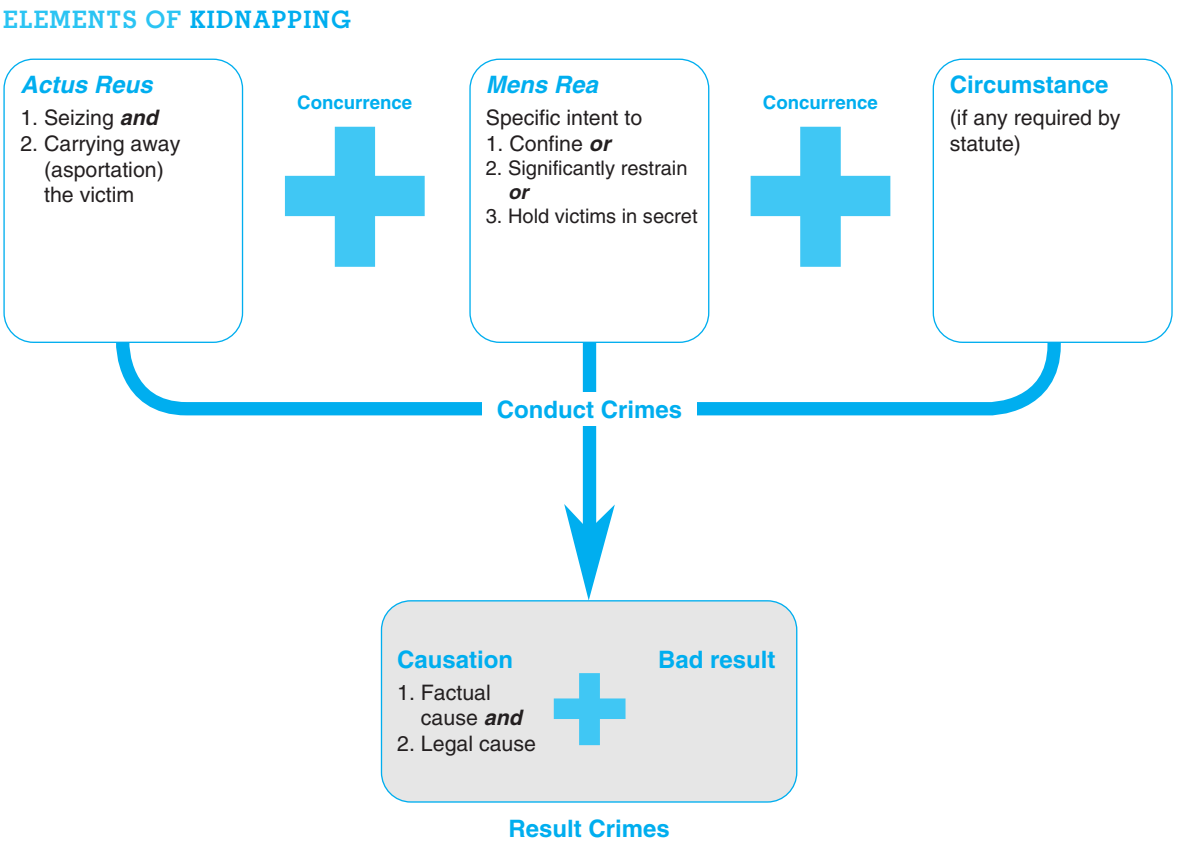
One of the greatest things about living in a free society is the right to control our freedom of movement, even though we may not appreciate it until it's taken away from us. The eighteenth century called it the **right of locomotion**, meaning the right to come and go as we please, to stay if we don't want to move, and to move if we don't want to stay. I'm reminded of how precious this right is every time we get several inches of snow (which can be pretty often here in Minnesota). My house has a long driveway that needs plowing before I can get out. As much as I love my house, I start feeling confined if the snowplow doesn't get there within an hour. This is a silly example, but it underscores the issues of the two crimes against personal liberty we'll look at in this section: kidnapping and false imprisonment.

Kidnapping

Kidnapping is an ancient result crime that originally involved holding the king's relatives for ransom. Of course, it was considered a serious offense because it interfered with the personal liberty of members of royal families. Kidnapping is taking and carrying away another person with the intent to deprive that person of personal liberty.

At common law, kidnapping consisted of six elements:

1. Seizing,
2. Carrying away (**asportation** of), and
3. Confining,
4. By force, threat of force, fraud, or deception,
5. Another person,
6. With the intent to deprive the other person of his or her liberty.



In the 1900s, kidnapping came to be considered a very serious felony in the United States—even a capital offense in some states. The seriousness had nothing to do with royalty but a lot to do with events during the first half of the twentieth century.

During Prohibition (1919 to 1933), kidnapping was prevalent in the organized crime world. One gang member might abduct a rival, "take him for a ride," and kill him. Much more frequently, rivals were captured and held hostage for ransom. Before long, kidnapping spread to include the spouses and children of law-abiding wealthy and prominent citizens. The most famous case was *State v. Hauptmann* (1935), involving the prosecution of the man charged and convicted of the ransom kidnap and murder of Charles Lindbergh's son. The famous and beloved aviator captured Americans' hearts and imaginations when he flew solo across the Atlantic Ocean.

Kidnapping was a misdemeanor in New Jersey in 1932 when the crime occurred, but the tremendous sympathy that Lindbergh's popular hero status generated, and the public outrage toward what was perceived as a rampant increase in random kidnappings of America's "pillars of wealth and virtue," led legislatures to enact harsh new kidnapping statutes. These statutes remain largely in force today, even though they were passed in an emotional overreaction to a few notorious cases.

In 1974, another widely publicized case breathed new life into these harsh statutes when Patricia Hearst, heiress to newspaper tycoon William Randolph Hearst, was kidnapped. The case met with public outrage, not only because of sympathy for the prominent Hearst family but also because of shock at the psychological and physical dimensions of the crime. The kidnappers were self-styled revolutionaries calling

themselves the Symbionese Liberation Army (SLA). One of the SLA's first demands was that Hearst's father, Randolph, distribute $1 million in food to the poor of California. Later on, much to her parents' and the public's horror, Patricia Hearst was accused of converting to the SLA and was later convicted of participating in bank robberies to raise money for the "revolution."

All this took place during a time when radicalism and violence were very much feared and when the Vietnam War protest and airline hijackings for terrorist political purposes were very much on the public's mind. The public saw Patty Hearst's capture and her family's deep trauma not just as one family's suffering but a threat to destroy American society.

The Hearst case focused attention on how monstrous kidnapping can be. It drew together in one story, capture, detention, terror, violence, and political radicalism. The details were trumpeted every day in newspapers and on radio and television. Hope that existing harsh and sweeping kidnapping legislation would be reassessed calmly vanished in this inflamed, emotional atmosphere.

President Nixon expressed his hope—a hope that many others shared—that the Supreme Court wouldn't declare capital punishment for kidnapping unconstitutional. California governor Ronald Reagan reflected the deep public outrage against kidnapping when he wished aloud that the kidnappers' demand for a free food program would set off a botulism epidemic among the poor.

Let's look at the *actus reus* and *mens rea* elements of kidnapping and at how the law grades the seriousness of acts of kidnapping.

Kidnapping Actus Reus

The heart of kidnapping *actus reus* consists of seizing and carrying away (asportation of) the victim. Since at least the eighteenth century, carrying a victim into a foreign country where no friends or family could give her aid and comfort, and the law couldn't offer protection, added a terrifying dimension to kidnapping.

In those early days, the victim had to be carried at least as far as another county and usually across its border. Modern interpretations have made the asportation requirement meaningless. The notorious case of *People v. Chessman* (1951) is the best example. Caryl Chessman was a serial rapist who, in one instance, forced a young woman to leave her car and get into his, which was only 22 feet away. The Court held that the mere fact of moving the victim, not how far she was moved, satisfied the asportation requirement. So moving his victim 22 feet was enough to convict and sentence Chessman to the gas chamber.

In our next case excerpt, a carjacking, *People v. Allen* (1997), the California Supreme Court ruled that it's not the number of feet the carjacker moved the victims but the "quality and character" of his movement that matters in asportation.

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CASE Did He Move Her a "Substantial" Distance?

People v. Allen
64 Cal.Rptr.2d 497 (1997)

HISTORY

Tyrone Allen was convicted in the Superior Court, City and County of San Francisco, of kidnapping of a person under the age of 14. He appealed. The Court of Appeal affirmed.

RUVOLO, J.

FACTS

On August 7, 1995, May SunYoung and her family lived at 2951 Treat Street in San Francisco. That morning, Ms. SunYoung was on her way to take her seven-year-old daughter, Kirstie, to summer camp and stopped her automobile briefly in the driveway to close her garage door manually as she was backing out onto the street.

As Ms. SunYoung closed her garage door, a man approached her from behind and said, "Excuse me, can you do me a favor?" While turning around she saw Tyrone Allen getting into her vehicle, whose engine was still running. He then locked the car doors. Kirstie was still in the vehicle with her seatbelt on and began crying. Because the driver's side window was rolled down about seven inches, Ms. SunYoung put her arms through the window and struggled with the appellant in an attempt to reach the ignition key and turn off the engine.

Allen then released the parking brake, put the vehicle in reverse, and backed out of the driveway with Kirstie inside and Ms. SunYoung running alongside the vehicle still attempting to reach the ignition key. The vehicle backed across Treat Street, which was a two-lane road with two parking lanes, until it hit the opposite curb and came to a stop. Allen estimated the vehicle movement was 30 to 40 feet. While Allen now claims this estimate to be "speculation," both sides at different times suggested that the distance moved was approximately five car lengths, or 50 feet.

Allen exited the vehicle, threw the car keys onto the ground, shoved Ms. SunYoung against a fence, and ran down the street carrying her purse, which had been left in the vehicle. Shortly thereafter, a neighbor on Treat Street several blocks away saw a man run by. In response to the neighbor's attempts to stop the man, the fleeing suspect stated, "Stay back, I got a gun." After a brief struggle, the man ran off but was later apprehended by San Francisco police officers and identified as the appellant.

The jury instruction given regarding the simple kidnapping count was CALJIC No. 9.52, which sets forth the elements of kidnapping of a person under 14 years of age as follows:

> Every person who unlawfully and with physical force or by any other means of instilling fear moves any other person under 14 years of age without her consent for a substantial distance, that is, a distance more than slight or trivial, is guilty of the crime of kidnapping.… (Pen. Code, § 208, subd. (b); all further statutory references are to the Penal Code unless otherwise indicated.)

OPINION

The only element of the crime for which appellant asserts there was insufficient evidence and inadequate jury instructions is **asportation**. For "simple" kidnapping, that is, a kidnapping not elevated to a statutory form of "aggravated" kidnapping, the movement needed must be "substantial," or a distance that is more than "trivial, slight, or insignificant."

Allen argues that his conviction for simple kidnapping must be reversed because the minimum distance requirement for asportation is not met. He asserts the movement of Ms. SunYoung's vehicle 30–50 feet down her driveway and across Treat Street with Kirstie inside as a matter of law cannot be "substantial," or a distance that is more than "trivial, slight, or insignificant."

Allen is correct that under most cases decided pre-1981 which have examined only the actual distance involved, the movement here would not meet the legal test of substantiality. Those cases which have considered the quality and character of the movement in addition to its absolute distance have weighed the purpose for the movement, whether it posed an increased risk of harm to the victim, and the context of the environment in which the movement occurred.

Purposes for movement found to be relevant have been those undertaken to facilitate the commission of a further crime, to aid in flight, or to prevent detection. We believe these factors are appropriate considerations.

"Substantiality" implies something more than only measured distance. While "slight" is consistent with a quantitative analysis, the term "trivial" is a qualitative term suggestive of the conclusion that more is envisioned in determining whether a kidnapping occurs than simply how far the victim is moved. The legal requirement for asportation is satisfied by a finding of either.

In so holding, we conclude that while in absolute footage the distance moved here may have been empirically short, it was of a character sufficient to justify a finding of "substantiality" by the jury. The movement, in part, was plainly made to prevent Ms. SunYoung from regaining possession of her vehicle and to facilitate appellant's flight from the area with Kirstie. In addition to evasion of capture,

the vehicle was moved from a position of relative safety onto a thoroughfare. The boundary crossed was significant because it placed Kirstie at greater risk of injury.

We confirm these factors, coupled with the distance traveled, are sufficient to satisfy the "substantial movement" requirement for the crime of simple kidnapping.…

AFFIRMED.

DISSENT

KLINE, J.

Movement as short a distance as that shown here—30 to 40 feet—has never been held to satisfy the asportation requirement of kidnapping. Indeed, considerably greater distances have often been held insufficient. As the majority opinion points out, movement of 90 feet, nearly three times the distance the victim in this case was moved, was held insufficient. The shortest distance this court has ever held to be "substantial" for this purpose was a full city block.

People v. Brown (1974) 523 P.2d 226 also dramatically demonstrates that the movement in the present case must be deemed trivial as a matter of law. The defendant in Brown had gone to the victim's residence in search of her husband, whose name he had discovered in the home of his estranged wife. He forced the victim to accompany him in a search of the house for her husband.

When a neighbor who heard the victim scream telephoned and asked if she needed help, the defendant dragged her out of the house and along a narrow passageway between her house and the house next door. A neighbor then ordered the defendant to release the victim and told him the police were on their way. Defendant released her and fled.

All in all he had taken her approximately 40 to 75 feet from the back door of her house. A unanimous Supreme Court had little difficulty concluding that "the asportation of the victim within her house and for a brief distance outside the house must be regarded as trivial."

I agree that by moving the child in the vehicle across the street Allen committed a crime other than carjacking and the various other offenses of which he was properly convicted; that crime was not kidnapping, however, but false imprisonment (Pen.Code, § 236), which does not require any movement.

Because the asportation in this case was trivial within the meaning of the applicable case law, I would reverse the judgment of conviction of simple kidnapping for lack of evidentiary support. I agree that in all other respects the judgment should be affirmed.

QUESTIONS

1. **What test did the Court establish to determine how far defendants have to move victims to satisfy the asportation element of kidnapping *actus reus*?**
2. **What reasons does the majority give to support its definition of "asportation"?**
3. **How does the dissent's definition of "asportation" differ from that of the majority's?**
4. **What reasons does the dissent give for its definition?**
5. **Do you agree with the majority or the dissent's definition of "asportation"? Defend your answer.**

Kidnapping Mens Rea

Kidnapping *mens rea* is stated usually as the specific intent to confine, significantly restrain, or hold victims in secret. The Wisconsin statute, for example, defines a "kidnapper" as one who "seizes or confines another without his consent and with intent to cause him to be secretly confined." Whatever the exact wording of the statutes, the heart of the kidnapping mental attitude remains to "isolate the victim from the prospect of release or friendly intervention" (Wisconsin Criminal Code 2006, ß 940.31).

Grading Kidnapping Seriousness

Kidnapping is usually divided into two degrees: simple and aggravated. The most common aggravating circumstances include kidnapping for the purpose of:

- Sexual invasions
- Obtaining a hostage
- Obtaining ransom
- Robbing the victim
- Murdering the victim

- Blackmailing
- Terrorizing the victim
- Achieving political aims

The penalty for aggravated kidnapping is usually life imprisonment and, until recently, occasionally even death.

False Imprisonment

False imprisonment is a lesser form of personal restraint than kidnapping, but the heart of the crime remains depriving others of their personal liberty. It's a lesser offense because there's no asportation requirement; the deprivation of liberty is brief; and the detention is less stressful. "False imprisonment" was succinctly defined as compelling a person "to remain where he does not wish to remain" (*McKendree v. Christy* 1961, 381).

Most forcible detentions or confinements, however brief, satisfy the *actus reus* of false imprisonment. This doesn't include restraints authorized by law—for example, when parents restrict their children's activities or victims detain their victimizers.

The Model Penal Code (MPC) requires the restraint to "interfere substantially with the victim's liberty," but, in most state statutes, *any* interference with another person's liberty is enough. For example, here's the way the Florida statute defines the *actus reus* of false imprisonment:

> False imprisonment means forcibly, by threat, or secretly confining, abducting, imprisoning, or restraining another person without lawful authority and against her or his will. (Florida Criminal Code 2006)

Although physical force often accomplishes the detention, it doesn't have to; threatened force is enough. So the threat "If you don't come with me, I'll drag you along" is enough. Even nonthreatening words can qualify, such as when a police officer who has no right to do so orders someone on the street into a squad car, asserting, "You're under arrest."

> False imprisonment is a specific-intent crime. According to a typical statute: False imprisonment consists of intentionally confining or restraining another person without his consent.… (New Mexico Criminal Code 2006) The motive for the detention doesn't matter. For example, if police officers make unlawful arrests, they can be prosecuted for false imprisonment even if they believed the arrests were lawful.

SUMMARY

LO 1
- Crimes against persons boil down to four types: taking a life; unwanted sexual invasions; bodily injury; and personal restraint.

LO 2
- Rape and other sexual assaults are different from all other felonies in that in other circumstances, the behaviors connected with them are legal, healthy, and desired.

LO 3
- The vast majority of rape victims are raped by men they know.

LO 4
- Modern court opinions have relaxed the strict definitions of "rape," and sexual assault, or criminal sexual conduct, statutes enacted in the 1970s and the 1980s have expanded the definition of "sex offenses" to embrace a wide range of nonconsensual penetrations and contacts, even if they fall far short of violent.

LO 3
- The vast majority of rape victims are raped by men they know. The law treats differently two kinds of rape: (1) aggravated rape, that is, rape by strangers or men with weapons who physically injure their victim; (2) unarmed acquaintance rape, nonconsensual sex between people who know each other.

LO 4
- The seriousness of sex offenses under the reform laws of the 1970s and 1980s is graded according to several criteria, including (1) penetrations and contacts; (2) forcible and nonconsensual; (3) physical injury to the victim or not (4) "gang rapes," and single rapist rapes.

LO 5
- Most traditional rape statutes, and the newer criminal sexual assault laws, define "rape" as intentional sexual penetration by force without consent. Courts today have adopted either of two definitions of "force": (1) extrinsic force and (2) intrinsic force.

LO 6
- Rape is a general-intent crime: defendants intended to commit the *act* of forcible sexual penetration.

LO 7
- Statutory rape is a strict liability crime in most states. Statutory rapists don't have to use force; the victim's immaturity takes the place of force. Minors can't legally consent to sexual conduct.

LO 8
- The essential difference between assault and battery is that assault requires no physical contact; an assault is complete before the offender touches the victim.

LO 9
- Since the early 1970s, domestic violence crimes have been transformed from a private concern to a criminal justice problem. Violence in intimate relationships is extensive and is not limited to one socioeconomic group, one society, or one period of time.

LO 10
- Stalking involves intentionally scaring another person by following, tormenting, or harassing him or her. Victims need not be injured or threatened.

LO 10
- Cyberstalking is the use of the Internet, e-mail, or other electronic communications devices to stalk another person through threatening behavior.

LO 11
- Kidnapping is an ancient result crime that consisted of holding the monarch's relatives for ransom. False imprisonment is a lesser form of personal restraint than kidnapping, but the heart of the crime remains depriving others of their personal liberty.

KEY TERMS

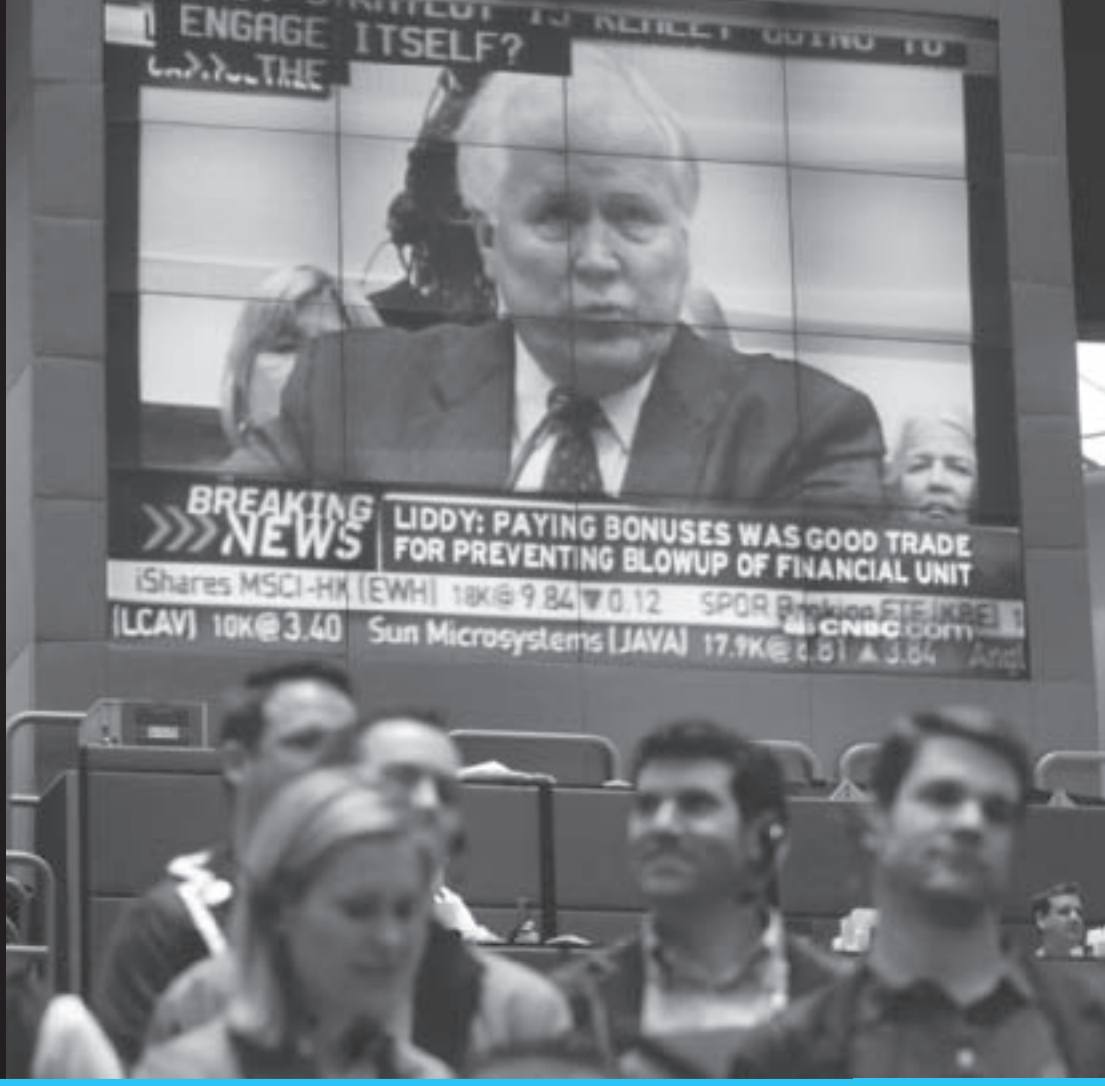
common law rape, p. 328
common law sodomy, p. 328
sexual assault, or criminal sexual conduct, p. 328
aggravated rape, p. 328
unarmed acquaintance rape, p. 328
corroboration rule, p. 330
rape shield statutes, p. 330
prompt-reporting rule, p. 330
marital rape exception, p. 330

sexual assault statutes, p. 330
rape, p. 332
actus reus (rape), p. 332
force and resistance rule, p. 332
utmost resistance standard, p. 334
reasonable resistance rule, p. 334
extrinsic force (in rape), p. 335
intrinsic force (in rape), p. 335
threat-of-force requirement (in rape), p. 342
fraud in the fact (in rape), p. 343
fraud in the inducement (rape), p. 343
general-intent crime, p. 343
honest and reasonable mistake rule (regarding consent in rape), p. 334
recklessness requirement (regarding consent in rape), p. 334
statutory rape, p. 346
reasonable mistake of age, p. 346
simple (second-degree) rape, p. 346
aggravated rape, p. 346
battery, p. 346
assault, p. 346
stalking, p. 346
attempted battery assault, p. 348
threatened battery assault ("intentional scaring"), p. 348
conditional threats (in assault), p. 348
subjective fear, p. 358
subjective fear only test, p. 358
objective fear only test, p. 358
intent to instill fear test, p. 358
cyberstalking, p. 358
right of locomotion, p. 362
kidnapping, p. 362
asportation (in kidnapping), p. 362
false imprisonment, p. 367

WEB RESOURCES

To prepare for exams, visit the *Criminal Law* companion website at www.cengage.com/criminaljustice/samaha, which features essential review and study tools such as flashcards, a glossary of terms, tutorial quizzes, and Supreme Court updates.

11



Traders work in the bond pits at the Chicago Board of Trade in Chicago on March 18, 2009, as television shows AIG CEO Edward Liddy testifying in front of Congress. The head of battered insurance giant AIG appealed to employees to return at least half the $165 million in retention bonuses paid to executives by the company.

LEARNING OBJECTIVES

1 Know that crimes against other people's property consist of taking, damaging or destroying property, and invading property.

2 Understand that the crime of theft grew out of the general social concern with violent crimes against persons.

3 Know that the federal mail fraud statute defines false pretenses much more broadly than common law fraud.

4 Know that it's illegal to receive stolen property only if you intend to keep it permanently.

5 Appreciate that the heart of robbery is the use of actual or threatened force to obtain someone else's property right now.

6 Understand that extortion differs from robbery in that the threat is to use force some time in the future.

7 Know that arson is a felony; criminal mischief is a misdemeanor.

8 Understand that the heart of both burglary and criminal trespass is invading other people's property, not taking, destroying, or damaging it.

9 Understand that criminal trespass used to be limited to unauthorized invasions of physical property, but now it includes unauthorized access to electronic information systems.

10 Know that identity theft is the most prevalent crime in the United States.

11 Appreciate that intellectual property theft causes annual losses of billions of dollars each year.

Crimes Against Property

CHAPTER OUTLINE

Is He a Hero or a Crook?

Charles E. Coughlin is either a hero or a crook, according to two portraits of the former Navy commander that emerged yesterday at his trial on charges that he lied about injuries he suffered September 11, 2001, to collect $331,000 from a victim's compensation fund. Coughlin, 49, of Severna Park, was indicted in October on charges of mail fraud, theft of public money, and filing false claims in the scheme. Coughlin's wife, Sabrina, 47, is also on trial, charged with stealing government property.

Assistant U.S. Attorney Susan E. Menzer accused Coughlin yesterday of falsely claiming that he suffered a debilitating injury while working at the Pentagon on September 11, 2001, as an excuse to apply for compensation from the Justice Department's Victim's Compensation Fund. Menzer said Coughlin lied on forms and at a hearing to collect the money. He also hid information from his doctors about previous injuries, including a degenerative neck problem that had plagued him for years before the attacks, Menzer said.

Despite claiming that he suffered a disability, Coughlin continued to play sports. He ran a marathon in December 2001 and played lacrosse at a tournament in Vail, Colorado, in 2004, Menzer said, showing jurors a photograph of Coughlin in the tournament. Coughlin eventually collected $331,034 from the fund. Prosecutors have said he used the money to pay off auto loans and to buy a $1 million home. "This case is about greed," Menzer said.

Attorneys for Coughlin and Sabrina Coughlin described Coughlin as a courageous man who spent 21 years in the Navy. When a hijacked jetliner crashed into the Pentagon where he was working, Coughlin, who is expected to testify, was hit by debris and slammed his head into a door while scrambling around in the dark and smoky building helping others escape, his attorney, Andrew Jay Graham, told jurors. Coughlin was awarded a Purple Heart for his actions and suffered a debilitating injury that changed his life that day, Graham said. "He is a brave human being," Graham said, adding that Coughlin is "an honest man."

Wilber 2009, B8

LO 1

There are many specific crimes against property—too many to list, let alone discuss here. To simplify, we'll look at three *categories* of crimes against property, and a few representative crimes within each. The three categories are:

1. *Taking* other people's property
2. *Damaging* or *destroying* other people's property
3. *Invading* other people's property

First, we'll look at four crimes that consist of *taking* someone else's property:

1. **Theft** Sneaking away with an iPod left unattended in the library
2. **Robbery** Sticking a gun in someone's side and demanding the $100 she just withdrew from an ATM machine
3. **Fraud** Abuse of trust: Bernard Madoff's Ponzi scheme that took billions of dollars from investors who trusted him with their fortunes; Navy Commander Charles E. Coughlin who was charged with fraudulently trying to collect over $300,000 dollars from the 911 victims' funds
4. **Receiving stolen property** Buying a new notebook computer for $75 that you know is stolen

Second, we'll look at two crimes involving *destroying* and *damaging* someone else's property:

1. **Arson** Setting a house on fire
2. **Criminal mischief** Damaging someone else's property (such as driving your car up on an obnoxious neighbor's new sod and spinning the wheels)

Third, we'll look at two criminal *invasions* of someone else's property:

1. *Burglary* Unlawfully entering someone else's house with the intent to steal a TV inside
2. *Criminal trespass* Entering your neighbor's yard where a "no trespassing" sign is posted

The examples provided represent the *traditional* ways to take, destroy, damage, and invade other people's property. **Cybercrime**, namely crimes committed through the Internet or some other computer network, is a serious and rapidly growing new problem. There are four types of cyber crimes (Yang and Hoffstadt 2006, 203–04):

1. *Crimes against information brokers* Data collectors (credit reporting agencies) and data aggregators (LexisNexis)
2. *Crimes against manufacturers and distributors of digital media* Movie, recording, and software companies

3. *Crimes against online product and service sales* Businesses that offer their products and services for sale on the Internet
4. *Crimes against business computer systems* Internal computer systems connected to the Internet, used to conduct daily business affairs, house companies' asset data, including their trade secrets

We often call cybercrimes "new crimes." But they're really new ways (admittedly sometimes very complex and sophisticated ways) to commit the three ancient kinds of property crimes: taking it, damaging or destroying it, and invading it. According to *The Electronic Frontier* (2000):

> Advances in technology—the advent of the automobile and the telephone for instance—have always given wrongdoers new means for engaging in unlawful conduct. The internet is no different: it is simply a new medium through which traditional crimes can now be committed.

History of Criminal Taking of Others' Property

LO 2

The long history of taking other people's property resulted in the expansion of the criminal law into what had been the private matter of protecting property. Criminal taking began as part of the social concern with violent crimes against the person (such as those you learned about in Chapters 9 and 10). That concern led to the creation of the common law felony of robbery—taking property by force or the threat of force—which is a violent crime against persons *and* their property.

Criminal law next expanded to include taking property without consent, even if the thief used no force. The first nonconsensual, nonviolent taking felony was **larceny**, the ancient crime of stealing, namely (1) taking and (2) carrying away (3) someone else's property without their consent and, most of the time, without their knowledge, (4) with the intent to permanently deprive victims of possession. Larceny was born as the common law tool to protect the Anglo-Saxons' most valuable possession—livestock—from dishonest or untrustworthy thieves (LaFave and Scott 1986, chap. 8; Perkins and Boyce 1982, chap. 4).

Larceny didn't protect the property of those who *voluntarily* handed it over to a caretaker—for example, a carrier who delivered property to someone else or a bank that held depositors' money. Larceny required that thieves "take and carry away" the property. Caretakers did neither; what they did was "convert" property that was lawfully in their possession to their own use. In criminal law, "**conversion**" means "wrongfully possessing or disposing of someone else's property as if it were yours."

As society advanced, the failure of larceny to protect against conversion by caretakers created a growing gap in the criminal law, especially in a society with exploding quantities and kinds of valuable possessions. These possessions included both **tangible property** (personal property items like jewelry) and **intangible property** (stocks,

bonds, and promissory notes), namely paper worth nothing by itself but which was proof of something of value.

As society became more complex, caretakers converting property that owners voluntarily handed over to them grew into an enormous problem. Legislatures responded to this problem of unlawful conversion of property by creating the felony of **embezzlement**. The earliest embezzlement statutes were directed at occupations like bank clerks. Eventually, statutes reached broadly to include all kinds of breaches of trust. According to the MPC reporter (ALI 1985, 2:223.1):

> A few American legislatures enacted fraudulent-conversion statutes penalizing misappropriation by anyone who received or had in his possession or control the property of another, or property which someone else "is entitled to receive and have." Indeed, some modern embezzlement statutes go so far as to penalize breach of faith without regard to whether anything is misappropriated. Thus, the fiduciary who makes forbidden investments, the official who deposits public funds in an unauthorized depository, the financial advisor who betrays his client into paying more for a property than fair market value, may be designated an embezzler. (129)

Embezzlement was the first of the **abuse-of-trust crimes** that eventually came to be called **white-collar crimes**—crimes growing out of opportunities to get someone else's property because of the perpetrator's occupation. Although the term at first referred only to business executives, it now includes property crimes that grow out of opportunities created by any lawful occupation (for example, if I take the MacBook the university provided to help me teach my classes, and I use it to promote the sales of the book you're reading). Statutes and courts are still creating new crimes to combat the same old evil of satisfying the excessive desire to get other people's property by the new methods, such as stealing their identities from computers and the Internet.

So, robbery applied to those who took or threatened to take someone else's property by force; larceny applied to those who sneaked away with someone else's property; embezzlement to those who kept permanently someone else's property they had only a temporary right to possess. But what about owners who were tricked into giving up possession or ownership? The deceivers hadn't "taken" the property, because the owners willingly gave it to them. They hadn't converted it either, because they didn't have even a temporary right to possess it.

The crime of **obtaining property by false pretenses** filled the gap left by larceny and embezzlement when it came to criminally getting ownership (not just possession) of other people's property. In false pretenses *actus reus*, "deceiving" replaces "taking" in larceny and "converting" in embezzlement. Deception requires a lie, like making a promise to deliver something when you can't, or don't intend to, keep the promise. The logic of social and economic history lies behind the separation of these three ways to get other people's property into separate crimes. But the distinctions still make sense. As we saw earlier, when society changed, embezzlement supplemented larceny, and then theft by deceit (false pretenses) supplemented both larceny and embezzlement to fight the new ways of unlawfully taking other people's money. So, with history and law to help us, we'll start our study of property crimes with the ancient felonies of larceny and robbery. We'll follow larceny into its modern form—theft. Then, we'll examine robbery, and its modern forms, and its close relative, extortion.

Larceny and Theft

Most states have consolidated the old crimes of larceny, embezzlement, and false pretenses into one offense called theft. They accept the social reality that all these ancient crimes were aimed at the same evil—intentionally getting control of someone else's property.

Consolidated theft statutes eliminate the artificial need to separate theft into distinct offenses according to their *actus reus*. So, under modern theft statutes, *actus reus* includes "taking and carrying away" *or* "converting" *or* "swindling" to obtain possession of someone else's property. The *mens rea* in modern theft statutes remains as it always was—acquiring someone else's property "purposely" or "knowingly" in MPC language or "intentionally" in non-MPC states in order to *permanently* deprive the owner of his or her possession.

In our next case excerpt, the New York Court of Appeals, the state's highest court, upheld the convictions of three defendants for shoplifting. The Court adapted the elements of the ancient crime of larceny to fit the modern crime of shoplifting. It relied in part on modern theft law to do so.

In our next case excerpt, the New York Court of Appeals, the state's highest court, upheld the convictions of three defendants for shoplifting.

CASE Did They Take and Carry Away the Shoplifted Items with Intent to Deprive the Store of Their Possession?

The People of the State of New York, Respondent, v. Ronald Olivo
The People of the State of New York, Respondent v. Stefan M. Gasparik
The People of the State of New York, Respondent v. George Spatzier
420 N.E.2d 40 (1981)
Court of Appeals of New York, Feb. 19, 1981

HISTORY

Three defendants were convicted of petit larceny, and they appealed. The Supreme Court, First Judicial Department, and the Supreme Court, Second Judicial Department, affirmed, and they appealed. The Court of Appeals, Cooke, CJ, affirmed.

COOKE, CJ.

These cases present a recurring question in this era of the self-service store that has never been resolved by this Court: may a person be convicted of larceny for shoplifting if the person is caught with goods while still inside the store? For reasons outlined below, it is concluded that a larceny conviction may be sustained, in certain situations, even though the shoplifter was apprehended before leaving the store.

FACTS

I

In *People v. Olivo*, the defendant was observed by a security guard in the hardware area of a department store. Initially conversing with another person, the defendant began to look around furtively when his acquaintance departed. The security agent continued to observe and saw the defendant assume a crouching position, take a set of wrenches and, secret it in his clothes. After again looking around, the defendant began walking toward an exit, passing a number of cash registers en route. When the defendant did not stop to pay for the merchandise, the officer accosted him a few feet from the exit. In response to the guard's inquiry, the defendant denied having the wrenches, but as he proceeded to the security office, the defendant removed the wrenches and placed them under his jacket. At trial, the defendant testified that he had placed the tools under his arm and was on line at a cashier when apprehended. The jury returned a verdict of guilty on the charge of petit larceny. The conviction was affirmed by Appellate Term.

II

In *People v. Gasparik*, the defendant was in a department store trying on a leather jacket. Two store detectives observed him tear off the price tag and remove a "sensormatic" device designed to set off an alarm if the jacket were carried through a detection machine. There was at least one such machine at the exit of each floor. The defendant placed the tag and the device in the pocket of another jacket on the merchandise rack. He took his own jacket, which he had been carrying with him, and placed it on a table. Leaving his own jacket, the defendant put on the leather jacket and walked through the store, still on the same floor, bypassing several cash registers. When he headed for the exit from that floor, in the direction of the main floor, he was apprehended by security personnel. At trial, the defendant denied removing the price tag and the sensormatic device from the jacket, and testified that he was looking for a cashier without a long line when he was stopped. The Court, sitting without a jury, convicted the defendant of petit larceny. Appellate Term affirmed.

III

In *People v. Spatzier*, the defendant entered a bookstore on Fulton Street in Hempstead carrying an attaché case. The two co-owners of the store observed the defendant in a ceiling mirror as he browsed through the store. They watched the defendant remove a book from the shelf, look up and down the aisle, and place the book in his case. He then placed the case at his feet and continued to browse. One of the owners approached the defendant and accused him of stealing the book. An altercation ensured and when the defendant allegedly struck the owner with the attaché case, the case opened, and the book fell out. At trial, the defendant denied secreting the book in his case and claimed that the owner had suddenly and unjustifiably accused him of stealing. The jury found the defendant guilty of petit larceny, and the conviction was affirmed by the Appellate Term.

OPINION

The primary issue in each case is whether the evidence, viewed in the light most favorable to the prosecution, was sufficient to establish the elements of larceny as defined by the Penal Law. To resolve this common question, the development of the common-law crime of larceny and its evolution into modern statutory form must be briefly traced.

Larceny at common law was defined as a trespassory taking and carrying away of the property of another with intent to steal it. The early common-law courts apparently viewed larceny as defending society against breach of the peace, rather than protecting individual property rights, and therefore placed heavy emphasis upon the requirement of a *trespassory taking*. Thus, a person such as a bailee who had rightfully obtained possession of property from its owner could not be guilty of larceny. The result was that the crime of larceny was quite narrow in scope.

Gradually, the courts began to expand the reach of the offense, initially by subtle alterations in the common-law concept of possession (e.g., American Law Institute, Model Penal Code [Tent Draft No. 1], art 206, app. A, p. 101). Thus, for instance, it became a general rule that goods entrusted to an employee were not deemed to be in his possession, but were only considered to be in his custody, so long as he remained on the employer's premises. And, in the case of *Chisser* (Raym. Sir.T. 275, 83 Eng.Rep. 142), it was held that a shop owner retained legal possession of merchandise being examined by a prospective customer until the actual sale was made. In these situations, the employee and the customer would not have been guilty of larceny if they had first obtained lawful possession of the property from the owner. By holding that they had not acquired possession, but merely custody, the court was able to sustain a larceny conviction.

As the reach of larceny expanded, the intent element of the crime became of increasing importance, while the requirement of a trespassory taking became less significant. As a result, the bar against convicting a person who had initially obtained lawful possession of property faded. In *King v. Pear* (1 Leach 212, 168 Eng.Rep. 208), for instance, a defendant who had lied about his address and ultimate destination when renting a horse was found guilty of larceny for later converting the horse. Because of the fraudulent misrepresentation, the court reasoned, the defendant had never obtained legal possession. Thus, "larceny by trick" was born.

Later cases went even further, often ignoring the fact that a defendant had initially obtained possession lawfully, and instead focused upon his later [possession]. The crime of larceny then encompassed not only situations where the defendant initially obtained property by a trespassory taking, but many situations where an individual, possessing the requisite intent, exercised control over property inconsistent with the continued rights of the owner. Parliament also played a role in this development. Thus, for example, in 1857 a statute extended larceny to all conversions by bailees. During this evolutionary process, the purpose served by the crime of larceny obviously shifted from protecting society's peace to general protection of property rights.

Modern penal statutes generally have incorporated these developments under a unified definition of larceny (see e. g., American Law Institute, Model Penal Code [Tent Draft No. 1], § 206.1 [theft is appropriation of property of another, which includes unauthorized exercise of control]). Case law, too, now tends to focus upon the actor's intent and the exercise of dominion and control over the property. Indeed, this court has recognized, in construing the New York Penal Law, that the "*ancient* common-law concepts of larceny" no longer strictly apply.

Section 155.05 of the Penal Law defines larceny:

> 1. A person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains, or withholds such property from an owner thereof. 2. Larceny includes a wrongful taking, obtaining or withholding of another's property,

> with the intent prescribed in subdivision one of this section, committed in any of the following ways: (a) By conduct heretofore defined or known as common law larceny by trespassory taking, common law larceny by trick, embezzlement, or obtaining property by false pretenses.

This evolution is particularly relevant to thefts occurring in modern self-service stores. In stores of that type, customers are impliedly invited to examine, try on, and carry about the merchandise on display. Thus in a sense, the owner has consented to the customer's possession of the goods for a limited purpose. That the owner has consented to that possession does not, however, preclude a conviction for larceny. If the customer exercises dominion and control wholly inconsistent with the continued rights of the owner, and the other elements of the crime are present, a larceny has occurred. Such conduct on the part of a customer satisfies the "taking" element of the crime.

Also required, of course, is some movement when property other than an automobile is involved. As a practical matter in shoplifting cases the same evidence which proves the taking will usually involve movement. The movement, or asportation requirement, has traditionally been satisfied by a slight moving of the property. This accords with the purpose of the asportation element which is to show that the thief had indeed gained possession and control of the property.

It is this element that forms the core of the controversy in these cases. The defendants argue, in essence, that the crime is not established, as a matter of law, unless there is evidence that the customer departed the shop without paying for the merchandise. Although this court has not addressed the issue, case law from other jurisdictions seems unanimous in holding that a shoplifter need not leave the store to be guilty of larceny. This is because a shopper may treat merchandise in a manner inconsistent with the owner's continued rights—and in a manner not in accord with that of prospective purchaser—without actually walking out of the store. Indeed, depending upon the circumstances of each case, a variety of conduct may be sufficient to allow the trier of fact to find a taking. It would be well-nigh impossible, and unwise, to attempt to delineate all the situations which would establish a taking. But it is possible to identify some of the factors used in determining whether the evidence is sufficient to be submitted to the fact finder.

In many cases, it will be particularly relevant that defendant concealed the goods under clothing or in a container. Such conduct is not generally expected in a self-service store and may in a proper case be deemed an exercise of dominion and control inconsistent with the store's continued rights. Other furtive or unusual behavior on the part of the defendant should also be weighed. Thus, if the defendant surveys the area while secreting the merchandise or abandoned his or her own property in exchange for the concealed goods, this may evince larcenous rather than innocent behavior. Relevant too is the customer's proximity to or movement towards one of the store's exists. Certainly it is highly probative of guilt that the customer was in possession of secreted goods just a few short steps from the door or moving in that direction. Finally, possession of a known shoplifting device actually used to conceal merchandise, such as a specially designed outer garment or false bottomed carrying case, would be all but decisive.

Of course, in a particular case, any one or any combination of these factors may take on special significance. And there may be other considerations, not now identified, which should be examined. So long as its bears upon the principal issue—whether the shopper exercised control wholly inconsistent with the owner's continued rights—any attending circumstance is relevant and may be taken into account.

Under these principles, there was ample evidence in each case to raise a factual question as to the defendants' guilt. In *People v. Olivo*, defendant not only concealed goods in his clothing, but he did so in a particularly suspicious manner. And, when defendant was stopped, he was moving towards the door, just three feet short of exiting the store. It cannot be said as a matter of law that these circumstances failed to establish a taking.

As discussed, the same evidence which establishes dominion and control in these circumstances will often establish movement of the property. And, the requisite intent generally may be inferred from all the surrounding circumstances. It would be the rare case indeed in which the evidence establishes all the other elements of the crime but would be insufficient to give rise to an inference of intent.

In *People v. Gasparik*, defendant removed the price tag and sensor device from a jacket, abandoned his own garment, put the jacket on, and ultimately headed for the main floor of the store. Removal of the price tag and sensor device, and careful concealment of those items, is highly unusual and suspicious conduct for a shopper. Coupled with defendant's abandonment of his own coat and his attempt to leave the floor, those factors were sufficient to make out a prima facie case of a taking.

In *People v. Spatzier*, defendant concealed a book in an attaché case. Unaware that he was being observed in an overhead mirror, defendant looked furtively up and down and aisle before secreting the book. In these circumstances, given the manner in which defendant concealed the book and his suspicious behavior, the evidence was not insufficient as a matter of law.

In sum, in view of the modern definition of the crime of larceny, and its purpose of protecting individual property rights, a taking of property in the self-service store context can be established by evidence that a customer exercised control over merchandise wholly inconsistent with the store's continued rights. Quite simply, a customer who crosses the line between the limited right he or she has to deal with merchandise and the store owner's rights may be subject to prosecution for larceny. Such a rule should foster the legitimate interests and continued operation of self-service shops, a convenience which most members of the society enjoy.

Accordingly, in each case, the order of the Appellate Term should be affirmed.

QUESTIONS

1. **State the elements of larceny.**
2. **Summarize the Court's arguments to support the proof of each of the elements of larceny.**
3. **Did the Court stretch the original meaning of the elements? Explain.**
4. **Is the decision good public policy? Explain.**
5. **Should the Court, or the legislature, change the meaning of the elements of larceny to fit modern conditions? Explain your answer.**

Theft by False Pretenses

Common law false pretenses *mens rea* requires the purpose or specific intent to obtain property by deceit and lies.

False pretenses was originally **common law fraud**, a misdemeanor. Typically, its statutory descendant includes the following elements (*Pederson v. Bibioff* 1992, 1120):

1. A false representation of an existing fact
2. The speaker's knowledge that it's false or ignorance as to its truth
3. Intent that the victim should act on the false fact
4. Ignorance on the victim's part that the fact is false
5. The victim's reliance on the truth of the fact
6. The victim's right to rely on the false fact
7. Damages caused to the victim by her reliance on the false representation

Federal Mail Fraud

LO 3

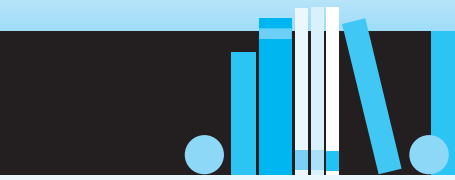
The **federal mail fraud statute** defines "false pretenses" much more broadly than common law fraud. It includes "schemes to defraud or for obtaining money or property" (U.S. Code Title 18, Section 1341). Notice that the statute doesn't require actual deprivation. It applies to anyone who "having devised, or intending to devise any scheme . . . to defraud," uses the mail "for the purpose of executing such scheme or attempting to do so" (Dubber and Kelman 2005, 953). According to the two experts,

> For over a generation, the mail and wire fraud statutes have provided federal prosecutors with a residual catch-all that was available when nothing else in their arsenal seemed likely to work . . . At first glance, [the federal mail fraud statute] may seem only intended to protect the integrity of a federally administered service, the post office. Yet, its key phrase, "scheme . . . to defraud" . . . has long served instead as a charter of authority for courts to decide retroactively what forms of unfair or questionable conduct in commercial, public and even private life should be deemed criminal. In so doing, this phrase has provided more expansive interpretations from prosecutors and judges than probably any other phrase in criminal law. (957)

The federal mail fraud statute played an essential role in the government's case against Bernard Madoff. His use of the mail to conduct business with his investors subjected him to the broad sweep of the federal mail fraud statute. The evidence resulted in his guilty plea and to his sentence of 150 years' imprisonment. Our next case excerpt,

U.S. v. Madoff (2009), tells the story of Madoff's Ponzi scheme and includes parts of what he said during his guilty plea hearing, and his and the judge's remarks regarding the 150-year sentence.

Our next case excerpt, U.S. v. Madoff (2009), tells the story of Madoff's Ponzi scheme.



CASE Was He Guilty of Using the Mail to Commit a Ponzi Scheme?

U.S. v. Madoff

Criminal Information, U.S. District Court, D.C. Circuit, filed March 10. (2009)

FACTS

Bernard L. Madoff Investment Securities LLC (BLMIS) was a broker-dealer registered with the Securities and Exchange Commission (SEC). Bernard Madoff was the founder of BLMIS and served as its sole member and principal.

Beginning in the 1980s, Madoff perpetrated a scheme to defraud BLIMIS clients by soliciting billions of dollars under false pretenses, failing to invest investors' funds as promised, and misappropriating and converting investors' funds to Madoff's own benefit and the benefit of others without the investors' knowledge or authorization. To execute the scheme, Madoff solicited and caused others to solicit prospective clients to open trading accounts with BLMIS, based on his promise to use investors' funds to buy securities of large, well-known corporations, and representations that he would achieve high rates of return for clients with limited risk. In fact, Madoff knew these representations were false. Madoff failed to honor his promises by failing to invest clients' funds in securities as he had promised. Instead, notwithstanding his promises and representations Madoff made on tens of thousands of account statements and other documents sent through the U.S. Postal Service to BLMIS clients throughout the operation of this scheme, Madoff operated a massive Ponzi scheme in which client funds were misappropriated and converted to the use of Madoff, BLMIS, and others.

In connection with this Ponzi scheme, Madoff accepted billions of dollars of investor money from individual investors, charitable organizations, trusts, and pension funds, and established on their behalf thousands of accounts at BLMIS. From the outset, Madoff obtained investor funds through interstate wire transfers from financial institutions and through mailings delivered by the U.S. Postal Service.

In carrying out this scheme, Madoff made false representations concerning his investment strategies to clients and prospective clients. Clients were promised that BLMIS would invest their funds in a basket of 35 to 50 common stocks within Standard & Poor's 100 Index (S&P 100), a collection of the 100 largest publicly traded companies. Further, to induce new and continued investments by clients and prospective clients, Madoff promised certain clients annual returns of up to 46 percent a year.

Contrary to his promises, Madoff used most of the investors' funds to meet other investors' periodic redemption requests. In addition, Madoff took some of these clients' investment funds as commissions which he used to support market making, and from which he received millions of dollars in benefits.

To conceal his scheme, Madoff withheld information from regulators and repeatedly lied to the SEC in written submissions and in sworn testimony.

Guilty Plea

Bernard Madoff entered a federal courtroom in Manhattan on Thursday to admit that he had run a vast Ponzi scheme that robbed thousands of investors of their life savings; he was as elegantly dressed as ever. But, preparing for jail, he wore no wedding ring—only the shadowy imprint remained of one he has worn for nearly 50 years.

He admitted his guilt for the first time in public, and apologized to his victims, dozens of whom were squeezed into the courtroom benches behind him, before being handcuffed and led away to jail to await sentencing.

"I knew what I was doing was wrong, indeed criminal," he said. "When I began the Ponzi scheme, I believed it would end shortly and I would be able to extricate myself and my clients." But finding an exit "proved difficult, and ultimately impossible," he continued, stumbling slightly in his prepared remarks. "As the years went by I realized this day, and my arrest, would inevitably come." Mr. Madoff acknowledged that he had "deeply hurt many, many people," adding, "I cannot adequately express how sorry I am for what I have done."

His testimony was shaped not only by expressions of regret, but also by his determination to shield his wife and family. (Henriques and Healy 2009)

Sentencing Hearing

Madoff Statement

Your Honor, I cannot offer you an excuse for my behavior. How do you excuse betraying thousands of investors who entrusted me with their life savings? How do you excuse deceiving 200 employees who have spent most of their working life working for me? How do you excuse lying to your brother and the two sons who spent their adult lives helping to build a successful and respectful business? How do you excuse lying and deceiving the wife who stood by you for 50 years, and still stands by you? And how do you excuse deceiving an industry you spent the better part of your life trying to improve? There is no excuse for that, and I don't ask for any forgiveness.

I am responsible for a great deal of suffering and pain. I understand that. I live in a tormented state now, knowing of all the pain and suffering that I have created. I have left a legacy of shame, as some of my victims have pointed out, to my family and my grandchildren. That's something I will live with for the rest of my life.

People have accused me of being silent and not being sympathetic. That is not true. They have accused my wife for being silent and not being sympathetic. Nothing could be further from the truth. She cries herself to sleep every night, knowing of all the pain and suffering I have caused, and I am tormented by that as well.

Apologizing and saying I am sorry, that's not enough. Nothing I can say will correct the things that I have done. I feel terrible that an industry I spent my life trying to improve is being criticized terribly now, that regulators who I helped work with over the years are being criticized by what I have done. That is a horrible guilt to live in. There is nothing I can do that will make anyone feel better for the pain and suffering I caused them, but I will live with this pain, with this torment, for the rest of my life.

I apologize to my victims. I will turn and face you. I am sorry. I know that doesn't help you. Your honor, thank you for listening to me.

Judge's Statement

Judge's statement at sentencing Madoff.

Objectively speaking, the fraud here was staggering. It's been more than 20 years. As for the amount of the monetary loss, there appears to be some disagreement. Mr. Madoff disputes that the loss amount is $65 billion or even $13 billion. But Mr. Madoff has now acknowledged that some $170 billion flowed into his business as a result of his fraudulent scheme. By any measure, the loss figure here is off the chart by many fold.

Moreover as many of the victims have pointed out, this is not just a matter of money. The breach of trust was massive. Investors— individuals, charities, pension funds, institutional clients—were repeatedly lied to, and as they were told their monies would be invested in stocks when they were not. Investors made important life decisions based on these fictitious account statements—when to retire, how to care for elderly parents, whether to buy a car sell a house, how to save for their children's college tuition. Charitable organizations and pension funds made important decisions based on false information about fictitious accounts. Mr. Madoff also repeatedly lied to the SGC and the regulators, in writing and in sworn testimony by withholding material information, by creating false documents to cover up his scheme.

Mr. Madoff argues a number of mitigating factors but they are less than compelling. It is true that he essentially turned himself in and confessed to the FBI. But the fact is that with the turn in the economy, he was not able to keep up with the requests of customers to withdraw their funds, and it is apparent that he knew that he was going to be caught soon. It is true that he consented to the entry of a $170 billion forfeiture order and has cooperated in transferring assets to the government for liquidation for the benefit of victims. But all of this was done only after he was arrested, and there is little that he could have done to fight the forfeiture of these assets. Moreover, the SIPC trustee has advised the court Mr. Madoff has not been helpful, and I simply do not get the sense that Mr. Madoff has done all that he could or told all he knows. I have taken into account the sentences imposed in other financial fraud cases in this district but, frankly, none of these other cases is comparable to this case in terms of the scope, duration and enormity of the fraud, and the degree of the betrayal.

In terms of mitigating factors in a white-collar fraud case such as this, I would expect to see letters from family and friends and colleagues. But not a single letter has been submitted attesting to Mr. Madoff's good deeds or good character or civic or charitable activities. The absence of such support is telling.

We have heard much about a life expectancy analysis. Based on this analysis, Mr. Madoff has a life expectancy of 13 years and he therefore asked for a sentence of 12 years or alternatively 15 to 20 years. According to his lawyer, if he spends about 20 or 25 years it would be largely, if not entirely symbolic.

But the symbolism is important, for at least three reasons. First retribution. One of the traditional notions of punishment is that an offender should be punished in proportion to his blameworthiness. Here the message must be that this kind of irresponsible manipulation of the system is extraordinarily evil, and is not merely a bloodless financial crime that takes place just on paper, but that it is instead as we have heard, one that takes a staggering human toll. The symbolism is important because the message must be sent that in a society governed by the rule of

law, Mr. Madoff will get what he deserves, and that he will be punished according to his moral culpability.

Second deterrence. Another important goal of punishment is deterrence, and the symbolism is important here because the strongest possible message must be sent to those who would engage in similar conduct that they will be caught and they will be punished to the fullest extent of the law.

Finally the symbolism is also important for the victims. The victims include individuals from all walks of life. The victims include charities, both large and small, as well as academic institutions, pension funds, and other entities. Mr. Madoff's very personal betrayal struck at the rich and not-so-rich—the elderly living on retirement funds and Social Security, middle-class folks trying to put their kids through college, and ordinary people who worked hard to save their money and thought they were investing it safely, for themselves and for their families.

A substantial sentence will not give the victims back their retirement funds or the monies they have saved to send their children or grandchildren to college. It will not give them back their financial security for the freedom from financial worries. But more is at stake than money as we have heard. The victims put their trust in Mr. Madoff. That trust was broken in a way that has left many victims, as well as others touting our financial institutions, our financial system, or government's ability to regulate and protect, and sadly, even themselves, [disillusioned].

I do not agree that the victims are succumbing to the temptation of mob vengeance. Rather, they are doing what they are supposed to be doing, placing their trust in our system of justice. A substantial sentence, the knowledge that Mr. Madoff has been punished to the fullest extent of the law, may, in some small measure, help these victims in their healing process.

Mr. Madoff, please stand. It is the judgment of this court that the defendant, Bernard L. Madoff, shall be and hereby is sentenced to a term of imprisonment of 150 years. Mr. Madoff, you have the right to appeal at least certain aspects of this judgment conviction. If you wish to appeal you must do so within 10 days. If you cannot afford an attorney, the court will appoint one for you.

We are adjourned.

QUESTIONS

1. **Identify the criminal charges against Madoff.**
2. **List all of the facts relevant to deciding the criminal action against Madoff.**
3. **Explain the reasons why the criminal case resulted in acquittals on some charges and a hung jury in the main charge.**
4. **Explain the basis for the civil action and what the government hopes to obtain in the case.**
5. **Summarize Madoff's statements at his guilty plea hearing and at his sentencing. What's your emotional reaction to the statements?**
6. **Was Madoff's sentence too harsh? Not harsh enough? About right? Back up your answer with facts and arguments from the excerpt.**
7. **Describe your emotional reaction to the story of Madoff's crimes.**
8. **Describe your emotional reaction to Madoff's statement at his sentencing hearing. If you were the judge, what effect would it have on your sentencing decision? Defend your answer.**
9. **Describe your emotional reaction to the judge's statement at Madoff's sentencing hearing. In your opinion, was the sentence too lenient? Too harsh? About right? Defend your answer, paying particular attention to the three purposes of punishment outlined by the judge.**

The "great recession" of 2007 hurt legitimate industries—automobiles, real estate, and banking. We're all aware of these casualties. What you may not be aware of is that it hurt Ponzi schemers (named after a con artist who ripped off millions from in 1920) too. In **Ponzi schemes**, schemers tell investors they're buying assets such as real estate, stocks and bonds, or consumer products. In fact, they're buying nothing. Instead, Ponzi schemers use the money to pay earlier investors. Eventually, the money dries up and everything collapses.

During this recession, Ponzi schemes collapsed at record rates. The FBI has about 500 open Ponzi investigations nationwide, up from 300 in 2006. According to FGI Special Agent David G. Nantz, chief of the economic crimes unit:

> We have more open Ponzi scheme cases than at any time in FBI history. We anticipated a spike, but the numbers we are seeing are even greater than expected. There's an old saying,

> "When the tide goes out, you can see who isn't wearing a bathing suit." And that definitely applies to Ponzi schemes. (Wilber 2009)

According to veteran postal inspector James H. Tendrick, who supervises the U.S. Department of Justice Department's fraud team, "It has been a flood. We don't have to go out scouring for these things. They're all just coming in the door" (Wilber 2009).

Why the increase in Ponzi schemes?

> As recently as a few decades ago, most Ponzi schemes were relatively small, relying on word of mouth, direct mail and advertisements in magazines. They generally burned out after two or three years. But through the internet and modern communications, Ponzi schemes have grown in size, scope, and sophistication. During the economic boom years, many schemes lured investors—including huge hedge funds and financial firms—into putting up billions of dollars. Smaller investors, drawing on home equity loans, also flooded Ponzis with cash.
>
> . . . Then the housing bubble burst, and the stock market began to sag, and the financial markets went into cardiac arrest. Soon Ponzi operators couldn't find new investors to keep their wheels spinning. Investors began screaming for their money back. When their calls were not returned or they were blown off, they started calling authorities. Cautious potential investors, bombarded with news reports about Madoff, quickly alerted regulators and federal agents to deals that seemed too good to be true. (Wilber 2009)

According to Professor William K. Black, former executive director of the Institute for Fraud Prevention, "This kind of climate is death on Ponzis," but he warns against overconfidence about their permanent demise. He says that

> the same trends that pumped the Ponzi industry and tore it apart will eventually lead to new opportunities for scam artists who manage to escape the law and financial carnage. The crooks know that potential investors, some desperate for a quick return, will not always be so wary. (Wilber 2009)

Federal Mail Fraud—Criminal and Civil Liability

LO 3

In our emphasis on the centuries-old *criminal* response to protect property from swindlers, we can't overlook that thefts, frauds, and swindles are also *civil wrongs*. "The history of larceny and fraud is also the history of supplementing civil actions with criminal punishment." What was once a *tort* is now also a crime (Dubber and Kelman 2005, 919). Our next case excerpt, *U.S. v. Coughlin*, includes excerpts from both the criminal case that resulted in acquittals and the civil action that is in progress against U.S. Navy Commander Charles Coughlin. The case involves scams to recover money from the September 11, 2001, Victim's Compensation Fund (VCF).

Our next case excerpt, U.S. v. Coughlin, includes excerpts from both the criminal case that resulted in acquittals and the civil action that is in progress against U.S. Navy Commander Charles Coughlin.

CASE Did He Try to Get 9/11 Victim Funds by False Pretenses?

U.S. v. Coughlin

340 St. Bees Drive, Severna Park Maryland (U.S. District Court, D.C 2008)

FACTS

On September 11, 2001, Charles E. Coughlin was a commander in the U.S. Navy. From June 2001 until he retired in June 2002, Coughlin was stationed at the Pentagon in the Navy Programming Division in Arlington, Virginia. Coughlin is a graduate of the Naval Academy and Harvard Business School who spent most of his 21-year military career in the submarine service, with a top-secret security clearance and shared command of nuclear submarines.

On December 19, 2003, Coughlin initiated a claim for damages with VCF by faxing interstate Part I of the Personal Injury Compensation form from Maryland to a VCF office in Virginia. In his application, Coughlin alleged that he suffered a partial, permanent disability from the September 11 attack on the Pentagon. He asserted that on September 11, he was struck on the head by falling debris. He also alleged that when he re-entered the Pentagon to assist in rescue efforts, he inadvertently struck his head on what he believed to be a door.

Coughlin's letter to VCF refers to a report by Anne Bowen, a physician with the Family Health Center at the Naval Academy at Annapolis, Maryland. Coughlin wrote "attached is a statement from Dr. Bowen detailing the extent of my injuries which has worsened already and continues to do so until at some point I obtain surgical steps to correct/ameliorate symptoms." Coughlin failed to submit Doctor Bowen's October 1, 2003, report to VCF. A review of Dr. Bowen's October 1, 2003, report shows that contrary to Coughlin's contention, she did not opine that Coughlin needed surgery for his alleged September 11, 2001, injuries.

Dr. Bowen's October 1, 2003, report described information Coughlin provided to her about the alleged injuries he sustained on September 11, 2001. She also detailed Coughlin's prior medical history, including neck pain since 1982. Dr. Bowen's report also included information about a 1998 neck injury from a fall. Coughlin acknowledged that he had previously suffered a similar injury in 1998, but claimed that he had fully recovered from his prior cervical spine injury. Coughlin did not submit his pre-September 11, 2001, medical records to VCF.

Coughlin had a history of neck and shoulder ailments prior to September 11, 2001, including an injury as early as 1978 to his left shoulder. As proof of Coughlin's alleged recovery from his prior injuries, Walter Laake, Coughlin's attorney, submitted the results of three marathons Coughlin ran prior to September 11, 2001. In his letter to the Special Master, Coughlin wrote, "Since 9/11 my life has changed substantially. I no longer engage in many athletic activities or am able to perform numerous household functions to the degree I did previously due to the symptoms mentioned above limiting my ability to participate" and "avoid any activities requiring abrupt turning of my head or raising my left arm above my shoulder for any length of time." Accordingly, "I no longer run marathons, ceased playing lacrosse last season after one game, and avoid playing basketball to any degree since I am a 'lefty' shooter."

Post–September 11, 2001, Coughlin continued to participate in physical activities, including lacrosse, basketball, and running. For example, Coughlin ran the New York marathon in November 2001. He successfully completed the course in under four hours. Coughlin injured his left index finger playing basketball post–September 11, 2001. Coughlin played a number of lacrosse games post–September 11, 2001.

On February 2, 2004, VCF determined that Coughlin's application for benefits should be denied due to ineligibility. On February 17, 2004, Laake sent from his Maryland office to the D.C. office of VCF, by Federal Express, Coughlin's appeal of his denial of VCF compensation. On February 20, 2004, Laake sent from Maryland to the D.C. VCF office, via the U.S. Postal Service, a cover letter and Coughlin's post–September 11, 2001, certified medical records. Omitted from those records was a medical record that documented Coughlin's finger injury, which he received playing basketball.

On March 9, 2004, Coughlin caused his attorney to mail from Maryland to the D.C. VCF office a medical report from Robert Smith, M.D., a letter from Kathleen Buda, R.N. (Coughlin's sister) and a letter dated February 18, 2004, from Rear Admiral Route. Without mentioning Dr. Bowen, Laake attached Dr. Smith's report in which he diagnosed Coughlin with a permanent, partial disability to his neck. According to Laake, Dr. Smith was consulted because of Coughlin's "inability to obtain medical records from military personnel." Coughlin saw Dr. Smith only once. Coughlin did not provide Dr. Smith with his complete medical records.

Based on the new information, VCF reversed its earlier decision, finding Coughlin eligible for benefits. VCF offered Coughlin a "presumed award" of $60,000, based on his submissions, which Coughlin rejected. On April 30, 2004, Laake sent an appeal of the $60,000 award from his Maryland office to the D.C. VCF office by Federal Express and requested a hearing on damages.

A hearing was held on May 13, 2004. At the hearing, Coughlin continued to claim that his prior injuries had resolved prior to September 11, 2001. Coughlin was

specifically asked what medications he was taking before September 11, 2001. Coughlin responded, "nothing to do with any musculature-related problems." In fact, Coughlin was prescribed medication to relieve muscle pain before September 11, 2001.

Coughlin claimed that as a result of his alleged September 11, 2001, injuries, he was no longer able to perform simple tasks, including hanging mirrors, installing curtains, painting, mulching, power washing, and putting up Christmas lights. He offered numerous exhibits to justify the amount of damages he sought.

In June 2004, based on Coughlin's assertions that he was permanently partially disabled as a result of the September 11, 2001, attack on the Pentagon, Coughlin was awarded $331,034 in damages: $151,034 for economic loss and $180,000 for noneconomic loss.

Based on the facts set forth in this complaint, there is reasonable cause to believe that from December 19, 2003, to June 28, 2004, Coughlin submitted false written statements and made material misrepresentations to VCF in order to obtain funds to which he was not entitled. These false statements relate to Coughlin's post–September 11, 2001, physical condition and need for replacement services as well as misrepresentations regarding Coughlin's prior injuries.

OPINION

Criminal Action (Pickler 2009)

A judge declared a mistrial Wednesday in the case of a retired naval officer accused of defrauding a fund for the victims of the Sept. 11 terror attacks, after a jury could not agree on whether he was guilty of the central charge against him. A jury found retired Cmdr. Charles Coughlin not guilty of three charges of mail fraud. But jurors said they were deadlocked on four other counts he faced, including the main charge of making a false claim to the 9–11 Victim Compensation Fund.

The trial lasted a month, and jurors deliberated for five days before sending a note to Judge Henry Kennedy saying they could only come to a unanimous decision on three counts. Kennedy sent them back to deliberate, but a few hours later they responded that agreement was hopeless. Jurors leaving the court said they were split 10-2 on the main count. Prosecutors had argued that Coughlin hadn't really suffered a partial permanent disability from the attack as he claimed because the avid athlete continued to play lacrosse and basketball and ran the New York City marathon in three hours and 43 minutes. "He ran a marathon after 9–11 so that threw a lot of suspicion on him," said juror Lois Rosen, who voted to convict him.

But juror Brian Muldoon and juror foreman Dave Geckle said they thought Coughlin was the kind of man who wouldn't let the pain stop him from exercising. "I broke my hip but I still run," Muldoon said. Geckle said he thought Coughlin was guilty when the prosecution presented its case, but changed his mind after seeing Coughlin testify because he seemed credible.

Civil Action (Schwartzman 2008, B1)

Coughlin filed his application for victims' compensation in 2004, just before the fund was about to shut down, said Walter Laake, the lawyer who helped him submit the papers. "I asked him why he waited for so long, and he said he felt very bad that he survived and others didn't," Laake recalled in an interview. "He felt terrible." "I thought this guy was a hero, he was what you would think of when you think of an officer in the armed forces—forthright, intelligent," Laake said. "The allegation of what he was supposed to have done was so out of character from what I was exposed to."

According to prosecutors, Coughlin asserted that his life had changed "substantially" since 2001. "I no longer run marathons," the commander wrote, "ceased playing lacrosse last season after one game, and avoid playing basketball to any degree since I am a 'lefty' shooter.'" But prosecutors contend in the lawsuit that Coughlin ran the marathon in New York in November 2001, that he "injured his left index finger" playing basketball and that he joined "a number of lacrosse games."

The compensation fund denied Coughlin's first application in February 2004. Two weeks later, Laake appealed the decision, sending more medical records. The compensation board then reversed its decision and awarded $60,000. But Coughlin appealed the ruling again, according to prosecutors. At a hearing in May 2004, Coughlin cited several examples of services he had to pay for as a result of his injuries, including $230 for window washing. Yet prosecutors claim that Coughlin's banking records indicate that at least one check he cited was used to pay the "Severn River Swim Club." After a hearing, the compensation board in June of 2004 increased his award to $331,034—including $151,034 for economic losses.

Six months later, prosecutors say, Coughlin used at least $200,000 of the money to buy his home, a 4,200-square-foot brick house with four bathrooms and a three-car garage. Coughlin also used the money to pay off loans he had taken out to pay for the 2002 Mercedes-Benz and a 2002 Honda Odyssey. The government has taken the vehicles pursuant to a seizure warrant, which is approved by a judge. Prosecutors want the court's permission to seize them permanently.

QUESTIONS

1. **Summarize all the facts in favor of a legitimate claim to the victims' funds.**
2. **Summarize all the facts supporting denial of the victims' funds.**
3. **Do you believe Coughlin is a hero or a "crook"? Back up your answer with specific details from the excerpt.**
4. **What penalty, if any, do you believe Coughlin deserves?**
5. **Describe your emotional reaction to the case.**

ETHICAL DILEMMA:

Should He Forfeit His Property Even if a Jury Didn't Convict Him?

The U.S. military granted Navy commander Charles E. Coughlin a Purple Heart and the government awarded him $331,000 for neck and other injuries he claimed to have suffered when American Airlines Flight 77 crashed into the Pentagon on September 11, 2001. Now government lawyers have concluded that Coughlin lied about his injuries—and they are seeking to seize his $1 million house in Severna Park, his Mercedes-Benz, and his minivan. The U.S. attorney's office has filed a civil suit alleging that the now-retired commander falsely claimed he suffered "a partial permanent disability" after falling debris struck him on the head at the Pentagon, where 184 people were killed.

Instructions

1. Go to the website www.cengage.com/criminaljustice/samaha.
2. Read the selections from the legal and public press sources regarding the alleged scam and the legal actions taken.
3. Based on the readings, did Commander Coughlin commit the crime of false pretenses? Write a one-page essay backing up your conclusion.
4. Which is the most effective public policy from the ethics standpoint? (a) Criminal prosecution? (b) Civil action for damages to the victims? (c) Seizure of Commander Coughlin's property? Write a one-page essay backing up your answer with points made in the readings.

Robbery and Extortion

LO 5

Now that you've seen the ancient crime of larceny brought up to date by modern fraud, let's turn to robbery, the other ancient crime brought up to date in modern statutes and case law.

The core of robbery is theft accomplished under circumstances intended to terrorize the victim by actual injury or the threat of immediate injury to the victim (ALI 1985, 2:222.1, 98). Robbery consists of hurting, or threatening to hurt, someone *right now* if they don't give up their property. Extortion, which grew out of robbery, consists of taking someone else's property by threats of *future* harm. Let's look first at robbery.

Robbery

Robbery is really two crimes, theft and assault (Chapter 10). But the criminal law has never treated it that way, because robbery is considered more serious than the sum of these two parts. The MPC reporter explains why:

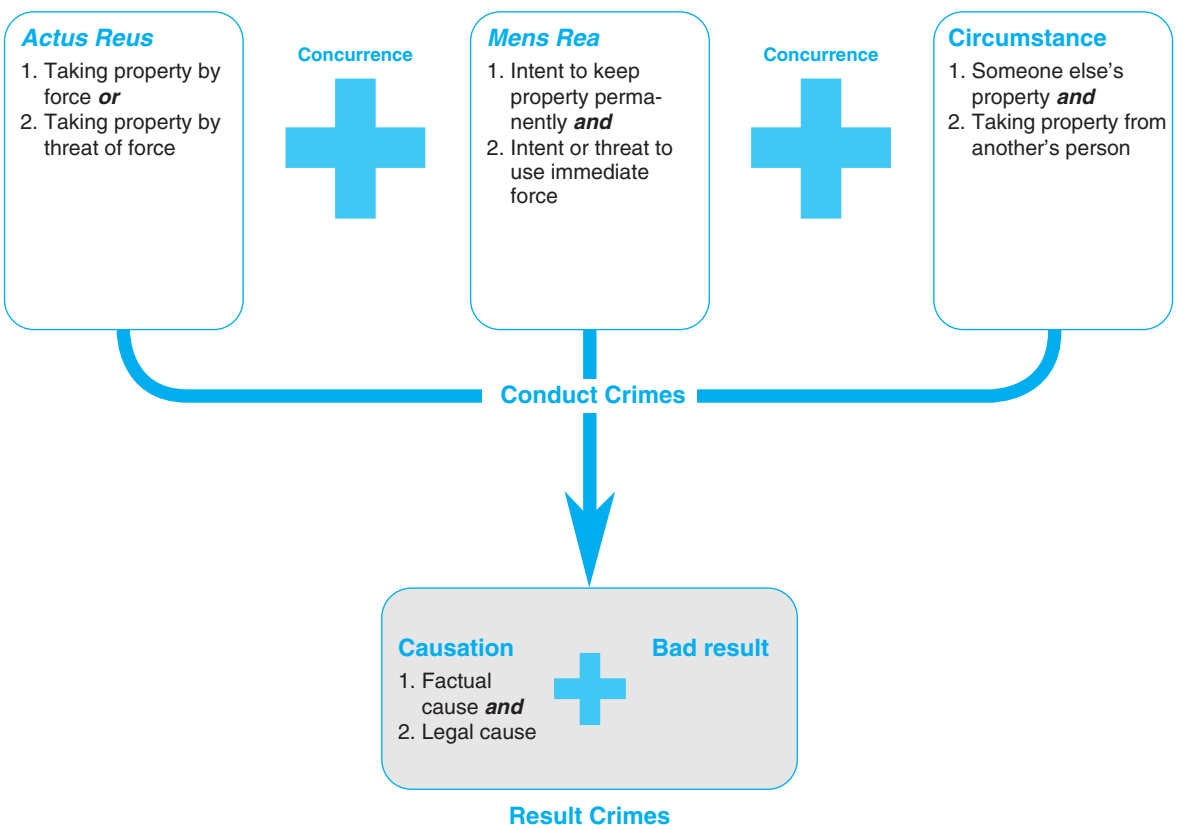
> The violent petty thief operating in the streets and alleys of big cities—the "mugger"—is one of the main sources of insecurity and concern in the population at large. There is a special element of terror in this kind of depredation. The

> ordinary citizen does not feel particularly threatened by the surreptitious larceny, embezzlement, or fraud. But there is understandable abhorrence of the robber who accosts on the streets and who menaces his victims with actual or threatened violence against which there is a general sense of helplessness. In proportion as the ordinary person fears and detests such behavior, the offender exhibits himself as seriously deviated from community norms, thus justifying more serious sanctions. In addition, the robber may be distinguished from the stealthy thief by the hardihood that enables him to carry out his purpose in the presence of his victim and over his opposition—obstacles that might deter ordinary sneak thieves and that justify the feeling of special danger evoked by the robber. (98)

As a victim of more than one mugging on city streets, I can vouch for the fear, anger, and sense of violation that goes along with losing something valuable, like the watch my mother gave me as a graduation present. But it's more than the value of what I lost that that signifies. It's the personal violation that goes along with fear and humiliation, even when there's no real threat. During the second mugging, I gave up my money because the mugger showed me his "weapon" bulging in his coat pocket. After I handed over the money, he pulled the "weapon" out of his pocket—a comb—and ran his thumb down the spokes, sneering, "Hey man, you should be more careful in the future," snickering as he swaggered away.

Let's look at the elements of robbery: its *actus reus, mens rea*, and required attendant circumstances.

ELEMENTS OF ROBBERY



Robbery Actus Reus *(Criminal Act)*

The use of force, or the threat of force, is the essence of the robbery criminal act. Any amount of force beyond the amount needed to take and carry away someone else's property is enough. Picking a pocket isn't robbery because "picking pockets" is defined as requiring only enough force to remove the contents of the pocket. But even slightly mishandling the victim, like a push, turns the pickpocket into a robber. Robbery doesn't even require the use of actual force; threatened force (a drawn gun or knife) is enough.

In our next case excerpt, *State v. Curley* (1997), the New Mexico Court of Appeals decided that under the state's robbery statute, the jury should've had the opportunity to decide whether Erwin Curley's "shove" was enough force to rob or only enough physical strength to steal the money in his victim's purse by snatching it.

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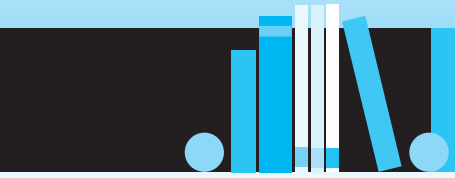


CASE Did He Take Her Purse by Force?

State v. Curley
939 P.2d 1103 (N.M.App., 1997)

HISTORY

Erwin Curley, the defendant, was convicted of robbery in the District Court, McKinley County. The defendant appealed. The Court of Appeals, Pickard, J., held that the defendant was entitled to requested instruction on the lesser included offense of larceny. The Court reversed and remanded for a new trial.

PICKARD, J.

This case requires us to determine: (1) what force suffices to turn a larceny into a robbery and (2) whether there is any view of the evidence pursuant to which that force was not shown.

FACTS

The prosecution arose out of a purse snatching. The evidence was that the victim was walking out of a mall with her daughter when Erwin Curley (the defendant) grabbed her purse and ran away. The victim described the incident as follows: "I had my purse on my left side . . . and I felt kind of a shove of my left shoulder where I had my purse strap with my thumb through it and I kind of leaned—was pushed—toward my daughter, and this person came and just grabbed the strap of my purse and continued to run."

The victim used the words "grab" or "pull" to describe the actual taking of the purse and "shove" or "push" to describe what the defendant did as he grabbed or "pulled [the purse] from her arm and hand." However, there was also evidence that the victim's thumb was not through the strap of the purse, but was rather on the bottom of the purse. The purse strap was not broken, and the victim did not testify that she struggled with the defendant for the purse in any way or that any part of her body offered any resistance or even moved when the purse was pulled from her arm and hand.

The defendant presented evidence that he was drunk and did not remember the incident at all.

OPINION

Robbery is theft by the use or threatened use of force or violence. NMSA 1978, § 30-16-2 (Repl.Pamp.1994). Because the words "or violence" refer to the unwarranted exercise of force and do not substantively state an alternative means of committing the offense, we refer simply to "force" in this opinion. The force must be the lever by which the property is taken.

Although we have cases saying that even a slight amount of force, such as jostling the victim or snatching

away the property, is sufficient, we also have cases in which a taking of property from the person of a victim has been held not to be robbery (wallet taken from victim's pocket while victim was aware that the defendant was taking the wallet).

A defendant is entitled to a lesser-included-offense instruction when there is some evidence to support it. There must be some view of the evidence pursuant to which the lesser offense is the highest degree of crime committed, and that view must be reasonable. Thus, in this case, to justify giving Defendant's larceny instruction, there must be some view of the evidence pursuant to which force sufficient to constitute a robbery was not the lever by which Defendant removed the victim's purse.

Defendant contends that such evidence exists in that the jury could have found that Defendant's shoving of the victim was part of his drunkenness, and then the purse was taken without force sufficient to constitute robbery. We agree. The applicable rule in this case is as follows:

> when property is attached to the person or clothing of a victim so as to cause resistance, any taking is a robbery, and not larceny, because the lever that causes the victim to part with the property is the force that is applied to break that resistance; however, when no more force is used than would be necessary to remove property from a person who does not resist, then the offense is larceny, and not robbery.

According to the minority rule adopted by Massachusetts, any purse snatching not accomplished by stealth would be robbery. We are not inclined to overrule cases such as *Sanchez*, in which we held that the taking of a wallet accompanied by just so much force as is necessary to accomplish the taking from a person who was not resisting was not robbery. Rather, we adhere to what we perceive to be the majority rule.

According to the majority rule, robbery is committed when attached property is snatched or grabbed by sufficient force so as to overcome the resistance of attachment. In cases such as this one, where one view of the facts appears to put the case on the border between robbery and larceny, it is necessary to further explore what is meant by the concept of "the resistance of attachment." Our exploration is informed by the interests protected by the two crimes.

Robbery may be classified not only as an offense against property but also as an offense against the person. It is the aspect of the offense that is directed against the person which distinguishes the crime of robbery from larceny and also justifies an increased punishment. Thus, the resistance of attachment should be construed in light of the idea that robbery is an offense against the person, and something about that offense should reflect the increased danger to the person that robbery involves over the offense of larceny.

The great weight of authority supports the view that there is not sufficient force to constitute robbery when the thief snatches property from the owner's grasp so suddenly that the owner cannot offer any resistance to the taking. On the other hand, when the owner, aware of an impending snatching, resists it, or when the thief's first attempt being ineffective to separate the owner from his property, a struggle for the property is necessary before the thief can get possession thereof, there is enough force to make the taking robbery.

Taking the owner's property by stealthily picking his pocket is not taking by force and so is not robbery; but if the pickpocket or his confederate jostles the owner, or if the owner, catching the pickpocket in the act, struggles unsuccessfully to keep possession, the pickpocket's crime becomes robbery. To remove an article of value, attached to the owner's person or clothing, by a sudden snatching or by stealth is not robbery unless the article in question (e.g., an earring, pin or watch) is so attached to the person or his clothes as to require some force to effect its removal.

Thus, it would be robbery, not larceny, if the resistance afforded is the wearing of a necklace around one's neck that is broken by the force used to remove it and the person to whom the necklace is attached is aware that it is being ripped from her neck. On the other hand, it would be larceny, not robbery, if the resistance afforded is the wearing of a bracelet, attached by a thread, and the person to whom the bracelet is attached is not aware that it is being taken until she realizes that it is gone.

Subtle differences in the amount of force used, alone, is neither a clear nor reasonable basis to distinguish the crime of robbery from that of larceny. However, if we remember that the reason for the distinction in crimes is the increased danger to the person, then an increase in force that makes the victim aware that her body is resisting could lead to the dangers that the crime of robbery was designed to alleviate. A person who did not know that a bracelet was being taken from her wrist by the breaking of a string would have no occasion to confront the thief, thereby possibly leading to an altercation. A person who knows that a necklace is being ripped from her neck might well confront the thief.

We now apply these rules to the facts of this case. Although the facts in this case are simply stated, they are rich with conflicting inferences. Either robbery or larceny may be shown, depending on the jury's view of the facts and which inferences it chooses to draw.

In the light most favorable to the State, Defendant shoved the victim to help himself relieve her of the purse, and the shove and Defendant's other force in grabbing the purse had that effect. This view of the facts establishes robbery, and if the jury believed it, the jury would be bound to find Defendant guilty of robbery.

However, there is another view of the facts. Defendant contends that the evidence that he was drunk allows the jury to infer that the shove was unintentional and that the remaining facts show the mere snatching of the purse, thereby establishing larceny. Two issues are raised by this contention that we must address:

(1) Is there a reasonable view of the evidence pursuant to which the shove was not part of the robbery? and

(2) even disregarding the shove, does the remaining evidence show only robbery?

We agree with Defendant that the jury could have inferred that the shove was an incidental touching due to Defendant's drunkenness. Defendant's testimony of his drunkenness and the lack of any testimony by the victim or any witness that the shove was necessarily a part of the robbery permitted the jury to draw this inference. Once the jury drew the inference that the shove was independent of the robbery, the jury could have found that Defendant formed the intent to take the victim's purse after incidentally colliding with her.

Alternatively, the jury could have found that Defendant intended to snatch the purse without contacting the victim and that the contact (the shove) was not necessary to, or even a part of, the force that separated the victim from her purse. The victim's testimony (that she felt "kind of a shove" and then Defendant grabbed her purse) would allow this inference. Thus, the jury could have found that the shove did not necessarily create a robbery.

The question would then remain, however, whether the grabbing of the purse was still robbery because more force was used than would have been necessary to remove the purse if the victim had not resisted. Under the facts of this case, in which the victim did not testify that she held the strap tightly enough to resist and in which there was some evidence that she was not even holding the strap, we think that there was a legitimate, reasonable view of the evidence that, once the shove is eliminated from consideration, Defendant used only such force as was necessary to remove the purse from a person who was not resisting. Under this view of the facts, Defendant took the purse by surprise from a person who was not resisting, and not by force necessary to overcome any resistance. Therefore, the trial court should have given Defendant's tendered larceny instructions.

Defendant's conviction is reversed and remanded for a new trial.

QUESTIONS

1. **List all of the evidence relevant to determining whether the purse snatching was a robbery.**
2. **State both the majority and the minority rule regarding the element of force in purse snatching.**
3. **Summarize the evidence in favor of and against each rule.**
4. **In your opinion, which is the better rule? Defend your answer.**

EXPLORING FURTHER

Robbery

Was the "Purse Snatching" Robbery?

Commonwealth v. Zangari, 677 N.E.2d 702 (Mass.App. 1997)

FACTS About 7:30 p.m., on June 10, 1994, two elderly women, Nancy Colantonio and Vera Croston, returned in Croston's 1981 Chevrolet Citation automobile to their home at 36 Webster Street, Haverhill. Croston, upon entering the driveway, located by the side of the stairs leading to the porch and front door, stopped the car to let Colantonio out. As Colantonio walked up the stairs, she felt James Zangari snatch her purse from under her arm.

She was stunned for a moment, then she turned around and saw Zangari running down Webster Street in the direction of Summer Street. She said she couldn't believe what she was seeing. Was Zangari guilty of robbery?

DECISION Yes, according to the Appeals Court of Massachusetts:

> Where the snatching or sudden taking of property from a victim is sufficient to produce awareness, there is sufficient evidence of force to permit a finding of robbery. In pickpocketing, which is accomplished by sleight of hand, such evidence is lacking. The difference accounts for the perceived greater severity of the offense of unarmed robbery in contrast with larceny.
>
> The minority rule followed in Massachusetts was firmly adopted in the face of contrary authority in some States. It seems that a division continues to the present although, as usual, one can anticipate that a classification of jurisdictions may falter somewhat when the decisions are examined in detail. Judgment affirmed.

Robbery Mens Rea *(Intent)*

Robbery *mens rea* is the same as theft *mens rea* (the intent to take another person's property and keep it permanently) but with the additional intent to use immediate force, or the threat of immediate force, to get it. So it's not robbery to take an iPod away from someone if you honestly, but mistakenly, believe it's yours. Of course, it's still a crime (battery if you use force or assault if you threaten to use it); it's just not robbery (LaFave and Scott 1986, 778–79).

The Degrees of Robbery

Most states have divided robbery into degrees, based on three circumstances:

1. Whether robbers are armed;
2. whether the robber acted alone or with accomplices; and
3. the kind and degree of injury robbers inflict on their victims.

New York's Penal Code (2003, § 160.00) is typical. First-degree robbers (§ 160.15) carry deadly weapons (or "play weapons" that look real) and seriously injure their victims. Second-degree robbers (§ 160.10) have accomplices or display play weapons and inflict some injury on their victims. Third-degree robbers (§ 160.05) are unarmed, and they inflict no injury on their victims.

Extortion

LO 6

Theft by **extortion** is taking someone else's property by threats of *future* harm. The circumstance element of time separates extortion from robbery: robbery is hurting, or threatening to hurt, someone *right now* if they don't give up their property; extortion is a threat to hurt someone *later* if they don't hand over the property.

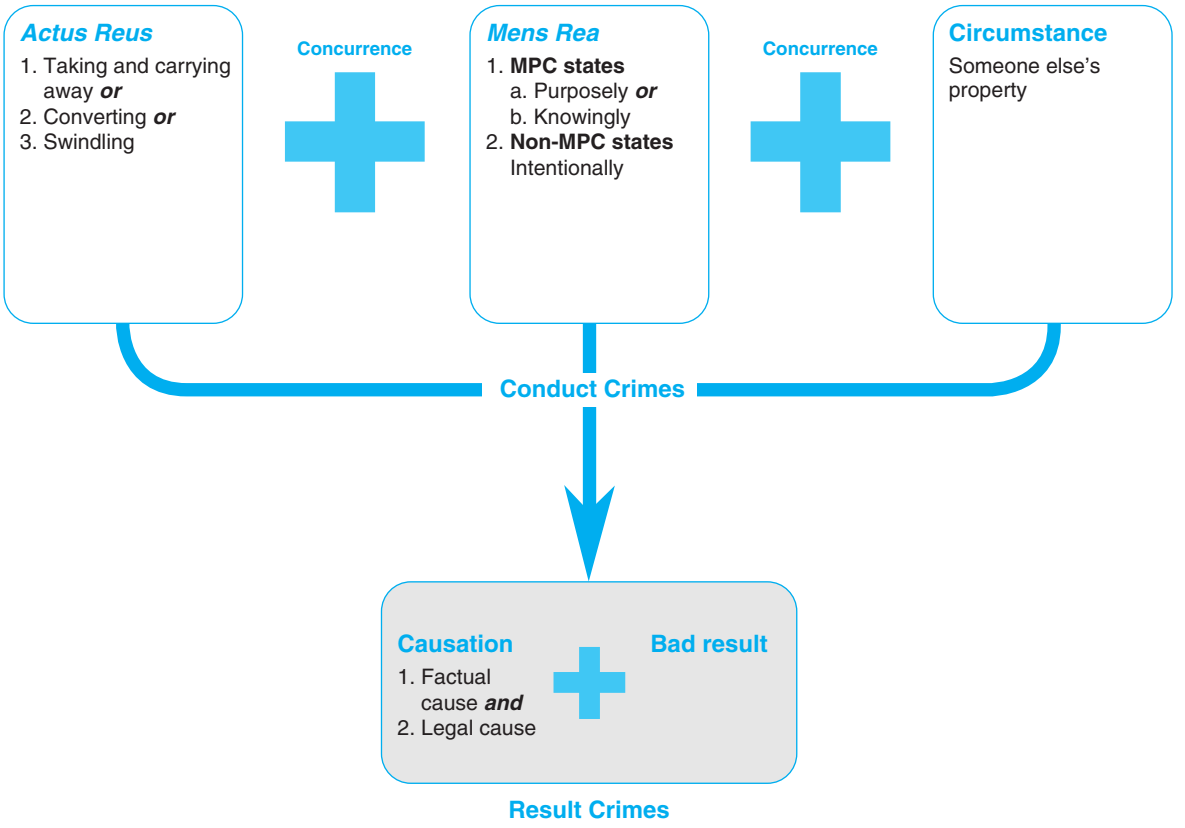
The elements of extortion consist of:

1. *Mens rea* The specific intent to take someone else's property by means of a variety of threats.
2. *Actus reus* A wide range of specific threats by which the taking of property is accomplished.

The MPC's "Theft by Extortion" (ALI 1985 2:223.4) provision is an excellent example of a comprehensive statute based on existing state law:

> *§ 223.4. Theft by Extortion*
>
> A person is guilty of theft if he purposely obtains property of another by threatening to:
>
> (1) inflict bodily injury on anyone or commit any other criminal offense; or
>
> (2) accuse anyone of a criminal offense; or
>
> (3) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute; or
>
> (4) take or withhold action as an official, or cause an official to take or withhold action; or
>
> (5) bring about or continue a strike, boycott or other collective unofficial action, if the property is not demanded or received for the benefit of the group in whose interest the actor purports to act; or
>
> (6) testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or
>
> (7) inflict any other harm which would not benefit the actor.
>
> It is an affirmative defense to prosecution based on paragraphs (2), (3) or (4) that the property obtained by threat of accusation, exposure, lawsuit or other invocation of official action was honestly claimed as restitution or indemnification for

ELEMENTS OF THEFT



harm done in the circumstances to which such accusation, exposure, lawsuit or other official action relates, or as compensation for property or lawful services.

Notice that threats don't have to be spelled out in detail; they can be indirect. The MPC's reporter puts it this way:

> It is sufficient, for example, that the actor ask for money in exchange for "protection" from harms where the actor intends to convey the impression that he will in some fashion instigate the harm from which he proposes to "protect" the victims. (ALI 1985, 2:205–6)

Also, threats don't have to be directed at hurting the victim; threats to hurt anyone are good enough, according to the code.

Let's look at one other nonviolent misappropriation of property crime that most consolidated theft statutes don't include: receiving stolen property.

Receiving Stolen Property

LO 4

It's not only a crime to steal someone else's property, it's also a crime to "receive" (accept) property someone else has already stolen. Called "receiving stolen property," the purpose of making this a crime is to prevent and to punish individuals who benefit from someone else's theft, even though they didn't have anything to do with the original theft.

Although the crime is primarily directed at fences (professionals who sell stolen property for profit), it also targets people whose mental attitude is that they know, or should know, they're buying stolen stuff because the prices are too low.

Receiving Stolen Property *Actus Reus*

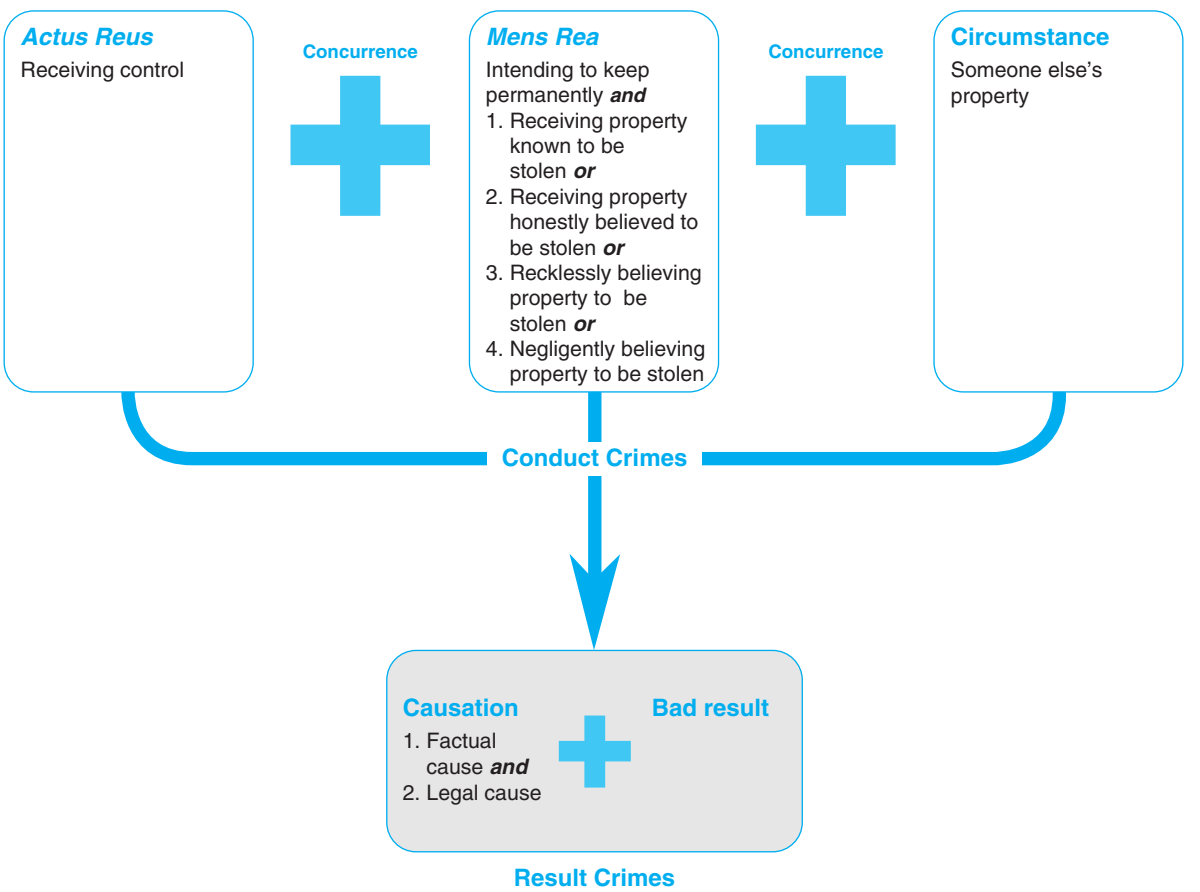
The *actus reus* of receiving stolen property is the act of receiving the property. Receiving requires that the receiver control the property, at least briefly. But the receiver doesn't have to possess the property physically. So if I buy a stolen TiVo from a fence for a friend, and the fence hands it over directly to my friend, I've received the stolen TiVo, even though I've never seen or touched it. If my friend gives the TiVo to her friend, her friend also has received the stolen TiVo. Also, anyone who temporarily hides stolen goods for someone else has received the stolen goods.

Receiving Stolen Property *Mens Rea*

LO 4

The receiving stolen property *mens rea* varies. In some states, receivers have to know the goods are stolen. In others, believing the goods are stolen is enough. In all jurisdictions, knowledge may be inferred from surrounding circumstances, such as receiving goods

ELEMENTS OF RECEIVING STOLEN PROPERTY



from a known thief or buying goods at a fraction of their real value (for example, buying a new top-of-the-line HDTV for $75). Some jurisdictions require only that receivers were reckless or negligent about whether the property was stolen. Recklessness and negligence as to whether the property was stolen are often directed at likely fences, usually junk dealers and pawn shop operators.

Another aspect of the *mens rea* of receiving stolen property is that receivers have to intend to keep the property permanently. This excludes police officers who knowingly accept stolen property and secretly place it in the hands of suspected fences to catch them. They haven't received stolen property because they don't intend to keep it, only to use it as bait.

Texas is one state that requires that receivers know that the property they control is stolen. The state has to prove actual knowledge beyond a reasonable doubt, but the prosecution can use circumstantial evidence to meet its burden of proof. In our next case excerpt, *Sonnier v. State*, a Texas trial court convicted Olga Sonnier of receiving stolen property and sentenced her to 15 years in prison for knowingly pawning four stolen P.V. amplifier speakers for $275 that were worth $1,400. The Texas Court of Criminal Appeals reversed the trial court's conviction.

In our next case excerpt, Sonnier v. State, a Texas trial court convicted Olga Sonnier of receiving stolen property and sentenced her to 15 years in prison for knowingly pawning four stolen P.V. amplifier speakers for $275 that were worth $1,400. The Texas Court of Criminal Appeals reversed the trial court's conviction.

CASE Did She Know the Speakers Were Stolen?

Sonnier v. State
849 S.W.2d 828 (Tex.App. 1992)

HISTORY

Olga Lee Sonnier, the defendant, was convicted after a bench trial in the 230th District Court, Harris County, of theft. She was sentenced to 15 years confinement, and she appealed. The Court of Appeals reversed and judgment of acquittal was ordered.

MIRABAL, J.

FACTS

On November 2, 1989, John L. Clough, the complainant, discovered several items missing from his establishment, the Houstonian Club. Among the items missing were four amplifier speakers, known as "P. V." or "Peavey" speakers. The speakers are the type that are connected to an amplifier system when bands play at the club. When the four speakers are stacked and connected, they stand about four feet tall and three feet wide. The speakers were valued at $1,400 when purchased, and could not be replaced for less than $2,000.

The complainant last saw the speakers on the night of November 1, 1989. He did not know the appellant, she was not his employee, and he did not give anyone permission to take the speakers from his club. An employee, Gaylord or "Ricky" Burton, worked for him a couple of months, but vanished at the same time the speakers did. Burton was supposed to be at the club on the morning the speakers disappeared.

The complainant reported the theft to the police. He told them he believed Burton had stolen the speakers. One of the complainant's employees had seen Burton take the speakers the morning of November 2, 1989. The speakers were found in a pawn shop. The complainant identified the speakers by their serial numbers.

Two employees of the pawn shop said two men came into the shop on November 2, 1989, and tried to pawn

the speakers. The men had no identification, and the employees could not accept the speakers without some identification. The men came back later with the appellant (Olga Sonnier), who had a driver's license, and she pawned the four speakers for $225.

The police, after an investigation, were unable to locate Burton, but did locate the appellant because her name, address, and signature were on the pawn tickets. The appellant was charged with theft. A pawn shop employee positively identified the appellant as the woman who pawned the speakers. The appellant called two witnesses, an employee of the pawn shop, Anthony Smith, and Sergeant Graves of the Houston Police Department. The appellant did not testify.

Smith testified two men tried to pawn the speakers. When he would not accept the speakers without some identification, the men left, but came back later with the appellant. She presented a driver's license and pawned the speakers. Sergeant Graves testified that the appellant phoned him and said she pawned the speakers for some friends who did not have a driver's license.

OPINION

In her first point of error, appellant asserts that the evidence is insufficient to show she had actual knowledge that the speakers were stolen. The essential elements of theft by receiving are:

(1) that a theft occurred by another person;

(2) the defendant received the stolen property; and

(3) when the defendant received the stolen property she knew it was stolen.

Texas Criminal Code Sec. 31.03. Theft

(1) A person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property.

(2) Appropriation of property is unlawful if:

  (1) it is without the owner's effective consent;

  (2) the property is stolen and the actor appropriates the property knowing it was stolen by another. . . .

Under the statute and the indictment, the State had the burden to prove beyond a reasonable doubt that appellant had actual subjective knowledge that the speakers were stolen. The evidence, viewed in the light most favorable to the prosecution, shows:

- On the same day the speakers were stolen, two men brought them to a pawn shop to hock them.
- When the pawn shop refused to accept the speakers because neither man would offer identification, the two men left, and then returned with appellant.
- Appellant pawned the four speakers for the two men. She used her driver's license, giving her correct name and address. She received $225 for the four speakers, about $56 for each, while they were worth at least $350 each.

The State emphasized in the trial court, and on appeal, that the sheer value of the speakers is enough for the trial court to find appellant knew they were stolen. The State argues that selling stolen property for less than market value is some evidence that the seller knew the property was stolen.

However, here the speakers were pawned, not sold, and the evidence does not indicate that the pawn shop paid an unusually low amount to pawn the speakers. Further, the evidence does not show that appellant, or any reasonable person of common experience, would likely even know the market value of the speakers.

We cannot say that the circumstances in this case exclude every other reasonable hypothesis except the hypothesis that appellant knew the speakers were stolen when she pawned them. We find, under the circumstances, appellant just as reasonably could have been doing a favor for her friends or acquaintances when she accompanied them to the pawn shop and used her own ID so the speakers could be pawned. We sustain appellant's point of error one.

In point of error three, appellant asserts the evidence was also insufficient to support her conviction under the "straight theft" paragraph of the indictment which alleged appellant

(1) unlawfully appropriated the speakers by acquiring them and otherwise exercising control over them,

(2) with the intent to deprive the owner of the property,

(3) without the effective consent of the owner. Tex. Penal Code Ann. ß 31.03(a), (b)(1). . . .

The evidence before the trial court placed appellant in possession of the speakers on the day they were stolen. The unexplained possession of stolen property may be sufficient to sustain a conviction for theft. To warrant such an inference of guilt from the circumstances of possession alone, the possession must be personal, recent, unexplained, and must involve a distinct and conscious assertion of a right to the property by the defendant.

When the party in possession gives a reasonable explanation for having the recently stolen property, the State must prove the explanation is false. Whether the explanation is reasonable and true is a question of fact. The fact finder is not bound to accept a defendant's explanation for possession of recently stolen property. A trial judge, sitting without a jury, is authorized to accept or reject any or all of the evidence.

Appellant was in possession of the speakers when she pledged them at the pawn shop. This was a distinct and conscious assertion of a right to the property. She pawned the speakers on the day they were stolen, a "recent" possession. The explanation for appellant's possession of the speakers came from the State's witnesses, as well as appellant's. The evidence is uncontradicted that two men

possessed the speakers and tried to pawn them. It was only when the two men were not allowed to pawn the speakers that they left, and then returned to the same pawn shop accompanied by appellant.

The explanation for appellant's possession or control over the speakers is clear and uncontested—the two men requested her help in getting the speakers pawned. There is no evidence of what the two men told appellant in order to get her help. We find nothing in the record to contradict the hypothesis that appellant may have believed the speakers belonged to one of the two men. There is not one shred of evidence placing appellant at the complainant's club at the time the speakers were removed; the evidence, instead, points only to complainant's prior employee, Burton, as the likely thief.

In addition to the inference of guilt raised by possession of recently stolen property, the evidence when viewed as a whole must still be sufficient under normal standards of appellate review, and if the evidence supports a reasonable hypothesis other than the guilt of appellant, a finding of guilt beyond a reasonable doubt is not a rational finding.

When viewed in its totality, we find the evidence in this case does not support a guilty verdict.

We reverse the judgment and order a judgment of acquittal.

QUESTIONS

1. **State the elements of theft without consent of the owner and the elements of receiving stolen property in the Texas theft statute.**
2. **List all the facts relevant to deciding each of the elements of theft without consent and receiving stolen property.**
3. **Assume you're the prosecutor. Argue that Olga Sonnier is guilty of theft without consent and receiving stolen property. Back up your answer with the facts you listed in (2).**
4. **Assume you're the defense counsel. Argue that Olga Sonnier should be acquitted of theft without consent and receiving stolen property. Back up your answer with the facts you listed in (2).**

Let's turn now to the second category of property crimes: damaging and destroying other people's property, which includes the specific crimes of arson and criminal mischief.

Damaging and Destroying Other People's Property

LO 7

In this section, we'll discuss two crimes of destroying property: arson (damaging or destroying buildings by burning) and criminal mischief (damaging or destroying personal property).

Arson

In the 1700s, "arson" was defined as "the malicious and willful burning of the house or outhouses of another." Blackstone (1769) called it an "offense of very great malignity, and much more serious than simple theft." According to Blackstone, here's why:

> Because, first, it is an offence against that right, of habitation, which is acquired by the law of nature as well as the laws of society. Next, because of the terror and confusion that necessarily attends it. And, lastly, because in simple theft the thing stolen only changes its master, but still remains in essence for the benefit of the public, whereas by burning the very substance is absolutely destroyed. (220)

Arson has grown far beyond its origins in burning houses to include burning almost any kind of building, vessel, or vehicle. Also, the property burned doesn't have to be someone else's. Today, arson is a crime against possession and occupancy, not just against ownership. So even where owners aren't in possession of, or don't occupy, their

own property, arson can still be committed against it. For example, if I lease my house and become its landlord, and I set fire to it to collect insurance on it, I've committed arson because I transferred occupancy to my tenant.

One thing hasn't changed; arson is still a very serious crime against property and persons. Arson kills hundreds and injures thousands of people every year. It damages and destroys more than a billion dollars worth of property and costs millions in lost taxes and jobs. It has also significantly increased insurance rates. Most states prescribe harsh penalties for arson. For example, in Texas and Alabama, arson is punishable by life imprisonment.

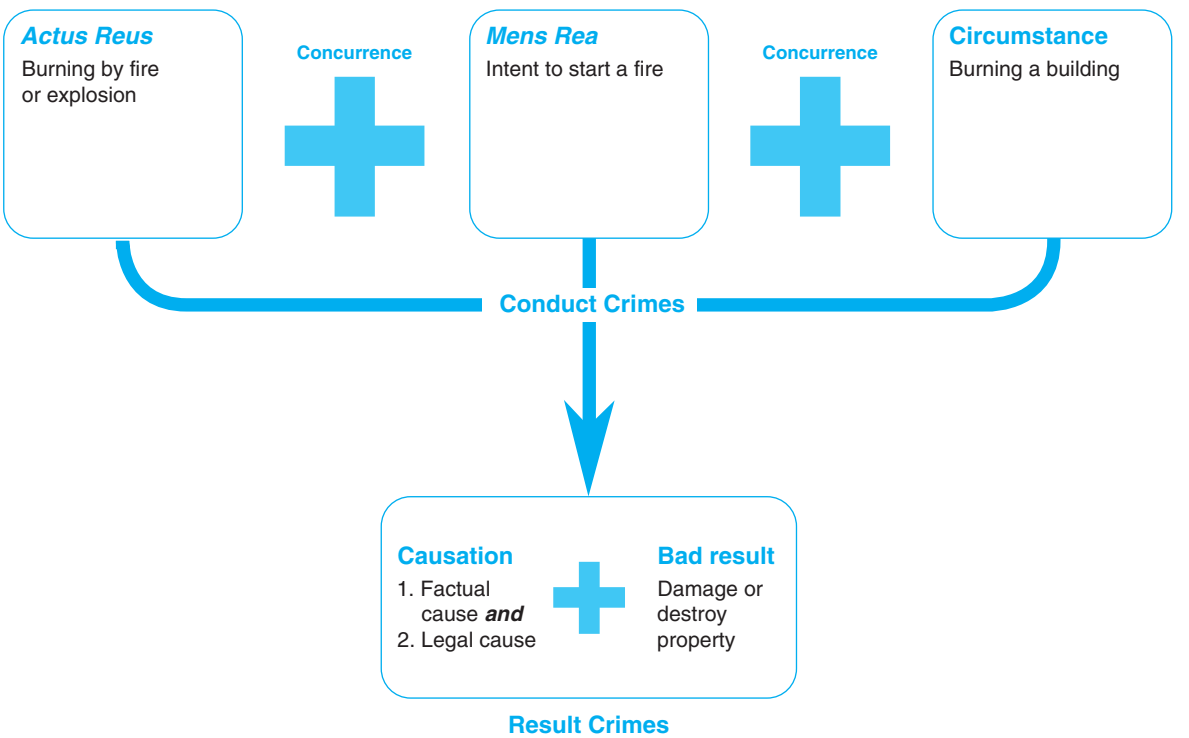
Let's look further at the *actus reus, mens rea*, and degrees of arson.

Actus Reus: *Burning*

At common law, **burning** had its obvious meaning—setting a building on fire. However, just setting the fire wasn't enough; the fire had to reach the structure and burn it. But burning didn't mean burning to the ground. Once the building caught on fire, the arson was complete, however slight the actual burning was.

Modern statutes have adopted the common law rule, and the cases pour great effort into deciding whether the smoke from the fire only blackened or discolored buildings, whether the fire scorched them, or whether the fire burned only the outside wall or the wood under it. The MPC (ALI 1985, 2:2, 3) tries to clear up many of the technical questions in common law arson by providing that "burning" means "starting a fire," even if the fire never touches the structure it was meant to burn. The drafters justify this

ELEMENTS OF ARSON



expansion of common law burning on the ground that there's no meaningful difference between a fire that has already started but hasn't reached the structure and a fire that's reached the structure but hasn't done any real damage to it.

Burning also includes explosions, even though the phrase "set on fire" doesn't usually mean "to explode." In *Williams v. State* (1992), when Tonyia Williams, one of the guests at a New Year's Eve party, started a fire, "the only physical damage caused by fire was smoke throughout the house and soot and smoke damage to one of the walls in the basement" (963).

Indiana's arson statute defined "arson" as: "A person who, by means of fire or explosive, knowingly or intentionally damages: (1) a dwelling of another person without his consent" (964). Williams argued that the "soot and smoke damage to the wall of the basement do not constitute 'damages' within the meaning of the arson statute." She argued that arson "requires proof of burning or charring as was the case at common law" (964). The state argued that

> damages in our present statute is not tied to the common law definition of the word "burning" and should therefore be construed in its plain and ordinary sense. Any damage, even smoke damage, would therefore be enough to satisfy the requirements of the statute. (964)

Williams was convicted, and she appealed. According to the Indiana Appeals Court:

> Traditionally the common law rigidly required an actual burning. The fire must have been actually communicated to the object to such an extent as to have taken effect upon it. In general, any charring of the wood of a building, so that the fiber of the wood was destroyed, was enough to constitute a sufficient burning to complete the crime of arson.

However, merely singeing, smoking, scorching, or discoloring by heat weren't considered enough to support a conviction (964). The Appeals Court agreed with the state: "We find that the smoke damage and the soot on the basement wall were enough to support a conviction for arson" (965).

Arson Mens Rea

Most arson statutes follow the common law *mens rea* requirement that arsonists have to "maliciously and willfully" burn or set fire to buildings. Some courts call arson *mens rea* general intent. According to the **general-intent definition**, purpose refers to the act in arson (burning or setting fire to buildings), not to the resulting harm (damaging or destroying them). So a prisoner who burned a hole in his cell to escape was guilty of arson because he purposely started the fire. So was a sailor who lit a match to find his way into a dark hold in a ship to steal rum. The criminal intent in arson is general—an intent to start a fire, even if there is no intent to burn a specific structure.

The Degrees of Arson

Typically, there are two degrees of arson. Most serious, **first-degree arson**, is burning homes or other occupied structures (such as schools, offices, and churches) where there's danger to human life. **Second-degree arson** includes burning unoccupied structures, vehicles, and boats.

The MPC divides arson into two degrees, based on defendants' blameworthiness. The most blameworthy are defendants who intend to destroy buildings, not merely set fire to

or burn them; these are first-degree arsonists. Second-degree arsonists set buildings on fire for other purposes. For example, if I burn a wall with an acetylene torch because I want to steal valuable fixtures attached to the wall, I'm guilty of second-degree arson for "recklessly" exposing the building to destruction even though I meant only to steal fixtures.

Statutes don't grade arson according to motive, but it probably ought to play some part, if not in formal degrees, then in sentencing. Why? Because arsonists act for a variety of motives. Some are so consumed by rage they burn down their enemies' homes. Then there are the pyromaniacs, whose psychotic compulsion drives them to set buildings on fire for thrills. And there are the rational, but equally deadly, arsonists who burn down their own buildings or destroy their own property to collect insurance. Finally, and most deadly and difficult to catch, the professional torch commits arson for hire.

Criminal Mischief

Arson under the common law was, and still is, the serious felony of intentionally burning occupied buildings. Criminal mischief descends from another common law crime, the misdemeanor called "malicious mischief." Malicious mischief consisted of destroying or damaging tangible property ("anything of value" that you can see, weigh, measure, or feel).

The modern counterpart of malicious mischief (the MPC calls it "criminal" mischief) includes three types of harm to tangible property:

1. Destruction or damage by fire, explosives, or other "dangerous acts" (the original malicious mischief)
2. Tampering with tangible property so as to endanger property
3. Deception or threat that causes someone to suffer money loss

All three forms of damage and destruction usually are defined as felonies but less serious felonies than the more serious felony arson.

Criminal Mischief Actus Reus

LO 7

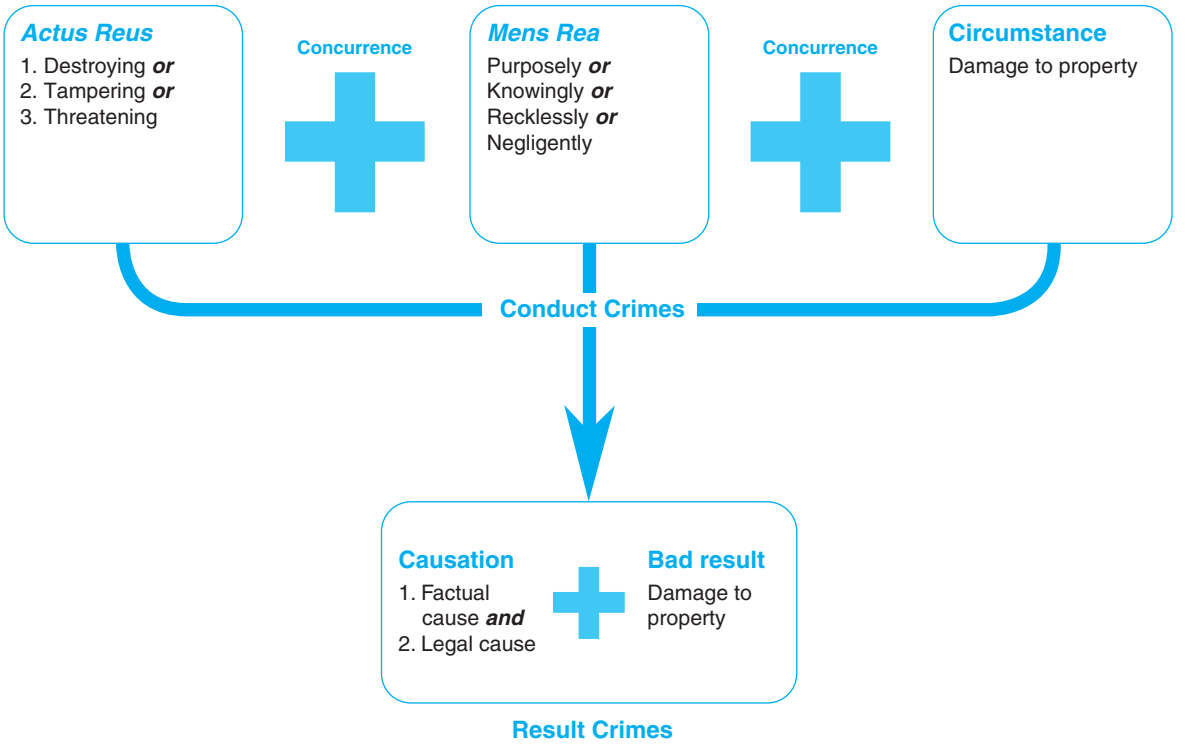
The *actus reus* of criminal mischief mirrors the three types of criminal mischief. In destruction or damage criminal mischief, the *actus reus* is burning, exploding, flooding, or committing some other dangerous act. Tampering is any act that creates a danger to property, even if it doesn't actually cause any damage to the property. So a cross burning on the lawn of an interracial couple's house wasn't "tampering" with the property, because the burning cross by itself created no damage and it didn't pose a threat of damage to the property (*Commonwealth v. Kozak* 1993).

Deception or threat *actus reus* usually consists of "expensive practical jokes," like "sending a false telegram notifying the victim that his mother is dying so that he spends several hundred dollars on a vain trip" or "misinforming a neighboring farmer that local tests of a particular seed variety have been highly successful, so that he wastes money and a year's work planting that seed" (ALI 1985, 2:2, 49).

Criminal Mischief Mens Rea

Generalizations about criminal mischief *mens rea* are impossible because statutes are all over the place, including whether they contain all the mental states we've encountered throughout the book (purposely, knowingly, recklessly, and negligently). So you need to check the malicious (or criminal) mischief statute of an individual state to find out how it defines the element of criminal intent.

ELEMENTS OF CRIMINAL MISCHIEF



We'll quote the MPC's provision because its *actus reus* and *mens rea* requirements make sense, and they're comprehensive.

§ 220.3. Criminal Mischief

(1) *Offense Defined.* A person is guilty of criminal mischief if he:

(a) damages tangible property of another purposely, recklessly, or by negligence in the employment of fire, explosives, or other dangerous means; or

(b) purposely or recklessly tampers with tangible property of another so as to endanger person or property; or

(c) purposely or recklessly causes another to suffer pecuniary loss by deception or threat.

(2) *Grading.* Criminal mischief is a felony of the third degree if the actor purposely causes pecuniary loss in excess of $5,000, or a substantial interruption or impairment of public communication, transportation, supply of water, gas or power, or other public service. It is a misdemeanor if the actor purposely causes pecuniary loss in excess of $100, or a petty misdemeanor if he purposely or recklessly causes pecuniary loss in excess of $25. Otherwise criminal mischief is a violation.

Pennsylvania's criminal mischief statute closely tracks the MPC provision. In our next case excerpt, *Commonwealth v. Mitchell* (1993), the Pennsylvania Superior Court affirmed Duane Mitchell's conviction for criminal mischief by painting "nigger," "KKK," and other racial slurs on Betty Jo and James Johnson's house.

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CASE Was He Guilty of Malicious Mischief?

Commonwealth v. Mitchell
WL 773785 (Pa.Com.Pl. 1993)

HISTORY

Following a nonjury trial, held on December 22, 1992, Duane Mitchell (the defendant) was convicted of the criminal mischief . . . graded as a misdemeanor of the third degree. The defendant filed timely post-trial motions, which were denied, and the defendant was sentenced to pay a fine of $150. The defendant filed post-trial motions, which were denied. The Superior Court affirmed the trial court's denial of the motions.

CRONIN, J.

FACTS

Following a report to the Upper Darby Police Department on Sunday, June 21, 1992, at 9:49 p.m., Lieutenant Michael Kenney and Officer Mark Manley of the Upper Darby Police Department proceeded to 7142 Stockley Road, Upper Darby, Pennsylvania. Upon arriving at the above location, both officers observed the following: painted on the front walk the word "nigger," the letters "KKK," and a cross painted under three dark marks; on each of the steps leading to the house was spray painted the word "nigger"; the front screen door had a painted cross with three marks above it; the patio was painted with the word "nigger" and a cross with three dark marks; the front walk had the word "nigger" and a cross with three dark marks; the front walk had the words "nigger get out" painted on it; the rear wall had painted the words "nigger get out or else" and a cross with the letters "KKK"; and the rear door had the words "KKK Jungle Fever Death" and a cross painted on it.

The owners of 7142 Stockley Road, Upper Darby, Pennsylvania, are James and Betty Jo Johnson, who had made settlement on the property on June 15, 1992, but had not occupied the home with their seven-year-old daughter, Zena. The Johnsons are an interracial couple, James Johnson being Afro-American and Betty Jo Johnson being Caucasian. The Johnsons had not given the defendant or any other person permission to spray paint on their property.

On June 25, 1992, the defendant, Duane Mitchell, was taken into custody by the Upper Darby Police Department. The defendant voluntarily waived, in writing, his right to counsel and his right to remain silent and freely gave a statement to the police. The defendant told the Upper Darby Police that he, the defendant, alone spray painted the above-mentioned words and symbols on the Johnson property located at 7142 Stockley Road, Upper Darby, Pennsylvania; at the time that he did the spray painting, he had been drinking.

Following a nonjury trial, held on December 22, 1992, the defendant was convicted of the summary offense of criminal mischief and the offense of ethnic intimidation, graded as a misdemeanor of the third degree in accordance with 18 Pa.C.S. § 2710(B). The defendant filed timely post-trial motions, which were denied by the order of trial court dated May 17, 1993.

OPINION

Criminal mischief is defined at 18 Pa.C.S. § 3304 as follows:

> *§ 3304. Criminal Mischief*
>
> (A) Offense Defined—A person is guilty of criminal mischief if he:
>
> (1) damages the tangible property of another intentionally, recklessly, or by negligence in the employment of fire, explosives, or other dangerous means listed in section 3302(A) of this title (relating to causing or risking catastrophe);
>
> (2) intentionally or recklessly tampers with tangible property of another so as to endanger person or property; or
>
> (3) intentionally or recklessly causes another to suffer pecuniary loss by deception or threat. 18 Pa.C.S. § 3304(A),

The defendant argues that the evidence was insufficient to prove that tangible property was damaged in the employment of fire, explosion, or other dangerous means. 1 Pa.C.S. § 1903 states that "(A) Words and phrases shall be construed according to rules of grammar and according

to their common usage; . . . " Section 1 of 18 Pa.C.S.§ 3304 makes a person guilty of the crime of criminal mischief if that person either intentionally damages the tangible property of another; recklessly damages the tangible property of another; or negligently damages the tangible personal property of another in the employment of fire, explosives or other dangerous means listed in section 3302(A) of title 18.

In this case it is abundantly clear that the defendant spray painted the phrases and words mentioned herein on the Johnsons' home located at 7142 Stockley Road, Upper Darby, Pennsylvania and that the defendant did so without the permission of the Johnsons. Sufficient evidence exists to support a verdict if the evidence, when viewed in a light most favorable to the verdict winner along with all reasonable inferences drawn therefrom, allows a fact finder to find that all elements of a crime have been established beyond a reasonable doubt.

The evidence was sufficient to prove beyond a reasonable doubt that the defendant intentionally damaged the tangible property of the Johnsons.

A court must interpret a statute to ascertain the intent of the legislature. It is clear from the use of the conjunctive "or" in Section 1 of 18 Pa.C.S. § 3304 that the legislature intended to punish either the intentional or the reckless or the negligent damaging of the tangible property of another person. The intentional spray painting of graffiti on the walls of a building is factually sufficient to support a conviction for criminal mischief.

It is equally clear that the commission of any of the other acts specified in either Section 1 or Section 2 or Section 3 of 18 Pa.C.S. § 3304 is sufficient to support a conviction for criminal mischief since the conjunctive "or" is used between Sections 2 and 3 of 18 Pa.C.S. § 3304 and the conjunctive "or" is to be given the same meaning and legislative intent as "or" is given with the states of mind (intent, reckless or negligent) in Section 1 of 18 Pa.C.S. § 3304. See 1 Pa.C.S. § 1903(A),1 Pa.C.S. § 1921(A)(B). For the foregoing reasons the defendant's post-trial motions were denied.

QUESTIONS

1. **State the elements of *actus reus* and *mens rea* as the Pennsylvania criminal mischief statute defines them.**
2. **List the facts relevant to each of the elements.**
3. **Assume you're Duane Mitchell's lawyer and argue that the facts don't prove the elements beyond a reasonable doubt.**
4. **Assume you're the state's prosecutor and argue that the facts prove the elements beyond a reasonable doubt.**

LO 8

Invading Other People's Property

The heart of burglary and criminal trespass is invading others' property, not taking, receiving, destroying, or damaging it. Invasion itself is the harm. So the two main crimes of invading someone else's property, home, or other occupied structure (**burglary**) or invading other property *(criminal trespass)* are crimes of criminal conduct; they don't require causing a bad result. So they're crimes even if no property is taken, damaged, or destroyed during the invasion.

Burglary

> Burglary, or nighttime housebreaking has always been looked upon as a very heinous offense, not only because of the abundant terror that it naturally carries with it, but also as it is a forcible invasion and disturbance of that right of habitation, which every individual might acquire in a state of nature. And the law of England has so particular and tender regard to the immunity of a man's house, that it styles it a castle and will never suffer it to be violated. (Blackstone 1769, 223)

Blackstone's definition of burglary just before the American Revolution emphasizes the special nature of homes. Why are they special? For many people, their homes are their most valuable if not their only material asset. But homes are more than property that's worth money. The novelist Sinclair Lewis (1922) described this difference between

homes as things with money value and homes as special places ("castles") that can't be measured by money alone:

> The Babbitts' house was five years old. It had the best of taste, the best of inexpensive rugs, a simple and laudable architecture, and the latest conveniences. Throughout, electricity took the place of candles and slatternly hearth-fires. Along the bedroom baseboard were three plugs for electric lamps, concealed by little brass doors. In the halls were plugs for the vacuum cleaner, and in the living-room plugs for the piano lamp, for the electric fan. The trim dining-room (with its admirable oak buffet, its leaded-glass cupboard, its creamy plaster walls, its modest scene of a salmon expiring upon a pile of oysters) had plugs which supplied the electric percolator and the electric toaster.
>
> In fact there was but one thing wrong with the Babbitt house: It was not a *home*. (chap. 2) (emphasis added)

Lewis means that a house is the material thing worth money, but a home is the haven of refuge where we seek security and privacy from the outside world.

The elements of common law burglary from which our modern law of burglary descends included:

1. Breaking and entering (*actus reus*)
2. The dwelling of another (circumstance element)
3. In the nighttime (circumstance element)
4. With the intent to commit a felony inside (*mens rea*)

Modern burglary has outgrown its common law origin of just protecting homes. Now, you can "burglarize" all kinds of structures, even vehicles, at any time of the day or night. Definitions such as "any structure" or "any building" are common in many statutes. One writer (Note 1951, 411) who surveyed the subject concluded that any structure with "four walls and a roof" was included.

Here's California's list of "structures" you can burglarize:

> Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, floating home, locked or sealed cargo container, whether or not mounted on a vehicle, trailer coach, any house car, inhabited camper, vehicle, when the doors are locked, aircraft, or mine or any underground portion thereof. (California Penal Code 2003, § 459)

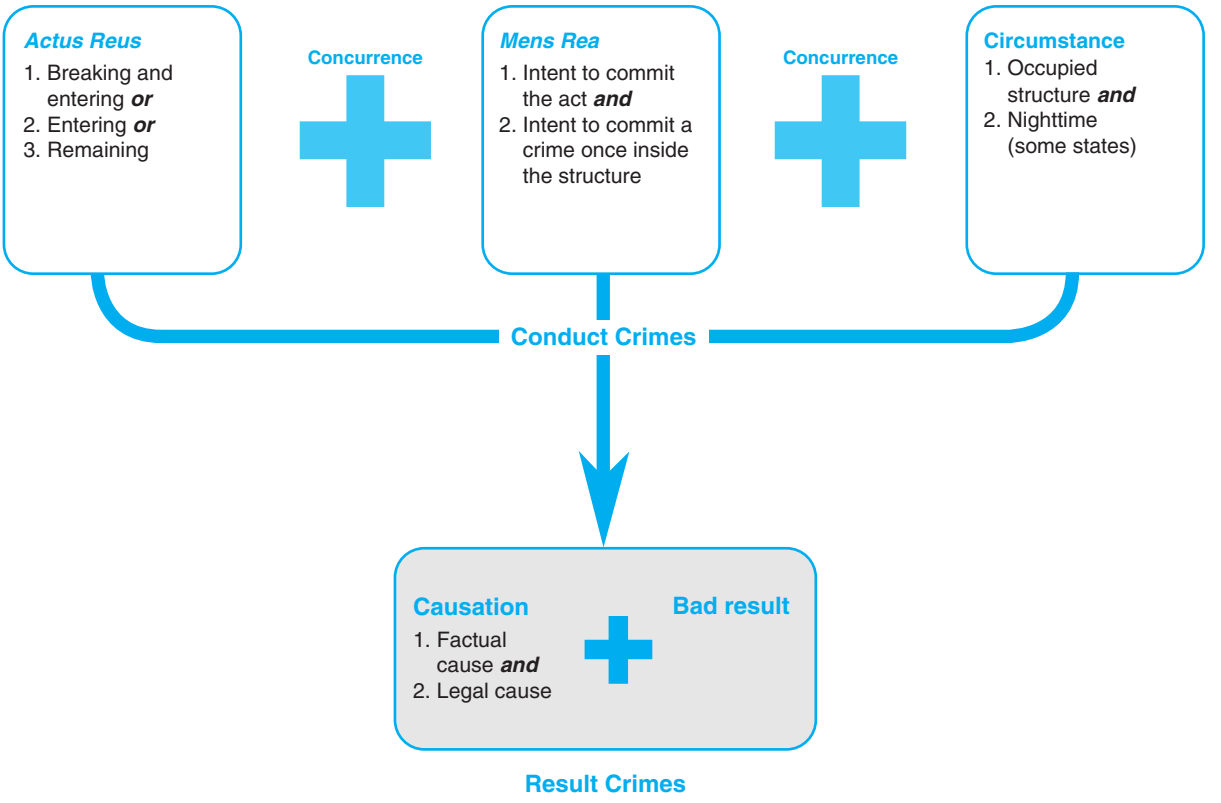
Let's look at the elements needed to prove burglary, and then the degrees of burglary.

Burglary Actus Reus

Until the 1900s, burglary *actus reus* consisted of two actions—breaking and entering. In the early days of the common law, **breaking** meant making a violent entry, usually knocking down doors and smashing windows. By 1900, the common law element of breaking had become a mere technicality, and most modern statutes have eliminated it entirely, leaving entering as the only element. A few states—for example, Massachusetts—have retained the ancient definition, "Whoever, in the night time, breaks and enters" (Massachusetts Criminal Code 2003, chap. 266 § 16).

Entering, like breaking, has a broad meaning in burglary law. From about 1650, partial entry was enough to satisfy burglary. One court (*Rex v. Bailey* 1818) ruled that

ELEMENTS OF BURGLARY



a burglar "entered" a house because his finger was inside the windowsill when he was caught. Today, some statutes have completely removed the entering element by providing that "remaining" in a structure lawfully entered is enough. So it's burglary to go into a store during business hours and wait in a restroom until the store closes with the intent to steal.

Some states don't even require burglars to get inside; it's enough if they try to get in. In *State v. Myrick* (1982), a man who got a door ajar but never set foot inside was convicted because the state's burglary statute didn't require entering or remaining. To some criminal law reformers, substituting "remaining" for "breaking and entering" badly distorts burglary's core idea—nighttime invasions into homes.

The MPC and several states take a middle ground between the old common law requirement of actual entry and eliminating entering completely. They've adopted a **surreptitious remaining element**, which means the burglar entered lawfully (for example, going into a bank during business hours) and waited inside to commit a crime.

Circumstances

The MPC's (ALI 1985, 2:2, 60) definition limits burglary to occupied structures, because they're the "intrusions that are typically the most alarming and dangerous." According to the code, "occupied structure" means "any structure, vehicle, or place adapted for overnight accommodations of persons, or for carrying on business therein, whether or not a person is actually present" (72). Most states take occupancy into account either as an element or as part of grading burglary as "aggravated burglary."

Another circumstance element of common law burglary was that burglars had to break and enter the dwelling "of another." Modern law has expanded the common law definition to include your own property; now, for example, landlords can burglarize their tenants' apartments. In *Jewell v. State* (1996), the Indiana Court of Appeals affirmed Barry Jewell's conviction for burglarizing his own house.

In* Jewell v. State *(1996), the Indiana Court of Appeals affirmed Barry Jewell's conviction for burglarizing his own house.

CASE Did He Burglarize His Own Home?

Jewell v. State
672 N.E.2d 417 (Ind.App. 1996)

HISTORY

Barry L. Jewell, after a jury trial, was convicted of burglary with a deadly weapon resulting in serious bodily injury, a class A felony, and battery resulting in serious bodily injury, a class C felony. Jewell was sentenced to an aggregate term of 48 years imprisonment. After a retrial Jewell appealed. The Indiana Court of Appeals affirmed.

ROBERTSON, J.

FACTS

In 1989, Bridget Fisher, who later married Jewell and changed her name to Bridget Jewell, purchased a home on contract in her maiden name from her relatives. Bridget and Jewell lived in the house together on and off before and after they married in 1990. Jewell helped fix the house up, and therefore, had some "sweat equity" in the house.

Jewell and Bridget experienced marital difficulties and dissolution proceedings were initiated. Jewell moved out of the house and Bridget changed the locks so that Jewell could not reenter. At a preliminary hearing in the dissolution proceedings, Bridget's attorney informed Jewell that Bridget wanted a divorce and wanted Jewell to stop coming by the house. Jewell moved into a friend's house, agreeing to pay him $100 per month in rent and to split the utility expenses.

Bridget resumed a romantic relationship with her former boyfriend, Chris Jones. Jewell told a friend that he wanted to get Jones in a dark place, hit him over the head with a two by four (a board), and cut his "dick" off. Jewell confronted Jones at his place of employment and threatened to kill him if he were to continue to see Bridget.

Jewell was observed on numerous occasions watching Bridget's house. Jewell used a shortwave radio to intercept and listen to the phone conversations on Bridget's cordless phone.

At approximately 4:00 a.m. on the morning of June 13, 1991, Jewell gained entry to Bridget's house through the kitchen window after having removed a window screen.

Bridget and Jones were inside sleeping. Jewell struck Jones over the head with a two by four until he was unconscious, amputated Jones' penis with a knife, and fed the severed penis to the dog. Bridget awoke and witnessed the attack, but she thought she was having a bad dream and went back to sleep. Bridget described the intruder as the same size and build as Jewell and as wearing a dark ski mask similar to one she had given Jewell. She observed the assailant hit Jones on the head with a board, and stab him in the lower part of his body.

A bloody two by four was found at the scene. The sheets on the bed where Bridget and Jones had been sleeping were covered in blood. Bridget discovered that one of her kitchen knives was missing. However, the police did not preserve the sheets or take blood samples and permitted Bridget to dispose of the sheets. A police officer involved explained that the possibility that any of the blood at the crime scene could have come from anyone other than Jones had not been considered.

Jones' severed penis was never found and he underwent reconstructive surgery. His physicians fashioned him a new penis made from tissue and bone taken from his leg. Jones experienced complications and the result was not entirely satisfactory.

OPINION

Jewell attacks the sufficiency of evidence supporting his conviction of Burglary, which is defined as: A person who breaks and enters the building or structure of another person, with intent to commit a felony in it, commits burglary. (Ind. Code 354321.) Jewell argues he was improperly convicted of breaking into his own house.

The burglary statute's requirement that the dwelling be that "of another person" is satisfied if the evidence demonstrates that the entry was unauthorized. In the present case, Bridget had purchased the house in her own name before the marriage. When she and Jewell experienced marital difficulties, Jewell moved out and Bridget changed the locks to prevent Jewell from reentering the house. Bridget alone controlled access to the house. Jewell entered the house at 4:00 a.m. through the kitchen window after having removed the screen.

The evidence supports the conclusion that the entry was unauthorized; and, therefore, we find no error.

Judgment AFFIRMED.

QUESTIONS

1. **List all of the facts relevant to determining whether Barry Jewell burglarized his own home.**
2. **How does the state of Indiana define the "dwelling of another" element?**
3. **How did the Court arrive at the conclusion that Barry Jewell burglarized his own home?**
4. **What's the reason for the "unauthorized entry" requirement?**
5. **Do you agree with it? Defend your answer.**

At common law, another circumstance element was "in the nighttime." There were three reasons for the nighttime element. First, it's easier to commit crimes at night. Second, it's harder to identify suspects you've seen at night. Third, and probably most important, nighttime intrusions frighten victims more than daytime intrusions. At least 18 states retain the nighttime requirement. Some do so by making nighttime an element of the crime. Others treat nighttime invasions as an aggravating circumstance. Some have eliminated the nighttime requirement entirely.

Burglary Mens Rea

Burglary is a specific-intent crime. The prosecution has to prove two *mens rea* elements:

1. The intent to commit the *actus reus* (breaking, entering, or remaining)
2. The intent to commit a crime once inside the structure broken into, entered, or remained in

The intended crime doesn't have to be serious. Intent to steal is usually good enough, but some states go further to include "any crime," "any misdemeanor," or even "any public offense" (Note 1951, 420).

Keep in mind another important point: it isn't necessary to complete or even attempt to commit the intended crime. Suppose I sneak into my rich former student Patrick's luxurious condo in Kona, Hawaii, while he's out making more money, intending to steal one of his three wireless notebook computers he doesn't need or use. Right after I get inside the front door, and not even close to where the notebooks are, my conscience gets the better of me. I say to myself, "I can't do this, even if Pat does have three notebook computers," and I slink back out the front door. I still committed burglary, because the burglary was complete the moment I was inside with the intent to steal one of the notebooks.

The Degrees of Burglary

Because burglary is defined so broadly, many states divide it into several degrees. Alabama's burglary statute is typical:

§ 13A-7-5. Burglary in the First Degree

(a) A person commits the crime of burglary in the first degree if he knowingly and unlawfully enters or remains unlawfully in a dwelling with intent to commit a crime therein, and, if, in effecting entry or while in dwelling or in immediate flight therefrom, he or another participant in the crime:

(1) Is armed with explosives or a deadly weapon; or

(2) Causes physical injury to any person who is not a participant in the crime; or

(3) Uses or threatens the immediate use of a dangerous instrument.

Sentence: 10 years to life

§ 13A-7-6. Burglary in the Second Degree

(a) A person commits the crime of burglary in the second degree if he knowingly enters or remains unlawfully in a building with intent to commit theft or a felony therein and, if in effecting entry or while in the building or in immediate flight therefrom, he or another participant in the crime:

(1) Is armed with explosives or a deadly weapon; or

(2) Causes physical injury to any person who is not a participant in the crime; or

(3) Uses or threatens the immediate use of a dangerous instrument.

(b) In the alternative to subsection (a) of this section, a person commits the crime of burglary in the second degree if he unlawfully enters a lawfully occupied dwelling-house with intent to commit a theft or a felony therein.

Sentence: 2–20 years

§ 13A-7-7. Burglary in the Third Degree

(a) A person commits the crime of burglary in the third degree if he knowingly enters or remains unlawfully in a building with intent to commit a crime therein.

Sentence: 1–10 years

Despite efforts to grade burglary according to seriousness, the broad scope of the offense invites injustices in most statutes. This is true in large part because burglary punishes the invasion and not the underlying crime—namely, the crime the burglar entered to commit. In many cases, the penalty for burglary is a lot harsher than the penalty for the intended crime. The difference between a 5-year sentence and a 20-year sentence sometimes depends upon the largely philosophical question of whether a thief forms the intent to steal before or after entering a building.

Criminal Trespass

LO 9

Criminal trespass is a broader but less serious crime than burglary. It's broader because it's not limited to invasions of occupied buildings, and the trespasser doesn't have to intend to commit a crime in addition to the trespass. The heart of criminal trespass is unwanted presence. The ancient misdemeanor called "trespass" referred to unwanted presence on (invasion of) another person's land. Not all unwanted presence was (or is) criminal trespass; only unauthorized presence qualifies. So, of course, law enforcement officers investigating a crime or gas company employees reading the meter, no matter how unwanted they are, aren't trespassers because they're authorized to be there.

Trespass used to be limited to unauthorized invasions of physical property. At first, only entry onto land was included; then entering and remaining on land and buildings were added; and since the explosion of computers and the Internet, unauthorized access to electronic information systems has been included.

Let's look at the elements and degrees of criminal trespass and at the special trespassing offense of computer trespass.

The Elements of Criminal Trespass

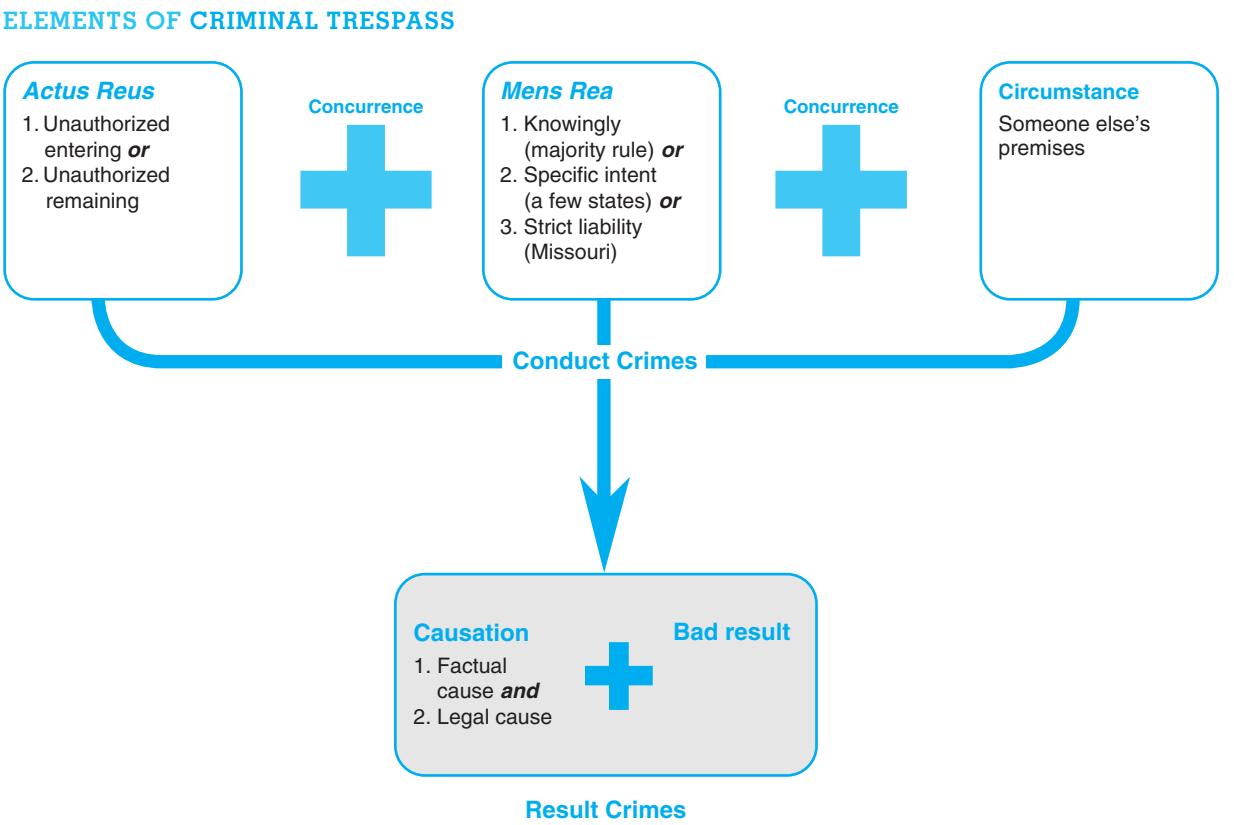
The *actus reus* of criminal trespass is the unauthorized entering of or remaining on the premises of another person (ALI 1985, 2:2, 87). The *mens rea* varies. Here are three variations:

1. The defendant knowingly enters or remains without authority or by invitation, license, privilege, or legality (most states).
2. The defendant has the specific intent to enter or remain without authority for some unlawful purpose (a few states).
3. The defendant bears strict liability for entering or remaining (Missouri, enters "unlawfully") (88).

The Degrees of Criminal Trespass

The MPC created three degrees of criminal trespass:

1. Misdemeanor entering or remaining in an occupied dwelling at night
2. Petty misdemeanor entering or remaining in any occupied building or structure
3. Violation entering or remaining in anyplace where a "no trespass" notice is given (warning to person, "no trespassing" sign, or fence)



Cybercrimes

We live in the Information Age. Computers and the Internet have greatly enhanced the capacity to exploit information about individuals and about ideas. "Life is built upon computerized data bases" (V. Johnson 2005, 255) that can be used for good and for ill.

Personal information about our health, our finances, and our likes and dislikes helps doctors, banks, and merchants help us. But it also helps identity thieves take our money and wreck our lives (V. Johnson 2005, 256–57) and, in extreme cases, even kill us and the people we love (see the *Remsburg v. Docusearch, Inc.* case excerpt later in this section).

Ideas and their practical application, **intellectual property**, can be the most valuable of all property any individual, business, or society can have. Whether this intellectual property is the copyright of a popular song; the patent on a breakthrough drug; a trade secret to an innovative product; or a trademark to a valuable brand, it's a source of wealth, jobs, and social and economic strength and stability (U.S. Department of Justice 2006, 13). But with these strengths, enhanced by computers and the Internet, come enhanced vulnerabilities to cybercrime, crimes aimed at the valuable information contained in computers, especially computer databases accessible through the Internet (*Yang and Hoffstadt* 2006, 201; also *U.S. v. Ancheta*, case excerpt later in this section).

Let's look at two cybercrimes that can be enhanced by computers and the Internet: identity theft and intellectual property theft.

Identity Theft

LO 10

Identity theft is the crime committed most often in the United States (see Figure 11.1). This isn't surprising given the enormous range of personal information contained in business, nonprofit organization, and government electronic databases. These

FIGURE 11.1 Number of Crimes 2005

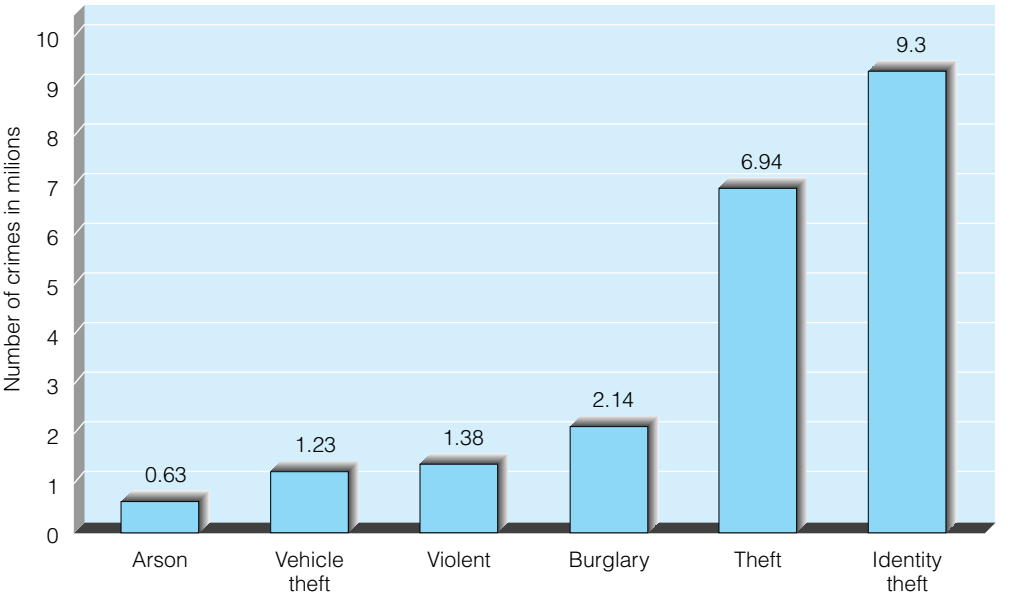


TABLE 11.1 Types of Information Collected by Government, Business, and Nonprofit Organizations

Types	Examples of the Information Collected
Names	First, middle, and last names
Relationships	Family members and employers
Contact information	Phone, physical addresses, e-mail addresses, websites
Personal information	Birthday, medical information, physical description, educational records
Official identifiers	Social security, driver's license, passport numbers
Financial records	Bank, credit card, frequent fliers, and investment accounts

Source: V. Johnson (2005, 256).

organizations collect, update, and use "masses of computerized information" about anyone who "voluntarily or involuntarily" deals with their institutions (see Table 11.1).

The consequences of wrongful access to personal information can be devastating, and they go beyond the money victims lose to identify thieves. The more than nine million annual identity theft victims spend an average of 600 hours over two to four years and $1,400 to clear their names (V. Johnson 2005, 257, n. 7). Victims may also lose job opportunities; be refused loans, education, housing, or cars; and be arrested for crimes they didn't commit (FDA 2005). In extreme cases, victims are blackmailed (a former chemistry graduate student found a security flaw in a commercial website and demanded ransom from the company to keep his mouth shut (Rustad 2001, 63); or stalked (Chapter 10, case excerpt, *State v. Hoying*); or even murdered (later in this section, case excerpt *Remsburg v. Docusearch, Inc.*).

The motivations for stealing other people's identity vary. They may be jilted lovers (*Remsburg v. Docusearch, Inc.*); or "bored juveniles, disgruntled employees, corporate spies, or organized crime networks" (Rustad 2001, 65); or just your "run-of-the-mill" thieves (V. Johnson 2005, 257).

Whatever their reasons for stealing identities, they're hard to catch. When they are caught, they're hard to convict (McMahon 2004). That has led some victims to turn to suing the providers of victims' identity. That's the route Helen Remsburg took. Liam Youens got Remsburg's 20-year-old daughter Amy's Social Security number, home address, and her job location from Docusearch, Inc. It cost him $204. A week later, Youens went to Amy's workplace. As she was leaving work, he shot her and then himself to death. This is the subject of our next case excerpt, *Remsburg v. Docusearch, Inc.*

In our next case excerpt,* Remsburg v. Docusearch, Inc., *a mother sues the provider of the information that led a man to her daughter's workplace, where he shot her as she was leaving work.

CASE Is She Entitled to Damages from the Identity Information Providers?

Remsburg v. Docusearch, Inc.
816 A.2d 1001 (N.H. 2003)

HISTORY

After her daughter was fatally shot at her workplace, Helen Remsburg, administrator of the estate of her daughter, Amy Lynn Boyer, sued in the U.S. District Court for the District of New Hampshire, defendants Docusearch, Inc., Wing and a Prayer, Inc., Daniel Cohn, Kenneth Zeiss, and Michele Gambino for wrongful death; invasion of privacy through intrusion upon seclusion; invasion of privacy through commercial appropriation of private information; violation of the federal Fair Credit Reporting Act, 15 U.S.C. §§ 1681a et seq.; and violation of the New Hampshire Consumer Protection Act, N.H.Rev.Stat. Ann. 358-A:1 et seq.

The defendants Docusearch, Inc., Wing and a Prayer, Inc., Daniel Cohn, and Kenneth Zeiss filed motions for summary judgment. ["Summary judgment" means the facts don't amount to a case against the defendant and should be dismissed without further proceedings.]

The material facts supporting the motions are undisputed.

Because the "motions raised important questions of New Hampshire law that should be resolved by the New Hampshire Supreme Court rather than a federal court," the U.S. District Court judge sent the following questions to the N.H. Supreme Court.

(1) Investigation service had duty to exercise reasonable care in disclosing personal information about daughter to client;

(2) Daughter's work address was not something secret, secluded, or private, and thus disclosure of that address could not support claim for invasion of privacy by intrusion upon seclusion;

(3) New Hampshire recognizes cause of action for invasion of privacy by appropriation of individual's name or likeness;

(4) Mother did not have a cause of action for appropriation; and

(5) Investigation service, which obtained daughter's work address through a pretextual phone call, was subject to liability for damages under the Consumer Protection Act.

DALIANIS, J.

FACTS

Docusearch, Inc. and Wing and a Prayer, Inc. (WAAP) jointly own and operate an Internet-based investigation and information service known as Docusearch.com. Daniel Cohn and Kenneth Zeiss each own 50 percent of each company's stock. Cohn serves as president of both companies and Zeiss serves as a director of WAAP. Cohn is licensed as a private investigator by both the State of Florida and Palm Beach County, Florida.

On July 29, 1999, New Hampshire resident Liam Youens contacted Docusearch through its Internet website and requested the date of birth for Amy Lynn Boyer, another New Hampshire resident. Youens provided Docusearch his name, New Hampshire address, and a contact telephone number. He paid the $20 fee by credit card. Zeiss placed a telephone call to Youens in New Hampshire on the same day. Zeiss cannot recall the reason for the phone call, but speculates that it was to verify the order. The next day, July 30, 1999, Docusearch provided Youens with the birth dates for several Amy Boyers, but none was for the Amy Boyer sought by Youens.

In response, Youens e-mailed Docusearch inquiring whether it would be possible to get better results using Boyer's home address, which he provided. Youens gave Docusearch a different contact phone number.

Later that same day, Youens again contacted Docusearch and placed an order for Boyer's Social Security number (SSN), paying the $45 fee by credit card. On August 2, 1999, Docusearch obtained Boyer's Social Security number from a credit reporting agency as a part of a "credit header" and provided it to Youens. A "credit header" is typically provided at the top of a credit report and includes a person's name, address, and Social Security number.

The next day, Youens placed an order with Docusearch for Boyer's employment information, paying the $109 fee by credit card and giving Docusearch the same phone number he had provided originally. Docusearch phone records indicate that Zeiss placed a phone call to Youens on August 6, 1999. The phone number used was the one Youens had provided with his follow-up inquiry regarding Boyer's birth date. The phone call lasted for less than one minute, and no record exists concerning its topic or whether Zeiss was able to speak with Youens.

On August 20, 1999, having received no response to his latest request, Youens placed a second request for Boyer's employment information, again paying the $109 fee by credit card. On September 1, 1999, Docusearch refunded Youens' first payment of $109 because its efforts to fulfill his first request for Boyer's employment information had failed.

With his second request for Boyer's employment information pending, Youens placed yet another order for information with Docusearch on September 6, 1999. This time, he requested a "locate by Social Security number" search for Boyer. Youens paid the $30 fee by credit card,

and received the results of the search—Boyer's home address—on September 7, 1999.

On September 8, 1999, Docusearch informed Youens of Boyer's employment address. Docusearch acquired this address through a subcontractor, Michele Gambino, who had obtained the information by placing a "pretext" telephone call to Boyer in New Hampshire. Gambino lied about who she was and the purpose of her call in order to convince Boyer to reveal her employment information. Gambino had no contact with Youens, nor did she know why Youens was requesting the information.

On October 15, 1999, Youens drove to Boyer's workplace and fatally shot her as she left work. Youens then shot and killed himself. A subsequent police investigation revealed that Youens kept firearms and ammunition in his bedroom, and maintained a website containing references to stalking and killing Boyer as well as other information and statements related to violence and killing.

OPINION

Question 1

All persons have a duty to exercise reasonable care not to subject others to an unreasonable risk of harm.

A private citizen has no general duty to protect others from the criminal attacks of third parties. This rule is grounded in the fundamental unfairness of holding private citizens responsible for the unanticipated criminal acts of third parties, because under all ordinary and normal circumstances, in the absence of any reason to expect the contrary, the actor may reasonably proceed upon the assumption that others will obey the law.

In certain limited circumstances, however, we have recognized that there are exceptions to the general rule where a duty to exercise reasonable care will arise. We have held that such a duty may arise because:

(1) a special relationship exists;

(2) special circumstances exist; or

(3) the duty has been voluntarily assumed.

The special circumstances exception includes situations where there is an especial temptation and opportunity for criminal misconduct brought about by the defendant.

Identity theft, i.e., the use of one person's identity by another, is an increasingly common risk associated with the disclosure of personal information, such as a SSN. A person's SSN has attained the status of a quasi-universal personal identification number. At the same time, however, a person's privacy interest in his or her SSN is recognized by state and federal statutes, including RSA 260:14, IV-a (Supp.2002), which prohibits the release of SSNs contained within drivers' license records. Armed with one's SSN, an unscrupulous individual could obtain a person's welfare benefits or Social Security benefits, order new checks at a new address on that person's checking account, obtain credit cards, or even obtain the person's paycheck.

The consequences of identity theft can be severe. The best estimates place the number of victims in excess of 100,000 per year and the dollar loss in excess of $2 billion per year. LoPucki, *Human Identification Theory and the Identity Theft Problem*, 80 Tex. L.Rev. 89, 89 (2001).
[See the "Number of Crimes, 2005" graph in your text for much higher numbers in 2005.]

Victims of identity theft risk the destruction of their good credit histories. This often destroys a victim's ability to obtain credit from any source and may, in some cases, render the victim unemployable or even cause the victim to be incarcerated.

The threats posed by identity theft lead us to conclude that the risk of criminal misconduct is sufficiently foreseeable so that an investigator has a duty to exercise reasonable care in disclosing a third person's personal information to a client. And we so hold. This is especially true when, as in this case, the investigator does not know the client or the client's purpose in seeking the information.

Questions 2 and 3

A tort action based upon an intrusion upon seclusion must relate to something secret, secluded or private pertaining to the plaintiff. In addressing whether a person's SSN is something secret, secluded or private, we must determine whether a person has a reasonable expectation of privacy in the number. SSNs are used to identify people to track Social Security benefits, as well as when taxes and credit applications are filed. In fact, "the widespread use of SSNs as universal identifiers in the public and private sectors is one of the most serious manifestations of privacy concerns in the Nation. Thus, while a SSN must be disclosed in certain circumstances, a person may reasonably expect that the number will remain private.

We next address whether a person has a cause of action for intrusion upon seclusion where an investigator obtains the person's work address by using a pretextual phone call. We must first establish whether a work address is something secret, secluded or private about the plaintiff.

In most cases, a person works in a public place. On the public street, or in any other public place, a person has no legal right to be alone. A person's employment, where he lives, and where he works are exposures which we all must suffer. We have no reasonable expectation of privacy as to our identity or as to where we live or work. Our commuting to and from where we live and work is not done clandestinely and each place provides a facet of our total identity.

Question 4

One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy. New Hampshire recognizes the tort of invasion of privacy by appropriation of an individual's name or likeness. The interest protected by the rule is the interest of the individual in the exclusive use of

his own identity, in so far as it is represented by his name or likeness, and in so far as the use may be of benefit to him or to others.

An investigator who sells personal information sells the information for the value of the information itself, not to take advantage of the person's reputation or prestige. The investigator does not capitalize upon the goodwill value associated with the information but rather upon the client's willingness to pay for the information. In other words, the benefit derived from the sale in no way relates to the social or commercial standing of the person whose information is sold. Thus, a person whose personal information is sold does not have a cause of action for appropriation against the investigator who sold the information.

Question 5

The last issue relates to the construction of the Consumer Protection Act, RSA chapter 358-A. We begin by considering the plain meaning of the words of the statute. RSA 358-A:2 (1995) states, in pertinent part:

> It shall be unlawful for any person to use any unfair or deceptive act or practice in the conduct of any trade or commerce within this state. Such unfair or deceptive act or practice shall include, but is not limited to, the following:
>
> III. Causing likelihood of confusion or of misunderstanding as to affiliation, connection or association with another.

Pretext phone calling has been described as the use of deception and trickery to obtain a person's private information for resale to others. The target of the phone call is deceived into believing that the caller is affiliated with a reliable entity who has a legitimate purpose in requesting the information. RSA 358-A:2, III explicitly prohibits this conduct. The pretext clearly creates a misunderstanding as to the investigator's affiliation.

The defendant argues that an investigator who makes a pretextual phone call to obtain information for sale does not conduct any "trade" or "commerce" with the person deceived by the phone call. The Consumer Protection Act defines "trade" and "commerce" as including "the advertising, offering for sale, sale, or distribution of any services and any property."

There is no language in the Act that would restrict the definition of "trade" and "commerce" to that affecting the party deceived by the prohibited conduct. In fact, the Act explicitly includes "trade or commerce directly or *indirectly* affecting the people of this state" (emphasis added). Here, the investigator used the pretext phone call to complete the sale of information to a client. Thus, the investigator's pretextual phone call occurred in the conduct of trade or commerce within the State.

We conclude that an investigator who obtains a person's work address by means of pretextual phone calling, and then sells the information, may be liable for damages under RSA chapter 358-A to the person deceived.

Remanded.

QUESTIONS

1. **State the five questions the U.S. District Court asked the New Hampshire Supreme Court to answer.**

2. **Summarize the Court's answers and the reasons for its answers.**

3. **If you were a juror, would you vote to award Helen Remsburg damages? How much? Back up your answer with the rich facts supplied by the Court.**

4. **Consider the final outcome in the case and the Remburgs' reaction to the case. About a year after the New Hampshire Supreme Court decided the case, the Remsburgs settled for $85,000.**

   Tim Remsburg, Amy Boyer's stepfather, said he and his wife wanted their day in court but grew frustrated with the court system. "This has never been about money," he said Wednesday. "There's just so many things that are still wrong, but we had to make a decision. We needed to get our lives back and focus on putting this behind us a little bit."

   Remsburg said the couple will continue to honor Amy's memory by spreading her story to the public and policy makers. And he believes the lawsuit, though it never went to trial, received enough publicity that information brokers such as Docusearch now think twice about selling private information. (Ramer 2004)

   Describe your reaction to the case after reading the excerpt and the final outcome.

Intellectual Property Theft

> The Congress shall have power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries. (U.S. Constitution, Article I, Section 8)

The importance of intellectual property wasn't lost on our nation's founders. They wrote it into the Constitution. We recognize it today in the copyright laws that

protect unauthorized copying and distribution of books, films, music compositions, sound recordings, and software programs. Other laws protect intellectual property from infringement on trademarks, trade secrets, and patents and thefts, damage, and destruction of intellectual property.

LO 11

Intellectual property definitely needs protection, even more today than before the widespread use of computers and the Internet. First, intellectual property theft costs at least $250 billion every year (Department of Justice 2006, 13). The cost may be a lot higher because businesses don't report these thefts, fearing it'll hurt business. Second, intellectual property thefts go undetected because of the difficulty of catching cybercriminals (Rustad 2001, 65).

Third, cybercriminals are smart, skilled, and highly motivated, not just by money but by the darker and dangerous side of our nature—revenge, hate, ideology, and the powerful, seductive, addictive thrill of hacking.

Hackers on the borderless Internet have obtained unauthorized access into computer systems to rob banks, infringe copyrights, commit fraud, distribute child pornography, and plan terrorist attacks (Rustad 2001, 63–64).

A whole new vocabulary has grown to describe the ways hackers commit cybercrimes. In addition to viruses and wiretapping, methods known even to functional computer illiterates like me, here's a list of some others compiled by Professor Michael Rustad (2001, 64):

- *Spoofing* When an attacker compromises routing packets to direct a file or transmission to a different location
- *Piggybacking* Programs that hackers use to piggyback on other programs to enter computer systems
- *Data diddling* The practice by employees and other knowledgeable insiders of altering or manipulating data, credit limits, or other financial information
- *Salami attack* A series of minor computer crimes—slices of a larger crime—that are difficult to detect. (For example, a hacker finds a way to get into a bank's computers. He quietly skims off a penny or so from each account. Once he has $200,000, he quits.)
- *E-mail flood attack* When so much e-mail is sent to a target that the transfer agent is overwhelmed, causing other communication programs to destabilize and crash the system
- *Password sniffing* Using password sniffing programs to monitor and record the name and password of network users as they log in and impersonating the authorized users to access restricted documents
- *Worm* Uses a network to send copies of itself to other systems and it does so without any intervention. In general, worms harm the network and consume bandwidth, whereas viruses infect or corrupt files on a targeted computer. Viruses generally do not affect network performance, because their malicious activities are mostly confined within the target computer itself.

Our last case excerpt in this chapter, *U.S. v. Ancheta* (2006), involves one cyberthief who got caught and pleaded guilty to multiple counts of computer fraud. Twenty-year-old Jeanson Ancheta worked in an Internet café in Downey, California. According to his aunt, he had modest ambitions—to join the military reserves, but he lived a luxurious lifestyle as an Internet café employee. He was often seen driving his BMW and spending

more than $600 a week on new clothes and car parts. The explanation was the profits he made from the results of a worm he authored. The worm allowed him to infect as many computers on the Internet as he could with off-the-shelf remote access Trojans (RATs) (Vamosi 2006).

Ancheta pleaded guilty to multiple counts of **cybercrime fraud**; he received 57 months in prison—the longest prison cybercrime theft sentence to date—and had to forfeit his BMW. Before you read the case excerpt, study the provisions in the federal cybercrime statute, "Fraud and Related Activity in Connection with Computers" (U.S. Code 2006, Title 18, Part I, Chapter 47 §1030(a)(5)(A)(i); 1030(a)(5)(B)(i), and 1030(b)) that Ancheta pleaded guilty to. Make sure you can state the *actus reus, mens rea*, circumstance, and bad result elements:

Fraud and Related Activity in Connection with Computers

(a) Whoever— . . .

(5)(A)

(i) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer. . . .

(5)(B) by conduct described in clause (i), (ii), or (iii) of subparagraph (A), caused (or, in the case of an attempted offense, would, if completed, have caused)—

(i) loss to 1 or more persons during any 1-year period (and, for purposes of an investigation, prosecution, or other proceeding brought by the United States only, loss resulting from a related course of conduct affecting 1 or more other protected computers) aggregating at least $5,000 in value. . . .

(b) Whoever attempts to commit an offense under subsection (a) of this section shall be punished as provided in subsection (c) of this section.

(c) The punishment for an offense under subsection (a) or (b) of this section is—

(1) (A) a fine under this title or imprisonment for not more than ten years, or both, in the case of an offense under subsection (a)(1) of this section which does not occur after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph; and

(B) a fine under this title or imprisonment for not more than twenty years, or both, in the case of an offense under subsection (a)(1) of this section which occurs after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph. . . .

Our last case excerpt in this chapter, U.S. v. Ancheta (2006), involves a twenty-year-old cyberthief who got caught and pleaded guilty to multiple counts of computer fraud.

CASE Did He Commit Fraud by Computer?

U.S. v. Ancheta
(C.D. Cal. 2006)
AQUILINA, J.

Concluding the first prosecution of its kind in the United States, a well known member of the "botmaster underground" was sentenced this afternoon to nearly five years in prison for profiting from his use of "botnets"—armies of compromised computers—that he used to launch destructive attacks, to send huge quantities of spam across the Internet, and to receive surreptitious installations of adware.

Jeanson James Ancheta, 21, of Downey, California, was sentenced to 57 months in federal prison by U.S. District Judge R. Gary Klausner in Los Angeles. During the sentencing hearing, Judge Klausner characterized Ancheta's crimes as "extensive, serious and sophisticated." The prison term is the longest known sentence for a defendant who spread computer viruses.

Ancheta pleaded guilty in January to conspiring to violate the Computer Fraud Abuse Act, conspiring to violate the CAN-SPAM Act, causing damage to computers used by the federal government in national defense, and accessing protected computers without authorization to commit fraud. When he pleaded guilty, Ancheta admitted using computer servers he controlled to transmit malicious code over the Internet to scan for and exploit vulnerable computers. Ancheta caused thousands of compromised computers to be directed to an Internet Relay Chat channel, where they were instructed to scan for other computers vulnerable to similar infection, and to remain "zombies" vulnerable to further unauthorized accesses.

Ancheta further admitted that, in more than 30 separate transactions, he earned approximately $3,000 by selling access to his botnets. The botnets were sold to other computer users, who used the machines to launch distributed denial of service (DDOS) attacks and to send unsolicited commercial e-mail, or spam. Ancheta acknowledged specifically discussing with the purchasers the nature and extent of the DDOS attacks or proxy spamming they were interested in conducting. Ancheta suggested the number of bots or proxies they would need to accomplish the specified acts, tested the botnets with them to ensure that the DDOS attacks or proxy spamming were successfully carried out, and advised them on how to properly maintain, update, and strengthen their purchased armies.

In relation to the computer fraud scheme, Ancheta admitted generating for himself and an unindicted co-conspirator more than $107,000 in advertising affiliate proceeds by downloading adware to more than 400,000 infected computers that he controlled. By varying the download times and rates of the adware installations, as well as by redirecting the compromised computers between various servers equipped to install different types of modified adware, Ancheta avoided detection by the advertising affiliate companies who paid him for every install. Ancheta further admitted using the advertising affiliate proceeds he earned to pay for, among other things, the multiple servers he used to conduct his illegal activity.

Following the prison term, Ancheta will serve three years on supervised release. During that time, his access to computers and the Internet will be limited, and he will be required to pay approximately $15,000 in restitution to the Weapons Division of the U.S. Naval Air Warfare Center in China Lake and the Defense Information Systems Agency, whose national defense networks were intentionally damaged by Ancheta's malicious code. The proceeds of Ancheta's illegal activity—including more than $60,000 in cash, a BMW automobile, and computer equipment—have been forfeited to the government.

Addressing the defendant at the conclusion of the sentencing hearing, Judge Klausner said: "Your worst enemy is your own intellectual arrogance that somehow the world cannot touch you on this." This case was investigated by the Los Angeles Field Office of the Federal Bureau of Investigation, which received assistance from the Southwest Field Office of the Naval Criminal Investigative Service and the Western Field Office of the Defense Criminal Investigative Service.

QUESTIONS

1. **State the *actus reus*, *mens rea*, attendance circumstance(s), and "bad result" elements of the federal "Fraud and Related Activity in Connection with Computers" statute.**
2. **List the relevant facts Ancheta admitted, and match them up with the elements you stated in (1).**
3. **What purposes of punishment do the forfeiture and sentence reflect? Recall the purposes of punishment laid out in Chapter 1: punishment requires (a) condemnation and hard treatment; (b) retribution; (c) a means of prevention (general and special deterrence, incapacitation, and rehabilitation); and (d) restitution. Back up your answer using the purposes of punishment.**
4. **Was the sentence fair? Too harsh? Too lenient? Explain your answer.**

SUMMARY

LO 1
- There are three categories of crimes against property: (1) taking other people's property (theft, robbery, and fraud); (2) damaging or destroying other people's property (arson, criminal mischief); (3) invading other people's property (burglary, criminal trespass) and receiving stolen property.

LO 3
- Common law false pretenses *mens rea* requires the purpose or specific intent to obtain property by deceit and lies.

LO 2
- The history of larceny and fraud is also the history of supplementing civil actions with criminal punishment.

LO 3
- The federal mail fraud statute defines "false pretenses" (fraud) much more broadly than common law fraud. It includes "schemes to defraud or for obtaining money or property."

LO 2
- Most states have consolidated the old crimes of larceny, embezzlement, and false pretenses into one offense called theft.

LO 2
- Under modern theft statutes, *actus reus* includes taking and carrying away, or converting, or swindling to obtain possession of someone else's property.

LO 5
- Criminal taking began as part of the social concern with violent crimes against the person. That concern led to the creation of the common law felony of robbery.

LO 5
- The core of robbery is theft accomplished under circumstances intended to terrorize the victim by actual injury or the threat of immediate injury to the victim. The use of force, or the threat of force, is the essence of the robbery criminal act. Most states have divided robbery into degrees.

LO 6
- Theft by extortion, often called blackmail, is taking someone else's property by threats of future harm.

LO 4
- Receiving stolen property requires that the receiver control the property, at least briefly. In some states, receivers of stolen property have to know the goods are stolen; in others, believing the goods are stolen is enough.

LO 11
- Besides traditional ways to take, destroy, damage, and invade other people's property, cybercrime, namely crimes committed through the Internet or some other computer network, is a serious and rapidly growing new problem.

LO 7
- Arson includes burning almost any kind of building, vessel, or vehicle. Arson is a very serious crime against property and persons.

LO 7
- There are three kinds of criminal mischief: (1) destruction or damage criminal mischief, (2) tampering, (3) deception or threat.

LO 8
- The heart of burglary is invading others' property. Burglary is a specific-intent crime.

LO 8, LO 9
- Criminal trespass is a broader but less serious crime than burglary. The heart of criminal trespass is unwanted presence.

LO 8, LO 9
- Computers and the Internet have greatly enhanced the capacity to exploit information about individuals and about ideas; this can be used for good and for ill.

LO 10

- Identity theft is the crime committed most often in the United States, and the consequences of wrongful access to personal information can be devastating.

LO 11

- Intellectual property definitely needs protection, even more today than before the widespread use of computers and the Internet.

KEY TERMS

theft, p. 372
robbery, p. 372
fraud, p. 372
receiving stolen property, p. 372
arson, p. 372
criminal mischief, p. 372
cybercrime, p. 372
larceny, p. 373
conversion, p. 373
tangible property, p. 373
intangible property, p. 373
embezzlement, p. 374
abuse-of-trust crimes, p. 374
white-collar crimes, p. 374
obtaining property by false pretenses, p. 374
consolidated theft statutes, p. 375
common law fraud, p. 378
federal mail fraud statute, p. 378
Ponzi schemes, p. 381
extortion (blackmail), p. 390
burning (in arson), p. 396
general-intent definition (of arson), p. 397
first-degree arson, p. 397
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burglary, p. 401
breaking (in burglary), p. 402
entering (in burglary), p. 402
surreptitious remaining element (in burglary), p. 403
criminal trespass, p. 406
intellectual property, p. 408
identity theft, p. 408
cybercrime fraud, p. 414

WEB RESOURCES

To prepare for exams, visit the *Criminal Law* companion website at www.cengage.com/criminaljustice/samaha, which features essential review and study tools such as flashcards, a glossary of terms, tutorial quizzes, and Supreme Court updates.

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LEARNING OBJECTIVES

1 To understand the origins and development of how disorderly conduct expanded to include "quality of life" offenses aimed at "bad manners" in public.

2 To understand how efforts to control bad manners in public underscore the tension between order and liberty in constitutional democracies.

3 To understand that the "broken-windows" theory claims "quality of life" crimes are linked to serious crime.

4 To appreciate that the widespread consensus among all classes, races, and communities that "street people's" and "street gangs'" bad behavior should be controlled has shaped the content of the criminal law.

5 To understand that most people are more worried about bad public manners than they are about serious crimes.

6 To understand that fear of gangs have led state and city governments to enact criminal laws to obtain civil gang injunctions to regulate gang behavior.

7 To appreciate that the empirical evidence on the effectiveness of civil gang injunctions in controlling gang behavior is mixed.

8 To know that "victimless crimes" against public decency (the ancient "crimes against public morals") are a hot-button issue between those who believe that criminal law should enforce morality and those who believe the nonviolent behavior of competent adults is none of the law's business.

On July 16, 2009, U.S. Attorney General Eric Holder met with community youth and families participating in the Los Angeles anti-gang program, Summer Night Lights, and the Watts Gang Task Force, in South Los Angeles, California. Earlier that day Holder annou that $500,000 in Reco Act funds were award the Support for Harbo Women's Lives (SHAW House, which offers su and transitional housing ser-vices for victims of domestic violence. SHAWL is a program of the Volunteers of America of Los Angeles.

Crimes Against Public Order and Morals

CHAPTER OUTLINE

What Gang Activity Is Criminal and What's the Proper Response to Criminal Gangs?

Youth crime in the United States remains near the lowest levels seen in the past three decades, yet public concern and media coverage of gang activity has skyrocketed since 2000. Fear has spread from neighborhoods with long-standing gang problems to communities with historically low levels of crime, and some policy makers have declared the arrival of a national gang "crisis." Yet many questions remain unanswered. How can communities and policy makers differentiate between perceived threats and actual challenges presented by gangs? Which communities are most affected by gangs and what is the nature of that impact? How much of the crime that plagues poor urban neighborhoods is attributable to gangs? And what approaches work to promote public safety?

(Greene and Pranis, Street Gangs *2009, 5)*

> The last species of offenses which especially affect the commonwealth are . . . the due regulation and domestic order of the kingdom. The individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners; and to be decent, industrious, and inoffensive. This head of offenses must therefore be very miscellaneous, as it comprises all such crimes as especially affect public society. (Blackstone 1769, 162)

Blackstone's eighteenth-century introduction to his chapter on crimes related to the "regulation and domestic order of the kingdom" is a good way to introduce you to the subject of this chapter, crimes against public order and morals. These crimes cover two vast areas of criminal law that involve mostly very minor crimes but, nonetheless, affect many more people than the crimes against persons and their property we've already discussed (Chapters 9–11) and the crimes against the state we'll discuss in Chapter 13.

LO 1 LO 2

We'll first look at **disorderly conduct crimes**—the misdemeanor of individual disorderly conduct and the group disorderly conduct felony of riot. Next, we'll examine in depth the application of disorderly conduct laws to what are now called **"quality of life" crimes**. These are crimes of "bad manners" in public. Significant numbers of people across the spectrums of age, sex, race, ethnicity, and class believe strongly that "bad manners" in public places create disorder and threaten the quality of life of ordinary people (Skogan 1990). Others believe just as strongly that making bad manners a crime denies individuals their liberty without due process of law (Fifth and Fourteenth Amendments to the U.S. Constitution; Chapter 2).

LO 2

Constitutional democracy can't survive without order and liberty, but there's a natural tension between them because they're fundamental values in conflict. The U.S. Supreme Court has recognized the need to balance order and liberty by holding repeatedly that "ordered liberty" is a fundamental requirement of our constitutional system (Chapter 2). In this chapter, "**order**" refers to acting according to ordinary people's standard of "good manners." "**Liberty**" refers to the right of individuals to come and go as they please without government interference.

LO 1

Throughout most of our history, "bad manners" crimes have been called **crimes against public order**. Today, we call them "quality of life" crimes. The list of quality of life offenses is long, including public drinking and drunkenness; begging and aggressive panhandling; threatening behavior and harassment; blocking streets and public places; graffiti and vandalism; street prostitution; public urination and defecation; unlicensed vending; and even "squeegeeing"—washing the windshields of stopped cars and demanding money for the "service."

We'll also examine the facts and myths about youth gang activity enforcement tactics with special emphasis on the empirical research on the effectiveness of the noncriminal preventive response, namely the civil gang injunction (CGI).

Finally, we'll examine "**victimless crimes,**" crimes involving willing participants, or participants who don't see themselves as victims.

Disorderly Conduct

Disorderly conduct crimes are offenses against public order and morals. Except for riot, they are minor crimes that legislators, judges, and scholars didn't pay much attention to until the 1950s when the Model Penal Code (MPC) was adopted by the American Law Institute (ALI). Why the lack of attention? The punishment was minor (small fines or a few days in jail); most defendants were poor; and convictions were rarely appealed. But disorderly conduct offenses are an important part of the criminal justice system for three reasons: they "affect large numbers of defendants, involve a great proportion of public activity, and powerfully influence the view of public justice held by millions of people" (ALI 1985, Part II, Vol. 3, Art. 250, 251, 309).

We'll divide our discussion of these crimes into two sections: the minor offenses included in individual disorderly conduct statutes (fighting in public) and the felony of riot (group disorderly conduct).

Individual Disorderly Conduct

LO 1

Disorderly conduct statutes grew out of the ancient common law crime known as "breach of the peace" (see Chapter 1, "Common Law Origins" section). It included both

the misdemeanors of **actual disorderly conduct** (e.g., fighting in public, making unreasonable noise) and **constructive disorderly conduct**, which was conduct that "tends to provoke or excite others to break it [the peace]" (Blackstone 1769, 148). Some statutes define "disorderly conduct" in general terms. Wisconsin's is a good example:

> Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor. (Wisconsin Criminal Code 2003, § 947.01)

Here's the other extreme, the frequently quoted Chicago disorderly conduct ordinance, which one court (*Landry v. Daley* 1968, 969) called "one of the most charming grab bags of criminal prohibitions ever assembled":

> All persons who shall make, aid, countenance or assist in making any improper noise, riot, disturbance, breach of the peace or diversion tending to a breach of the peace, within the limits of the city; all persons who shall collect in bodies or crowds for unlawful purposes, or for any purpose, to the annoyance or disturbance of other persons; all persons who are idle or dissolute and go about begging; all persons who use or exercise any juggling or other unlawful games; all persons who are found in houses of ill-fame or gaming houses; all persons lodging in or found at any time in sheds, barns, stables, or unoccupied buildings, or lodging in the open air and not giving a good account of themselves; all persons who shall wilfully assault another in the city, or be engaged in, aid, abet in any fight, quarrel, or other disturbance in the city; all persons who stand, loiter, or stroll about in any place in the city, waiting or seeking to obtain money or other valuable things from others by trick or fraud, or to aid or assist therein; all persons that shall engage in any fraudulent scheme, device or trick to obtain money or other valuable thing in any place in the city, or who shall aid, abet, or in any manner be concerned therein; all touts, rapers, steerers, or cappers, so called, for any gambling room or house who shall ply or attempt to ply their calling on any public way in the city; all persons found loitering about any hotel, block barroom, dramshop, gambling house, or disorderly house, or wandering about the streets either by night or day without any known lawful means of support, or without being able to give a satisfactory account of themselves; all persons who shall have or carry any pistol, knife, dirk, knuckles, slingshot, or other dangerous weapon concealed on or about their persons; and all persons who are known to be narcotic addicts, thieves, burglars, pickpockets, robbers or confidence men, either by their own confession or otherwise, or by having been convicted of larceny, burglary, or other crime against the laws of the state, who are found lounging in, prowling, or loitering around any steamboat landing, railroad depot, banking institution, place of public amusement, auction room, hotel, store, shop, public way, public conveyance, public gathering, public assembly, court room, public building, private dwelling house, house of ill-fame, gambling house, or any public place, and who are unable to give a reasonable excuse for being so found, shall be deemed guilty of disorderly conduct, and upon conviction thereof, shall be severely fined not less than one dollar nor more than two hundred dollars for each offense. (Quoted in ALI 1985, Part II, Vol. 3, 326–27)

Both types of statutes create two problems. First, they're too vague to give individuals and law enforcement officers notice of what the law prohibits (see Chapter 2, "Void-for-Vagueness Doctrine" section). Second, neither requires *mens rea* (Chapter 4). The MPC (ALI 1985, Part II, Vol. 3, 324–25) addresses both of these problems in Section 250.2:

§ 250.2. DISORDERLY CONDUCT

(1) Offense Defined. A person is guilty of disorderly conduct if, with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:

(a) engages in fighting or threatening, or in violent or tumultuous behavior; or

(b) makes unreasonable noise or offensively coarse utterance, gesture or display, or addresses abusive language to any person present; or

(c) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.

"Public" means affecting or likely to affect persons in a place to which the public or a substantial group has access; among the places included are highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, or any neighborhood.

(2) Grading. An offense under this section is a petty misdemeanor if the actor's purpose is to cause substantial harm or serious inconvenience, or if he persists in disorderly conduct after reasonable warning or request to desist. Otherwise disorderly conduct is a violation.

Notice that Section 250.2(1) requires a mental attitude of subjective fault (Chapter 4)—namely, either knowledge or recklessness. So conscious risk creation is the minimum level of culpability; negligence isn't good enough (see Chapter 4, "The Model Penal Code's (MPC's) Mental Attitudes" section). Next, notice that the MPC limits conduct that qualifies as disorderly conduct *actus reus* to three actions:

1. Fighting in public
2. Making "unreasonable noise" or using "abusive language" (see Chapter 2, "Free Speech" section)
3. Creating a "hazardous or physically offensive condition," such as strewing garbage, setting off "stink bombs," or turning off lights in crowded public places

In practice, the most common use of disorderly conduct statutes is the ban on fighting in public. Fighting can cause two harms: disturbing community peace and quiet and disturbing or endangering innocent bystanders. The MPC also includes several "special" sections devoted to other specifically defined acts of disorderly conduct (Table 12.1). The majority of states have adopted the *actus reus* and the *mens rea* provisions of the MPC.

Group Disorderly Conduct (Riot)

Group disorderly conduct consisted of three misdemeanors at the common law: unlawful assembly, rout, and riot. All three were aimed at preventing "the ultimate evil of open disorder and breach of the public peace" (ALI 1985, 3:313).

Unlawful assembly was committed when a group of at least three persons joined for the purpose of committing an unlawful act. If the three or more took action toward achieving their purpose, they committed **rout**. If the group actually committed an unlawful violent act, or performed a lawful act in a "violent or tumultuous manner," they committed **riot**.

TABLE 12.1 Model Penal Code Special Disorderly Conduct Sections

Offense	Element	Description
False public alarms (250.3)	*Mens rea*	Knowingly
	Actus reus	Initiating or circulating a report or warning of a bombing or a catastrophe
	Harm	Likely to cause evacuation or public inconvenience or alarm
Public drunkenness (250.5)	*Actus reus*	Appearing in a public place "manifestly under the influence of alcohol, narcotics, or other drug, not therapeutically administered"
	Harm	To the degree it may "endanger himself or other persons or property, or annoy persons in his vicinity"
Loitering or prowling (250.6)	*Actus reus*	Loitering or prowling
	Circumstances	"In a place, at a time, or in a manner not usual for law-abiding individuals"
		Warrant "alarm for the safety of persons or property in the vicinity"
Obstructing highways or other public passages (250.7)	*Mens rea*	Purposely or recklessly
	Actus reus	Obstructs highway or public passage (except if exercising lawful First Amendment rights) (Chapter 2)
Disrupting meetings and processions (250.8)	*Mens rea*	Purposely
	Actus reus	Prevent or disrupt a lawful meeting, procession, or gathering either physically or by words, gestures, or displays designed to "outrage the sensibilities of the group"

Committing riot didn't require the group to plan their unlawful violent act before they got together; it was enough that once together they came up with the riotous plan of violence. The Riot Act of 1714 turned the common law misdemeanor of riot into a felony. The felony consisted of 12 or more persons who "being unlawfully, riotously, and tumultuously assembled together" stayed together for one hour after being warned to disperse by the reading of a proclamation. (Now you know the original meaning of "reading the riot act.") Here's Queen Victoria's version:

> Our sovereign lady the Queen chargeth and commandeth all persons being assembled immediately to disperse themselves and peaceably to depart to their habitations or to their lawful business, upon the pains contained in the Act made in the first year of King George for preventing tumults and riotous assemblies. God Save the Queen. (ALI 1985, 3:314, n. 8)

Riot is still a felony under modern law for two reasons. First, it lets the law provide harsher penalties for disorderly conduct when group behavior gets "especially alarming or dangerous." Second, it allows the law to punish persons in a disorderly crowd who

disobey police orders to disperse (ALI 1985, 3:316–17). Every state has some form of riot act; many have adopted the MPC provision:

> *RIOT §250.1(1) (1) RIOT*
>
> A person is guilty of riot, a felony of the third degree, if he participates with [two] or more others in a course of disorderly conduct:
>
> (a) with purpose to commit or facilitate the commission of a felony or misdemeanor;
>
> (b) with purpose to prevent or coerce official action; or
>
> (c) when the actor or any other participant to the knowledge of the actor uses or plans to use a firearm or other deadly weapon.

"Quality of Life" Crimes

LO 3

In the 1980s, two prominent scholars sensed a deep public yearning for recovering what they called a lost sense of public "good manners," especially in our largest cities. Professors James Q. Wilson and George L. Kelling (1982) suggested that what were labeled "petty crimes" weren't just "bothering" law-abiding people and creating a yearning for a more polite past; they were connected to serious crime. They called this connection between disorderly conduct and serious crime the **broken-windows theory**. According to Kelling, research conducted since the article was written in 1982 has demonstrated "a direct link between disorder and crime."

Wilson described the broken-windows theory in 1996 more cautiously. In the foreword to a book written by Kelling and Catherine M. Coles, *Fixing Broken Windows* (1996), Wilson wrote:

> We used the image of broken windows to explain how neighborhoods might decay into disorder and even crime if no one attends faithfully to their maintenance. If a factory or office window is broken, passersby observing it will conclude that no one cares or no one is in charge. In time, a few will begin throwing rocks to break more windows. Soon all the windows will be broken, and now passersby will think that, not only is no one in charge of the building no one is in charge of the street on which it faces. Only the young, the criminal, or the foolhardy have any business on an unprotected avenue, and so more and more citizens will abandon the street to those they assume prowl it. Small disorders lead to larger and larger ones, and perhaps even to crime. (xiv)

Professor Wesley G. Skogan (1990), the author of some of the research on which Kelling relies, has also characterized his and others' research more cautiously than Kelling:

> Our concern with common crime is limited to whether disorder is a *cause* of it. . . . Neighborhood levels of disorder are closely related to crime rates, to fear of crime, and the belief that serious crime is a neighborhood problem. This relationship could reflect the fact that the link between crime and disorder is a *causal* one, or that both are dependent on some third set of factors (such as poverty or neighborhood instability). (10) (emphasis added)

Despite the caution, Skogan still concluded that the data "support the proposition that disorder needs to be taken seriously in research on neighborhood crime and that, both directly and through crime, it plays an important role in neighborhood decline" (75).

Professor Bernard Harcourt (2001) at the University of Chicago Law School replicated Skogan's research and found a weak to no causal link between disorder and serious crime (8–9). The best and most recent research strongly suggests that disorder and serious crime have common causes, but they don't cause each other, at least not directly (Sampson and Raudenbush 1999, 637–38).

LO 4, LO 5

Most of the national debate over crime, criminal law books (this one included), and criminal justice courses concentrate on the serious crimes we've analyzed in Chapters 9–11. But there's a disconnect between this national focus on one side and local concern on the other. Mayors and local residents do worry about murder, rape, burglary, and theft, but they also care a lot about order on their streets, in their parks, and in other public places.

LO 5

In a careful and extensive survey of a representative sample of high- and low-crime neighborhoods in major cities, public drinking, followed closely by loitering youths, topped the list of worries among all classes, races, and ethnic groups, among both men and women.

LO 5

Survey participants also listed begging, street harassment, noisy neighbors, vandalism, street prostitution, and illegal vending (Skogan 1990, 2). Prosecutor Karen Hayter found this out when she created Kalamazoo, Michigan's Neighborhood Prosecutor Program. When Hayter "asked residents what crimes worried them the most, she thought it would be the big ones: murder, assault, breaking and entering," but that's not what she was told. Instead, said Hayter, "Loud noise, littering, loitering, curfew violations, junk autos, rundown houses—those are considered quality-of-life crimes, and they're very important to residents in an area" (National Public Radio 2003).

LO 4

Any examination of criminal law has to recognize quality of life crimes as part of early twenty-first-century life. Since the 1980s, state statutes and city ordinances have reinvigorated and molded the old crimes against public order and morals to fit the public's demand that criminal justice preserve, protect, and even restore the quality of life in their communities. The courts have assumed the burden of balancing the social interest in public order against the social interest in individual liberty and privacy (Skogan 1990, 21).

LO 1

Let's examine how states and localities have shaped traditional public order and morals laws to control the public behavior of two groups—"street people" and street gangs—and the quality of life crimes commonly associated with them: vagrancy, loitering, panhandling, and gang activity.

Vagrancy and Loitering

LO 4

For at least 600 years, it's been a crime for poor people to roam around without visible means of support **(vagrancy)** or to stand around with no apparent purpose **(loitering)**. The Articles of Confederation specifically denied to paupers the freedom to travel from state to state. In 1837, in *Mayor of New York v. Miln*, the U.S. Supreme Court approved the efforts by the state of New York to exclude paupers arriving by ship. According to the Court, it's as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts as it is to guard against physical pestilence, which may arise from unsound and infectious articles. Every state in the union had and enforced vagrancy and loitering statutes that wrote the Court's view into law (Simon 1992, 631).

Vagrancy

LO 4

Laws targeting poor people's behavior, and the attitudes behind them, began to change during the Great Depression of the 1930s. In 1941, the U.S. Supreme Court struck down a vagrancy statute that prohibited the importation of paupers into California.

In response to the argument that the regulation of paupers enjoyed a long history, the Court dismissed the earlier decisions as out of date. According to the Court, "We do not think that it will now be seriously contended that because a person is without employment and without funds he constitutes a 'moral pestilence.'" In a concurring opinion, Justice Robert Jackson encouraged the Court to "say now, in no uncertain terms, that a mere property status, without more, cannot be used by a state to test, qualify, or limit his rights as a citizen of the United States" (*Edwards v. California* 1941, 184).

During the 1960s and 1970s, courts began to strike down vagrancy laws because they unfairly discriminated against the poor. The following excerpt from an opinion written by Chief Justice Thompson of the Nevada Supreme Court in *Parker v. Municipal Judge* (1967) reflects this trend:

> It is simply not a crime to be unemployed, without funds, and in a public place. To punish the unfortunate for this circumstance debases society. The comment of [U.S. Associate Supreme Court] Justice Douglas is relevant: "How can we hold our heads high and still confuse with crime the need for welfare or the need for work?"

In *Papichristou v. City of Jacksonville* (1972), the U.S. Court struck down the Jacksonville, Florida, vagrancy ordinance, which was nearly identical to virtually every other vagrancy law in the country. Writing for a unanimous Court, Justice Douglas declared the ordinance void for vagueness, because it both failed to give adequate notice to individuals and it encouraged arbitrary law enforcement (Chapter 2). The Court warned that criminal statutes aimed at the poor

> teach that the scales of justice are so tipped that even-handed administration of the law is not possible. The rule of law, evenly applied to minorities as well as majorities, to the poor as well as the rich, is the great mucilage that holds society together. (169)

Loitering

LO 4

In *Kolender v. Lawson* (1983), the U.S. Supreme Court tightened the constitutional restrictions on loitering statutes. The counterpart to vagrancy, which means to roam about with no visible means of support, loitering means to "remain in one place with no apparent purpose." In *Kolender*, the Court struck down a California statute that combined ancient vagrancy and loitering into a new crime defined as "wandering the streets and failing to produce credible identification" when a police officer asked for it. As it did with the vagrancy statute in *Papachristou*, the Court ruled that the statute was void for vagueness.

According to Harry Simon (1992), staff attorney for the Legal Aid Society in Santa Ana, California:

> With the Supreme Court's decisions in Papichristou and Kolender, loitering and vagrancy laws ceased to be effective tools to punish and control the displaced poor. While judicial attitudes on vagrancy and loitering laws had changed, local officials perceived the invalidation of these laws as a dangerous assault on their authority to enforce social order. (645)

According to Robert C. Ellickson (1996), professor of Property and Urban Law at the Yale Law School:

> Many judges at the time seemed blind to the fact that their constitutional rulings might adversely affect the quality of urban life and the viability of city centers. It is one thing to protect unpopular persons from wrongful confinement; it is another to imply that these persons have no duty to behave themselves in public places. In addition, federal constitutional rulings are one of the most centralized and inflexible forms of lawmaking. In a diverse and dynamic nation committed to separation of powers and federalism, there is much to be said for giving state and local legislative bodies substantial leeway to tailor street codes to city conditions, and for giving state judges ample scope to interpret the relevant provisions of state constitutions. (1213–14)

At the same time these decisions were easing up on control over the behavior of poor people in public, other events were creating a rapidly—and to many a frightening—growth of an underclass. Mental institutions were in the midst of major deinstitutionalization of the mentally ill; family breakdowns and breakups were increasing steeply; crack cocaine was becoming more available on the streets; hard economic times were upon us; and budgets for social programs were tightening.

By the late 1980s, this rising underclass and its public presence and behavior led many city dwellers to conclude that things had gone too far. The liberal columnist Ellen Goodman, in "Swarms of Beggars Cause 'Compassion Fatigue,'" captured this attitude when she wrote, "Today at least, this tourist, walking from one block to another, one cup to another, one city to another, wants to join in a citizens' chorus: 'Enough's enough'" (Simon 1992, 1218).

LO 5

Municipal codes reflected this growing intolerance of street people's behavior. By the late 1990s, Juliette Smith (1996) found that "at least thirty-nine American cities had initiated or continued policies that criminalize activities associated with homelessness" (29).

Enforcing the laws regulating the behavior of homeless and other street people generates controversy because these laws seem to target the poorest and weakest members of the community to provide for the comfort and convenience of better-off residents. But James Q. Wilson defends these laws, noting that the special competence of courts lies in defining and applying rights; courts typically hear the cases of "an individual beggar, sleeper, or solicitor." Such an individual rarely poses a threat to anyone, "and so the claims of communal order often seem, in the particular case, to be suspect or overdrawn." According to George Kelling and Catherine Coles (1996):

LO 2

> But the effects on a community of many such individuals taking advantage of the rights granted to an individual (or often, as the Court sees it, an abstract depersonalized individual) are qualitatively different from the effects of a single person. A public space—a bus stop, a market square, a subway entrance—is more than the sum of its parts; it is a complex pattern of interactions that can become dramatically more threatening as the scale and frequency of those interactions increase. As the number of unconventional individuals increases arithmetically, the number of worrisome behaviors increases geometrically (Kelling and Coles 1996, xiv).

San Francisco is one of many cities whose officials enforced the quality of life laws against the "bad public manners" of street people, but it's also a city where a few individuals turned to the Court to fight for the constitutional rights of homeless people.

In *Joyce v. City and County of San Francisco* (1994), U.S. District Judge Lowell Jensen heard a motion to grant a **preliminary injunction** (a temporary court order to do or to stop doing something) to stop the city of San Francisco from continuing its Matrix Program. The program was designed to preserve the quality of life on San Francisco streets and other public places. Be aware that granting a preliminary injunction isn't a decision that the plaintiff is right; it only means the plaintiff has presented enough evidence to justify a temporary freeze to give the Court time to decide whether to rule in the plaintiff's favor.

In Joyce v. City and County of San Francisco (1994), U.S. District Judge Lowell Jensen heard a motion to grant a preliminary injunction (a temporary court order to do or to stop doing something) to stop the city of San Francisco from continuing its Matrix Program.

CASE Did the Program Violate the Rights of Homeless People?

Joyce v. City and County of San Francisco
846 F. Supp. 843 (N.D.Cal. 1994)

HISTORY

Bobby Joe Joyce, Timothy E. Smith, Thomas O'Halloran, and Jim Tullah, homeless persons, brought an action against the city seeking a preliminary injunction against the Matrix Program that targeted violation of certain ordinances (quality of life offenses) and thus allegedly penalized homeless persons for engaging in life-sustaining activities. U.S. District Judge Lowell Jensen denied the plaintiffs' motion for a preliminary injunction.

JENSEN, J.

FACTS

Plaintiffs to this action seek preliminary injunctive relief, an order to stop enforcing the ordinances, on behalf of themselves and a class of homeless individuals alleged to be adversely affected by the City and County of San Francisco's (the "City's") "Matrix Program." Institution of the Matrix Program followed the issuance of a report in April 1992 by the San Francisco Mayor's Office of Economic Planning and Development, which attributed to homelessness a $173 million drain on sales in the City.

In August of 1993, the City announced commencement of the Matrix Program, and the San Francisco Police Department began stringently enforcing a number of criminal laws. The City describes the program as "initiated to address citizen complaints about a broad range of offenses occurring on the streets and in parks and neighborhoods. [The Matrix Program is] a directed effort to end street crimes of all kinds."

The program addresses quality of life offenses including public drinking and inebriation, obstruction of sidewalks, lodging, camping or sleeping in public parks, littering, public urination and defecation, aggressive panhandling, dumping of refuse, graffiti, vandalism, street prostitution, and street sales of narcotics, among others.

A four-page intradepartmental memorandum addressed to the Police Department's Southern Station Personnel condemned quality of life violations, the "type of behavior [which] tends to make San Francisco a less desirable place in which to live, work or visit," and directed the vigorous enforcement of 18 specified code sections, including prohibitions against trespassing, public inebriation, urinating or defecating in public, removal and possession of shopping carts, solicitation on or near a highway, erection of tents or structures in parks, obstruction and aggressive panhandling.

The memorandum directed all station personnel, "When not otherwise engaged, pay special attention and enforce observed 'Quality of Life' violations. . . . "

In a police department bulletin entitled "Update on Matrix Quality of Life Program," Deputy Chief Thomas Petrini referred to the intended nondiscriminatory policy of the program's enforcement measures:

> All persons have the right to use the public streets and places so long as they are not engaged in specific criminal activity. Factors such as race, sex, sexual preference, age, dress, unusual or disheveled or impoverished

> appearance do not alone justify enforcement action. Nor can generalized complaints by residents or merchants or others justify detention of any person absent such individualized suspicion.

The memorandum stated that the "rights of the homeless must be preserved" and included as an attachment a department bulletin on "Rights of the Homeless," which stated that:

> All members of the Department are obligated to treat all persons equally, regardless of their economic or living conditions. The homeless enjoy the same legal and individual rights afforded to others. Members shall at all times respect these rights.

The police department has, during the pendency of the Matrix Program, conducted continuing education for officers regarding nondiscriminatory enforcement of the program.

The plaintiffs, pointing to the discretion inherent in policing the law enforcement measures of the Matrix Program, allege certain actions taken by police to be "calculated to punish the homeless." As a general practice, the program is depicted by plaintiffs as "targeting hundreds of homeless persons who are guilty of nothing more than sitting on a park bench or on the ground with their possessions, or lying or sleeping on the ground covered by or on top of a blanket or cardboard carton."

The City contests the depiction of Matrix as a singularly focused, punitive effort designed to move "an untidy problem out of sight and out of mind." The City emphasizes its history as one of the largest public providers of assistance to the homeless in the State, asserting that "individuals on general assistance in San Francisco are eligible for larger monthly grants than are available almost anywhere else in California." By its own estimate, the City will spend $46.4 million for services to the homeless for 1993–94. Of that amount, over $8 million is specifically earmarked to provide housing, and is spent primarily on emergency shelter beds for adults, families, battered women, and youths. An additional $12 million in general assistance grants is provided to those describing themselves as homeless, and free health care is provided by the City to the homeless at a cost of approximately $3 million.

Since its implementation, the Matrix Program has resulted in the issuance of over 3,000 citations to homeless persons.

OPINION

The Court is called upon to decide whether to grant a preliminary injunction. Such relief constitutes an extraordinary use of the Court's powers, and is to be granted sparingly and with the ultimate aim of preserving the status quo pending trial on the merits. The decision whether to grant preliminary injunctive relief is largely left to its discretion. However, this discretion has been circumscribed by the presence or not of various factors, notably, the likelihood that the moving party will prevail on the merits and the likelihood of harm to the parties from granting or denying the injunctive relief.

The injunction sought by plaintiffs at this juncture of the litigation must be denied for each of two independent reasons. First, the proposed injunction lacks the necessary specificity to be enforceable, and would give rise to enforcement problems sufficiently inherent as to be incurable by modification of the proposal. Second, those legal theories upon which plaintiffs rely are not plainly applicable to the grievances sought to be vindicated, with the effect that the Court cannot find at this time that, upon conducting the required balance of harm and merit, plaintiffs have established a sufficient probability of success on the merits to warrant injunctive relief.

Equal Protection Clause

[Denial of equal protection requires proof that] governmental action [was] undertaken with an intent to discriminate against a particular individual or class of individuals. Such intent may be evinced by statutory language, or in instances where an impact which cannot be explained on a neutral ground unmasks an invidious discrimination. Under the latter approach, a neutral law found to have a disproportionately adverse effect upon a minority classification will be deemed unconstitutional only if that impact can be traced to a discriminatory purpose.

In the present case, plaintiffs have not at this time demonstrated a likelihood of success on the merits of the equal protection claim, since the City's action has not been taken with an evinced intent to discriminate against an identifiable group. Various directives issued within the Police Department mandate the nondiscriminatory enforcement of Matrix. Further, the Police Department has, during the pendency of the Matrix Program, conducted continuing education for officers regarding nondiscriminatory enforcement of the Program. It has not been proven at this time that Matrix was implemented with the aim of discriminating against the homeless. That enforcement of Matrix will, de facto, fall predominantly on the homeless does not in itself effect an equal protection clause violation.

Even were plaintiffs able at this time to prove an intent to discriminate against the homeless, the challenged sections of the Program might nonetheless survive constitutional scrutiny. Only in cases where the challenged action is aimed at a suspect classification, such as race or gender, or premised upon the exercise of a fundamental right, will the governmental action be subjected to a heightened scrutiny.

Counsel for plaintiff proposed at the hearing that this Court should be the first to recognize as a fundamental right the "right to sleep." This is an invitation the Court, in its exercise of judicial restraint, must decline. The discovery of a right to sleep concomitantly requires

prohibition of the government's interference with that right. This endeavor, aside from creating a jurisprudential morass, would involve this unelected branch of government in a legislative role for which it is neither fit, nor easily divested once established.

Due Process of Law

Plaintiffs contend the Matrix Program has been enforced in violation of the due process clause of the United States Constitution. Plaintiffs specifically argue that due process has been violated by employing punitive policing measures against the homeless for sleeping in public parks.

Plaintiffs claim that San Francisco Park Code section 3.12 has been applied by police in an unconstitutional manner. That section provides,

> No person shall construct or maintain any building, structure, tent or any other thing in any park that may be used for housing accommodations or camping, except by permission from the Recreation and Park Commission.

Plaintiffs contend the Police Department has impermissibly construed this provision to justify citing, arresting, threatening and "moving along" those "persons guilty of nothing more than sitting on park benches with their personal possessions or lying on or under blankets on the ground." Plaintiffs have submitted declarations of various homeless persons supporting the asserted application of the San Francisco Park Code section. It appears, if plaintiffs have accurately depicted the manner in which the section is enforced, that the section may have been applied to conduct not covered by the section and may have been enforced unconstitutionally.

CONCLUSION

In common with many communities across the country, the City is faced with a homeless population of tragic dimension. Today, plaintiffs have brought that societal problem before the Court, seeking a legal judgment on the efforts adopted by the City in response to this problem. The role of the Court is limited structurally by the fact that it may exercise only judicial power, and technically by the fact that plaintiffs seek extraordinary pretrial relief.

The Court does not find that plaintiffs have made a showing at this time that constitutional barriers exist which preclude that effort. Accordingly, the Court's judgment at this stage of the litigation is to permit the City to continue enforcing those aspects of the Matrix Program now challenged by plaintiffs.

Accordingly, plaintiffs' motion for a preliminary injunction is DENIED.

IT IS SO ORDERED.

QUESTIONS

1. **Describe the main elements of the Matrix Program.**
2. **Why did San Francisco adopt the Matrix Program?**
3. **What are the plaintiffs' objections to the Matrix Program?**
4. **Assume you're the attorney for San Francisco and argue that the Court should deny the injunction.**
5. **Assume you're the attorney for the homeless people and argue that the Court should issue the injunction.**
6. **If you could, what terms would you include in an injunction in this case?**

Panhandling

This quote comes from *Washington Post* reporter Renee Sanchez's article about the continuing backlash against the so-called rights revolution of the 1960s and 1970s.

> On the concrete plaza outside [San Francisco] City Hall here, day or night, dozens of homeless men and women shuffle from bench to grate dragging blankets or pushing shopping carts stuffed with all they own. They beg, they bicker, they sleep. It is a ragged, aimless procession that never ends. It is also a sight that this ever-tolerant city is tired of seeing. Frustrated by how difficult it is to end homelessness even in robust economic times, and facing pressure to make neighborhoods and business centers safe and clean, San Francisco has become the latest in a growing number of cities deciding that it is time to get tougher. (Sanchez 1998, A3)

According to Robert Tier (1993), general counsel for the American Alliance for Rights and Responsibilities:

> Many City Councils have been convinced to adopt new and innovative controls on antisocial behavior to maintain minimal standards of public conduct and to keep public spaces safe and attractive. . . . One of the most common examples of these efforts are ordinances aimed at aggressive begging. (286)

LO 1, LO 2

These "new and innovative controls" rely on ancient laws against begging, or panhandling. **Panhandling** consists of stopping people on the street to ask them for food or money. At the outset, keep in mind that these new antibegging ordinances don't apply to organized charities. So although it's a crime for a private beggar to panhandle for money, it's legal for the Salvation Army to ring their bells to get contributions.

Why the distinction? Supporters of the distinction say the rights revolution has simply gone too far. It's reached the point, they say, where the rights of a minority of offensive individuals trump the quality of life of the whole community. Associate Supreme Court Justice Clarence Thomas (1996) commenting on "how judicial interpretations of the First Amendment and of 'unenumerated' constitutional rights have affected the ability of urban communities to deal with crime, disorder, and incivility on their public streets," told the Federalist Society:

> Vagrancy, loitering, and panhandling laws were challenged [during the rights revolution] because the poor and minorities could be victims of discrimination under the guise of broad discretion to ensure public safety. Moreover, as a consequence of the modern tendency to challenge society's authority to dictate social norms, the legal system began to prefer the ideal of self-expression without much attention to self-discipline or self-control.
>
> What resulted was a culture that declined to curb the excesses of self-indulgence—vagrants and others who regularly roamed the streets had rights that could not be circumscribed by the community's sense of decency or decorum. (269)

"Hey, buddy, can you spare some change?" is clearly speech. And, of course, the First Amendment guarantees individuals freedom of speech. But free speech doesn't mean you can say anything you want anywhere at anytime (Chapter 2). The U.S. Supreme Court has "rejected the notion that a city is powerless to protect its citizens from unwanted exposure to certain methods of expression which may legitimately be deemed a public nuisance" (Scheidegger 1993, 7).

LO 2

The Court has established a number of tests to determine whether ordinances violate the First Amendment guarantee of free speech. One is to look at the place where the speech takes place. In traditional public forums—streets, sidewalks, and parks—where people have since ancient times expressed their views, the freedom to solicit is virtually unrestricted. In designated public forums—places the government chooses to make available to the public—the government has more leeway to regulate solicitation.

In nonpublic forums—airports, bus stations, railroad stations, subways, and shopping malls—the government has broad power to restrict and even prohibit solicitation (Scheidegger 1993, 7–9).

The First Amendment free speech clause also permits time, place, and manner regulations. According to the U.S. Supreme Court (*R.A.V. v. City of St. Paul* 1992; Chapter 2), to be constitutional, restrictions have to satisfy three elements of a **time, place, and manner test**:

1. They're not based on the content of the speech.
2. They serve a significant government interest—for example, maintaining the free flow of pedestrian traffic.
3. They leave open other channels of expression.

The first element in the test bars the use of the regulation to suppress any message about social conditions that panhandlers are trying to convey.

The second element is often hotly debated. Advocates for panhandlers argue that the regulation of panhandling is really a government policy of removing "unsightly" poor people from public view. Others maintain that the "purpose is to permit people to use the streets, sidewalks, and public transportation free from the borderline robbery and pervasive fraud which characterizes so much of today's panhandling" (Scheidegger 1993, 10–11).

The third element requires the regulation to allow panhandlers to beg in other ways. So a panhandling ordinance that prohibits "aggressive panhandling" leaves panhandlers free to beg peaceably. So do bans on fraudulent panhandling or panhandling in subways. Panhandlers can beg honestly on streets and in parks (10–11).

In addition to forum and time, place, and manner restrictions, the First Amendment gives the government considerable leeway to regulate nonverbal expression (expressive conduct; Chapter 2). This would allow direct efforts to stop panhandlers from approaching people or blocking the sidewalk to beg or receiving the money they solicited.

Finally, the First Amendment grants commercial speech (advertising and other means of "asking for" money) less protection than other types of speech. Because begging relies on talking listeners into handing over their money, panhandling is commercial speech. Jimmy Gresham, a homeless person, challenged the constitutionality of Indianapolis' aggressive panhandling ordinance in U.S. District Court and asked for an injunction against the enforcement of the ordinance. The District Court rejected his challenge and denied his request for the injunction. The U.S. Court of Appeals for the Seventh Circuit affirmed the District Court's decision in *Gresham v. Peterson* (2000).

In our next case excerpt, Jimmy Gresham, a homeless person, challenged the constitutionality of Indianapolis' aggressive panhandling ordinance in U.S. District Court and asked for an injunction against the enforcement of the ordinance.

CASE Was the Panhandling Ordinance Vague, and Did It Violate Free Speech?

Gresham v. Peterson
225 F.3d 899 (7th Cir. 2000)

HISTORY

Jimmy Gresham challenged an Indianapolis ordinance that limits street begging in public places and prohibits entirely activities defined as "aggressive panhandling." The U.S. District Court granted the city summary judgment on Gresham's request for a permanent injunction. Gresham appealed. The U.S. Circuit Court affirmed the District Court's decision.

KANNE, J.

FACTS

Jimmy Gresham is a homeless person who lives in Indianapolis on Social Security disability benefits of $417 per month. He supplements this income by begging, using the money to buy food. He begs during both the daytime and nighttime in downtown Indianapolis. Because different people visit downtown at night than during the day, it is important to him that he be able to beg at night.

Gresham approaches people on the street, tells them he is homeless and asks for money to buy food. Gresham has not been cited for panhandling under the new

ordinance, but he fears being cited for panhandling at night or if an officer interprets his requests for money to be "aggressive" as defined by the law.

Gresham filed this class action shortly after the ordinance took effect, requesting injunctive and declaratory relief. Gresham moved for a preliminary injunction barring enforcement of the ordinance on the grounds that it was unconstitutionally vague and violated his right to free speech. The District Court, after hearing oral argument . . . , entered a final order denying the motion for preliminary injunction and dismissing the case.

OPINION

Gresham raises two principal arguments. First, he contends that the provisions defining aggressive panhandling are vague because they fail to provide clear criteria to alert panhandlers and authorities of what constitutes a violation and because they fail to include an intent element.

Second, he argues that the statute fails the test for content-neutral time, place and manner restrictions on protected speech.

A. The First Amendment

Laws targeting street begging have been around for many years, but in the last twenty years, local communities have breathed new life into old laws or passed new ones. Cities, such as Indianapolis, have tried to narrowly draw the ordinances to target the most bothersome types of street solicitations and give police another tool in the effort to make public areas, particularly downtown areas, safe and inviting.

While the plaintiff here has focused the inquiry on the effects of the ordinance on the poor and homeless, the ordinance itself is not so limited. It applies with equal force to anyone who would solicit a charitable contribution, whether for a recognized charity, a religious group, a political candidate or organization, or for an individual. It would punish street people as well as Salvation Army bell ringers outside stores at Christmas, so long as the appeal involved a vocal request for an immediate donation.

The ordinance bans panhandling by beggars or charities citywide on any "street, public place or park" in three circumstances. First, it would prohibit any nighttime panhandling. § 407-102(b). Second, it would prohibit at all times—day or night—panhandling in specified areas. § 407-102(c). Third, it would prohibit "aggressive panhandling" at all times. § 407-102(d)(1)-(6).

The defendants emphatically point out that the ordinance allows a great deal of solicitation, including "passive" panhandling, which does not include a vocal appeal, street performances, legitimate sales transactions and requests for donations over the telephone or any other means that is not "in person" or does not involve an "immediate donation." Under the ordinance, one could lawfully hold up a sign that says "give me money" and sing "I am cold and starving," so long as one does not voice words to the effect of "give me money."

[The U.S. Supreme Court has held that] government may enact "reasonable regulations" so long as they reflect "due regard" for the constitutional interests at stake. Governments may "enforce regulations of the time, place and manner of expression which are content neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."

Because the parties here agree that the regulations are content neutral, the Indianapolis ordinance should be upheld if it is narrowly tailored to achieve a significant governmental purpose and leaves open alternate channels of communication.

The city has a legitimate interest in promoting the safety and convenience of its citizens on public streets. The plaintiff concedes this much, but argues that a total nighttime ban on verbal requests for alms is substantially broader than necessary and therefore cannot be considered narrowly tailored. However, a government regulation can be considered narrowly tailored "so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." This means the regulation need not be a perfect fit for the government's needs, but cannot burden substantially more speech than necessary. Furthermore, a time, place or manner restriction need not be the least restrictive means of achieving the government purpose, so long as it can be considered narrowly tailored to that purpose.

The city determined that vocal requests for money create a threatening environment or at least a nuisance for some citizens. Rather than ban all panhandling, however, the city chose to restrict it only in those circumstances where it is considered especially unwanted or bothersome—at night, around banks and sidewalk cafes, and so forth. These represent situations in which people most likely would feel a heightened sense of fear or alarm, or might wish especially to be left alone. By limiting the ordinance's restrictions to only those certain times and places where citizens naturally would feel most insecure in their surroundings, the city has effectively narrowed the application of the law to what is necessary to promote its legitimate interest.

Finally, the plaintiff contends that the statute fails to provide ample alternative channels of communication. We disagree.

An adequate alternative does not have to be the speaker's first or best choice, or one that provides the same audience or impact for the speech. However, the Court has "shown special solicitude for forms of expression that are much less expensive than feasible alternatives," and so an alternative must be more than merely theoretically available. It must be realistic as well.

Furthermore, an adequate alternative cannot totally foreclose a speaker's ability to reach one audience even

if it allows the speaker to reach other groups. The Indianapolis ordinance allows many feasible alternatives to reach both the daytime and nighttime downtown Indianapolis crowds. Under the ordinance, panhandlers may ply their craft vocally or in any manner they deem fit (except for those involving conduct defined as aggressive) during all the daylight hours on all of the city's public streets.

Gresham contends that soliciting at night is vital to his survival, a fact we do not dispute, but the ordinance leaves open many reasonable ways for him to reach the nighttime downtown crowd. He may solicit at night, so long as he does not vocally request money. He may hold up signs requesting money or engage in street performances, such as playing music, with an implicit appeal for support.

Although perhaps not relevant to street beggars, the ordinance also permits telephone and door-to-door solicitation at night. Thus to the extent that "give me money" conveys an idea the expression of which is protected by the First Amendment, solicitors may express themselves vocally all day, and in writing, by telephone or by other non-vocal means all night.

Furthermore, they may solicit in public places on all 396.4 square miles of the city, except those parts occupied by sidewalk cafes, banks, ATMs and bus stops.

B. Vagueness

Gresham next challenges certain provisions of the ordinance as unconstitutionally vague. Specifically, he contends that the definition[s] of aggressive panhandling in sections (d)(4) and (d)(5) are not sufficiently clear to direct authorities on the enforcement of the law, nor to allow panhandlers such as Gresham to avoid violating the law.

Section (d)(4) prohibits "following behind, ahead or alongside a person who walks away from the panhandler after being solicited." [Chapter 2, The Void-for-Vagueness Doctrine section] Gresham argues hypothetically that police could cite a person for inadvertently violating this section merely by walking in the same direction as the solicited person, without intending to engage in "aggressive panhandling." Also, section (d)(5) refers to making a person "fearful or feel compelled" without defining what the terms mean in relation to panhandling. A generalized guilt at economic inequality might make one "feel compelled" even by the meekest request for money.

The void-for-vagueness doctrine forbids the enforcement of a law that contains "terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." Legislative enactments must articulate terms "with a reasonable degree of clarity" to reduce the risk of arbitrary enforcement and allow individuals to conform their behavior to the requirements of the law. A statute that "vests virtually complete discretion in the hands of the police" fails to provide the minimal guidelines required for due process.

Paragraph (d)(5) could be construed to prohibit "any statement, gesture, or other communication" that makes a reasonable person feel they face danger if they refuse to donate, that they are being compelled out of physical fear. The possibility that a polite request for a donation might be heard as a threatening demand by an unusually sensitive or timid person is eliminated by the "reasonable person" standard included in the ordinance.

A statement that makes a reasonable person feel compelled to donate out of physical fear amounts to a prohibition on robbery or extortion, which of course would be constitutional. While it is not a certainty that the state courts would adopt constitutional interpretations of the panhandling provisions, they are entitled to the opportunity to do so, and we will not interfere with that right. The district court did not err in refusing to enjoin the ordinance based on the vagueness concerns.

CONCLUSION

For the foregoing reasons, we AFFIRM the district court's denial of a permanent injunction and dismissal of Gresham's complaint.

QUESTIONS

1. **State the main elements in Indianapolis' panhandling ordinance.**
2. **Summarize the positions of the city of Indianapolis and Jimmy Gresham regarding the ordinance.**
3. **Should there be a distinction between organized charities and individual beggars when it comes to asking for money in this ordinance? Explain your answer.**
4. **According to the Court, what's the difference between solicitation and commercial speech? What's the significance of distinguishing between them?**
5. **According to the Court, why doesn't the ordinance violate the free speech clause of the First Amendment?**
6. **Should panhandling be considered speech? Defend your answer.**
7. **Assuming that panhandling is speech, is this ordinance a reasonable "time, place, and manner" regulation of free speech?**
8. **Summarize the arguments the Court gives for ruling that the ordinance isn't unconstitutionally vague. Do you agree? Defend your answer.**

ETHICAL DILEMMA

Criminalizing Being Poor: Is It Ethical Public Policy?

It's too bad so many people are falling into poverty at a time when it's almost illegal to be poor. You won't be arrested for shopping in a Dollar Store, but if you are truly, deeply, in-the-streets poor, you're well advised not to engage in any of the biological necessities of life—like sitting, sleeping, lying down, or loitering. City officials boast that there is nothing discriminatory about the ordinances that afflict the destitute, most of which go back to the dawn of gentrification in the '80s and '90s. "If you're lying on a sidewalk, whether you're homeless or a millionaire, you're in violation of the ordinance," a city attorney in St. Petersburg, Florida, said in June, echoing Anatole France's immortal observation that "the law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges."

Instructions

1. Go to the website www.cengage.com/criminaljustice/samaha.
2. Read "Is It Now a Crime to Be Poor? (Barbara Ehrenreich, *New York Times* op-ed column, August 9, 2009).
3. Assume you're a policy advisor to the mayor of your town or city. Write a one-page position paper on the "right" response to the "problem" of using the streets for the "biological necessities of life."

Gang Activity

LO 6

"Bands of loitering youth" seriously threaten their quality of life, say many city residents (Skogan 1990, 23). Gangs can include everything from casual groups of kids who are just hanging out drinking a little bit all the way to "organized fighting squads" who terrorize neighborhoods. The casual groups do little more than "bother" residents. According to one observer, "They are neighborhood kids, and they sometimes make a nuisance of themselves. Actually they stand there because they have no place to go" (23). Gangs composed of older, rowdier members are more threatening.

> According to a resident in a neighborhood with one of these gangs: Sometimes I walk out of my house and start to try to walk down the street, and a gang will cross the street and try to scare me and my mother. A gang used to sit and drink beer and smoke pot in front of our stairs. My mom used to come out and tell them to get off; they would, and then when she would go into the house they'd come back, sit down, and look at us. Actually we're afraid to walk around in the neighborhood after it gets dark. I stay right in front of the house where my mom can see me. (24)

Let's look at some criminal law and civil law efforts to control gang activities, and then review the latest research on the effectiveness of these efforts.

Criminal Law Responses to Gang Activity

LO 6

A number of state and city governments have passed criminal laws to regulate gang behavior. In some places, it's a crime to participate in a gang. Some statutes and ordinances have stiffened the penalties for crimes committed by gang members. Others make it a crime to encourage minors to participate in gangs. Some have applied organized crime statutes to gangs. A few have punished parents for their children's gang activities. Cities have also passed ordinances banning gang members from certain public places, particularly city parks.

In 1992, Chicago was facing a skyrocketing increase in crime rates that many outspoken people blamed on street gangs. But unlike the sweeping injunction approved in California, the Chicago City Council passed a modern version of the ancient loitering ordinances (discussed in the "Loitering" section). Chicago's ordinance gave its police the power to order groups of loiterers (people who "remain in one place with no apparent purpose") to disperse or face arrest if officers reasonably believed that one of the loiterers was a gang member (Poulos 1995, 379–81).

No one was surprised when the ordinance set off an angry debate. Mayor Richard Daley Jr. expressed one view: "In some areas of the city, street gangs are terrorizing residents and laying claim to whole communities." Bobbie Crawford, a waitress, expressed another view: "When kids reach a certain age they hang around on street corners. I sure wouldn't like my children taken to a police station for hanging around." And Joan Suglich, mother of six, asked, "What if somebody asks his boys to walk him home so gang members don't jump him. Are police going to arrest them?"

Nor was anyone surprised when the debate ended up in the U.S. Supreme Court. In *City of Chicago v. Morales* (1999), a divided Court decided that the ordinance was void for vagueness. Several justices, but not a majority, also argued that the ordinance violated the right to come and go as you please without unreasonable government interference.

In our next case excerpt, City of Chicago v. Morales (1999), a divided Supreme Court decided that the ordinance that gave the police the power to order groups of loiterers to disperse or face arrest was void for vagueness.

CASE Was the Loitering Ordinance Void for Vagueness?

City of Chicago v. Morales
527 U.S. 41 (1999)

HISTORY

Jesus Morales and other defendants in several separate cases were charged in the Circuit Court of Cook County, with violating the Chicago antigang ordinance. Morales and the defendants in one case moved to dismiss the actions against them. The Circuit Court, Cook County, granted the motion. The city appealed. The Illinois Appellate Court affirmed.

The defendants in a second case were charged with violating the ordinance. The Circuit Court dismissed the charges. The Appellate Court affirmed. The city petitioned for leave to appeal, which the Appellate Court granted.

In a third case, the defendants were charged, in the Circuit Court, with violating the ordinance, were convicted, and were sentenced to jail terms. The defendants

appealed. The Appellate Court reversed. The city petitioned for leave to appeal.

After granting the petitions to appeal in all three cases, and consolidating the cases for one hearing, the Supreme Court of Illinois affirmed.

The U.S. Supreme Court granted certiorari and affirmed the judgment of the Illinois Supreme Court.

STEVENS, J. announced the judgment of the Court and delivered the opinion.

FACTS

In 1992, the Chicago City Council enacted the Gang Congregation Ordinance, which prohibits "criminal street gang members" from "loitering" with one another or with other persons in any public place.

The ordinance creates a criminal offense punishable by a fine of up to $500, imprisonment for not more than six months, and a requirement to perform up to 120 hours of community service. Commission of the offense involves four elements.

First, the police officer must reasonably believe that at least one of the two or more persons present in a "public place" is a "criminal street gang member."

Second, the persons must be "loitering," which the ordinance defines as "remain[ing] in any one place with no apparent purpose."

Third, the officer must then order "all" of the persons to disperse and remove themselves "from the area."

Fourth, a person must disobey the officer's order. If any person, whether a gang member or not, disobeys the officer's order, that person is guilty of violating the ordinance.

Two months after the ordinance was adopted, the Chicago Police Department promulgated General Order 92-4 to provide guidelines to govern its enforcement. That order purported to establish limitations on the enforcement discretion of police officers "to ensure that the antigang loitering ordinance is not enforced in an arbitrary or discriminatory way."

The limitations confine the authority to arrest gang members who violate the ordinance to sworn "members of the Gang Crime Section" and certain other designated officers and establish detailed criteria for defining street gangs and membership in such gangs.

In addition, the order directs district commanders to "designate areas in which the presence of gang members has a demonstrable effect on the activities of law abiding persons in the surrounding community," and provides that the ordinance "will be enforced only within the designated areas." The city, however, does not release the locations of these "designated areas" to the public.

During the three years of its enforcement, the police issued over 89,000 dispersal orders and arrested over 42,000 people for violating the ordinance. In the ensuing enforcement proceedings, two trial judges upheld the constitutionality of the ordinance, but 11 others ruled that it was invalid.

The city believes that the ordinance resulted in a significant decline in gang-related homicides. It notes that in 1995, the last year the ordinance was enforced, the gang-related homicide rate fell by 26 percent. In 1996, after the ordinance had been held invalid, the gang-related homicide rate rose 11 percent. However, gang-related homicides fell by 19 percent in 1997, over a year after the suspension of the ordinance.

Given the myriad factors that influence levels of violence, it is difficult to evaluate the probative value of this statistical evidence, or to reach any firm conclusion about the ordinance's efficacy.

OPINION

The basic factual predicate for the city's ordinance is not in dispute. The very presence of a large collection of obviously brazen, insistent, and lawless gang members and hangers-on on the public ways intimidates residents, who become afraid even to leave their homes and go about their business. That, in turn, imperils community residents' sense of safety and security, detracts from property values, and can ultimately destabilize entire neighborhoods.

We have no doubt that a law that directly prohibited such intimidating conduct . . . [as described in the facts] would be constitutional, but this ordinance broadly covers a significant amount of additional activity. Uncertainty about the scope of that additional coverage provides the basis for respondents' claim that the ordinance is too vague.

The freedom to loiter for innocent purposes is part of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment. We have expressly identified this "right to remove from one place to another according to inclination" as "an attribute of personal liberty" protected by the Constitution. Indeed, it is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is "a part of our heritage" or the right to move "to whatsoever place one's own inclination may direct" identified in Blackstone's Commentaries.

Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.

A law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits. It is difficult to imagine how any citizen of the city of Chicago standing in a public place with a group of people would know if he or she had an "apparent purpose." If she were talking to another person, would she have an apparent purpose? If she were frequently checking her watch and looking expectantly down the street, would she have an apparent purpose?

Since the city cannot conceivably have meant to criminalize each instance a citizen stands in public with a

gang member, the vagueness that dooms this ordinance is not the product of uncertainty about the normal meaning of "loitering," but rather about what loitering is covered by the ordinance and what is not.

The Illinois Supreme Court emphasized the law's failure to distinguish between innocent conduct and conduct threatening harm. Its decision followed the precedent set by a number of state courts that have upheld ordinances that criminalize loitering combined with some other overt act or evidence of criminal intent (ordinance criminalizing loitering with purpose to engage in drug-related activities; ordinance criminalizing loitering for the purpose of engaging in or soliciting lewd act).

The city's principal response to this concern about adequate notice is that loiterers are not subject to sanction until after they have failed to comply with an officer's order to disperse. "Whatever problem is created by a law that criminalizes conduct people normally believe to be innocent is solved when persons receive actual notice from a police order of what they are expected to do."

We find this response unpersuasive for at least two reasons. First, the purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law. No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. Such an order cannot retroactively give adequate warning of the boundary between the permissible and the impermissible applications of the law.

Second, the terms of the dispersal order compound the inadequacy of the notice afforded by the ordinance. It provides that the officer "shall order all such persons to disperse and remove themselves from the area." This vague phrasing raises a host of questions. After such an order issues, how long must the loiterers remain apart? How far must they move? If each loiterer walks around the block and they meet again at the same location, are they subject to arrest or merely to being ordered to disperse again? As we do here, we have found vagueness in a criminal statute exacerbated by the use of the standards of "neighborhood" and "locality." . . . Both terms are elastic and, dependent upon circumstances, may be equally satisfied by areas measured by rods or by miles.

The Constitution does not permit a legislature to set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This ordinance is therefore vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all."

The broad sweep of the ordinance also violates the requirement that a legislature establish minimal guidelines to govern law enforcement. There are no such guidelines in the ordinance. In any public place in the city of Chicago, persons who stand or sit in the company of a gang member may be ordered to disperse unless their purpose is apparent.

The mandatory language in the enactment directs the police to issue an order without first making any inquiry about their possible purposes. It matters not whether the reason that a gang member and his father, for example, might loiter near Wrigley Field is to rob an unsuspecting fan or just to get a glimpse of Sammy Sosa leaving the ballpark; in either event, if their purpose is not apparent to a nearby police officer, she may—indeed, she "shall"—order them to disperse.

Recognizing that the ordinance does reach a substantial amount of innocent conduct, we turn, then, to its language to determine if it "necessarily entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat."

The principal source of the vast discretion conferred on the police in this case is the definition of loitering as "to remain in any one place with no apparent purpose." [That definition] provides absolute discretion to police officers to determine what activities constitute loitering.

It is true that the requirement that the officer reasonably believes that a group of loiterers contains a gang member does place a limit on the authority to order dispersal. That limitation would no doubt be sufficient if the ordinance only applied to loitering that had an apparently harmful purpose or effect, or possibly if it only applied to loitering by persons reasonably believed to be criminal gang members. Not all of the respondents in this case, for example, are gang members.

The city admits that it was unable to prove that Morales is a gang member but justifies his arrest and conviction by the fact that Morales admitted "that he knew he was with criminal street gang members." But this ordinance requires no harmful purpose and applies to non-gang members as well as suspected gang members. It applies to everyone in the city who may remain in one place with one suspected gang member as long as their purpose is not apparent to an officer observing them. Friends, relatives, teachers, counselors, or even total strangers might unwittingly engage in forbidden loitering if they happen to engage in idle conversation with a gang member.

In our judgment, the Illinois Supreme Court correctly concluded that the ordinance does not provide sufficiently specific limits on the enforcement discretion of the police "to meet constitutional standards for definiteness and clarity."

We recognize the serious and difficult problems testified to by the citizens of Chicago that led to the enactment of this ordinance. We are mindful that the preservation of liberty depends in part on the maintenance of social order. However, in this instance the city has enacted an ordinance that affords too much discretion to the police and too little notice to citizens who wish to use the public streets.

Accordingly, the judgment of the Supreme Court of Illinois is AFFIRMED.

DISSENT

SCALIA, J.

Until the ordinance that is before us today was adopted, the citizens of Chicago were free to stand about in public places with no apparent purpose—to engage, that is, in conduct that appeared to be loitering. In recent years, however, the city has been afflicted with criminal street gangs. These gangs congregated in public places to deal in drugs, and to terrorize the neighborhoods by demonstrating control over their "turf." Many residents of the inner city felt that they were prisoners in their own homes. Chicagoans decided that to eliminate the problem it was worth restricting some of the freedom that they once enjoyed.

The minor limitation upon the free state of nature that this prophylactic arrangement imposed upon all Chicagoans seemed to them (and it seems to me) a small price to pay for liberation of their streets.

The majority today invalidates this perfectly reasonable measure by elevating loitering to a constitutionally guaranteed right, and by discerning vagueness where, according to our usual standards, none exists. The fact is that the present ordinance is entirely clear in its application, cannot be violated except with full knowledge and intent, and vests no more discretion in the police than innumerable other measures authorizing police orders to preserve the public peace and safety.

DISSENT

THOMAS, J. JOINED BY REHNQUIST, J. AND SCALIA, J.

The duly elected members of the Chicago City Council enacted the ordinance at issue as part of a larger effort to prevent gangs from establishing dominion over the public streets. By invalidating Chicago's ordinance, I fear that the Court has unnecessarily sentenced law-abiding citizens to lives of terror and misery. The ordinance is not vague. Any fool would know that a particular category of conduct would be within its reach. Nor does it violate the Due Process Clause. The asserted "freedom to loiter for innocent purposes" is in no way "deeply rooted in this Nation's history and tradition."

The human costs exacted by criminal street gangs are inestimable. In many of our Nation's cities, gangs have "virtually overtaken certain neighborhoods, contributing to the economic and social decline of these areas and causing fear and lifestyle changes among law-abiding residents."

Ordinary citizens like Ms. D'Ivory Gordon explained that she struggled just to walk to work:

> When I walk out my door, these guys are out there. They watch you. They know where you live. They know what time you leave, what time you come home. I am afraid of them. I have even come to the point now that I carry a meat cleaver to work with me. I don't want to hurt anyone, and I don't want to be hurt. We need to clean these corners up. Clean these communities up and take it back from them.

Eighty-eight-year-old Susan Mary Jackson echoed her sentiments, testifying:

> We used to have a nice neighborhood. We don't have it anymore. I am scared to go out in the daytime, you can't pass because they are standing. I am afraid to go to the store. I don't go to the store because I am afraid. At my age if they look at me real hard, I be ready to holler.

Another long-time resident testified:

> I have never had the terror that I feel everyday when I walk down the streets of Chicago. I have had my windows broken out. I have had guns pulled on me. I have been threatened. I get intimidated on a daily basis, and it's come to the point where I say, well, do I go out today? Do I put my ax in my briefcase? Do I walk around dressed like a bum so I am not looking rich or got any money or anything like that?

Today, the Court focuses extensively on the "rights" of gang members and their companions. It can safely do so—the people who will have to live with the consequences of today's opinion do not live in our neighborhoods. Rather, the people who will suffer from our lofty pronouncements are people like Ms. Susan Mary Jackson; people who have seen their neighborhoods literally destroyed by gangs and violence and drugs.

They are good, decent people who must struggle to overcome their desperate situation, against all odds, in order to raise their families, earn a living, and remain good citizens. As one resident described, "There is only about maybe 1 or 2 percent of the people in the city causing these problems maybe, but it's keeping 98 percent of us in our houses and off the streets and afraid to shop."

By focusing exclusively on the imagined "rights" of the 2 percent, the Court today has denied our most vulnerable citizens the very thing that Justice STEVENS elevates above all else—the "freedom of movement." And that is a shame.

QUESTIONS

1. **List the four elements in the Chicago antigang ordinance.**
2. **List the specific arguments the majority gave to support its conclusion that the ordinance was vague.**
3. **Explain specifically all of the reasons why the dissenting judges disagreed.**
4. **Would "any fool" know what conduct this ordinance prohibited? Defend your answer.**
5. **Did the majority properly balance the interest in community order with the individual liberty? Explain your answer.**
6. **If the majority didn't properly strike the balance, how would you do it differently? Explain your answer.**

Civil Law Responses

LO 6

In addition to criminal penalties, cities have also turned to civil remedies to control gang activity. For example, in the ancient civil remedy, the injunction to abate public nuisances, which is still used, city attorneys ask courts to declare gang activities and gang members public nuisances and to issue **public nuisance injunctions**, court orders to eliminate the particular nuisance.

According to the California Supreme Court, in *People ex rel. Gallo v. Acuna* (1997), a public nuisance may be any act

> which alternatively is injurious to health or is indecent, or offensive to the senses; the result of the act must interfere with the comfortable enjoyment of life or property; and those affected by the act may be an entire neighborhood or a considerable number of people.

The city attorney of Santa Clara in *Acuna* asked for an injunction ordering gang members to stop doing all of the following:

(a) Standing, sitting, walking, driving, gathering or appearing anywhere in public view with any other defendant herein, or with any other known "VST" (Varrio Sureno Town or Varrio Sureno Locos) member;
(b) Drinking alcoholic beverages in public excepting consumption on properly licensed premises or using drugs;
(c) Possessing any weapons including but not limited to knives, dirks, daggers, clubs, nunchukas, BB guns, concealed or loaded firearms, and any other illegal weapons as defined in the California Penal Code, and any object capable of inflicting serious bodily injury including but not limited to the following: metal pipes or rods, glass bottles, rocks, bricks, chains, tire irons, screwdrivers, hammers, crowbars, bumper jacks, spikes, razor blades, razors, sling shots, marbles, ball bearings;
(d) Engaging in fighting in the public streets, alleys, and/or public and private property;
(e) Using or possessing marker pens, spray paint cans, nails, razor blades, screwdrivers, or other sharp objects capable of defacing private or public property;
(f) Spray painting or otherwise applying graffiti on any public or private property, including but not limited to the street, alley, residences, block walls, vehicles and/or any other real or personal property;
(g) Trespassing on or encouraging others to trespass on any private property;
(h) Blocking free ingress and egress to the public sidewalks or street, or any driveways leading or appurtenant thereto in "Rocksprings";
(i) Approaching vehicles, engaging in conversation, or otherwise communicating with the occupants of any vehicle or doing anything to obstruct or delay the free flow of vehicular or pedestrian traffic;
(j) Discharging any firearms;
(k) In any manner confronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting and/or battering any residents or patrons, or visitors to "Rocksprings," or any other persons who are known to have complained about gang activities, including any persons who have provided information in support of this Complaint and requests for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction;

(l) Causing, encouraging, or participating in the use, possession and/or sale of narcotics;
(m) Owning, possessing or driving a vehicle found to have any contraband, narcotics, or illegal or deadly weapons;
(n) Using or possessing pagers or beepers in any public space;
(o) Possessing channel lock pliers, picks, wire cutters, dent pullers, sling shots, marbles, steel shot, spark plugs, rocks, screwdrivers, "slim jims" and other devices capable of being used to break into locked vehicles;
(p) Demanding entry into another person's residence at any time of the day or night;
(q) Sheltering, concealing or permitting another person to enter into a residence not their own when said person appears to be running, hiding, or otherwise evading a law enforcement officer;
(r) Signaling to or acting as a lookout for other persons to warn of the approach of police officers and soliciting, encouraging, employing or offering payment to others to do the same;
(s) Climbing any tree, wall, or fence, or passing through any wall or fence by using tunnels or other holes in such structures;
(t) Littering in any public place or place open to public view;
(u) Urinating or defecating in any public place or place open to public view;
(v) Using words, phrases, physical gestures, or symbols commonly known as hand signs or engaging in other forms of communication which describe or refer to the gang known as "VST" or "VSL" as described in this Complaint or any of the accompanying pleadings or declarations;
(w) Wearing clothing which bears the name or letters of the gang known as "VST" or "VSL";
(x) Making, causing, or encouraging others to make loud noise of any kind, including but not limited to yelling and loud music at any time of the day or night.

The California trial court issued the injunction, and the California Supreme Court upheld the injunction against challenges that it both violated freedom of association and was void for vagueness. Injunctions, like crimes that outlaw gang activities, call for balancing community and individual rights. The community interest in the quality of life requires peace, quiet, order, and a sense of security. At the same time, even members of street gangs have the right to associate, express themselves, travel freely, and be free from vague laws (see Chapter 2, "The Void-for-Vagueness Doctrine" section).

Review of Empirical Research on Gangs and Gang Activity

LO 7

Youth crime in the United States remains near the lowest levels seen in the past three decades, yet public concern and media coverage of gang activity has skyrocketed since 2000. Fear has spread from neighborhoods with long-standing gang problems to communities with historically low levels of crime, and some policy makers have declared the arrival of a national gang "crisis." Yet many questions remain unanswered. How can communities and policy makers differentiate between perceived threats and actual challenges presented by gangs? Which communities are most affected by gangs and what is the nature of that impact? How much of the crime that plagues poor urban neighborhoods is attributable to gangs? And what approaches work to promote public safety?

LO 7

The Justice Policy Institute (Greene and Pranis 2007) conducted an extensive review of research on gangs "because we believe that the costs of uninformed policy making—including thousands of lives lost to violence or imprisonment—are simply too high" (5). They point out how the news is full of stories that hammer home a cycle, repeated in city after city: crime goes up in [you name the city]; law enforcement cracks down on gang activity; and crime goes down (7). But, a review of the investigations of gang enforcement efforts in 17 jurisdictions since the 1980s tells a different story. Findings from the investigations include:

- Lack of correspondence between the problem, typically lethal and/or serious violence, and a law-enforcement response that targets low-level, nonviolent misbehavior.
- Resistance on the part of key agency personnel to collaboration or implementation of the strategy as designed.
- Evidence that the intervention had no effect or a negative effect on crime and violence.
- A tendency for any reductions in violence crime to evaporate quickly, often before the end of the intervention.
- Poorly designed evaluations that make it impossible to draw any conclusions about the effects of an intervention.
- Failure of replication efforts to achieve results comparable to those of pilot programs.
- Severe imbalance of power and resources between law enforcement and community partners that hamper the implementation of balanced gang control initiatives.(7)

LO 7

In this section, we'll focus on the latest available research on the effectiveness of civil injunctions to control gangs. **Civil gang injunctions (CGI)** are a growing gang suppression strategy. They're noncriminal lawsuits brought by cities seeking restraining orders to bar gang members from gang activities, which can include, among others, interacting with one another, entering specific sections of the city, and wearing gang colors.

Professors Cheryl Maxson and Karen Hennigan, and David Sloane (2005) conducted the first scientific assessment of CGIs in San Bernardino, California. They surveyed residents in five neighborhoods about their perceptions and experience of crime, gang activity, and neighborhood quality 18 months before and 6 months after the injunction was issued. They found positive evidence of *short-term* effects in the disordered, primary injunction area, including less gang presence, fewer reports of gang intimidation, and less fear of confrontation with gang members, but *no significant changes* in *intermediate* or *long-term* outcomes except for less fear of crime (577).

Professor Jeffrey Grogger (2002) evaluated the effectiveness of CGIs. Grogger developed an extensive database of neighborhood-level reported crime counts from four police jurisdictions within Los Angeles County. He constructed two different comparison samples of neighborhoods not covered by injunctions to control for underlying trends that could cause an overstatement of the CGIs' effects. The analysis indicates that, in the first year after the injunctions are imposed, they lead the level of violent time to decrease by 5 to 10 percent (69).

Saint Paul, Minnesota, is an excellent example of the cycle of news coverage, and the findings from the investigations reported in the *Gang Wars* report. Saint Paul's 2009 CGI is the subject of our next case excerpt.

Our next case excerpt, City of Saint Paul v. East Side Boys and Selby Siders, *involves the 2009 civil gang injunctions in the city of Saint Paul, Minnesota.*

CASE Should Specific Members of the Gang Be Banned from Attending the Cinco de Mayo Celebration?

City of Saint Paul v. East Side Boys and Selby Siders
(City of Saint Paul 2009)

FACTS

On June 30, 2009, Saint Paul, Minnesota, initiated two CGI lawsuits against the East Side Boys and the Selby Siders, two local gangs with a

> long history of violent criminal conduct, including a recent murder and numerous recent confrontations involving gunfire. "As we have clearly stated, criminal gangs are not welcome in our community. The public has a right to be free from criminal gang violence and intimidation, and as the home of some of the most prominent community festivals in the country like Rondo Days, we are doing everything we can to protect our community from gang activity. Saint Paul is a safe city, and these injunctions are an innovative tool to send a clear message to gangs that we will not tolerate any violence in our community," Mayor Chris Coleman said.
>
> "These civil injunctions have proven to be worthwhile tools, as they specifically focus on those gangs who have repeatedly demonstrated purpose and action that tears at the safety and fabric of the community events like Rondo," Saint Paul Police Chief John Harrington said. "In addition to the benefits of enforceability, these injunctions speak to Saint Paul's historical standards of community safety."
>
> The civil legal actions are intended to help prevent criminal gang activity from occurring during the Rondo Days festival on July 18. [The Rondo Days Festival is an annual celebration to remember the African-American neighborhood of Rondo, which was split by the construction of Interstate 94 in the mid-1960s.] City Attorney John Choi said the two civil actions are a part of an important law enforcement strategy to proactively disrupt criminal gang activity in Saint Paul's neighborhoods. "We had great public safety results because of the civil gang injunction against the Sureño 13 earlier this year, and we have every expectation that this proactive effort will work again with the Selby Siders and East Side Boys," Choi said.
>
> The Civil Gang Injunction Statute (Minn. Stat. §§ 617.91–617.97) authorizes a city attorney, county attorney or the attorney general to commence a civil action against criminal gangs to enjoin criminal gang activity. The civil lawsuit filed by Choi seeks injunctive relief pursuant to the Civil Gang Injunction Statute that was developed by the Community Prosecution Unit of the Saint Paul City Attorney's Office and passed by the Minnesota Legislature in 2007.
>
> In May, the Ramsey County District Court issued Minnesota's first civil gang injunction against a criminal gang in *City of Saint Paul v. Sureño 13* (Ramsey County District Court Case Number 62-CV-09-3113). The use of civil gang injunctions has been upheld by the California Supreme Court and Appellate Courts in Texas.
>
> Among other things, the City of Saint Paul is seeking a court order prohibiting the known leaders of the East Side Boys and Selby Siders from associating with known gang members anywhere near the Rondo Days Festival.
>
> . . . "From our city attorney's office to our police department to our Second Shift initiative, much of what we do in Saint Paul is about public safety and improving the lives of our residents," Mayor Coleman said. "The civil lawsuits filed demonstrate the proactive approach Saint Paul is taking to prevent gangs from taking root in Saint Paul.

QUESTIONS

1. **Assume you're an aide to the city. Would you recommend that the city go forward with the injunction?**
2. **Relying on the information in your text, what specifically would you want the mayor, police chief, city attorney, and the public to know about CGIs?**

"Victimless Crimes"

Let me be clear about how we're going to use the term "victimless crime" in this section. First, it applies only to consenting adults, not minors. Second, it refers to crimes committed by adults who don't see themselves as victims of their behavior. Let's look at the controversy surrounding the issue and then at two crimes that are generally considered victimless—prostitution and solicitation.

The "Victimless Crime" Controversy

LO 8

Referring to many crimes in which the perpetrators don't see themselves as victimized as "victimless crimes" is controversial; Table 12.2 lists some of these crimes. We've already examined the question of adult drug use in a constitutional democracy (Chapters 2 and 3, *Robinson v. California* and *Powell v. Texas*). And we've discussed the application of the principles of *actus reus* and *mens rea* to drug crimes (Chapters 3 and 4).

Let's look a little closer at a few offenses that involve consensual adult sexual conduct. First, a little history: In medieval days, when the Church was more powerful than kings and queens, ecclesiastical courts had total power to try and punish crimes against "family and morals," including all nonviolent sexual behavior and marital relations breaches. As monarchs grew stronger, royal courts eventually gained control over most of these offenses. Once the monarch's courts took them over, they became the crimes against public morals, most of which would be on the list of anyone who subscribes to the idea of victimless crimes (Morris and Hawkins 1970, chap. 1).

Controversy makes it tough to balance public good and individual privacy in these cases. There's broad agreement that the crimes against persons and property you read about in Chapters 9 through 11 deserve punishment. However, no such agreement exists when it comes to whether those listed in Table 12.2 should be crimes. In fact, there's a deep rift between those who believe criminal law should enforce morals to "purify" society and those who just as deeply believe that consenting adults' nonviolent sexual conduct is none of the criminal law's business (Morris and Hawkins 1970).

TABLE 12.2 "Victimless Crimes"

Substance abuse (Chapters 2 and 3)
Internet censorship
Loitering
Prostitution
Sodomy (*Lawrence v. Texas*, Chapter 2)
Seat-belt law violations
Helmet law violations
Violating bans on bungee jumping
Assisted suicide

LO 2

Perhaps no issue in criminal policy has caused more acrimonious debate over a longer time than that of the role law should play in enforcing public morals. Two English Victorian scholars, the philosopher John Stuart Mill and the historian Sir James F. Stephen, started the debate. Their two major positions were summed up in the widely known and debated Wolfendon Report, an English document recommending the decriminalization of private sexual conduct of two types, between adult consenting male homosexuals and between adult sex workers and their customers.

Here's the summary of the majority of the commission's position:

> There remains one additional argument which we believe to be decisive, namely, the importance which society and the law ought to give to individual freedom of choice and action in matters of private morality. Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business. To say this is not to condone or encourage private immorality. On the contrary, to emphasize the personal private nature of moral or immoral conduct is to emphasize the personal and private responsibility of the individual for his own actions, and that is a responsibility which a mature agent can properly be expected to carry for himself without the threat of punishment from the law. (Wolfendon Report 1957, 20–21)

And here's English jurist Sir Patrick Devlin's rebuttal to the majority position:

> I think, therefore, that it is not possible to set theoretical limits to the power of the State to legislate against immorality. It is not possible to settle in advance exceptions to the general rule or to define inflexibly areas of morality into which the law is in no circumstances to be allowed to enter. Society is entitled by means of its laws to protect itself from dangers, whether from within or without. Here again I think that the political parallel is legitimate.
>
> The law of treason is directed against aiding the king's enemies and against sedition from within. The justification for this is that established government is necessary for the existence of society and therefore its safety against violent overthrow must be secured. But an established morality is as necessary as good government to the welfare of society. Societies disintegrate from within more frequently than they are broken up by external pressures.
>
> There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first state of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions. The suppression of vice is as much the law's business as the suppression of subversive activities; it is no more possible to define a sphere of private morality than it is to define one of private subversive activity. (Wolfendon Report 1957, 48)

Prostitution and Solicitation

Nonviolent sex offenses cover a broad spectrum (see Table 12.3). Let's look at a few of these crimes related to prostitution. Prostitution is an ancient business, prospering in all cultures at all times no matter the condemnation of religion and morals.

LO 1

Prostitution is also considered a crime nearly everywhere in the United States, persisting no matter how severe the laws or how tough the efforts of police to enforce them.

TABLE 12.3 Prostitution and Related Offenses

Fornication
Prostitution
Solicitation of prostitution ("pimping")
Adult consensual sex outside marriage
Adultery

Prostitution used to be reserved for describing the act of selling sexual intercourse for money—and only selling, not buying, sex was included.

Now it means all contacts and penetrations (Chapter 10 defines these terms) as long as they're done with the intent to gratify sexual appetite. And both patrons (buyers) and prostitutes (sellers) can commit prostitution. In the past, the law recognized only women as prostitutes. Now both men and women who sell sex are prostitutes.

It's a crime not only to buy and sell sex but also to solicit prostitution (sometimes called "promoting prostitution," "pimping," or "pandering"). Soliciting prostitution means getting customers for prostitutes and/or providing a place for prostitutes and customers to engage in sex for money.

Prostitution and promoting prostitution are misdemeanors in most states, but it's a serious felony when circumstances such as minors, violence, and weapons are involved.

Here's an edited version of Minnesota's elaborate and detailed statute on prostitution, promotion, and aggravating circumstances:

§ 609.324. PROSTITUTION

Subdivision 1. Engaging in, hiring, or agreeing to hire a minor to engage in prostitution; penalties.

(a) Whoever intentionally does any of the following may be sentenced to imprisonment for not more than 20 years or to payment of a fine of not more than $40,000, or both:

(1) engages in prostitution with an individual under the age of 13 years; or

(2) hires or offers or agrees to hire an individual under the age of 13 years to engage in sexual penetration or sexual contact.

(b) Whoever intentionally does any of the following may be sentenced to imprisonment for not more than ten years or to payment of a fine of not more than $20,000, or both:

(1) engages in prostitution with an individual under the age of 16 years but at least 13 years; or

(2) hires or offers or agrees to hire an individual under the age of 16 years but at least 13 years to engage in sexual penetration or sexual contact.

(c) Whoever intentionally does any of the following may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both:

(1) engages in prostitution with an individual under the age of 18 years but at least 16 years; or

(2) hires or offers or agrees to hire an individual under the age of 18 years but at least 16 years to engage in sexual penetration or sexual contact.

Subd. 2. Solicitation or acceptance of solicitation to engage in prostitution; penalty. Whoever solicits or accepts a solicitation to engage for hire in sexual penetration or sexual contact while in a public place may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than $3,000 or both. Except as otherwise provided in subdivision 4, a person who is convicted of violating this subdivision while acting as a patron must, at a minimum, be sentenced to pay a fine of at least $1,500.

Subd. 3. Engaging in, hiring, or agreeing to hire an adult to engage in prostitution; penalties.

Whoever intentionally does any of the following may be sentenced to imprisonment for not more than 90 days or to payment of a fine of not more than $700, or both:

(1) engages in prostitution with an individual 18 years of age or above; or

(2) hires or offers or agrees to hire an individual 18 years of age or above to engage in sexual penetration or sexual contact.

Except as otherwise provided in subdivision 4, a person who is convicted of violating clause (1) or (2) while acting as a patron must, at a minimum, be sentenced to pay a fine of at least $500.

Whoever violates the provisions of this subdivision within two years of a previous conviction may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than $3,000, or both.

Except as otherwise provided in subdivision 4, a person who is convicted of a gross misdemeanor violation of this subdivision while acting as a patron, must, at a minimum, be sentenced as follows: (1) to pay a fine of at least $1,500; and (2) to serve 20 hours of community work service.

The court may waive the mandatory community work service if it makes specific, written findings that the community work service is not feasible or appropriate under the circumstances of the case.

Subd. 4. Community service in lieu of minimum fine.

The court may order a person convicted of violating subdivision 2 or 3 to perform community work service in lieu of all or a portion of the minimum fine required under those subdivisions if the court makes specific, written findings that the convicted person is indigent or that payment of the fine would create undue hardship for the convicted person or that person's immediate family. Community work service ordered under this subdivision is in addition to any mandatory community work service ordered under subdivision 3.

Subd. 5. Use of motor vehicle to patronize prostitutes; driving record notation.

When a court sentences a person convicted of violating this section while acting as a patron, the court shall determine whether the person used a motor vehicle during the commission of the offense. If the court finds that the person used a motor vehicle during the commission of the offense, it shall forward its finding to the commissioner of public safety who shall record the finding on the person's driving record.

SUMMARY

LO 1
- Crimes against public order and morals are areas of criminal law that involve mostly very minor crimes but, nonetheless, affect many more people than the crimes against persons and their property.

LO 1
- Historically, group disorderly conduct consisted of three misdemeanors at the common law: unlawful assembly, rout, and riot.

LO 2
- "Quality of life" crimes refer to the laws that are meant to control "bad manners" in public places. "Quality of life" crimes underscore the tension between liberty and order in a constitutional democracy.

LO 3
- The "broken window" theory states there is a link between minor quality of life offenses and more serious crimes. The empirical findings as to whether there's a link are mixed.

LO 4, LO 5
- There's wide consensus among high- and low-crime neighborhoods in major cities that public drinking, followed closely by loitering youths, tops the worries among all classes, races, and ethnic groups, among both men and women.

LO 4
- For at least 600 years, it's been a crime for poor people to roam around without visible means of support (vagrancy) or to stand around with no apparent purpose (loitering).

LO 4
- New and innovative controls against aggressive begging by street people rely on ancient laws against begging, or panhandling. States can control the time, place, and manner of panhandling, but cannot control the content of panhandling.

LO 6
- "Bands of loitering youth" seriously threaten the quality of life in communities. A number of state and city governments have passed criminal laws to regulate gang behavior. Antigang ordinances meet due process and liberty requirements if they define "loitering" more specifically than just hanging out with no apparent purpose.

LO 6, LO 7
- Cities have sought civil gang injunctions to control gang behavior, but the evidence is mixed as to civil injunctions' effectiveness.

LO 8
- The term "victimless crime" applies to: (1) consenting adults, not minors and (2) to crimes committed by adults who don't see themselves as victims of their behavior.

LO 8
- Prostitution is an ancient business, prospering in all cultures at all times no matter the condemnation of religion and morals.

KEY TERMS

disorderly conduct crimes, p. 420
"quality of life" crimes, p. 420
order, p. 420
liberty, p. 420
crimes against public order, p. 420
"victimless crimes," p. 420
actual disorderly conduct, p. 421
constructive disorderly conduct, p. 421
unlawful assembly, p. 422
rout, p. 422
riot, p. 422
broken-windows theory, p. 424
vagrancy, p. 425
loitering, p. 425

preliminary injunction, p. 428
panhandling, p. 431
time, place, and manner test, p. 431
public nuisance injunctions, p.440
civil gang injunctions (CGI), p. 442

WEB RESOURCES

To prepare for exams, visit the *Criminal Law* companion website at www.cengage.com/criminaljustice/samaha, which features essential review and study tools such as flashcards, a glossary of terms, tutorial quizzes, and Supreme Court updates.

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LEARNING OBJECTIVES

1 Understand how defining and applying crimes against the state reflects the enduring idea of balancing security and freedom during wartime emergencies.

2 Know that treason is the only crime that is defined in the Constitution; is a fundamental weapon against present allegiance and support to foreign enemies; and is very difficult to prove because of its history.

3 Appreciate that crimes against potential terrorist attacks are subject to the limits placed on traditional criminal law.

4 Know that the most commonly prosecuted crime against the state since September 11, 2001, is to terrorists or terrorist organizations.

5 Appreciate that "providing material support or resources" is open to constitutional challenges.

Displaced Darfurians arrived by truck at the Zamzam refugee camp in northern Darfur, Sudan, on Thursday, February 26, 2009. More than 26,000 people from the region of Muhajeria have arrived in the Zamzam camp in recent weeks, fleeing the fighting and Arab militias.

Crimes Against the State

CHAPTER OUTLINE

Balance in Times of Emergency

Whoever, within the United States or subject to the jurisdiction of the United States, knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 10 years, or both.

USA Patriot Act (2001)

You don't have to wait until the fuse is being lit. If that were the standard, a lot of bombs would go off and a lot of people would lose their lives.

Michael Chertoff, U.S. Department of Homeland Security (Anderson 2003)

If you cast too wide a net and you don't use appropriate discretion to limit these prosecutions, you risk ensnaring innocent people and you demean the entire process of prosecuting terror.

Neal Sonnett, National Association of Criminal Defense Lawyers (Anderson 2003)

LO 1

In the different views of the Patriot Act quoted in the opener, you can see the tension between two core values in our constitutional democracy—the need for safety and security and the desire for privacy and liberty.

The **USA Patriot Act** (2001) is an acronym for "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism." Aimed at fighting and preventing international terrorism, it was passed and signed into law on October 16, 2001, after the September 11 attacks on the World Trade Center and the Pentagon.

This chapter is about how we apply the enduring principles of criminal law (Chapters 1–4) to protect the core values of security and freedom in a time of great testing by threats from terrorist groups who are prepared to kill innocent Americans both in the United States and around the world. Grave as the threat may be today, we should remember our Constitution was adopted during a time of similar major threats to our nation's security.

We'll examine the history and modern law of treason, the other ancient crimes of disloyalty (sedition, sabotage, and espionage), and the specific crimes against domestic and international terrorism enacted after the Oklahoma City bombing in 1993 and the attacks on the World Trade Center and the Pentagon on September 11, 2001.

Treason

LO 1

Treason is the only crime defined in the U.S. Constitution. This is how Article III, Section 3, defines this most heinous of all crimes against the state:

> Treason against the United States shall consist only in levying War against them, or, in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

There's also a U.S. Code (2006) treason statute that includes the constitutional definition and adds this penalty provision:

> Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined under this title but not less than $10,000; and shall be incapable of holding any office under the United States. (Title 18, Part I, Chapter 115, § 2381)

Let's look at how treason laws were viewed both before and after the Revolution.

Treason Laws and the American Revolution

LO 2

The revolutionaries who wrote the U.S. Constitution knew very well the new government they were about to create couldn't survive without the active support (or at least the passive submission) of most of the people. They also realized it was going to be some time before this new republican form of government took hold among the people.

The people's allegiance would be especially important to the newborn nation's survival in the early years following the Revolution, a time of gigantic threats from enemies inside and outside the new country. From within, Benedict Arnold's betrayal of General Washington was fresh in their minds, and English royalists among them remained deeply loyal to King George III.

From without, unfriendly countries had designs on the new country's territory. To the north in Canada, England was hovering, smarting from the loss of the American colonies and looking for payback. Spain to the south had just taken back Florida and claimed the whole Mississippi Valley. And France had only recently been thrown out of the Ohio Valley. These unfriendly nations formed alliances with Native American nations by taking advantage of deep injustices the Americans continued to inflict on the tribes.

These threats led the authors of the Constitution to take a tough stand against individuals who broke their allegiance in the face of these dangers. But there was a flip side to their tough stand. Many of the drafters' ancestors had fled to the colonies to escape persecution for heresy and prosecution for treason. More to the point, almost all of them were traitors themselves under British law. English treason consisted either of levying war against the king or giving aid and comfort to the king's enemies. They'd done both. They'd levied war against the King of England by fighting the Revolutionary War, and they'd given aid and comfort to England's bitterest enemy, France.

Everything they did to further the interests of the colonies was done under threat of prosecution for treason. English prosecutions for treason weren't pretty. Thomas Jefferson referred to the English law of treason as a "deadly weapon in the hands of tyrannical kings" and "weak and wicked Ministers which had drawn the blood of the best and honestest men in the kingdom" (Jefferson 1853, 1:215). Treason prosecutions were probably on Benjamin Franklin's mind when he quipped at the signing of the Declaration of Independence, "We must all hang together, or most assuredly we shall all hang separately" (Lederer 1988, 27).

What were they worried about? The existing law of treason in England defined "treason" as "adherence to the enemy." **Adherence** here means breaking allegiance to your own country by forming an "attachment to the enemy." Criminalizing attachment—joining the enemy's military forces—wasn't an issue; everybody agreed that was treason. But what about "giving aid and comfort to the enemy"? With this loose phrase, "attachment" could lead to attacks on thoughts and feelings. Suppose "disloyalty" took the forms of sympathy for our enemies or even apathy toward our own cause. Were they treason, too? (They were in England.) And would zealous patriotism, so needed in troubled times, tempt the government to bend the rules in its attempt to protect the country? (It did in England.)

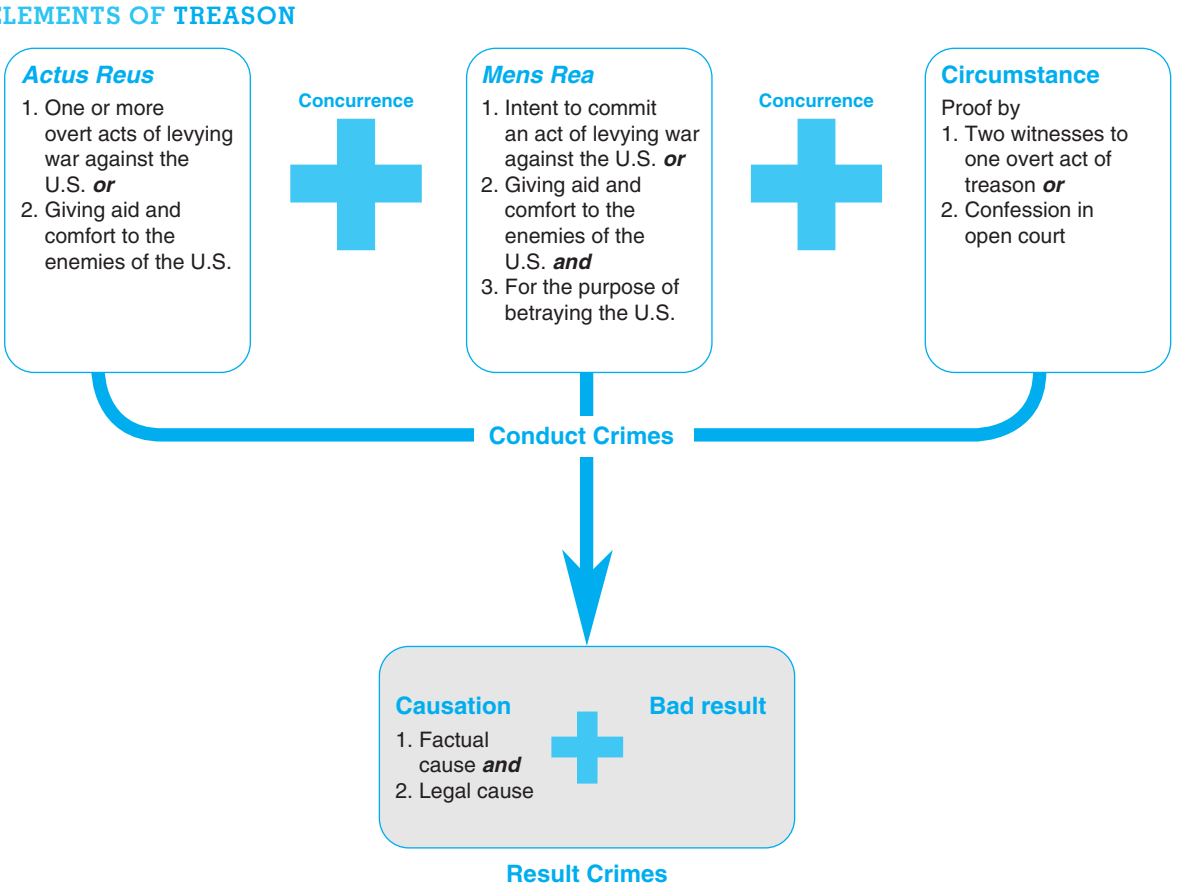
The worries that treason law would be abused boiled down to two concerns:

1. That peaceful opposition to the government, not just rebellion, would be repressed.
2. That innocent people might be convicted of treason because of perjury, passion, and/or insufficient evidence. The authors of the Constitution were determined that disloyal feelings or opinions and the passions of the time wouldn't be a part of the law of treason.

So as much as they recognized the need for allegiance to the new government, their fear of abusive prosecutions for treason led them to adopt "every limitation that the practice of governments had evolved or that politico-legal philosophy to that time had advanced" (*Cramer v. U.S.* 1945, 23–24). By the time the Constitution was adopted, government and philosophy had come to limit treason to two disloyal behaviors: (1) levying war against your own country and (2) giving aid and comfort to the enemy.

The authors of the Constitution adopted these two acts and then, for more protection, added three more limits to the reach of treason:

1. They banned legislatures and courts from creating new treasons.
2. They required two witnesses to at least one overt (unconcealed) act of treason or a confession in open court.
3. They wrote these limits into the body of the U.S. Constitution, where it would be very tough to tamper with them because of the intentionally cumbersome constitutional amendment process.



Treason consists of three elements. First, **treason *actus reus*** consists of either levying war against the United States or giving aid and comfort to the enemies of the United States. Second, **treason *mens rea*** consists of intentionally giving aid and comfort for the very purpose of betraying the United States. Third, **proof of treason** requires either two witnesses to the *actus reus* or confession in open court.

Associate U.S. Supreme Court Robert Jackson stated the elements of treason in this straightforward language in one of the very few treason cases in U.S. history, *Cramer v. U.S.* (1945):

> The crime of treason consists of two elements: adherence to the enemy; and rendering him aid and comfort. A citizen intellectually or emotionally may favor the enemy and harbor sympathies or convictions disloyal to this country's policy or interest, but so long as he commits no act of aid and comfort to the enemy, there is no treason. On the other hand, a citizen may take actions, which do aid and comfort the enemy—making a speech critical of the government or opposing its measures, profiteering, striking in defense plants or essential work, and the hundred other things which impair our cohesion and diminish our strength—but if there is no adherence to the enemy in this, if there is no intent to betray, there is no treason. (29)

Treason Law since the Adoption of the U.S. Constitution

Distrust of treason prosecutions didn't end with the adoption of the Constitution. Throughout U.S. history, the government has prosecuted only a handful of people for treason, and presidents have pardoned or at least mitigated death sentences of most of those

few who've been found guilty. The only exception was President Eisenhower's refusal to stop the execution of Ethel Rosenberg, convicted of conspiring to give atomic bomb secrets to the Soviet Union. She and her husband, Julius, were executed in 1951. There's still plenty of controversy surrounding the Rosenbergs' executions (Meerpol 2003).

In 1945, six years before the Rosenbergs' executions, the U.S. Supreme Court dealt with disloyalty—giving aid and comfort to Nazi Germany for the purpose of betraying the United States—and proving it, in *Cramer v. U.S.* (1945). This case was part of the fallout from the darkest days of World War II.

Early in June 1942, when the war was going badly for the Allies, German submarines were able to get close enough to the East Coast of the United States to allow eight Germans to get ashore, four on Long Island and four in Florida. They managed to bring along several crates of dynamite and lots of cash. The plan was to blow up bridges, factories, and maybe a department store owned by Jews. The object of the plot was, first, to sabotage the war effort by destroying strategic places. Second, they planned to demoralize the American public by terror—namely, by the brazen act of coming right onto U.S. soil and blowing up our places of defense and business.

The saboteurs never committed sabotage. Within days of their landing, they turned themselves in to the FBI. The reason they went to the FBI isn't clear. They may have had a change of heart, or feared getting caught, or perhaps they never were really saboteurs at all but Germans disillusioned with Hitler, hoping to escape to the United States (Nazi Saboteur Case 1942, "Transcript of Military Commission"). Whatever the reason, the eight saboteurs were immediately tried by a secret military commission and convicted. Six were quickly executed; two were sentenced to life in prison.

Shortly before the saboteurs were caught, Anthony Cramer got together with two of them, Werner Thiel and Edward Kerling, at the Lexington Inn in New York City. Later that day, Cramer had dinner with Werner Thiel at Thompson's Cafeteria in New York City.

In 1943, Cramer was arrested and charged with treason based on his meetings with the by-then executed Thiel and Kerling. At Cramer's treason trial, two FBI agents testified they had witnessed his meetings with Thiel and Kerling and that the three ate, drank, and "engaged long and earnestly in conversation."

The government claimed these acts amounted to "giving aid and comfort to the enemy" and that the FBI agents' testimony satisfied the constitutional requirement of two witnesses. The trial judge and jury agreed; Cramer was convicted (*Cramer v. U.S.*, 1945). However, the U.S. Supreme Court, by a vote of 5–4, disagreed and reversed Cramer's conviction. According to Justice Jackson, writing for the majority, two witnesses to the dinner wasn't good enough to prove treason:

> The whole purpose of the constitutional [two witness] provision is to make sure that a treason conviction shall rest on direct proof of two witnesses and not even a little on imagination.
>
> And without the use of some imagination it is difficult to perceive any advantage which this meeting afforded to Thiel and Kerling as enemies or how it strengthened Germany or weakened the United States in any way whatever. It may be true that the saboteurs were cultivating Cramer as a potential "source of information and an avenue for contact." But there is no proof either by two witnesses or by even one witness or by any circumstance that Cramer gave them information. . . .
>
> Meeting with Cramer in public drinking places to tipple and trifle was no part of the saboteurs' mission and did not advance it. It may well have been a digression which jeopardized its success. (38)

Sedition, Sabotage, and Espionage

The lesson of *Cramer v. U.S.* is clear: It's very hard to convict someone of treason—and as you've already learned, that's just what the authors intended. But treason isn't the only crime aimed at combating disloyalty and keeping the allegiance of our citizens. Let's look at three of these crimes, which are very much like ancient crimes with the same names—sedition, sabotage, and espionage. Then, we'll examine some specific antiterrorism laws that borrowed from these three ancient crimes.

Sedition

For centuries, it's been a crime against the state not just to commit treason but to "stir up" others to overthrow the government by violence. Advocating the violent overthrow of the government was called **sedition**. The "stirring up" could be done by speeches (**seditious speech**), writings (**seditious libel**), or agreement (**seditious conspiracy**).

In 1798, during the French Revolution and impending war with France, the U.S. Congress enacted the country's first sedition act. Banning a lot more than stirring up the violent overthrow of the government, it made it a crime to

> unlawfully combine or conspire together with intent to oppose any measure or measures of the government of the United States, or to impede the operation of any law of the United States, or to intimidate or prevent any [official] from undertaking, performing, or executing his duty. (Urofsky and Finkelman 2002a, I:141)

The Sedition Act also made it a crime to

> write, print, utter, or publish any false, scandalous and malicious writing or writings" with intent to "defame" the U.S. Government or excite the hatred of the good people [against the U.S. Government]. (142)

The U.S. Criminal Code (2006) definition of "seditious conspiracy" sticks to conspiracies that advocate violence. It provides:

> If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall each be fined under this title or imprisoned not more than twenty years, or both. (Title 18, Part I, Chapter 115, § 2384)

In the **Smith Act of 1940**, Congress made it a crime to conspire to teach or advocate overthrowing the government by force or to be a member of a group that advocated the violent overthrow of the government. In 1948, a federal grand jury indicted 12 national leaders of the U.S. Communist Party. After an often-explosive trial that lasted nine months, the leaders were convicted in 1949 (Urofsky and Finkelman 2002b, II: 758–59). In *Dennis v. U.S.* (1951), the U.S. Supreme Court upheld the convictions of the Communist Party leaders against a challenge that the Smith Act violated the First Amendment's ban on laws that "abridge" free speech and association.

Sabotage

Sabotage is the crime of damaging or destroying property for the purpose of interfering with and hindering preparations for war and defense during national emergencies. Here's how the U.S. Criminal Code (2006, Title 18, Part I, Chapter 105, § 2153) defines the sabotage of war and defense materials, buildings, and utilities:

> Whoever, when the United States is at war, or in times of national emergency with intent to injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war or defense activities, or, with reason to believe that his act may injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war or defense activities, willfully injures, destroys, contaminates or infects, or attempts to so injure, destroy, contaminate or infect any war material, war premises, or war utilities, shall be fined under this title or imprisoned not more than thirty years, or both.

Other sections of Chapter 105 apply to similar acts against forts, harbors, and sea areas (§ 2152); production of defective war (§ 2154) or national defense (§ 2155) material, premises, and utilities; and destruction of national defense materials, premises, and utilities. Utilities include

> railroads, railways, electric lines, roads of whatever description, any railroad or railway fixture, canal, lock, dam, wharf, pier, dock, bridge, building, structure, engine, machine, mechanical contrivance, car, vehicle, boat, aircraft, airfields, air lanes, and fixtures or appurtenances thereof, or any other means of transportation whatsoever, whereon or whereby such war material or any troops of the United States, or of any associate nation, are being or may be transported either within the limits of the United States or upon the high seas or elsewhere; and all air-conditioning systems, dams, reservoirs, aqueducts, water and gas mains and pipes, structures and buildings, whereby or in connection with which air, water or gas is being furnished, or may be furnished, to any war premises or to the Armed Forces of the United States, or any associate nation, and all electric light and power, steam or pneumatic power, telephone and telegraph plants, poles, wires, and fixtures, and wireless stations, and the buildings connected with the maintenance and operation thereof used to supply air, water, light, heat, power, or facilities of communication to any war premises or to the Armed Forces of the United States, or any associate nation. (§ 2151)

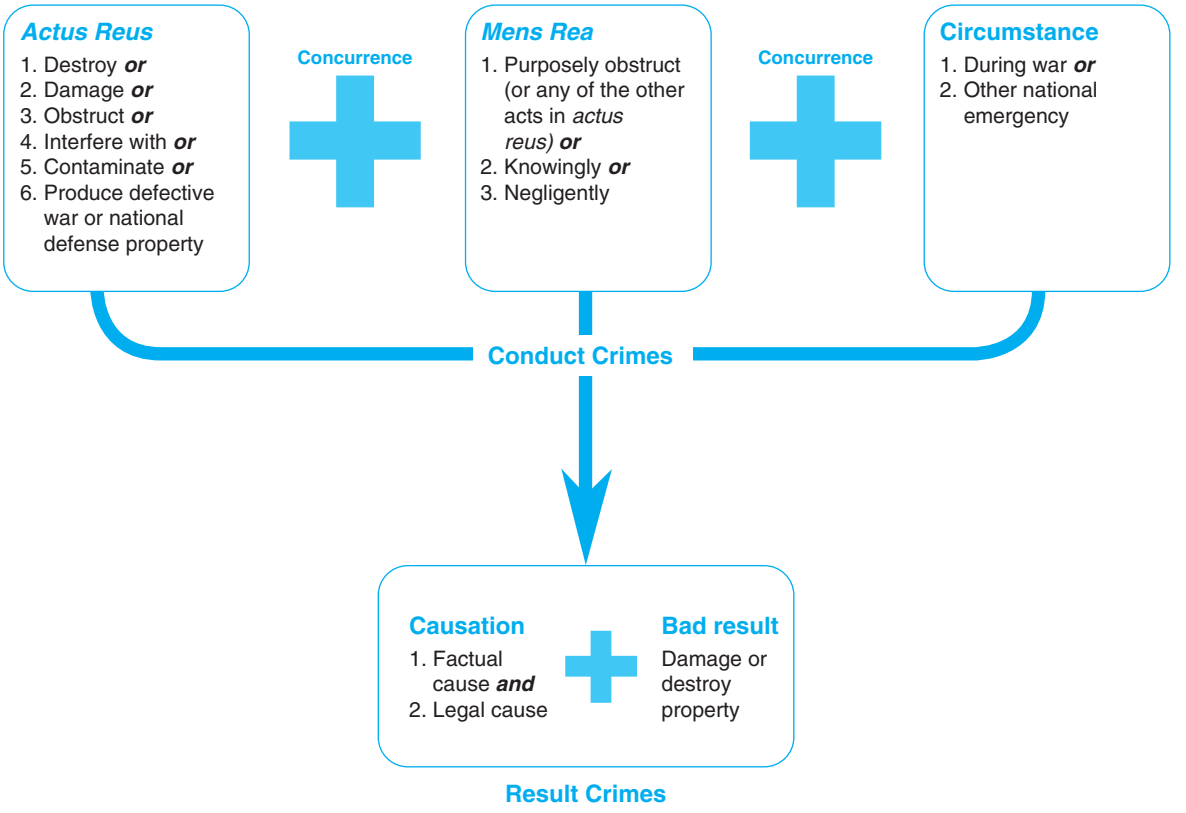
The code isn't completely clear about the required mental attitude. Most of the time, it's expressed as "willfully," sometimes "with intent to," and at least once "with reason to believe." Whatever the exact words, it's probably closest to the highest level of culpability—purpose (Chapter 4).

Espionage

You probably know espionage by its more common name "spying." Merriam-Webster (2003) defines "**espionage**" as

> the systematic secret observation of words and conduct by special agents upon people of a foreign country or upon their activities or enterprises (for example, war production or scientific advancement in military fields) and the accumulation of information (intelligence gathering) about such people, activities, and enterprises for political or military uses.

ELEMENTS OF SABOTAGE



The U.S. Code (2006, Title 18, Chapter 37, § 794) separates spying into two crimes: (1) espionage during peace and (2) espionage during war. The code defines "espionage during peace" as turning or attempting to turn over information about national defense to any foreign country with "intent or with reason to believe" the information is "to be used" to either hurt the United States or help any foreign country. The penalty is any term of imprisonment up to life or, if someone died as a result of the espionage, death (§ 794[a]).

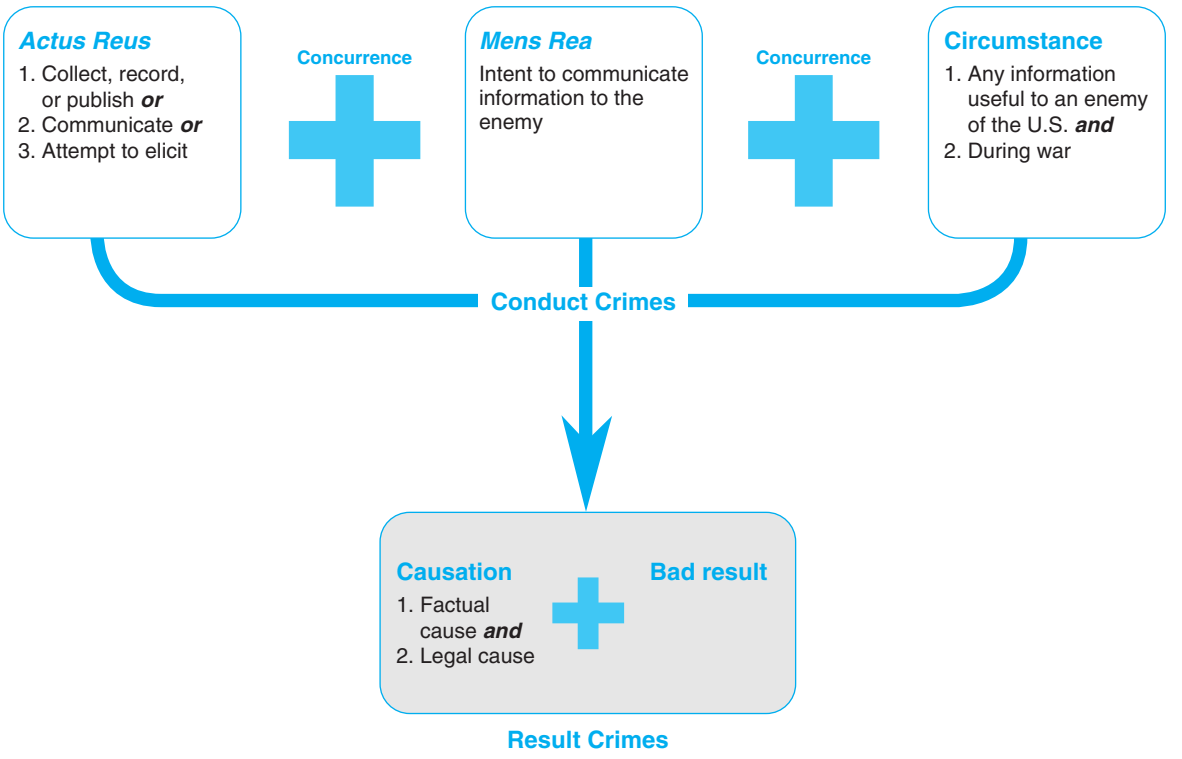
The crime of espionage during war consists of collecting, recording, publishing, or communicating (or attempting to do any of these) "any information" about troop movements, ships, aircraft, or war materials and any other information "which might be useful to the enemy." The penalty is death or any term of imprisonment up to life (§794[b]).

Anti-Terrorism Crimes

LO 1

A number of sections of the U.S. Code are available for prosecuting crimes related to terrorists and terrorist organizations. ("**Terrorism**," in the nonlegal sense, means the use of violence and intimidation in the pursuit of political aims.) These include the crimes we've already discussed—treason, sedition, sabotage, and espionage. Naturally,

ELEMENTS OF ESPIONAGE



prosecutors can also use the murder, attempted murder, and conspiracy to murder provisions in the code. Then, there are some specific anti-terrorism crimes—mainly, U.S. Code Chapter 113B, "Terrorism" (Title 18, Part I), the **Anti-Terrorism and Effective Death Penalty Act (AEDPA)** (1996), and the USA Patriot Act (2001). These acts include the following crimes:

1. Use of certain weapons of mass destruction (§ 2332a)
2. Acts of terrorism transcending national boundaries (§ 2332b)
3. Harboring or concealing terrorists (§ 2339)
4. Providing material support to terrorists (§ 2339A)
5. Providing material support or resources to designated foreign terrorist organizations (§ 2339B)

Before we examine these crimes, it's important that you know the elements of terrorism as they're defined in the U.S. Code (§ 2331). The code divides terrorism into two kinds: international terrorism and domestic terrorism. According to the code:

> **International terrorism** (§ 2331[1]) consists of violent acts or acts dangerous to human life that
>
> 1. Are committed outside the United States
> 2. Would be crimes if they were committed inside the United States
> 3. Are committed, or appear to be committed, with the intent
>
> (a) To intimidate or coerce a civilian population;

(b) To influence the policy of a government by intimidation or coercion; or

(c) To affect the conduct of a government by mass destruction, assassination, or kidnapping.

Domestic terrorism (§ 2331[5]) consists of the same elements, but the acts are committed inside the United States. Now that you know the definitions, let's look at some specific terrorist crimes included in the U.S. Code.

The Use of Weapons of Mass Destruction

According to the U.S. Code (2006), it's a felony punishable by up to life imprisonment, or execution if someone dies, to use, to threaten to use, or attempt or conspire to use, a weapon of mass destruction against a U.S. citizen outside the United States (Title 18, Part I, Chapter 113B, § 2332a); any person or property inside the United States (§ 2332a); any property owned, leased, or used by the U.S. government inside or outside the United States (§ 2332a[3]); or any property owned, leased, or used by a foreign government inside the United States (§ 2332a[4]). "**Weapons of mass destruction**" means "any **destructive device**," including any:

1. Explosive, incendiary, or poison gas
2. Bomb
3. Grenade
4. Rocket that has a propellant charge over 4 ounces
5. Missile that has an explosive or incendiary charge over 1.4 ounce
6. Mine
7. Device similar to the devices listed in (1)–(6) (U.S. Code, Title 18, Part I, Chapter 44, § 921)

The following are also defined as weapons of mass destruction:

- Any weapon intended to cause death or serious bodily injury by poisonous chemicals, or their precursors
- Any weapon involving a disease mechanism
- Any weapon designed to release radiation or radioactivity at a level dangerous to human life (§ 2332[c][2])

Acts of Terrorism Transcending National Boundaries

According to U.S. Code, § 2332b, it's a felony for anyone whose "**conduct transcends national boundaries**"—that is, acts that take place partly outside and partly inside the United States—to

1. Kill, kidnap, maim, assault resulting in serious bodily injury, or assault with a deadly weapon any person within the United States; or
2. "Create a substantial risk of serious bodily injury to any other person" by destroying or damaging any structure, conveyance, or other property within the United States; or
3. Threaten, or attempt, or conspire to commit (1) or (2) if the following circumstance elements are present:

a. The victim, or intended victim is the U.S. government, a member of the uniformed services, or any official, officer, employee, or agent of the legislative, executive, or judicial branches, or of any department or agency, of the United States.
b. The structure, conveyance, or other property is owned by or leased by the United States

The penalties include:

1. Death or up to life imprisonment for killing or for death resulting from the conduct
2. Up to life imprisonment for kidnapping
3. Up to 35 years for maiming
4. Up to 30 years for assault with a deadly weapon or assault resulting in serious bodily injury
5. Up to 25 years for damaging or destroying property

Harboring or Concealing Terrorists

Section 2339 of the U.S. Code provides:

> Whoever harbors or conceals any person who he knows, or has reasonable grounds to believe, has committed, or is about to commit, an offense under section 32 (relating to destruction of aircraft or aircraft facilities), section 175 (relating to biological weapons), section 229 (relating to chemical weapons), section 831 (relating to nuclear materials), paragraph (2) or (3) of section 844(f) (relating to arson and bombing of government property risking or causing injury or death), section 1366(a) (relating to the destruction of an energy facility), section 2280 (relating to violence against maritime navigation), section 2332a (relating to weapons of mass destruction), or section 2332b (relating to acts of terrorism transcending national boundaries) of this title, section 236(a) (relating to sabotage of nuclear facilities or fuel) of the Atomic Energy Act of 1954 (42 U.S.C. 2284(a)),or section 46502 (relating to aircraft piracy) of title 49, shall be fined under this title or imprisoned not more than ten years, or both.

The ***actus reus* of harboring or concealing** consists of harboring or concealing persons who have committed or are about to commit a list of terrorist-related crimes. The ***mens rea* of harboring or concealing** requires knowing (or that a reasonable person should have known) the *actus reus* of harboring or concealing was about to be committed. The penalty is a fine or up to ten years of imprisonment.

All of the crimes we've covered so far in this chapter are available to the U.S. government for prosecuting suspected terrorists and convicting guilty ones. But, as of August 2006, the only person convicted of any of those crimes has been Zacarias Moussaoui, the so-called twentieth hijacker. After a trial lasting more than four years, Moussaoui eventually pleaded guilty to all six crimes he was charged with, all of them conspiracies (U.S. Department of Justice 2001):

1. Conspiracy to commit acts of terrorism
2. Conspiracy to commit aircraft piracy
3. Conspiracy to destroy aircraft

4. Conspiracy to use airplanes as weapons of mass destruction
5. Conspiracy to murder government employees
6. Conspiracy to destroy property

In the penalty phase of the trial, the jury declined to recommend his execution, recommending life imprisonment instead. Most of the 9/11 families seemed satisfied with the jury's decision; most professionals weren't.

LO 4

There are a few other cases not yet decided, but the government's clear charges of choice are "providing material support or resources to individual terrorists" (U.S. Code 2003, Title 18, Part I, Chapter 113B, § 2339A), and/or to "terrorist organizations" (§ 2339B) (Roth 2003; Table 13.1). Let's turn to those most important crimes now.

Providing "Material Support" to Terrorists and/or Terrorist Organizations

LO 4

The felony of providing **material support** was first created in the 1996 Anti-Terrorism and Effective Death Penalty Act (AEDPA) (§ 323), which was aimed at domestic terrorist acts. It was passed after Timothy McVeigh bombed the federal building in Oklahoma City, Oklahoma. (See Table 13.1 for a list of types of "material support.")

The AEDPA felony, with harsher penalties, became Sections 2339A and B of the 2001 USA Patriot Act. The Patriot Act is a huge law (300+ pages long) passed with lightning speed only six weeks after the September 11 attacks. Most of the act deals with criminal procedure, surveillance and intelligence, law enforcement information sharing, search and seizure, interrogation, and detention. Of course, these are extremely important, but we won't discuss them here because they're subjects for criminal procedure, not criminal law.

TABLE 13.1 Types of "Material Support"

Currency or monetary instruments or financial securities
Financial services
Lodging
Training
Expert advice or assistance
Safe houses
False documentation or identification
Communications equipment
Facilities
Weapons
Lethal substances, explosives
Personnel
Transportation
Other physical assets, except medicine or religious materials

TABLE 13.2 "Material Support" Provisions

SEC. 2339A.—PROVIDING MATERIAL SUPPORT TO TERRORISTS

Offense.—Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of [a list of provisions related to terrorist acts in the U.S. Code] or in preparation for, or in carrying out, the concealment or an escape from the commission of any such violation, or attempts or conspires to do such an act, shall be fined under this title, imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. . . .

Definition.—In this section, the term "material support or resources" means . . . [the list of items in Table 13.1].

SEC. 2339B.—PROVIDING MATERIAL SUPPORT OR RESOURCES TO DESIGNATED FOREIGN TERRORIST ORGANIZATIONS

(a) *Prohibited Activities.*—

(1) Unlawful conduct.—

Whoever, within the United States or subject to the jurisdiction of the United States, knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.

Section 2339A makes it a federal felony to provide, attempt, or conspire to "provide material support or resources" to commit any of a long list of federal crimes. It aims at providing support to individual terrorists. Section 2339B bans providing, attempting to provide, or conspiring to provide "material support or resources to a designated foreign terrorist organization."

The crimes of providing material support to individuals or organizations are proximity crimes. **Proximity crimes** ban conduct because of its closeness to other crimes—in this case, 44 other federal crimes individual terrorists or terrorist organizations might commit (Doyle 2005, 1–2, 7–8). They aim at "nipping terrorism in the bud." They try to prevent what we most want to prevent—killing and destruction by terrorist acts.

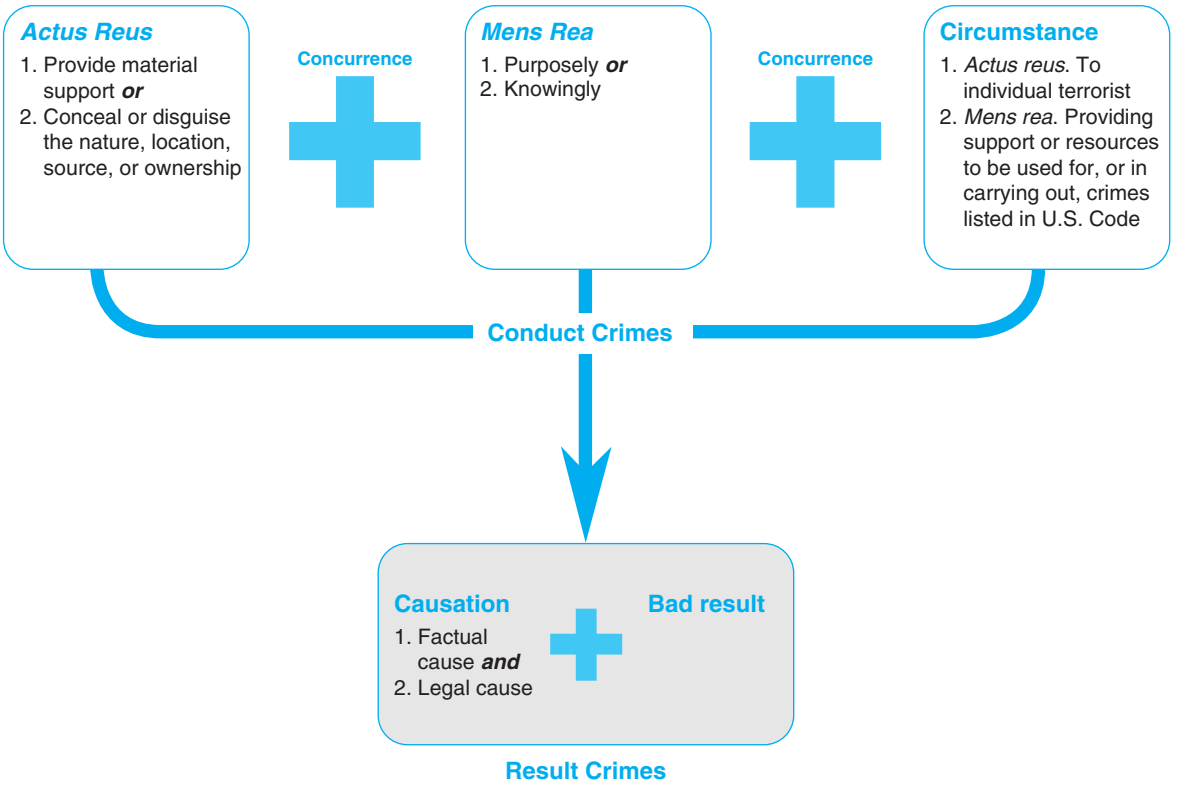
A few decisions in the U.S. District Courts and U.S. Courts of Appeals have ruled that parts of the material support provisions violate the U.S. Constitution (see Table 13.2). These same decisions have also applied a demanding interpretation of "knowingly," the *mens rea* element in the material support provisions.

LO 5

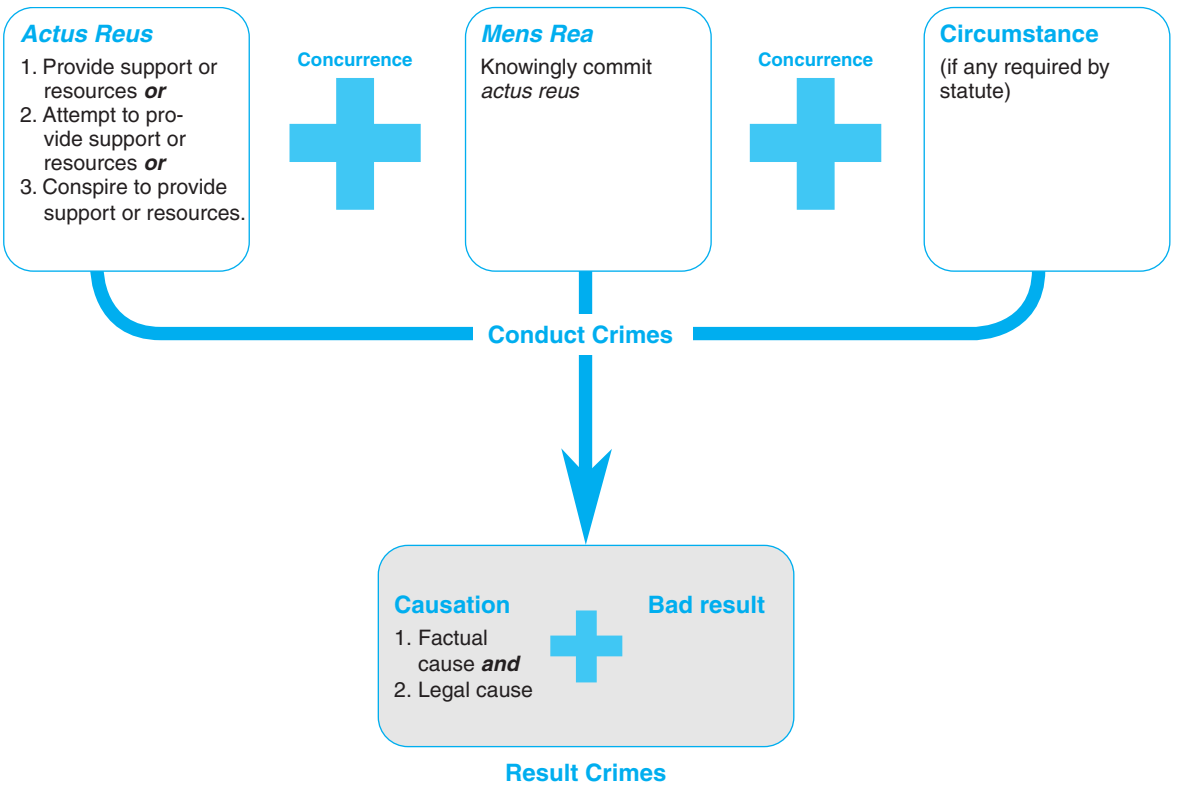
None of the cases has reached the U.S. Supreme Court, but a few have reached and been decided in the U.S. District Courts and the U.S. Courts of Appeals. One of the cases that challenged the material support sections' constitutionality was the prosecution of John Walker Lindh, the "American Taliban." Lindh attended a military training camp in Pakistan run by Harakut ul-Mujahideen, whose followers had been designated by the U.S. Secretary of State as a "terrorist group dedicated to an extremist view of Islam"; traveled to Afghanistan; and joined the Taliban. There, he informed Taliban personnel "that he was an American and that he wanted to go to the front lines to fight." Lindh was captured by the Northern Alliance, an ally of the United States in the war in Afghanistan. Later, he was indicted for providing and conspiring to provide material support to Harakut ul-Mujahideen.

In *U.S. v. Lindh*, Lindh tried and failed to get the indictment dismissed on the ground that the material support provisions are void for vagueness and violate the First Amendment because of overbreadth (Chapter 2). His case, heard in the U.S. District

ELEMENTS OF MATERIAL SUPPORT TO TERRORISTS



ELEMENTS OF MATERIAL SUPPORT TO TERRORIST ORGANIZATIONS



Court, Eastern District of Virginia, never went to trial because Lindh reached a guilty plea agreement with the United States. According to the terms of the agreement, Lindh pleaded guilty to two crimes ("supplying services to the Taliban" and "carrying an explosive during the commission of a felony") in exchange for receiving less than a life sentence. He was sentenced to 10 years for each offense, to be served consecutively (one after the other), and 3 years of supervised release following his 20 years in prison and fined $250,000 for each offense (*U.S. v. Lindh* 2002).

Lindh's acts were clearly within the *actus reus* of "providing material support" to al Qaeda and the Taliban—he trained, carried a weapon and a grenade, and fought on their side. And the First Amendment clearly didn't protect his association with them. Other cases aren't so clear. Several federal court decisions have ruled that parts of §§ 2339 A and B violate the First Amendment rights of free speech and assembly and that they're void for vagueness (Chapter 2).

LO 3

In addition to the constitutional challenges, some cases have also read a very high standard of *mens rea* into the sections. Particularly troubling to some courts were the uncertain meaning of "training," "personnel," "expert advice or assistance," and "service." In *Humanitarian Law Project v. Reno* (2000), the Ninth Circuit U.S. Court of Appeals declared "personnel" vague because it might include "the efforts of a simple advocate" (1137–38); "training" because it might include innocent academic instruction (1138); and "expert advice or assistance" because it might, like "training" and "personnel," include constitutionally protected First Amendment speech (1185).

To cure these constitutional and interpretation problems, Congress amended the "material support" provisions in § 6603 of the Intelligence Reform and Prevention of Terrorism Act of 2004 (Doyle 2005, 2). Now, the *mens rea* provision with respect to providing support to *individuals* reads:

> Whoever *knowingly* provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.

And, with respect to providing support to *organizations*, the IRTPA amends AEDPA's prohibition on "providing material support or resources" to a designated foreign terrorist organization to read: a person who provides "material support or resources" to a designated organization must *know* that (1) "the organization is a designated terrorist organization," (2) "the organization has engaged or engages in terrorist activity," or that (3) "the organization has engaged or engages in terrorism."

LO 5

Section 6603 also enacted new definitions of the uncertain terms (Doyle 2006, 2–3):

> ***Training*** The term "training" means instruction or teaching designed to impart a specific skill, as opposed to general knowledge.
>
> ***Expert advice or assistance*** The term "expert advice or assistance" means advice or assistance from scientific, technical, or other specialized knowledge.
>
> ***Personnel*** No person may be prosecuted under this section in connection with the term "personnel" unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may include himself) to work under that terrorist organization's direction or control, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization shall not be considered to be working under the organization's direction and control.

Finally, IRTPA, amended the definition of "material support or resources" to include an additional ban on providing "service."

The case excerpt, *Humanitarian Law Project v. Mukasey* (2009), was decided after Congress tried to stave off constitutional challenges to the material support sections. The case gave Congress's efforts "mixed grades." Section 6603 cured the vagueness problem in "personnel" but not in "training" or in "expert advice or assistance." It added that "service" was also vague.

The following case excerpt,* Humanitarian Law Project v. Mukasey *(2009), ruled that Congress partly cured the constitutional vagueness in the material support sections of the Patriot Act.

CASE What's "Material Support?"

Humanitarian Law Project v. Mukasey
552 F.3d 916, (C.A.9 Cal. 2009)

HISTORY

Organizations and individuals desiring to provide support for lawful activities of two organizations that had been designated as foreign terrorist organizations sought an injunction to prohibit enforcement of the criminal ban on providing material support to such organizations. The U.S. District Court for the Central District of California, Audrey B. Collins, J., granted summary judgment in part for government. Plaintiffs appealed.

PREGERSON, CJ.

We are once again called upon to decide the constitutionality of sections 302 and 303 of the act and its 2004 amendment, the Intelligence Reform and Terrorism Prevention Act ("IRTPA").

FACTS

The plaintiffs are six organizations, a retired federal administrative law judge, and a surgeon. The Kurdistan Workers Party, a.k.a Partiya Karkeran Kurdistan ("PKK"), and the Liberation Tigers of Tamil Eelam ("LTTE") engage in a wide variety of unlawful and lawful activities. The plaintiffs seek to provide support only to nonviolent and lawful activities of PKK and LTTE. This support would help Kurds living in Turkey and Tamils living in Tamil Eelam in the northern and eastern provinces of Sri Lanka to achieve self-determination.

The plaintiffs who support PKK want: (1) to train members of PKK on how to use humanitarian and international law to peacefully resolve disputes, (2) to engage in political advocacy on behalf of Kurds who live in Turkey, and (3) to teach PKK members how to petition various representative bodies such as the United Nations for relief.

The plaintiffs who support LTTE want: (1) to train members of LTTE to present claims for tsunami-related aid to mediators and international bodies, (2) to offer their legal expertise in negotiating peace agreements between the LTTE and the Sri Lankan government, and (3) to engage in political advocacy on behalf of Tamils who live in Sri Lanka.

On March 19, 1998, the plaintiffs filed a complaint in the District Court, alleging that AEDPA (Anti-Terrorism and Effective Death Penalty Act) violated their First and Fifth Amendment rights. The plaintiffs sought a preliminary injunction to bar the government from enforcing against them AEDPA's prohibition against providing "material support or resources" to PKK and LTTE.

On August 27, 2003, the plaintiffs filed a complaint in the District Court, challenging AEDPA's ban on providing "expert advice or assistance" to a designated foreign terrorist organization. The District Court found that term to be unconstitutionally vague, but not overbroad. The District Court granted the plaintiffs' request for injunctive relief. Both parties appealed.

On December 3, 2003, we affirmed the District Court's holding that the terms "training" and "personnel" were void for vagueness. A majority of the panel also read into the statute a *mens rea* requirement holding that "to sustain a conviction under § 2339B, the government

must prove beyond a reasonable doubt that the donor had knowledge that the organization was designated by the Secretary as a foreign terrorist organization or that the donor had knowledge of the organization's unlawful activities that caused it to be so designated." The parties sought, and we granted, en banc review (HLP I).

On December 17, 2004, three days after the en banc panel heard oral argument, Congress passed the Intelligence Reform and Terrorism Prevention Act ("IRTPA"), which amended AEDPA.

Because of the amendments to AEDPA contained in IRTPA, the en banc panel, on December 21, 2004, "vacated the judgment and injunction of the panel regarding the terms 'personnel' and 'training,' and remanded this case to the district court for further proceedings." The en banc panel also affirmed the District Court's rulings on the rest of the plaintiffs' First Amendment challenges "for the reasons set out in [two earlier cases involving the same plaintiffs]." On April 1, 2005, we remanded the plaintiffs' separate challenge to the term "expert advice or assistance" to the District Court to consider IRTPA's impact on the litigation.

On remand, the District Court consolidated the two cases (the "personnel" and "training" challenge and the "expert advice and assistance" challenge). Plaintiffs also challenge IRTPA's newly added term "service." The District Court held that the terms "training" and "service" are unconstitutionally vague. With respect to the term "expert advice or assistance," the District Court held that the "other specialized knowledge" part of the definition is void for vagueness, but that the "scientific" and "technical" knowledge part of the definition was not vague. The District Court also held that the newly added definition of "personnel" cured the vagueness of that term. The District Court rejected the rest of the plaintiffs' challenges and granted partial summary judgment for the government. Both parties timely appealed.

OPINION

A. Specific Intent

In their prior appeals, Plaintiffs argued that AEDPA section 2339B(a) violates their Fifth Amendment due process rights because that section does not require proof of *mens rea* to convict a person for providing "material support or resources" to a designated foreign terrorist organization. We read the statute to require that the donor of the "material support or resources" have knowledge "either of an organization's designation or of the unlawful activities that caused it to be so designated."

In December 2004, Congress passed IRTPA that revised AEDPA to essentially adopt our reading of AEDPA section 2339B to include a knowledge requirement. Thus, post-IRTPA, to convict a person for providing "material support or resources" to a designated foreign terrorist organization, the government must prove that the donor defendant "had knowledge that the organization is a designated terrorist organization, that the organization has engaged or engages in terrorist activity, or that the organization has engaged or engages in terrorism." On December 21, 2004, the en banc panel vacated our judgment, and remanded the case to the district court for further proceedings in light of IRTPA. The district court's decision on remand is now the matter before us.

Plaintiffs argue that IRTPA does not sufficiently cure AEDPA section 2339B's *mens rea* deficiency. They contend that section 2339B(a) continues to violate due process because it does not require the government to prove that the donor defendant acted with specific intent to further the terrorist activity of the designated organization. Plaintiffs urge us to invalidate the statute or, alternatively, to read a specific intent requirement into the statute.

"In our jurisprudence guilt is personal." Thus, we must "construe a criminal statute in light of the fundamental principle that a person is not criminally responsible unless 'an evil-meaning mind' accompanies 'an evil-doing hand.'" In other words, unless Congress expressly communicates its intent to dispense with a *mens rea* requirement and create strict criminal liability, the notion of "personal guilt" requires some culpable intent before criminal liability attaches. "Determining the mental state required for commission of a federal crime requires 'construction of the statute and inference of the intent of Congress.'" We remain mindful that we "should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute."

Here, AEDPA section 2339B(a) requires the government to prove that the donor defendant provided "material support or resources" to a designated foreign terrorist organization with *knowledge* that the donee organization is a designated foreign terrorist organization, or with *knowledge* that the organization is or has engaged in terrorist activities or terrorism. As amended, AEDPA section 2339B(a) complies with the "conventional requirement for criminal conduct—awareness of some wrongdoing." Thus, a person with such knowledge is put on notice that "providing material support or resources" to a designated foreign terrorist organization is unlawful. Accordingly, we hold that the amended version of section 2339B comports with the Fifth Amendment's requirement of "personal guilt."

Plaintiffs urge us to read a specific intent requirement into AEDPA section 2339B. They rely on *Scales v. United States* (1961). In *Scales*, the Supreme Court held that it was wrong to impute criminal guilt based on membership in an organization without proof that the defendant acted with culpable intent. As amended, section 2339B(a) does not proscribe membership in or association with the terrorist organizations, but seeks to punish only those who have provided "material support or resources" to a foreign terrorist organization with *knowledge* that the organization was a designated foreign terrorist organization, or that it is or has engaged in terrorist activities or terrorism. Accordingly, unlike the statute in *Scales* which

was silent with respect to requisite *mens rea*, section 2339B(a) exposes one to criminal liability only where the government proves that the donor defendant acted with culpable intent-knowledge. Because we find that acting with "knowledge" satisfies the requirement of "personal guilt" and eliminates any due process concerns, we decline Plaintiffs' invitation to extend the holding in *Scales*.

Finally, in enacting IRTPA, Congress explicitly stated that knowledge of the organization's designation as a foreign terrorist organization, or knowledge of its engagement in terrorist activities or terrorism, is required to convict under section 2339B(a). As the district court correctly observed, Congress could have, but chose not to, impose a requirement that the defendant act with the specific intent to further the terrorist activity of the organization. It is not our role to rewrite a statute, and we decline to do so here.

Because there is no Fifth Amendment due process violation, we affirm the district court on this issue.

B. Vaguenees

AEDPA section 2339B(a), as amended by IRTPA in December 2004, now criminalizes the act of knowingly providing "material support or resources" to a designated foreign terrorist organization. The amended statute defines "material support and resources" as:

> any property, tangible or intangible, or *service*, including currency or monetary instruments or financial securities, financial services, lodging, *training, expert advice or assistance*, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, *personnel* (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials (emphasis added). (18 U.S.C. § 2339A(b)

Plaintiffs argue that this amended definition is impermissibly vague because the statute fails to notify a person of ordinary intelligence as to what conduct constitutes "material support or resources." Specifically, Plaintiffs argue that the prohibitions on providing "training," "expert advice or assistance," "service," and "personnel" to designated organizations are vague because they are unclear and could be interpreted to criminalize protected speech and expression.

The Due Process Clause of the Fifth Amendment requires that statutes clearly delineate the conduct they proscribe. While due process does not "require 'impossible standards' of clarity," the "requirement for clarity is enhanced when criminal sanctions are at issue or when the statute abuts upon sensitive areas of basic First Amendment freedoms." In such cases, the statute "must be sufficiently clear so as to allow persons of ordinary intelligence a reasonable opportunity to know what is prohibited." Moreover, "because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."

Vague statutes are invalidated for three reasons: "(1) to avoid punishing people for behavior that they could not have known was illegal; (2) to avoid subjective enforcement of laws based on 'arbitrary and discriminatory enforcement' by government officers; and (3) to avoid any chilling effect on the exercise of First Amendment freedoms."

1. "Training"

The district court held that IRTPA did not cure the vagueness of the term "training," and enjoined the government from enforcing against Plaintiffs AEDPA's ban on providing "training." Generally, we would start our vagueness analysis by considering the plain meaning of the language at issue. However, where Congress expressly defines a term, the definition provided by Congress guides our vagueness analysis.

To survive a vagueness challenge, the statute must be sufficiently clear to put a person of ordinary intelligence on notice that his or her contemplated conduct is unlawful. Because we find it highly unlikely that a person of ordinary intelligence would know whether, when teaching someone to petition international bodies for tsunami-related aid, one is imparting a "specific skill" or "general knowledge," we find the statute's proscription on providing "training" void for vagueness.

Even if persons of ordinary intelligence could discern between the instruction that imparts a "specific skill," as opposed to one that imparts "general knowledge," we hold that the term "training" would remain impermissibly vague. As we previously noted in *HLP I*, limiting the definition of the term "training" to the "imparting of skills" does not cure unconstitutional vagueness because, so defined, the term "training" could still be read to encompass speech and advocacy protected by the First Amendment.

For the foregoing reasons, we reject the government's challenge and agree with the district court that the term "training" remains impermissibly vague because it "implicates, and potentially chills, Plaintiffs' protected expressive activities and imposes criminal sanctions of up to fifteen years imprisonment without sufficiently defining the prohibited conduct for ordinary people to understand."

2. "Expert Advice or Assistance"

The district court previously invalidated the undefined term "expert advice or assistance" on vagueness grounds. The district court reasoned that the prohibition against providing "expert advice or assistance" could be construed to criminalize activities protected by the First Amendment. The government appealed. We now have the benefit of IRTPA's language while reviewing this appeal. IRTPA defines the term "expert advice or assistance" as imparting "scientific, technical, or other specialized knowledge" (18 U.S.C. § 2339A(b)(3)).

The government argues that the ban on "expert advice or assistance" is not vague. The government relies on the Federal Rules of Evidence's definition of expert testimony as testimony based on "scientific, technical,

or other specialized knowledge." The government argues that this definition gives a person of ordinary intelligence reasonable notice of conduct prohibited under the statute. Plaintiffs contend that the definition of "expert advice or assistance" is vague as applied to them because they cannot determine what "other specialized knowledge" means.

We agree with the district court that "the Federal Rules of Evidence's inclusion of the phrase 'scientific, technical, or other specialized knowledge' does not clarify the term 'expert advice or assistance' for the average person with no background in law." The portion of the "expert advice or assistance" definition that refers to "scientific" and "technical" knowledge is not vague. Unlike "other specialized knowledge," which covers every conceivable subject, the meaning of "technical" and "scientific" is reasonably understandable to a person of ordinary intelligence.

3. "Service"

IRTPA amended the definition of "material support or resources" to add the prohibition on rendering "service" to a designated foreign terrorist organization. There is no statutory definition of the term "service." Plaintiffs argue that proscribing "service" is vague because each of the other challenged provisions could be construed as a provision of "service." The district court agreed. We adopt the district court's holding and its reasoning. The term "service" presumably includes providing members of PKK and LTTE with "expert advice or assistance" on how to lobby or petition representative bodies such as the United Nations. "Service" would also include "training" members of PKK or LTTE on how to use humanitarian and international law to peacefully resolve ongoing disputes. Thus, we hold that the term "service" is impermissibly vague because "the statute defines 'service' to include 'training' or 'expert advice or assistance,'" and because " 'it is easy to imagine protected expression that falls within the bounds' of the term 'service.'"

4. "Personnel"

In our 2000 decision, we concluded that "personnel" was impermissibly vague because the term could be interpreted to encompass expressive activity protected by the First Amendment. We stated that "it is easy to see how someone could be unsure about what AEDPA prohibits with the use of the term 'personnel,' as it blurs the line between protected expression and unprotected conduct." We observed that "someone who advocates the cause of the PKK could be seen as supplying them with personnel. But advocacy is pure speech protected by the First Amendment."

As amended by IRTPA, AEDPA's prohibition on providing "personnel" is not vague because the ban no longer "blurs the line between protected expression and unprotected conduct." Unlike the version of the statute before it was amended by IRTPA, the prohibition on "personnel" no longer criminalizes pure speech protected by the First Amendment. Plaintiffs advocating lawful causes of PKK and LTTE cannot be held liable for providing these organizations with "personnel" as long as they engage in such advocacy "entirely independently of those foreign terrorist organizations."

Because IRTPA's definition of "personnel" provides fair notice of prohibited conduct to a person of ordinary intelligence and no longer punishes protected speech, we hold that the term "personnel" as defined in IRTPA is not vague.

CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

QUESTIONS

1. **Identify the terms in the material assistance provisions that the defendants challenged as violating the Constitution.**
2. **Summarize the Court's arguments for its decision about the constitutionality of each of the challenged terms.**
3. **Are the terms clear to an ordinary reasonable person? Are they clear to you? What's the difference between the two? Explain your answers.**

ETHICAL DILEMMA

"Should Suspected Terrorists Be Tried in Military Courts or Ordinary Criminal Courts?"

As the Obama administration and Congress grapple with issues stemming from the impending closure of the U.S. detention facility at Guantanamo Bay and consider how to deliver justice in complex terrorism cases, America's federal court system holds many of the solutions the nation's leaders seek, according to a new report by two former federal prosecutors.

In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Court–2009 Update and Recent Developments challenges the arguments of those who favor new, untested legal regimes for terrorism suspects such as "national security courts" or administrative detention without trial by presenting a comprehensive, fact-based assessment of the capability of federal courts to handle terrorism cases. The report is the most thorough examination to date of federal terrorism cases brought against those who are associated—organizationally, financially, or ideologically—with Islamist extremist terrorist groups such as al Qaeda.

Instructions

1. Go to the website www.cengage.com/criminaljustice/samaha.
2. Read the full report.
3. Write a policy position paper summarizing the debate over whether to try suspected terrorists in military or ordinary courts. Take a stand on whether ordinary or military courts promote the most ethical public policy.

SUMMARY

LO 1, 2
- Treason is the only crime defined in the U.S. Constitution.

LO 1
- The revolutionaries who wrote the U.S. Constitution knew that the new government they were about to create couldn't survive without the active support of most of the people. The people's allegiance would be especially important to the newborn nation's survival in the early years following the Revolution, a time of gigantic threats from enemies inside (traitor, spies, and other disloyal individuals) and outside (England, Spain, France, and Native American nations) the new country.

LO 1
- The authors of the Constitution had mixed feelings about treason because, in the eyes of the English government, they were traitors and their own ancestors had fled from religious persecution and prosecution for treason.

LO 1
- The authors of the Constitution had two worries: (1) that peaceful opposition to the government, not just rebellion, would be repressed and (2) that innocent people might be convicted of treason because of perjury, passion, and/or insufficient evidence.

LO 1
- Throughout U.S. history, the government has prosecuted only a handful of people for treason, and presidents have pardoned or at least mitigated death sentences of most of those few who've been found guilty.

LO 3
- A number of sections of the U.S. Code are available for prosecuting crimes related to terrorists and terrorist organizations.

LO 3
- The *actus reus* of harboring or concealing terrorist consists of harboring or concealing persons who have committed or are about to commit a list of terrorist-related crimes. The *mens rea* requires knowing the *actus reus* of harboring or concealing was about to be committed.

LO 4, 5
- The most-argued issues in material support cases include: (1) Due process—is the term "material support" void for vagueness? And (2) First Amendment—does providing material support violate the right to free speech and association?

KEY TERMS

USA Patriot Act, p. 451
treason, p. 452
adherence (to the enemy in treason), p. 453
treason *actus reus*, p. 454
treason *mens rea*, p. 454
proof of treason, p. 454
sedition, p. 456
seditious speech, p. 456
seditious libel, p. 456
seditious conspiracy, p. 456
Smith Act of 1940, p. 456
sabotage, p. 457
espionage, p. 457
terrorism, p. 458
Anti-Terrorism and Effective Death Penalty Act (AEDPA), p. 459
international terrorism, p. 459
domestic terrorism, p. 460
weapons of mass destruction (any "destructive device"), p. 460
conduct transcends national boundaries, p. 460
actus reus of harboring or concealing (terrorists), p. 461
mens rea of harboring or concealing (terrorists), p. 461
material support, p. 462
proximity crimes, p. 463
training, p. 465
expert advice or assistance, p. 465
personnel, p. 465

WEB RESOURCES

To prepare for exams, visit the *Criminal Law* companion website at www.cengage.com/criminaljustice/samaha, which features essential review and study tools such as flashcards, a glossary of terms, tutorial quizzes, and Supreme Court updates.

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Appendix

Selected Amendments of the Constitution of the United States: The Bill of Rights and Amendment XIV

Amendment I Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment II A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Amendment III No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VII In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment VIII Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XIV *Passed by Congress June 13, 1866. Ratified July 9, 1868.*

SECTION 1 All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2 Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3 No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two thirds of each House, remove such disability.

SECTION 4 The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5 The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Go to the *Criminal Law* 10e website for the full text of the Constitution of the United States.

Glossary

abuse-of-discretion standard an adjudicator's failure to exercise sound, reasonable, and legal decision making.

abuse-of-trust crimes (in property crime) crimes committed by caretakers.

accessories the parties liable for separate, lesser offenses following a crime.

accomplices the parties liable as principals before and during a crime.

actual disorderly conduct completed disorderly conduct (fighting).

actual possession physical possession; on the possessor's person.

actus reus the criminal act or the physical element in criminal liability.

***actus reus* of harboring or concealing (terrorists)** the wrongful act that comprises harboring terrorists.

adequate provocation the circumstance element in voluntary manslaughter that is the trigger that sets off the sudden killing of another person; acts that qualify as reducing murder to manslaughter.

adherence (to the enemy in treason) breaking allegiance to one's own country.

administrative crimes violations of federal and state agency rules.

affirmative defenses defenses in which the defendant bears the burden of production.

aggravated rape (first degree) rape committed with a weapon, by more than one person, or causing serious physical injury to the victim.

American bystander rule there's no legal duty to rescue or call for help to aid someone who's in danger even if helping poses no risk whatsoever to the potential rescuer.

analysis of criminal liability Conduct that unjustifiably *and* inexcusably inflicts or threatens *substantial* harm to individual or public interests.

Anti-Terrorism and Effective Death Penalty Act (AEDPA) law defining new crimes of domestic terrorism and increasing the penalties for domestic terrorism crimes.

***Apprendi* (bright-line) rule** other than a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum; must be submitted to a jury and proved beyond a reasonable doubt.

arson intentionally burning a house or other structure.

asportation the carrying away of another's property.

assault an attempt to commit a battery or intentionally putting another in fear.

attempt *actus reus* steps taken to complete a crime that's never completed.

attempt *mens rea* specific intent to commit a crime that's never completed.

attempted battery assault consists of having the specific intent to commit a battery and taking substantial steps toward carrying it out without actually completing the attempt.

attendant circumstances a circumstance connected to an act, an intent, and/or a result required to make an act criminal.

attendant circumstances element an accompanying or accessory fact, event, or condition required for criminal liability.

bad result crimes (result crimes) serious crimes that include causing a criminal harm in addition to the conduct itself.

barbaric punishments punishment considered no longer acceptable.

battery unwanted and unjustified offensive touching.

bench trial trials without juries, in which judges find the facts.

bifurcation a mandate that the death penalty decision be made in two phases: a trial to determine guilt and a second separate proceeding, after a finding of guilt, to consider the aggravating factors for, and mitigating factors against, capital punishment.

blameworthiness (also called "culpability") the idea that we can only punish people who we can blame, and we can only blame people who are responsible for what they do.

born-alive rule homicide law once said that to be a person, and therefore a homicide victim, a baby had to be "born alive" and capable of breathing and maintaining a heartbeat on its own.

breaking (in burglary) *actus reus* of common law burglary requiring an unlawful entry into someone else's building.

broken-windows theory theory that minor offenses or disorderly conduct can lead to a rise in serious crime.

burden of persuasion the responsibility to convince the fact finder of the truth of the defense.

burden of production the responsibility to introduce initial evidence to support a defense.

burden of proof the affirmative duty to prove a point in dispute; the responsibility to produce the evidence to persuade the fact finder.

burglary breaking and entering a building with intent to commit a crime inside the building.

burning (*actus reus* in arson) setting a building on fire, and the fire actually reaches the structure.

"but for" cause cause in fact (also called *sine qua non* cause); the actor's conduct sets in motion a chain of events that, sooner or later, leads to a result; see **factual ("but for") cause**.

capital cases death penalty cases in death penalty states and "mandatory life sentence without parole" cases in non–death penalty states.

case-by-case approach the facts and circumstances surrounding the way the felony was committed in the particular case, not the elements of the crime in the abstract, may be considered to determine whether it was dangerous to human life.

case citation source reference to a case or other legal authority.

castle exception the principle stating that defenders have no need to retreat when attacked in their homes.

causation requirement that criminal conduct cause a harm defined in the criminal code.

cause in fact the objective determination that the defendant's act triggered a chain of events that ended as the bad result, such as death in homicide.

chain conspiracies participants at one end of the chain may know nothing of those at the other end, but every participant handles the same commodity at different points, such as manufacture, distribution, and sale.

chilling effect when people hesitate to express themselves because they fear criminal prosecution even though the Constitution protects their speech.

choice-of-evils defense defense of making the right choice—namely, choosing the lesser of two evils.

choice-of-evils defense (general principle of necessity) defense that although the defendant may have caused the harm or evil that ordinarily would constitute a crime, in the present case the defendant has not caused a net harm or evil because of justifying circumstances and should be exonerated.

civil commitment involuntary confinement not based on criminal conviction.

civil gang injunction (CGI) judge issues a restraining order against specific gang members of a particular gang.

code states states that have abolished the common law.

codified (criminal law) written definitions of crimes and punishments enacted by legislatures and published.

cohabitants two people who share a residence.

common law crimes crimes originating in the English common law.

common law fraud All multifarious means which human ingenuity can devise and which are resorted to by one individual to get an advantage over another by false suggestions or suppression of the truth. It includes all surprises, tricks, cunning, or dissembling, and any unfair way which another is cheated.

common law paramour rule defense to murder that a husband found his wife in the act of adultery.

common law rape intentional forced heterosexual vaginal penetration by a man with a woman not his wife.

common law sodomy anal intercourse between two males.

complicity the principle regarding parties to crime that establishes the conditions under which more than one person incurs liability before, during, and after committing crimes; when one person is liable for another person's crime.

concurrence the requirement that *actus reus* must join with *mens rea* to produce criminal conduct or that conduct must cause a harmful result.

concurring opinion statements in which justices agree with the decision but not the reasoning of a court's opinion.

conditional threats not enough to satisfy the *mens rea* of assault because they're not immediate.

conduct crimes crimes requiring a criminal act triggered by criminal intent.

conduct transcending national boundaries (in terrorist crimes) element in new antiterrorism crime statute that cites acts of terrorism that take place partly outside and partly inside the United States.

consolidated theft statutes eliminate the artificial need to separate theft into distinct offenses according to their *actus reus*.

conspiracy agreeing to commit a crime.

conspiracy *actus reus* consists of two parts: (1) an agreement to commit a crime (in all states) and (2) an overt act in furtherance of the agreement (in about half the states).

conspiracy *mens rea* specific intent to commit a crime or specific intent to commit a legal act by illegal means.

constitutional democracy the balance between the power of government and the rights of individuals.

constructive disorderly conduct acts that tend toward causing others to breach the peace.

constructive possession legal possession or custody of an item or substance.

conversion illegal use of another's property.

corpus delicti the Latin name for "body of the crime."

corroboration rule element in rape that the prosecution had to prove rape by the testimony of witnesses other than the victim.

crimes against public order crimes that harm the public peace generally (for example, disorderly conduct).

crimes of moral turpitude conduct that is contrary to justice, honesty, or morality.

criminal act the physical element of criminal liability.

criminal attempt intending to commit a crime and taking steps to complete it but something interrupts the completion of the crime's commission.

criminal codes definitions of crimes and punishments by elected legislatures.

criminal conduct acts triggered by criminal intent.

criminal conspiracy agreement between two or more persons to commit a crime.

criminal homicide a homicide that's neither justified nor excused.

criminal liability *actus reus, mens rea*, concurrence, causation, and harmful result, which are the basis for the elements of crime the prosecution has to prove beyond a reasonable doubt.

criminal mischief (in property crimes) misdemeanor of damaging or destroying other people's property.

criminal negligence manslaughter includes the mental elements of both recklessness and negligence.

criminal objective the criminal goal of an agreement to commit a crime.

criminal omissions take two forms: (1) mere failure to act or (2) failure to intervene in order to prevent a serious harm.

criminal punishment punishments prescribed by legislatures.

criminal sexual conduct statutes expanded the definition of "sex offenses" to embrace a wide range of nonconsensual penetrations and contact.

criminal solicitation urging another person to commit a crime, even though the person doesn't respond to the urging.

criminal trespass an unlawful act committed against a person or the property of another.

criminal trespass (in property crimes) the crime of invading another person's property.

criteria for decision (in death penalty cases) must be limited by the criteria established and announced *before* the decision to sentence the defendant to death but includes aggravating factors for and mitigating factors against imposing death.

cruel and unusual punishment punishments banned by the Eighth Amendment to the U.S. Constitution.

culpability blameworthiness based on *mens rea*; deserving of punishment because of individual responsibility for actions.

curtilage the area immediately surrounding a dwelling.

cybercrime crimes committed through the Internet or some other computer network.

cyberstalking the use of the Internet, e-mail, or other electronic communication devices to stalk another person through threatening behavior.

damages money plaintiffs get for the injuries they suffer.

dangerous act rationale (in attempt law) looking at how closely a defendant came to completing a crime.

dangerous person rationale (in attempt law) looking at how fully a defendant developed a criminal purpose to commit a crime.

dangerous proximity test to success test/physical proximity test looking at the seriousness of the offense intended; the closeness to completion of the crime; and the probability the conduct would actually have resulted in completion of the crime.

defense of consent a justification defense that says if mentally competent adults want to be crime victims, no paternalistic government should get in their way.

defense of duress excuse of being forced to commit a crime.

defense of excuse defenses based on the idea that what the defendant did was a crime but under the circumstances he wasn't responsible for what he did (insanity).

defense of voluntary abandonment the actor voluntarily and completely gives up his criminal purpose before completing the offense.

depraved heart murder extremely reckless killing.

destructive device (in terrorist crimes) device used to commit terrorist acts (for example, bombs, poison gas).

determinate (fixed) sentences sentences that fit the punishment to the crime.

determinism (and criminal punishment) actions beyond the control of individual free will.

deterrence theory the theory that excluding evidence obtained in violation of the Constitution prevents illegal law enforcement.

diminished capacity mental capacity less than "normal" but more than "insane"; an attempt to prove that the defendant incapable of the requisite intent of the crime charged is innocent of that crime but may well be guilty of a lesser one.

diminished responsibility a defense of excuse in which the defendant argues "What I did was wrong, but under the circumstances I'm *less* responsible."

discretionary decision making judicial criminal law-making power that leaves judges lots of leeway for making decisions based on their professional training and experience.

disorderly conduct crimes crimes against public order and morals.

domestic terrorism terrorist crimes committed inside the United States.

***Durham* rule (or product test of insanity)** an insanity test to determine whether a crime was a product of mental disease or defect.

elements of a crime the parts of a crime that the prosecution must prove beyond a reasonable doubt, such as *actus reus, mens rea*, concurrence, causation, and bad result.

embezzlement the crime of lawfully gaining possession of someone else's property and later converting it to one's own use.

entering (in burglary) part of the *actus reus* of burglary.

entrapment government actions that induce individuals to commit crimes that they otherwise wouldn't commit.

equal protection of the laws criminal laws can treat groups of people differently only if the different treatment is reasonable.

equivalent of specific intent some courts define a willful, premeditated, deliberate killing as the same as specific intent, which may render the difference between first- and second-degree murder meaningless.

espionage the crime of spying for the enemy.

euthanasia the act or practice of causing or hastening the death of a person who is suffering from an incurable or terminal disease or condition, especially a painful one.

ex post facto laws laws passed after the occurrence of the conduct constituting the crime.

excusable homicide accidental killings done by someone "not of sound memory and discretion" (insane and immature).

excuse defenses defendants admit what they did was wrong but claim that under the circumstances they weren't responsible for what they did.

expert advice or assistance providing help to terrorists by a variety of means.

express conduct (in First Amendment) nonverbal communication.

"express" malice aforethought intentional killings planned in advance.

extortion (blackmail) misappropriation of another's property by means of threats to inflict bodily harm in the future.

extraneous factor a condition beyond the attempter's control.

extreme mental or emotional disturbance a defense that reduces criminal homicide to manslaughter if emotional disturbance provides a reasonable explanation for the defendant's actions.

extrinsic force (in rape) requires some force in addition to the amount needed to accomplish the penetration.

factual ("but for") cause conduct that, in fact, leads to a harmful result.

factual impossibility the defense that some extraneous factor made it impossible to complete a crime.

failure to intervene (criminal omission) one type of omission *actus reus*.

failure to report (criminal omission) one type of omission *actus reus*.

failure-of-proof theory (defense) defendant disproves the prosecution's case by showing he or she couldn't have formed the state of mind required to prove the mental element of the crime.

fair notice (void-for-vagueness doctrine) vague laws deny individuals life, liberty, and property without due process of law because they don't give individuals fair warning.

false imprisonment the heart of the crime is depriving others of their personal liberty.

federal mail fraud statute fraud by using the U.S. Postal Service, as in making false representations through the mail to obtain an economic advantage.

federal system structure of U.S. government divided into federal and state governments.

felonies serious crimes that are generally punishable by one year or more in prison.

felony murder unintentional deaths that occur during the commission of felonies.

feticide law defining when life begins for purposes of applying the law of criminal homicide.

first-degree arson arson accompanied by some aggravating circumstance.

first-degree murder premeditated, deliberate killings and other particularly heinous capital murders.

fixed (determinate) sentences sentences that fit the punishment to the crime.

Florida Personal Protection Law Florida's version of the enactment of the "new castle doctrine."

force and resistance rule victims had to prove to the courts they didn't consent to rape by demonstrating that they resisted the force of the rapist.

fraud in the fact (in rape) when a rapist fraudulently convinces his victim that the act she consented to was something other than sexual intercourse.

fraud in the inducement the fraud is in the benefits promised, not in the act.

fundamental right to privacy preferred right guaranteed in the Bill of Rights that requires a compelling state interest to justify legislation restricting privacy.

general attempt statute statute that defines the elements of attempt that apply to all crimes.

general deterrence (also called general prevention) aims by threat of punishment to deter criminal behavior in the general population.

general intent crime intent to commit the *actus reus*—the act required in the definition of the crime.

general intent definition (of arson) intent to commit the *actus reus*—the act required in the definition of "arson."

general intent plus "general intent" refers to the intent to commit the *actus reus* of the crime and "plus" refers to some "special mental element" in addition to the intent to commit the criminal act.

general part of the criminal law principles that apply to all crimes.

general principle of necessity (defense to crime) the justification of committing a lesser crime to avoid the imminent danger of a greater crime.

"Good Samaritan" doctrine doctrine that imposes a legal duty to render or summon aid for imperiled strangers.

guilty verdict decision of the fact finder that the prosecution has proven guilt beyond a reasonable doubt.

hedonism (and criminal punishment) the theory that the validity of a law should be measured by the extent to which it promotes the greatest good for the greatest number of people.

honest and reasonable mistake rule a negligence mental element in rape cases in which the defendant argues that he honestly, but mistakenly, believed the victim consented to sex.

identity theft stealing another person's identity for the purpose of getting something of value.

ignorance of the law a defense that the defendant didn't know the rules, so he couldn't know he was breaking the law.

imminent danger element in self-defense that injury or death is going to happen right now.

imminent danger of attack element in self-defense that injury or death is going to happen right now.

imperfect defense defense reducing, but not eliminating, criminal liability.

"implied" malice aforethought killings that weren't intentional or planned but still resulted from the intention to do harm.

incapacitation punishment by imprisonment, mutilation, and even death.

inchoate offenses offenses based on crimes not yet completed.

indeterminate sentencing laws legislatures set only the outer limits of possible penalties, and judges and corrections professionals decide actual sentence lengths.

indispensable element test (attempt law) asks whether defendants have gotten control of everything they need to complete the crime.

inherently dangerous felony approach courts look at the felony in the abstract—if a felony *can* be committed in a way that's *not* dangerous to life, even if it was committed in a dangerous way in the case before the court, then it's not inherently dangerous.

initial aggressor a person who begins a fight can't claim the right to self-defense.

injunction to abate public nuisances an action in which city attorneys ask the courts to declare gang activities and gang members public nuisances and to issue injunctions to abate their activities.

insanity legal term for a person who is excused from criminal liability because a mental disease or defect impairs his *mens rea*.

intangible property property that lacks a physical existence (examples include stock options, trademarks, licenses, and patents).

intellectual property information and services stored in and transmitted to and from electronic data banks; a rapidly developing area of property crimes.

intent to cause serious bodily injury murder when death results following acts triggered by the intent to inflict serious bodily injury short of death.

intent to instill fear test test that determines if the actor intended to instill fear.

international terrorism terrorist acts dangerous to U.S. citizens committed outside the United States.

intervening cause the cause that either interrupts a chain of events or substantially contributes to a result.

intrinsic force (in rape) requires only the amount of force necessary to accomplish the penetration.

involuntary manslaughter criminal homicides caused either by recklessness or gross criminal negligence.

irresistible impulse test tests whether the will is so impaired that it makes it impossible for the person to control the impulse to do wrong.

judgment (in criminal cases) court's decision in a case.

judicial waiver when a juvenile court judge uses her discretion to transfer a juvenile to adult criminal court.

justifiable homicide killing in self-defense, capital punishment, and police use of deadly force.

justification defenses defendants admit they were responsible for their acts but claim what they did was right (justified) under the circumstances.

kidnapping taking and carrying away another person with intent to deprive the other person of personal liberty.

knowing consent you know you're committing an act or causing a harm but you're not acting for that purpose.

knowing consent (in defense of consent) the person consenting knows what she's consenting to.

knowing possession awareness of physical possession.

knowledge (in *mens rea*) consciously acting or causing a result.

larceny taking and carrying away another person's property without the use of force with the intent to permanently deprive its owner of possession.

last proximate act rule your acts brought you as close as possible to completing the crime.

last-straw rule a smoldering resentment or pent-up rage resulting from earlier insults or humiliating events, culminating in a triggering event that, by itself, might be insufficient to provoke the deadly act.

legal cause a subjective judgment as to whether it's fair and just to blame the defendant for the result; cause recognized by law to impose criminal liability.

legal duty (in criminal omission) liability only for duties imposed by contract, statute, or "special relationships."

legal fiction (in *actus reus*) treating as a fact something that's not a fact if there's a good reason for doing so.

legal impossibility the defense that what the actor attempted was not a "crime."

legal (proximate cause) the main cause of the result of criminal conduct.

liability the technical legal term for "responsibility."

liberty the right of individuals to go about in public free of undue interference.

loitering remaining in one place with no apparent purpose.

***M'Naghten* rule** see **right-wrong test**.

malice aforethought killing on purpose after planning it.

malum in se a crime inherently bad or evil.

malum prohibitum crime a crime not inherently bad or evil but merely prohibited.

mandatory minimum sentences the legislatively prescribed, nondiscretionary amount of prison time that all offenders convicted of the offense must serve.

manifest criminality the requirement in law that intentions have to turn into criminal deeds to be punishable.

manslaughter unlawful killing of another person without malice aforethought.

marital rape exception legally, husbands can't rape their wives.

material support (in terrorist crimes) element in terrorist crimes that consists of helping terrorists or terrorist organizations.

medical model of crime the medical model is based on the idea that crime is a disease that experts can diagnose, treat, and cure ("medical model" of criminal law).

mental disease disease of the mind, not the equivalent of insanity.

mens rea the "state of mind" the prosecution has to prove beyond a reasonable doubt; criminal intent from an evil mind; the mental element in crime, including purpose, knowledge, recklessness, and negligence.

***mens rea* of harboring or concealing (terrorists)** the intent to conceal terrorists.

mere possession physical possession.

mere presence rule a person's presence at the scene of a crime doesn't by itself satisfy the *actus reus* requirement of accomplice liability.

misdemeanors minor crimes for which the penalty is usually less than one year in jail or a fine.

mistake of fact to be mistaken about the law or fact; to believe the facts are one thing when they're really another; a defense whenever the mistake prevents the formation of any fault-based mental attitude.

Model Penal Code the code developed by the American Law Institute to guide reform in criminal law.

motive the reason why a defendant commits a crime.

murder intentionally causing the death of another person with malice aforethought.

murder *actus reus* causing a death of a person.

murder *mens rea* the purposeful, knowing, reckless, or negligent killing of a person.

necessity (choice-of-evils defense) general principle of an honest and reasonable belief that it's necessary to commit a lesser crime (evil) to prevent the imminent danger of a greater crime (evil).

negligence the unconscious creation of substantial and unjustifiable risks.

no fault liability that requires neither subjective nor objective fault.

not guilty verdict fact finder decides the prosecution has not proven guilt beyond a reasonable doubt.

objective fault requires no purposeful or conscious bad mind in the actor; it sets a standard of what the "average person should have known."

objective fear only test test that is used to determine if a reasonable person would be afraid.

objective test of cooling-off-time in voluntary manslaughter, the element of whether in similar circumstances a reasonable person would've had time to cool off.

objective test of entrapment focuses on the actions that government agents take to induce individuals to commit crimes.

obtaining property by false pretenses in modern law often called "theft by deceit," pertaining to property.

offenses of general application describes the inchoate crimes, which are partly general and partly specific.

one voluntary act is enough conduct that includes one voluntary act will satisfy the *actus reus* requirement for criminal liability.

opinion (in criminal cases) part of an appellate court case that explains the court's reasons for its decision.

order behavior in public that comports with minimum community standards of civility.

overt act (in conspiracy) requirement of conspiracy *actus reus* of some act toward completing the crime in addition to the agreement.

panhandling stopping people on the street to ask them for food or money.

paramour rule a husband who caught his wife in the act of adultery had adequate provocation to kill and could reduce criminal homicide to voluntary manslaughter.

parent responsibility laws statutes that make parents liable for their children's crimes.

perfect defense defense that leads to outright acquittal.

personnel sales personnel staff, employees, workforce, workers, labor force, human resources, manpower, wage labor.

Pinkerton rule the rule that conspiracy and the underlying crime are separate offenses.

plaintiffs those who sue for wrongs in tort cases.

plurality opinion (in criminal cases) a statement in which the greatest number, but not a majority, of the justices favor a court's decision.

Ponzi scheme A Ponzi scheme is a fraudulent investment operation that pays returns to investors from their own money or money paid by subsequent investors rather than from any actual profit earned.

precedent prior court decision that guides judges in deciding future cases.

preliminary injunction a temporary order issued by a court after giving notice and holding a hearing.

preparation offenses acts amounting to just getting ready to commit a crime (attempt law).

preponderance of the evidence more than 50 percent of the evidence proves justification or excuse.

present danger danger that's probably going to happen sometime in the future but not right now (self-defense).

presumption of bodily integrity the principle of personal autonomy presumes that every individual controls the integrity of her own body.

presumption of innocence the government always has the burden to justify its use of power even against people who turn out to be guilty.

prevention punishing offenders to prevent crimes in the future.

principle of causation requirement that criminal conduct cause a harm defined in the criminal code.

principle of concurrence some mental fault has to trigger the *actus reus* in criminal conduct crimes and the cause in bad-result crimes; *see* **concurrence**.

principle of legality a principle stating that there can be no crime or punishment if there are no specific laws forewarning citizens that certain specific conduct will result in a particular punishment.

principle of *mens rea* see ***mens rea*** the principle that to secure a conviction the prosecution has to prove the state of mind of a defendant at the moment the crime was committed.

principle of proportionality a principle of law stating that the punishment must be proportional to the crime committed.

principle of utility permitting only the minimum amount of pain necessary to prevent the crime as punishment.

principles of criminal liability the principles of *actus reus, mens rea*, concurrence, causation, and harmful result, which are the basis for the elements of crime the prosecution has to prove beyond a reasonable doubt.

probable desistance test a dangerous person test that focuses on how far defendants have gone, not on what's left for them to do to complete the crime.

product test (Durham rule) an insanity test to determine whether a crime was a product of mental disease or defect.

product-of-mental-illness test a test to determine whether a crime was a product of mental disease or defect.

prompt-reporting rule rape victims have to report the rape soon after it occurs.

proof beyond a reasonable doubt proof that overcomes the doubt that prevents one from being firmly convinced of a defendant's guilt, or the belief that there is a real possibility that a defendant is not guilty.

proof of treason no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

proximate cause the main cause of the result of criminal conduct; legal cause.

proximity crimes ban conduct because of its closeness to other crimes.

proximity tests tests of dangerous conduct: physical proximity, dangerous proximity, and indispensable element.

public nuisance injunctions actions in which city attorneys ask the courts to declare gang activities and gang members public nuisances and to issue injunctions to abate the public nuisance.

punishment intentional infliction of pain on a person convicted of a crime.

punitive damages damages that make an example of defendants and punish them for their behavior.

purpose (in *mens rea*) the specific intent to act and/or cause a criminal harm.

purposely acts taken for the very aim of engaging in conduct or causing a criminal result.

"quality-of-life" crimes breaches of minimum standards of decent behavior in public.

rape intentional sexual penetration by force without consent.

rape *actus reus* the act of sexual penetration.

rape shield statutes statutes that prohibit introducing evidence of victims' past sexual conduct.

rates of imprisonment number of prisoners per 100,000 people in the population.

rationalism (and criminal punishment) the proportionality of the punishment to the crime.

reason the intellectual element in criminal conduct.

reason (in insanity defense) the mental capacity to distinguish right from wrong.

reasonable doubt the doubt that prevents one from being firmly convinced of a defendant's guilt, or the belief that there is a real possibility that a defendant is not guilty.

reasonable doubt standard due process requires both federal and state prosecutors to prove every element of a crime beyond a reasonable doubt.

reasonable mistake of age a defense to statutory rape in California and Alaska if the defendant reasonably believed his victim was over the age of consent.

reasonable resistance rule (in rape) the amount of force required to repel rapists to show nonconsent in rape prosecutions.

receiving stolen property benefiting from someone else's property without having participated in the wrongful acquisition in the first place.

recklessness the conscious creation of substantial and unjustifiable risk.

recklessness requirement (regarding consent in rape) adopted by some states in rape cases, it requires that the defendant has to be aware that there's a risk the victim hasn't consented to sexual intercourse.

rehabilitation prevention of crime by treatment.

resisting-victim exception exception to the third-party exception to felony murder in which the defendant can be charged with the killing of his accomplice if it is committed by the resisting victim.

respondeat superior employers are legally liable for their employees' illegal acts.

result crimes serious crimes that include causing a criminal harm in addition to the conduct itself, for example, criminal homicide.

retreat rule you have to retreat but only if you reasonably believe that backing off won't unreasonably put you in danger of death or serious bodily harm.

retribution punishment based on just deserts.

retroactive criminal law making a person can't be convicted of, or punished for, a crime unless the law defined the crime and prescribed the punishment *before* she acted; "*the* first principle of criminal law."

right of locomotion the right to come and go without restraint.

right to privacy a right that bans "all governmental invasions of the sanctity of a man's home and the privacies of life."

right-wrong test (M'Naghten rule, in insanity defense, for mental disease or mental defect) an insanity defense focus on whether a mental disease or defect impaired the defendants' reason so that they couldn't tell the difference between right and wrong.

riot disorderly conduct committed by more than three persons.

robbery taking and carrying away another's property by force or threat of force with the intent to permanently deprive the owner of possession.

rout three or more people moving toward the commission of a riot.

rule of law the principles that require that established written rules and procedures define, prohibit, and prescribe punishments for crimes.

rule of lenity when judges apply a criminal statute to the defendant in the case before them, they have to stick "clearly within the letter of the statute," resolving all ambiguities in favor of defendants and against the application of the statute.

sabotage damaging or destroying property for the purpose of hindering preparations for war and national defense during national emergencies.

scienter the Latin name for "awareness."

Second Amendment the right to bear arms.

second-degree arson burning unoccupied structures, vehicles, and boats.

second-degree murder a catchall offense including killings that are neither manslaughter nor first-degree murder; unintentional killings.

sedition the crime of "stirring up" treason by words.

seditious conspiracy agreement to "stir up" treason.

seditious libel writings aimed at "stirring up" treason.

seditious speech "stirring up" treason by means of the spoken word.

sentencing guidelines a narrow range of penalties established by a commission within which judges are supposed to choose a specific sentence.

sexual assault statutes expanded the definition of "sex offenses" to embrace a wide range of nonconsensual penetrations and contacts.

simple (second-degree) rape rape without aggravated circumstances.

Smith Act of 1940 U.S. statute aimed at Communists who advocated the violent overthrow of the government.

solicitation trying to get someone to commit a crime.

solicitation *actus reus* urging another person to commit a crime.

solicitation *mens rea* intent to get another person to commit a crime.

special deterrence the threat of punishment aimed at individual offenders in the hope of deterring future criminal conduct.

special part of the criminal law defines the elements of specific crimes.

specific attempt statutes attempt statutes that define the elements of attempting to commit specific crimes.

specific intent the attitude represented by subjective fault, where there's a "bad" mind or will that triggers the act; the intent to do something beyond the *actus reus*.

specific intent plus real premeditation deliberation the law looks at three areas to determine whether a killing was premeditated and deliberate: signs of planning, motive, and deliberate method in the killing.

stalking intentionally scaring another person by following, tormenting, or harassing.

stand-your-ground rule rule that states that if you didn't start the fight, you have the right to stand your ground and kill.

stare decisis the principle that binds courts to stand by prior decisions and to leave undisturbed settled points of law.

status (as *actus reus*) who we are as opposed to what we do; a condition that's not an action can't substitute for action as an element in crime.

statutory rape to have carnal knowledge of a person under the age of consent whether or not accomplished by force.

strict liability liability without fault, or in the absence of *mens rea*; it's based on voluntary action alone.

subjective and objective fear test test that determines if the defendant's acts induced fear in the victim and would cause a reasonable person to fear.

subjective fault fault that requires a "bad mind" in the actor.

subjective fear only test test that determines if the victim was actually afraid.

subjective test of entrapment focuses on the predisposition of defendants to commit crimes.

substantial capacity test insanity due to mental disease or defect impairing the substantial capacity either to appreciate the wrongfulness of conduct or to conform behavior to the law.

substantial steps test (in attempt *actus reus*) in the Model Penal Code, substantial acts toward completion of a crime that strongly corroborate the actor's intent to commit the crime.

superseding cause the cause that relieves from responsibility (liability) the party whose act started the series of events which led to the result because the original conduct is no longer the proximate cause.

surreptitious remaining element entering a structure lawfully with the intent to commit a crime inside.

syndrome novel defenses of excuse based on symptoms of conditions such as being a Vietnam vet suffering from post-traumatic stress disorder or having premenstrual symptoms.

tangible property personal property (not real estate).

terrorism in the nonlegal sense, it means the use of violence and intimidation in the pursuit of political aims.

theft the consolidated crimes of larceny, embezzlement, and false pretenses.

theft by deceit or trick obtaining someone else's property by deceit and lies.

third-party exception defense to felony murder that someone other than the felon caused the death during the commission of a felony.

threatened battery assault sometimes called the crime of "intentional scaring," it requires only that actors intend to frighten their victims, thus expanding assault beyond attempted battery.

threat-of-force requirement prosecution must prove a sexual assault victim feared imminent bodily harm and that the fear was reasonable.

three-strikes-and-you're-out laws statutes enacted by state governments in the United States which require the state courts to hand down a mandatory and extended period of incarceration to persons who have been convicted of a serious criminal offense on three or more separate occasions.

time, place, and manner test three-part test to determine whether a statute places legitimate limits on the First Amendment right of free speech.

torts private wrongs for which you can sue the party who wronged you and recover money.

training (in terrorism) training terrorists to commit terrorist acts.

treason crime of levying war against the United States or of giving aid and comfort to its enemies.

treason *actus reus* whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere.

treason *mens rea* intend to use organized force to overthrow the government.

two-stage (bifurcated) trial one phase of a trial to determine guilt, the other to determine the punishment.

unarmed acquaintance rape nonconsensual sex between people who know each other; rape involving dates, lovers, neighbors, coworkers, employers, and so on.

unequivocality test/*res ipsa loquiter* test ("act speaks for itself") examines the likelihood the defendant won't complete the crime (attempt law).

unilateral approach (in conspiracy) not all the conspirators need to agree to commit a crime to impose criminal liability (conspiracy *actus reus*).

unlawful act includes everything from committing felonies, misdemeanors, and even traffic violations, city ordinances, administrative crimes, and noncriminal wrongs, such as civil trespass and other torts.

unlawful act manslaughter sometimes called "misdemeanor manslaughter," it's involuntary manslaughter based on deaths that take place during the commission of another crime.

unlawful assembly ancient crime of three or more persons gathering together to commit an unlawful act.

understandable provocation a provocation to kill in the heat of passion that's recognized by law and will reduce murder to manslaughter.

USA Patriot Act act passed by Congress following September 11, 2001, creating some new (and enhancing the penalties for existing) crimes of domestic and international terrorism.

utmost resistance standard the requirement that rape victims must use all the physical strength they have to prevent penetration.

vagrancy ancient crime of poor people wandering around with no visible means of support.

vicarious liability the principle of liability for another based on relationship.

"victimless" crimes crimes without complaining victims (for example, recreational illegal drug users).

void-for-overbreadth doctrine the principle that a statute is unconstitutional if it includes in its definition of "undesirable behavior" conduct protected under the U.S. Constitution.

void-for-vagueness doctrine the principle that statutes violate due process if they don't clearly define crime and punishment in advance.

volitional incapacity (irresistible impulse test) test to determine impairment of the will that makes it impossible to control the impulse to do wrong.

voluntary consent consent that is the product of free will, not of force, threat of force, promise, or trickery.

voluntary manslaughter intentional killings committed in the sudden heat of passion upon adequate provocation.

weapons of mass destruction any destructive device used to commit acts of terror.

wheel conspiracies one or more defendants participate in every transaction.

white-collar crimes crimes growing out of opportunities to get someone else's property provided by the perpetrator's occupation.

will free choice or decision.

withdrawal exception if initial aggressors completely withdraw from fights they provoke, they can claim the defense of self-defense.

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Note: *Page numbers in boldface denote glossary terms.*

D

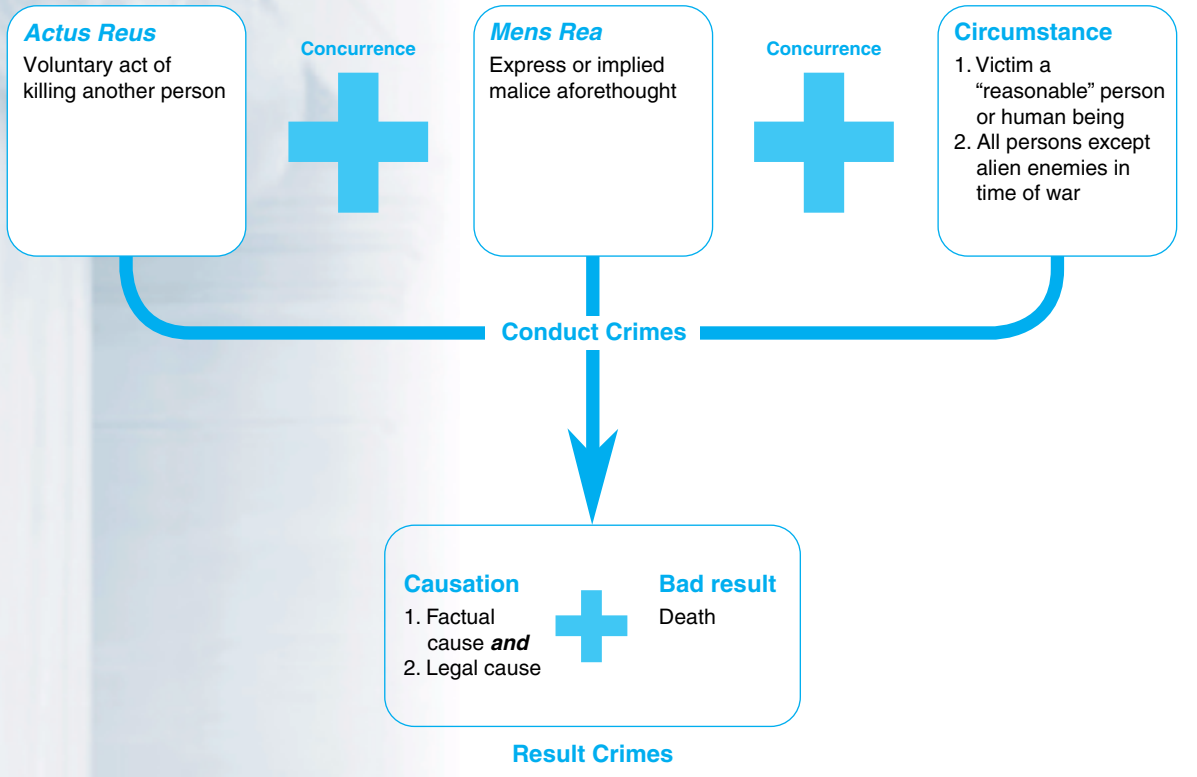
Elements of Crime

Features

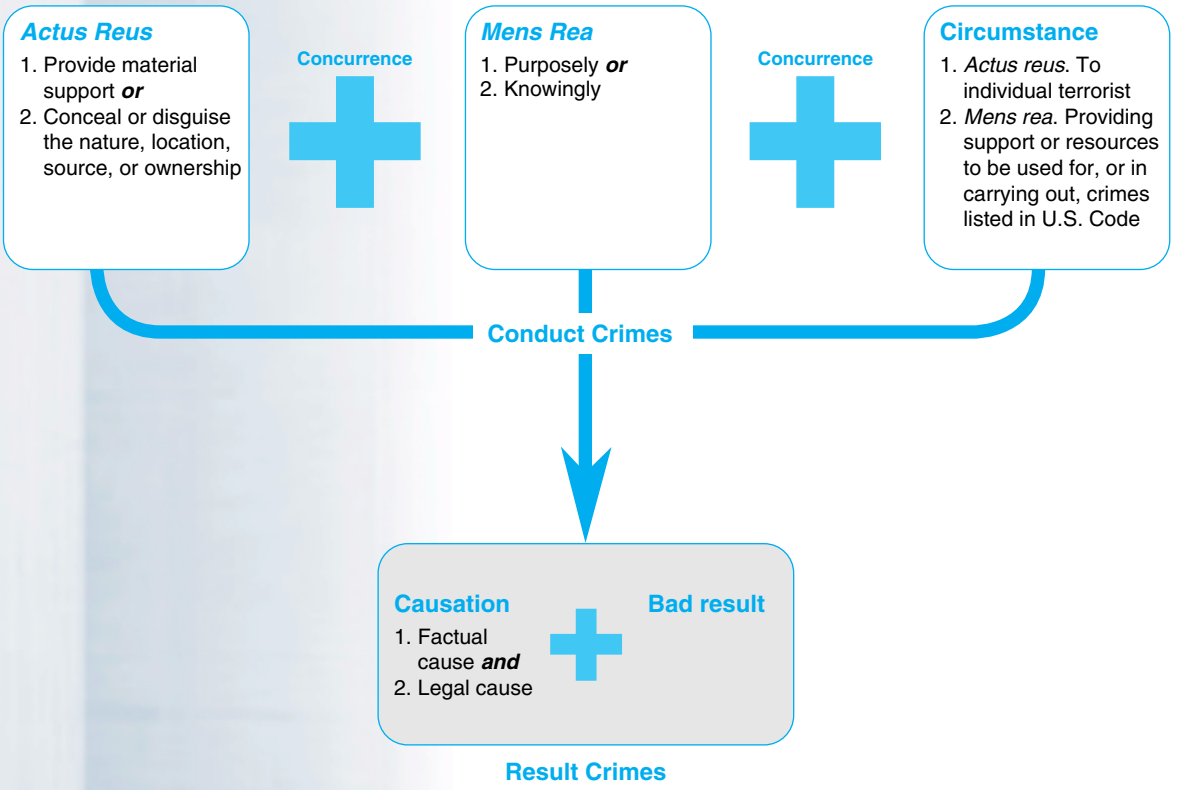
Criminal Law **has always followed the three-step analysis of criminal liability (criminal conduct, justification, and excuse). All three of these steps are included in each "Elements of Crime" graphic, but elements that are not required in certain crimes—like crimes that don't require a "bad" result—are grayed out. The new figures go right to the core of the three-step analysis of criminal liability, making it easier to master the essence of criminal law: applying general principles to specific individual crimes.**

Elements of . . .

ELEMENTS OF COMMON LAW MURDER

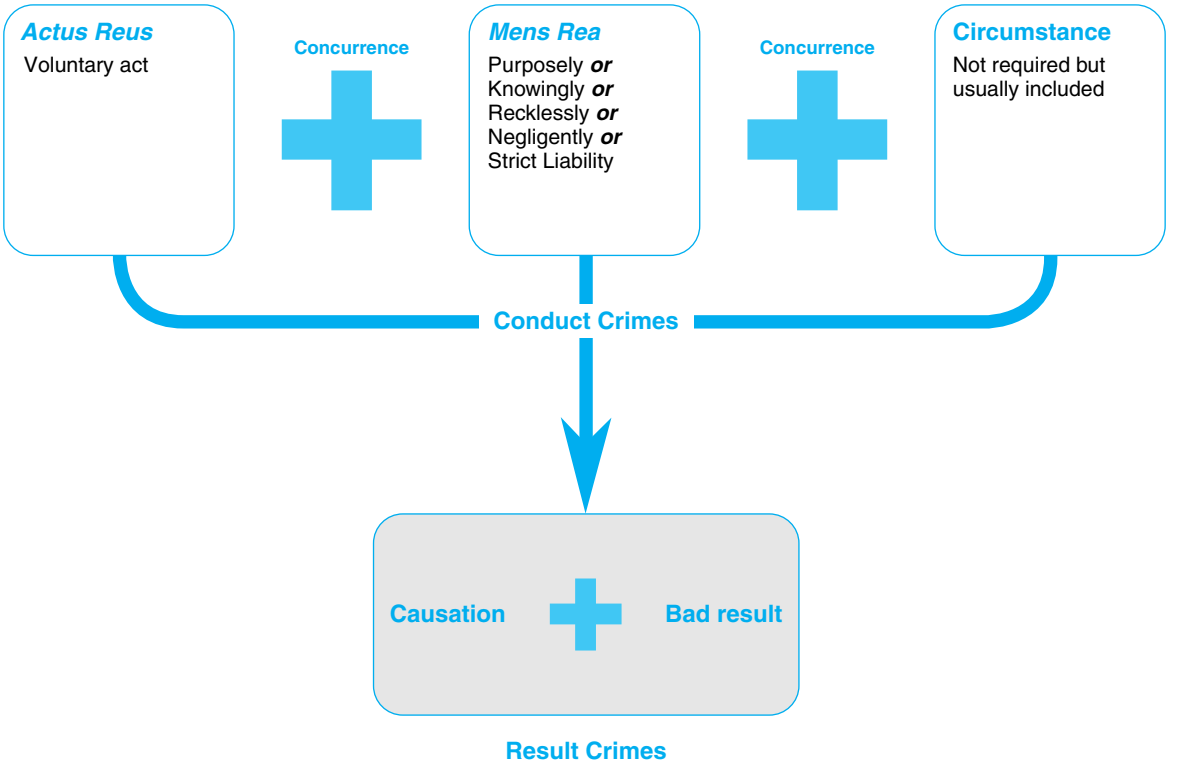


ELEMENTS OF MATERIAL SUPPORT TO TERRORISTS

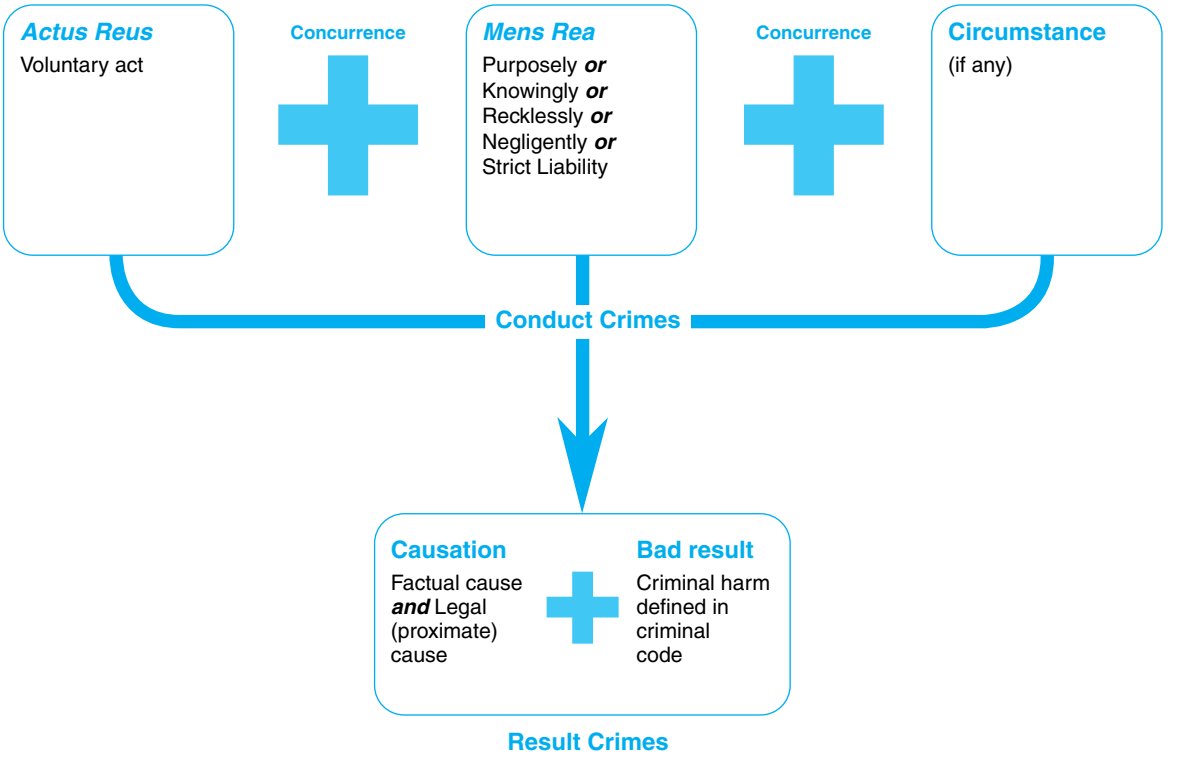


Element of Figures

ELEMENTS OF CRIMINAL CONDUCT CRIMES



ELEMENTS OF BAD RESULT CRIMES



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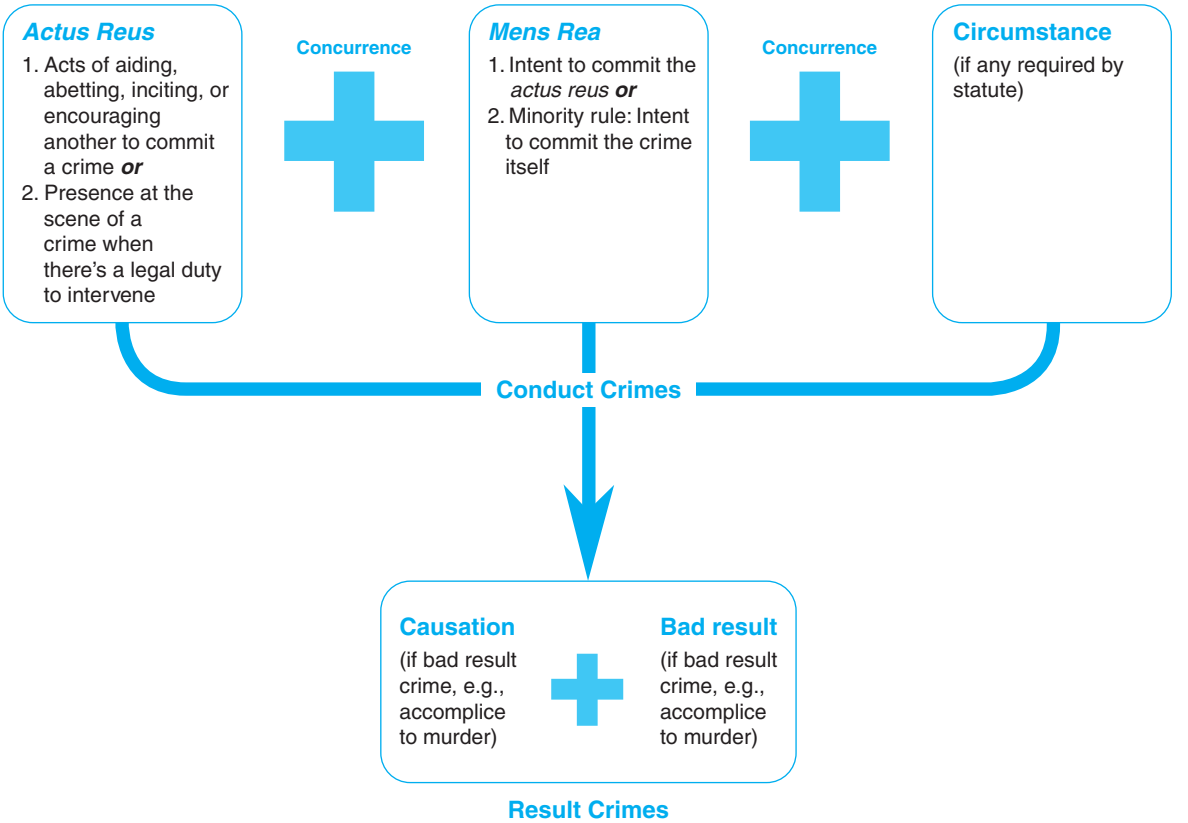

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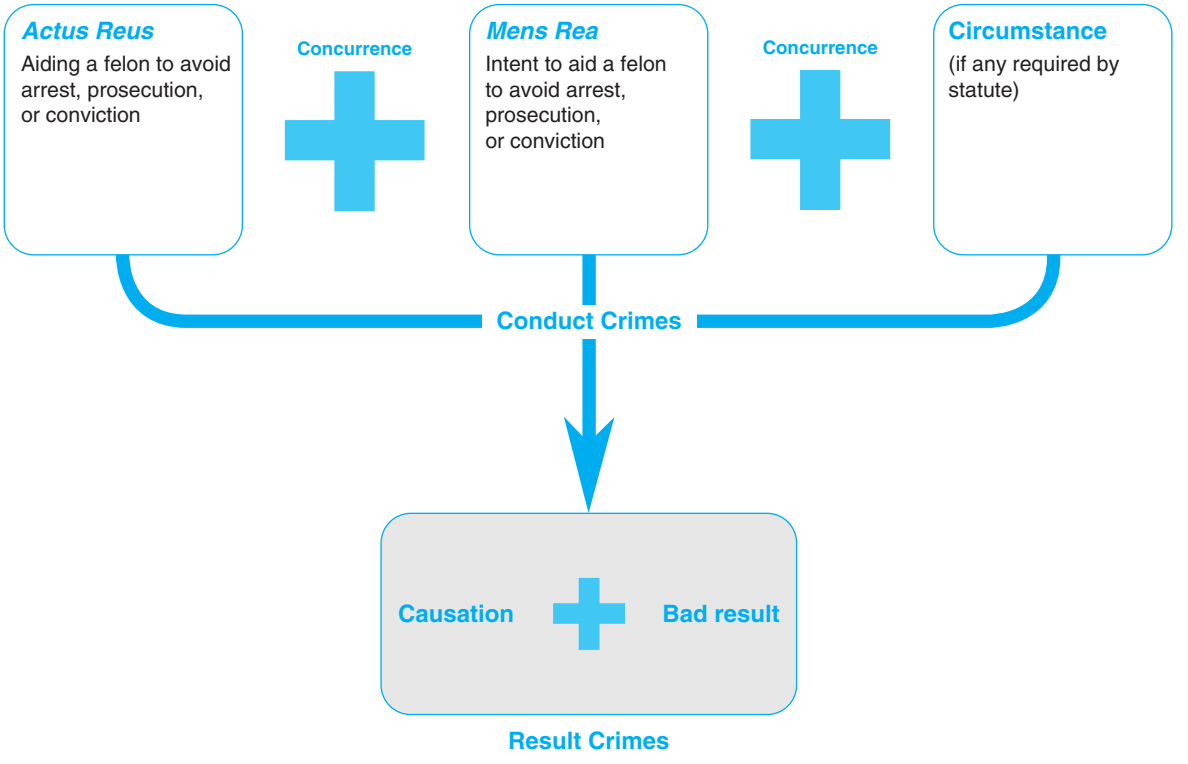

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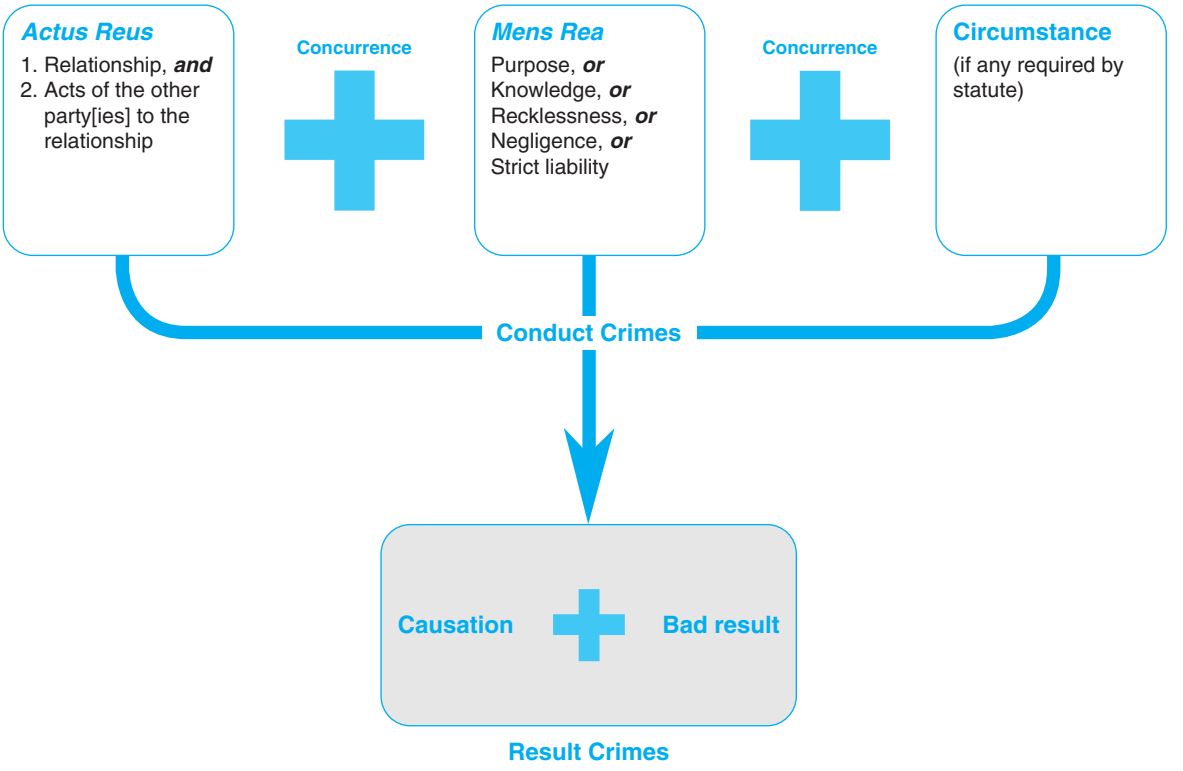

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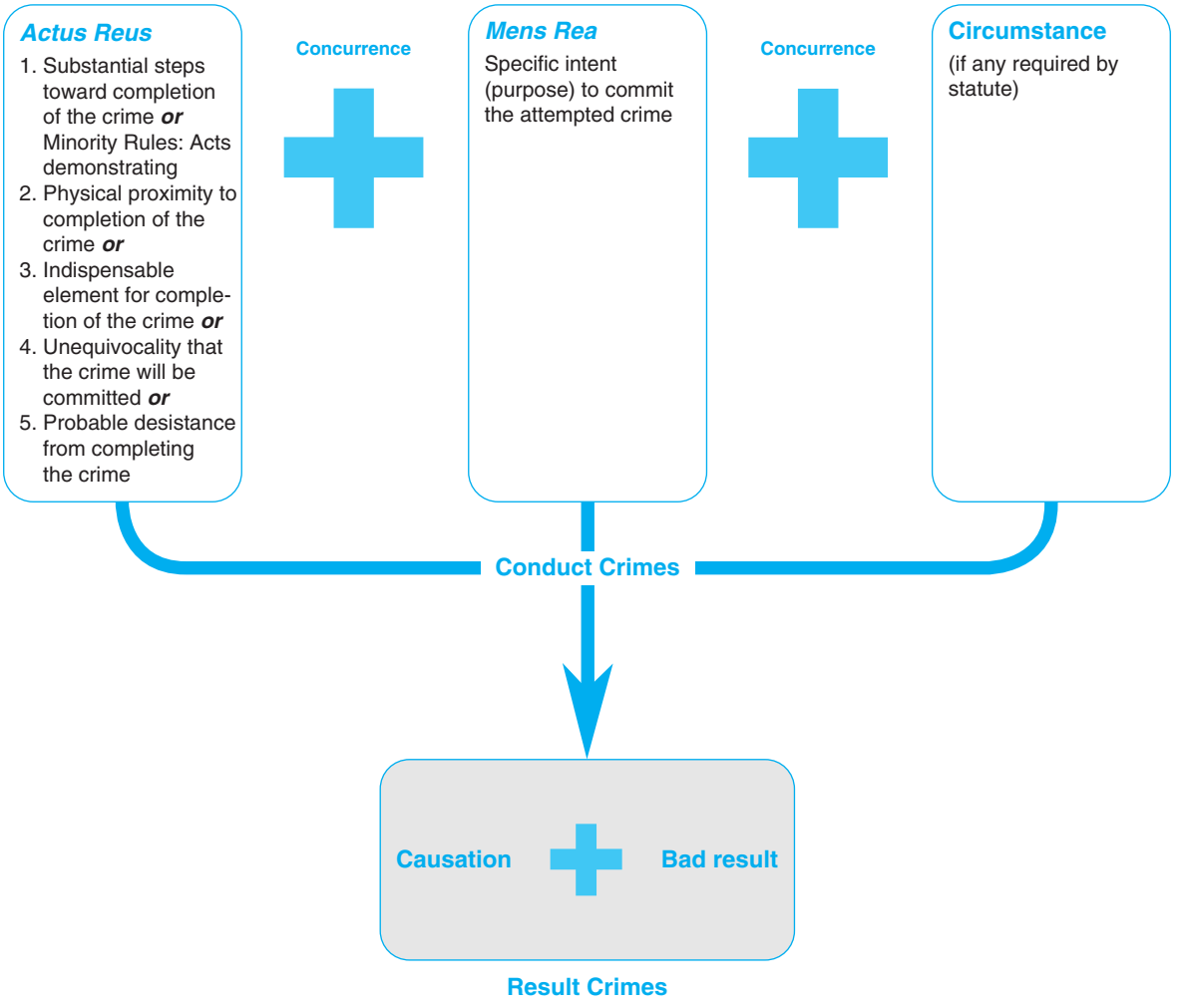

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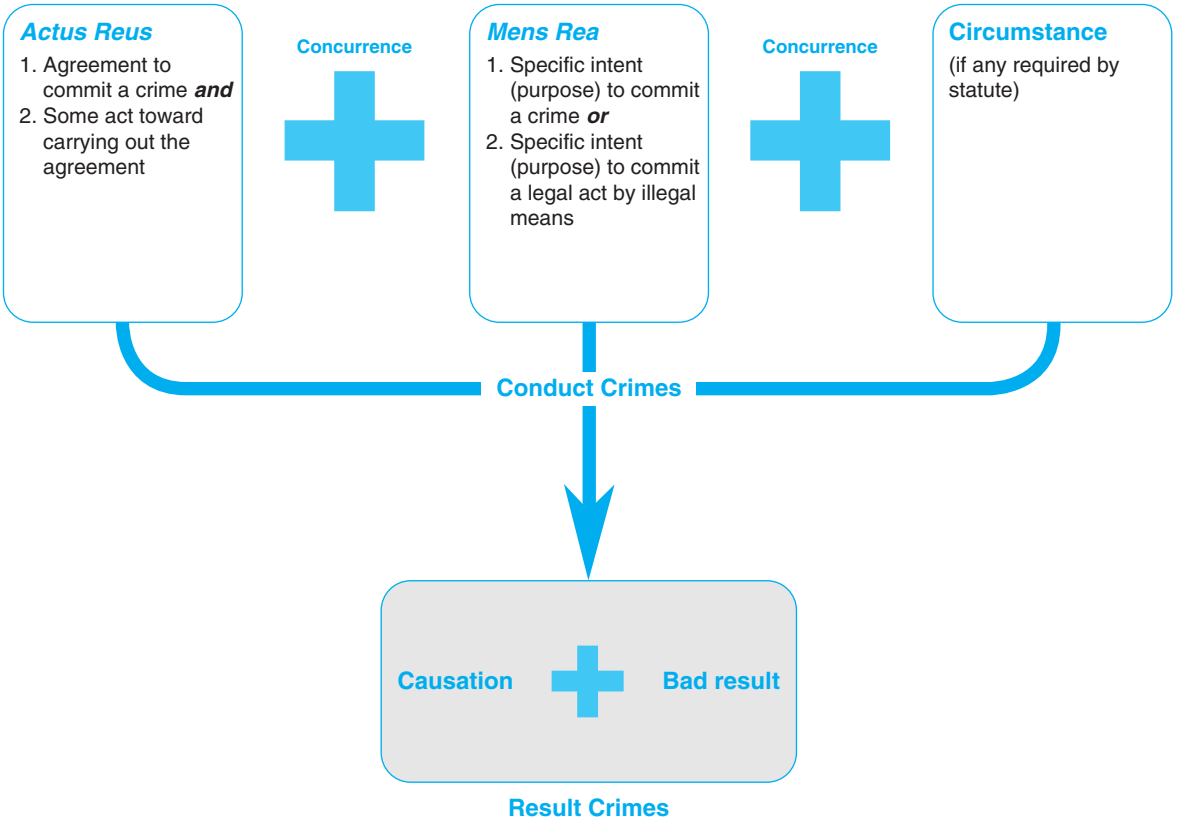

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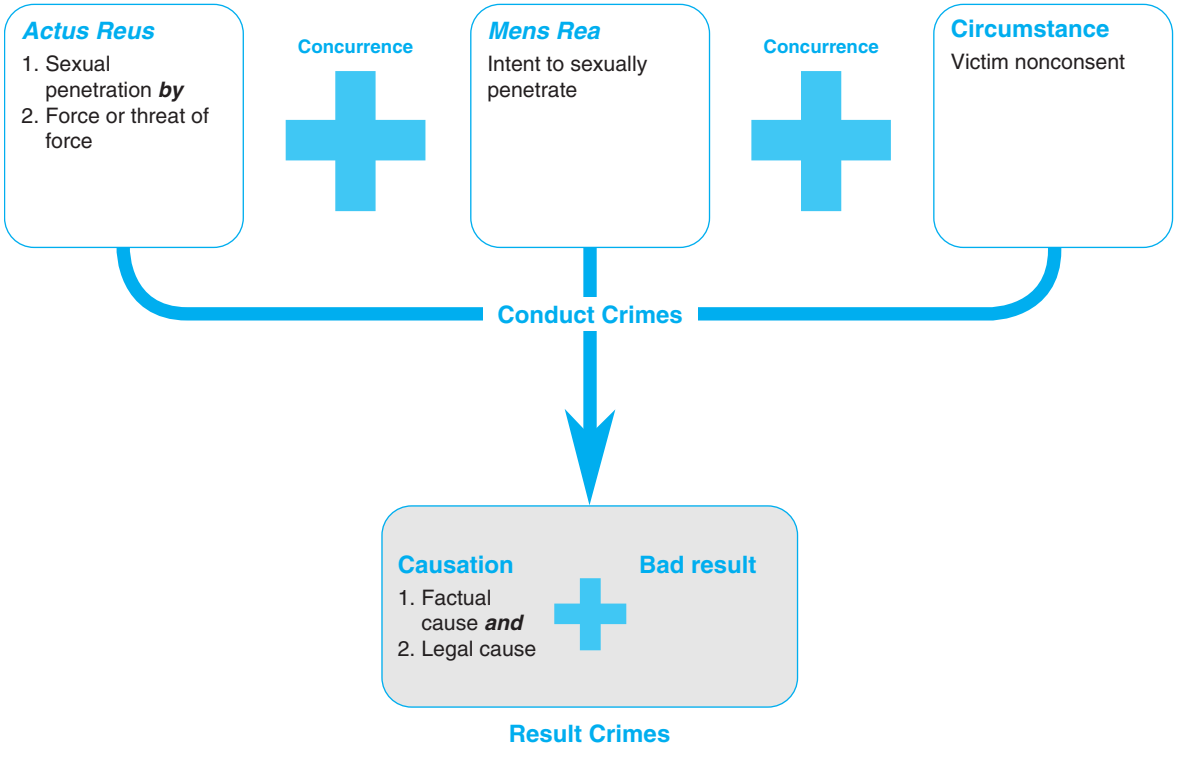

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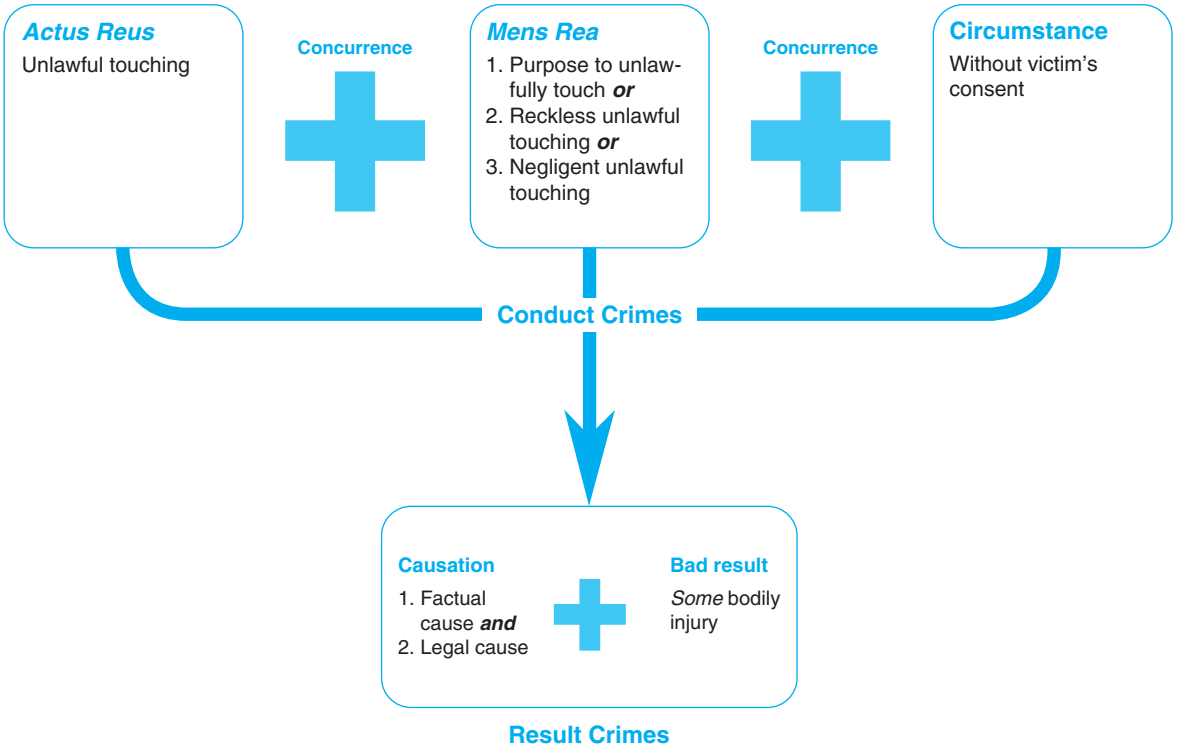

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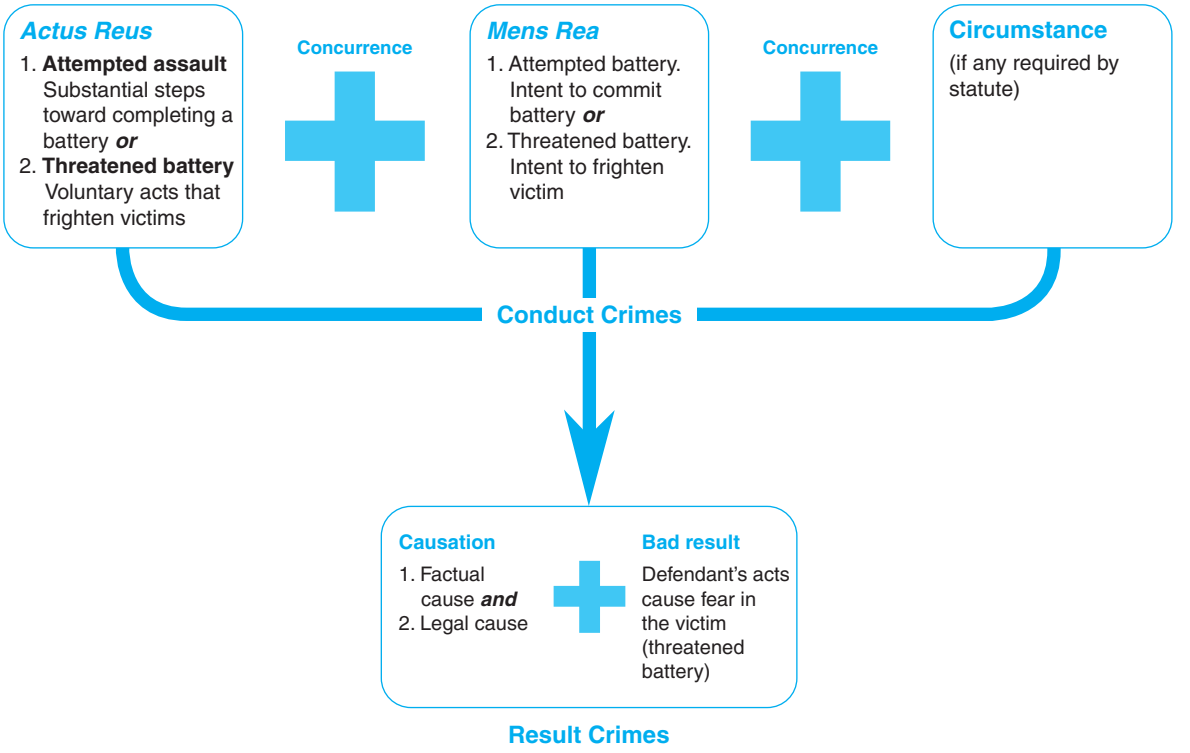

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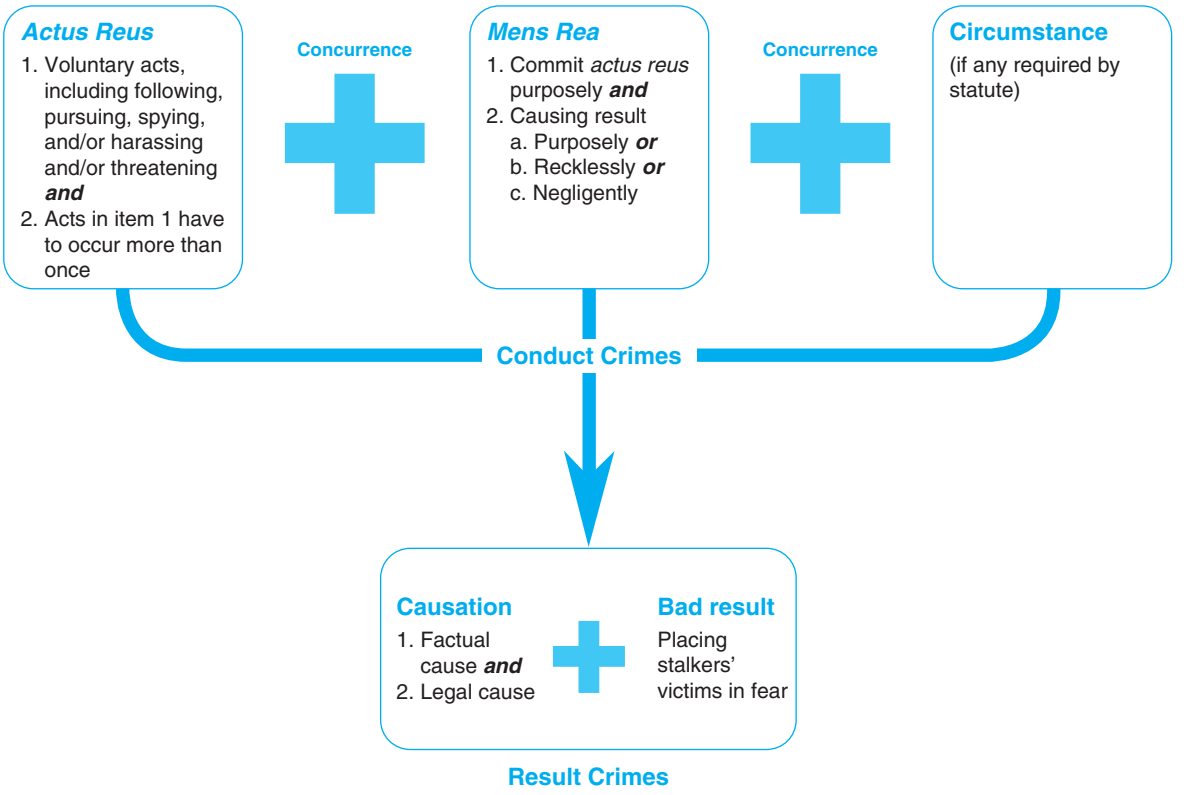

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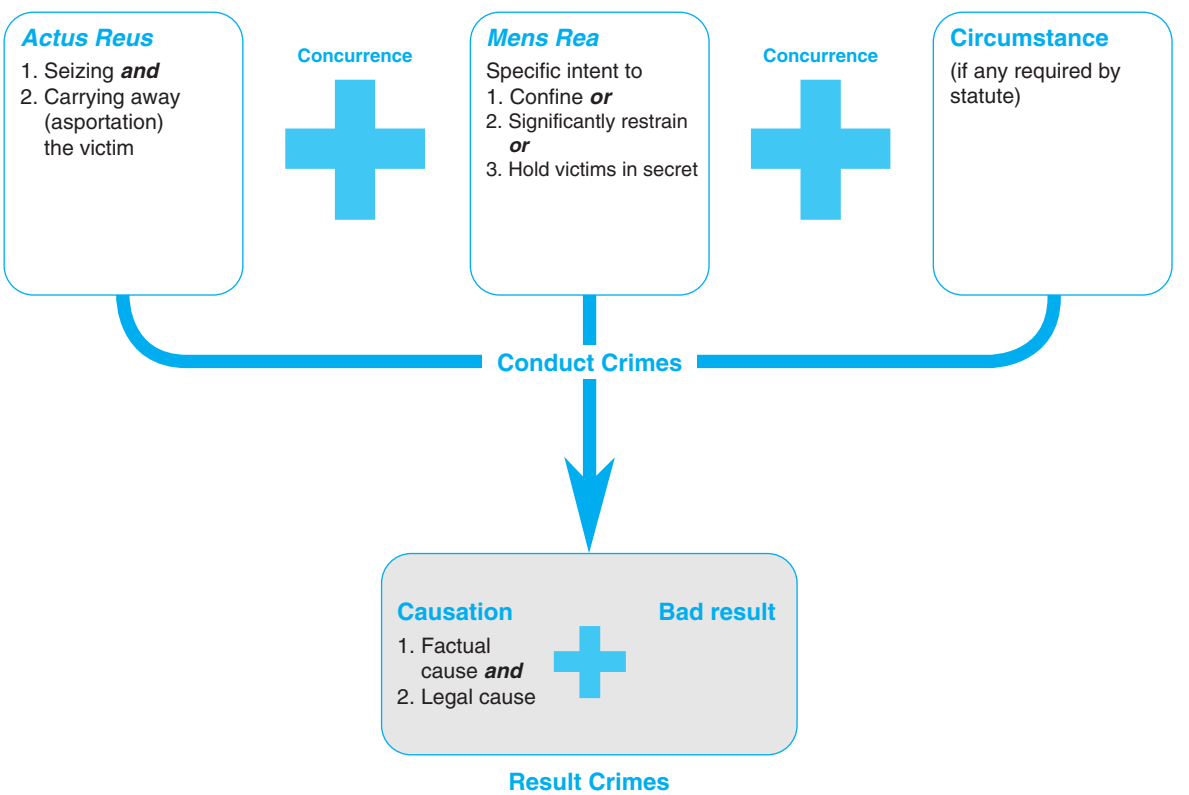

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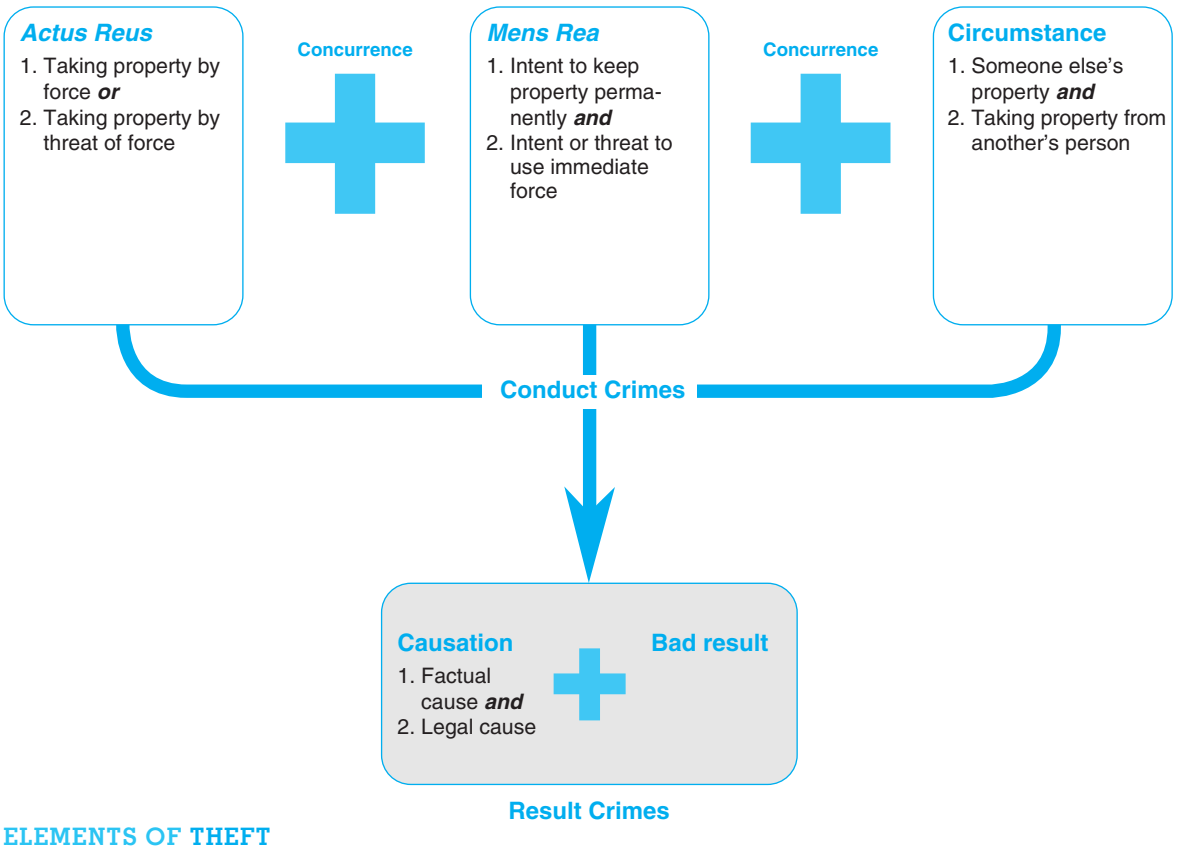

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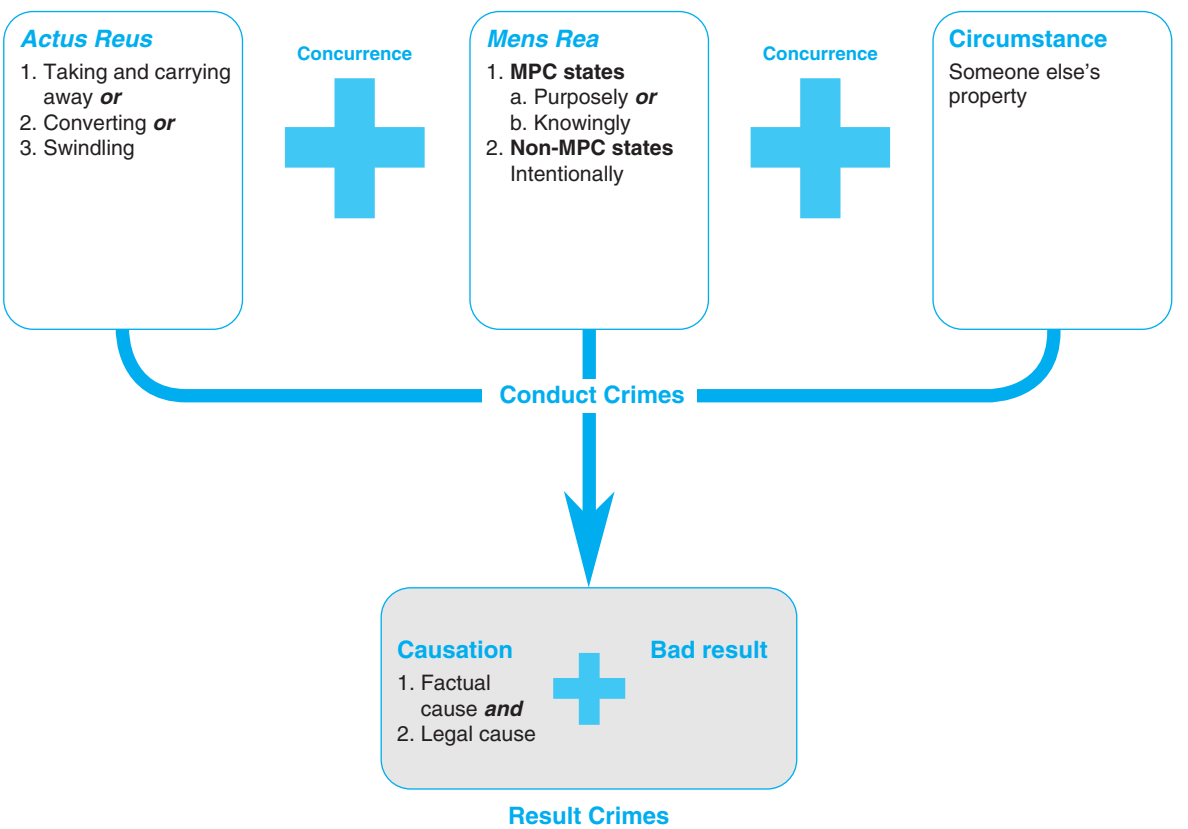

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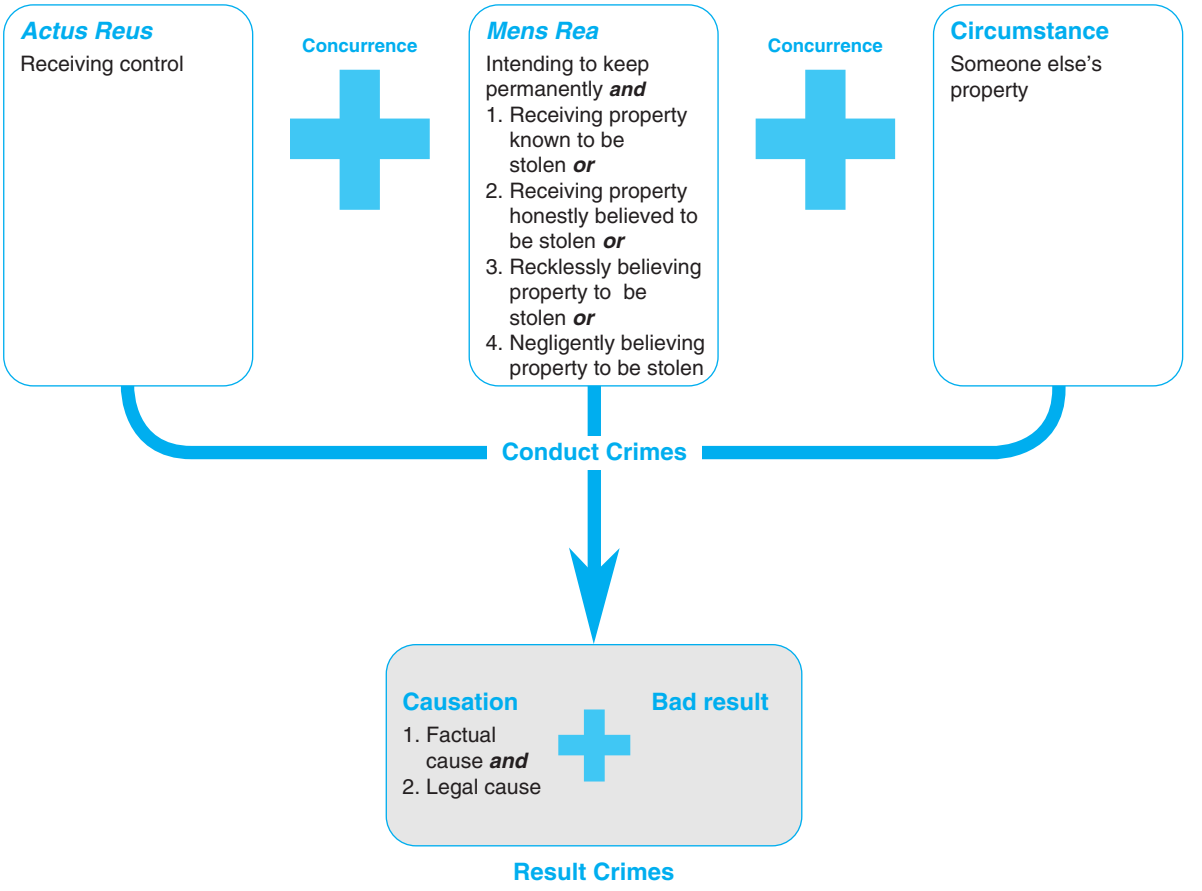

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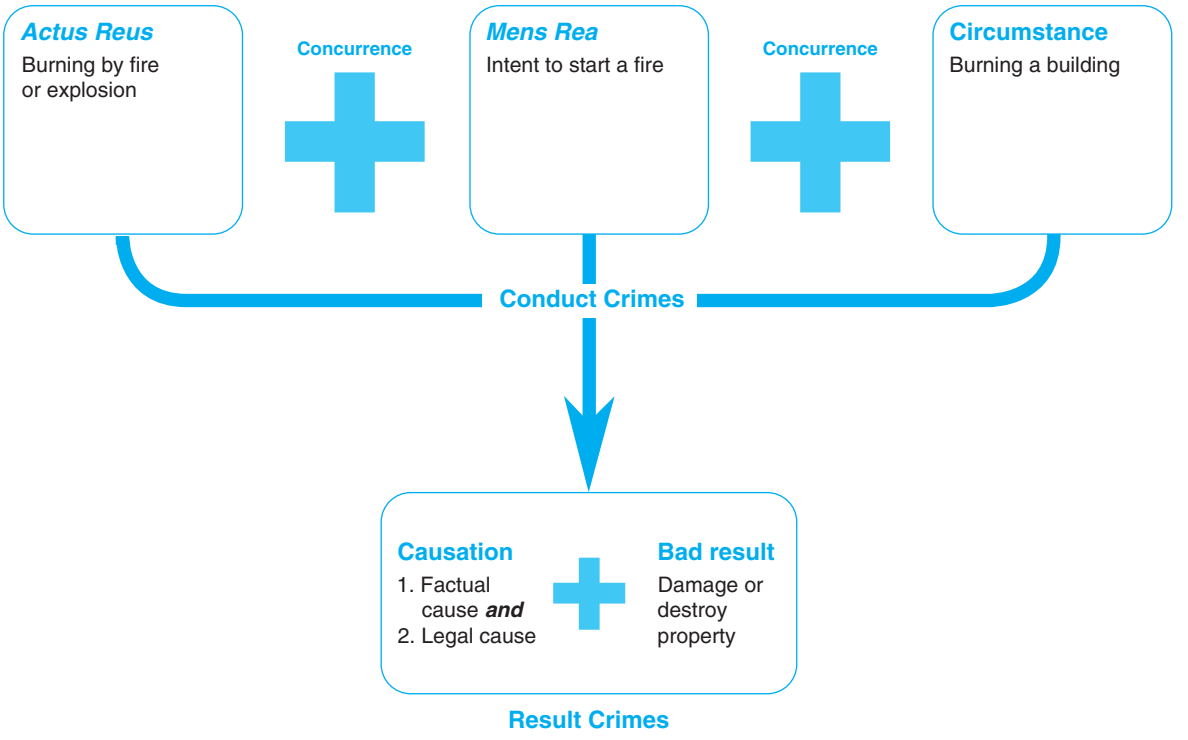

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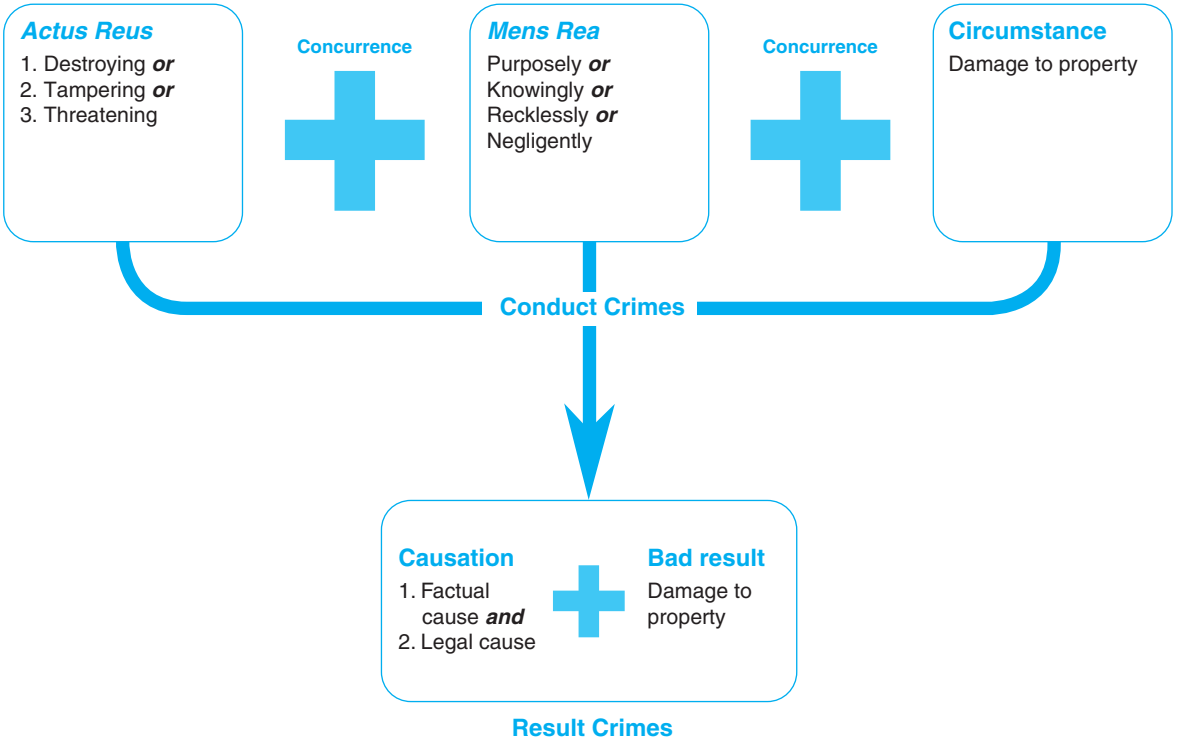

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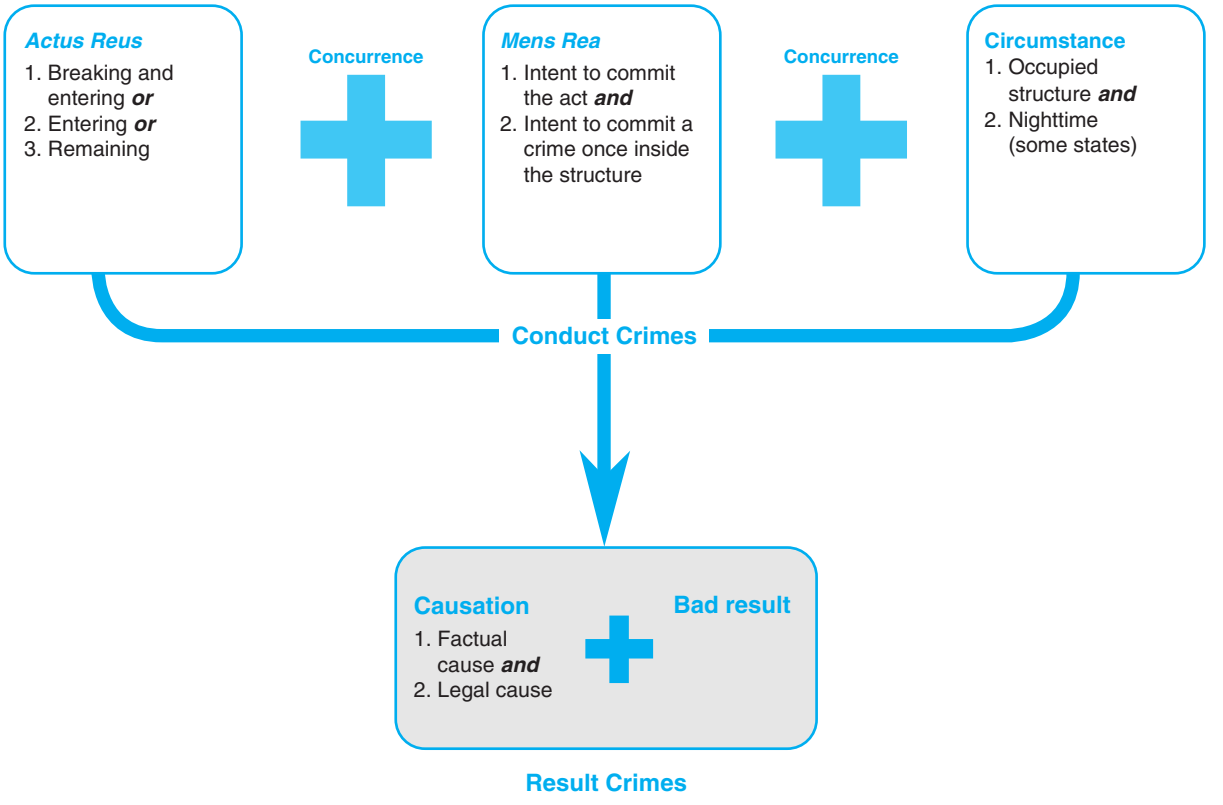

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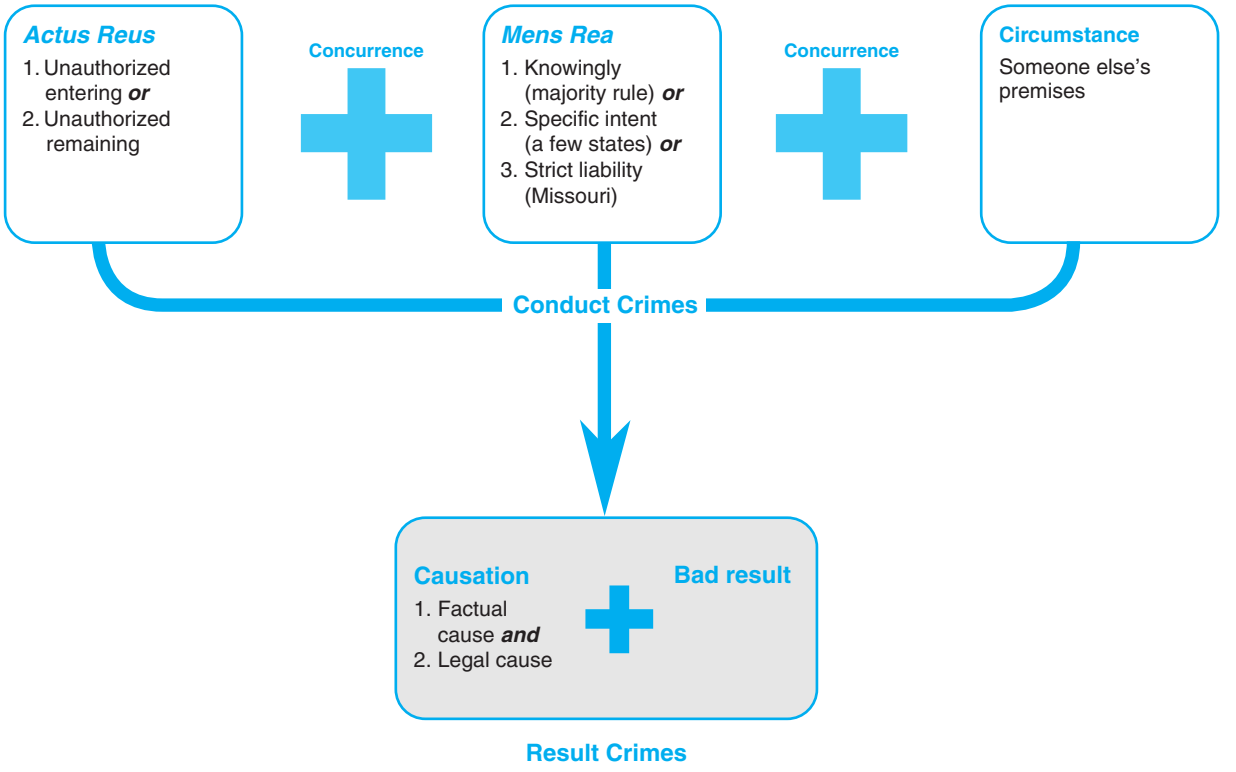

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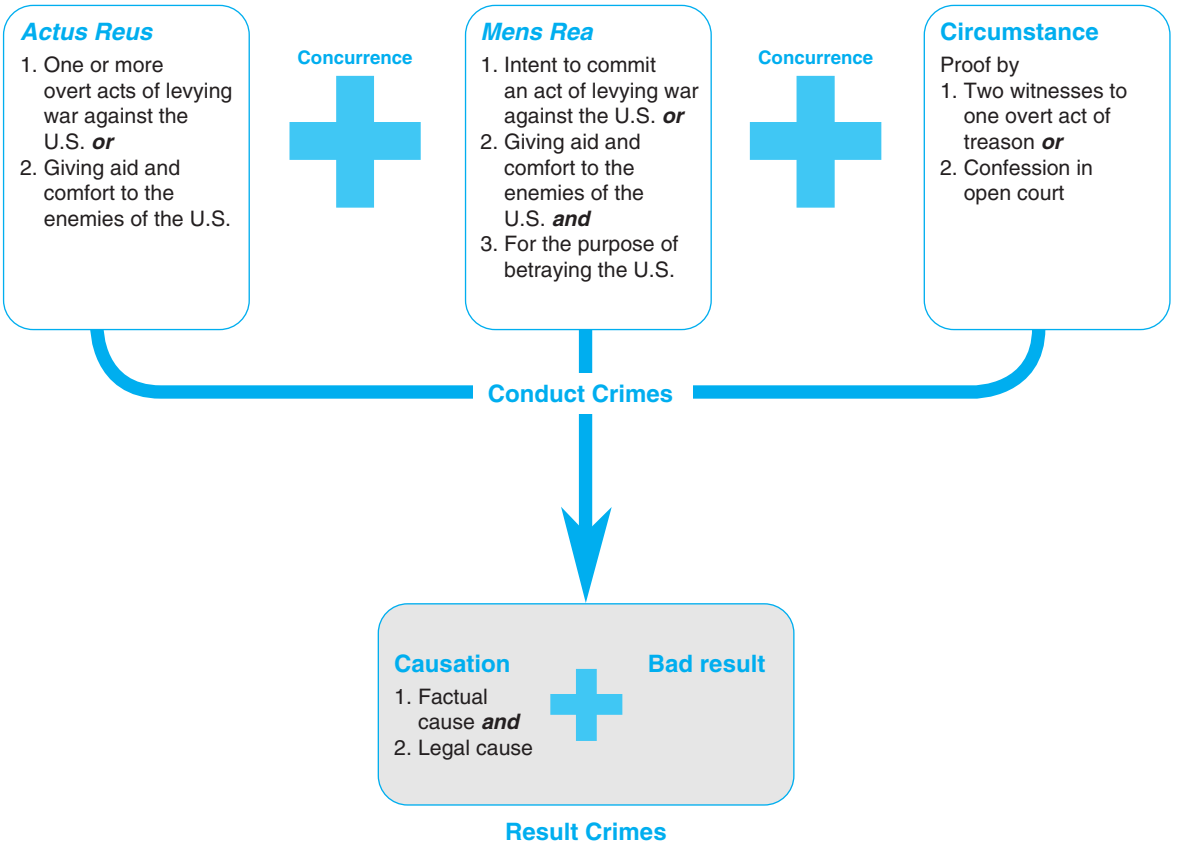

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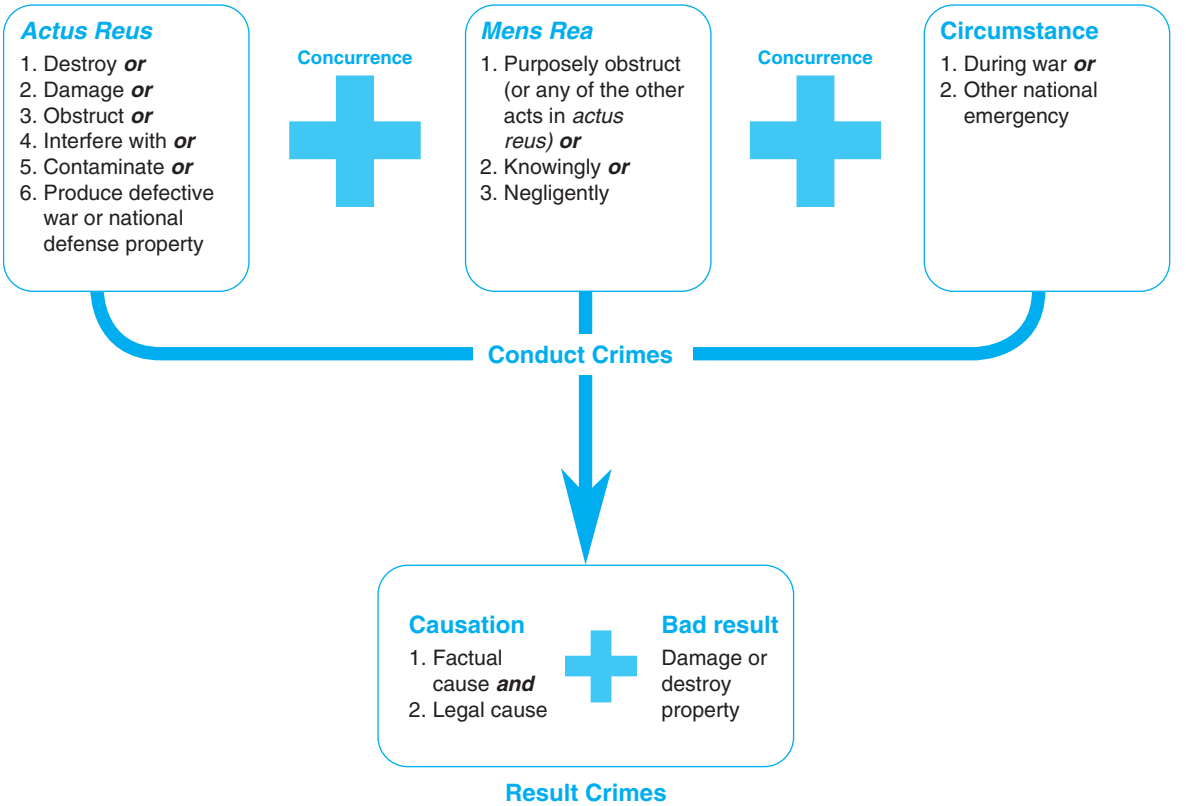
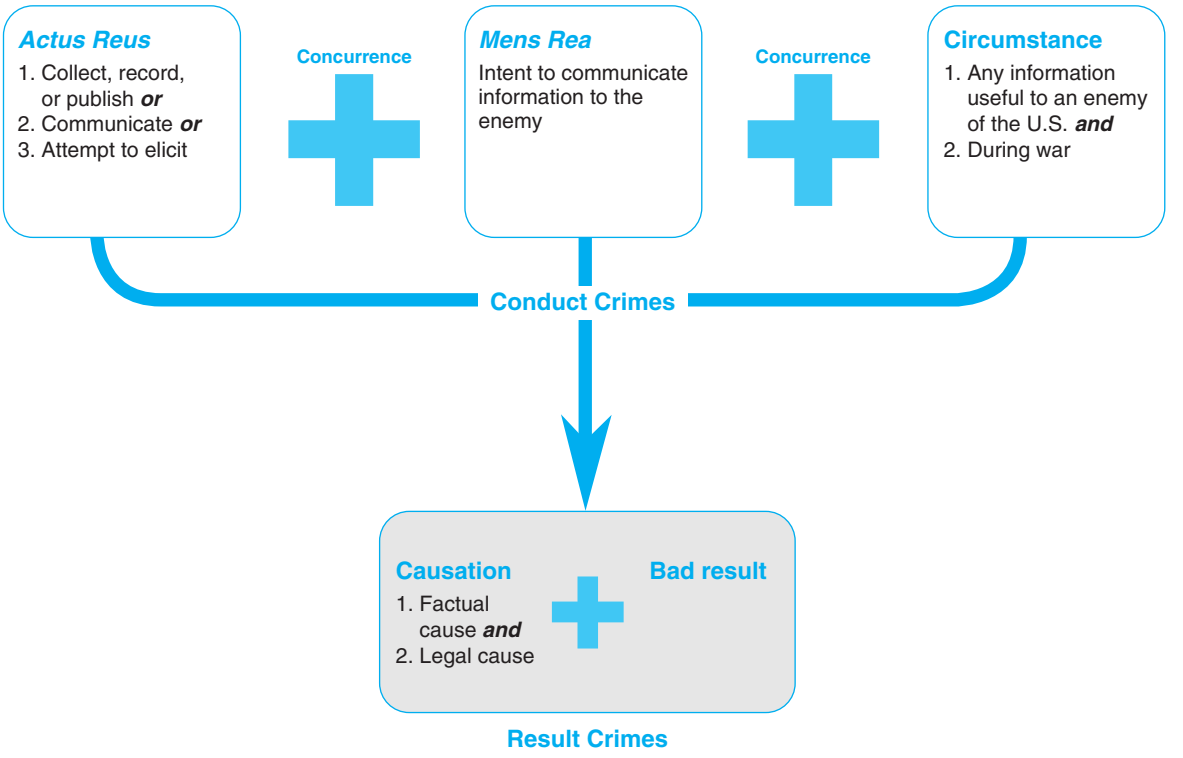
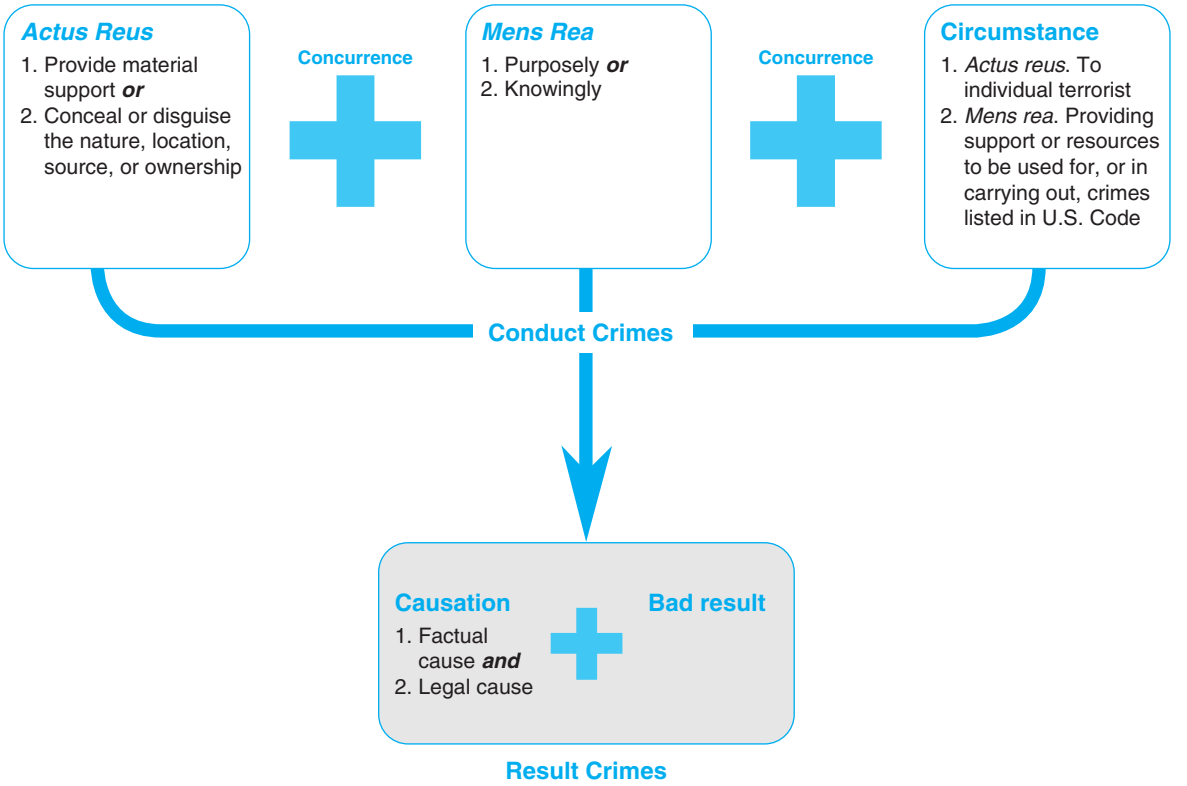


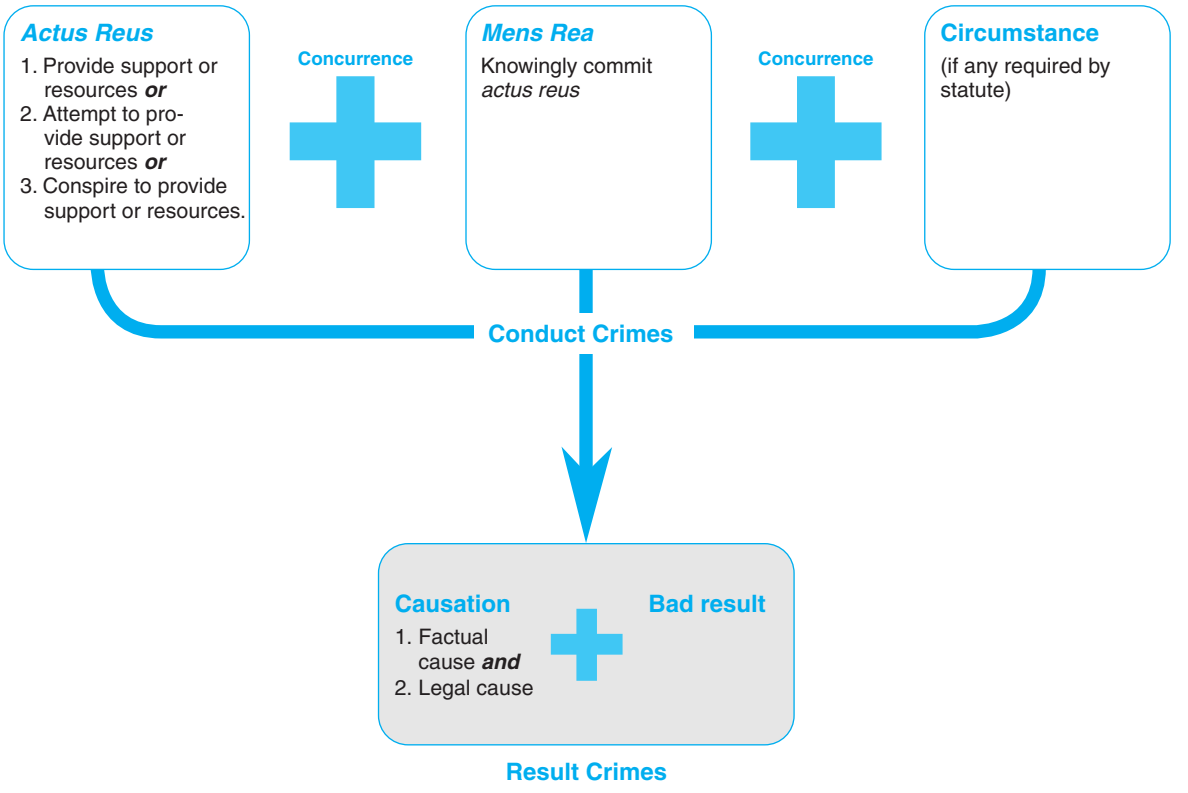
ELEMENTS OF ESPIONAGE



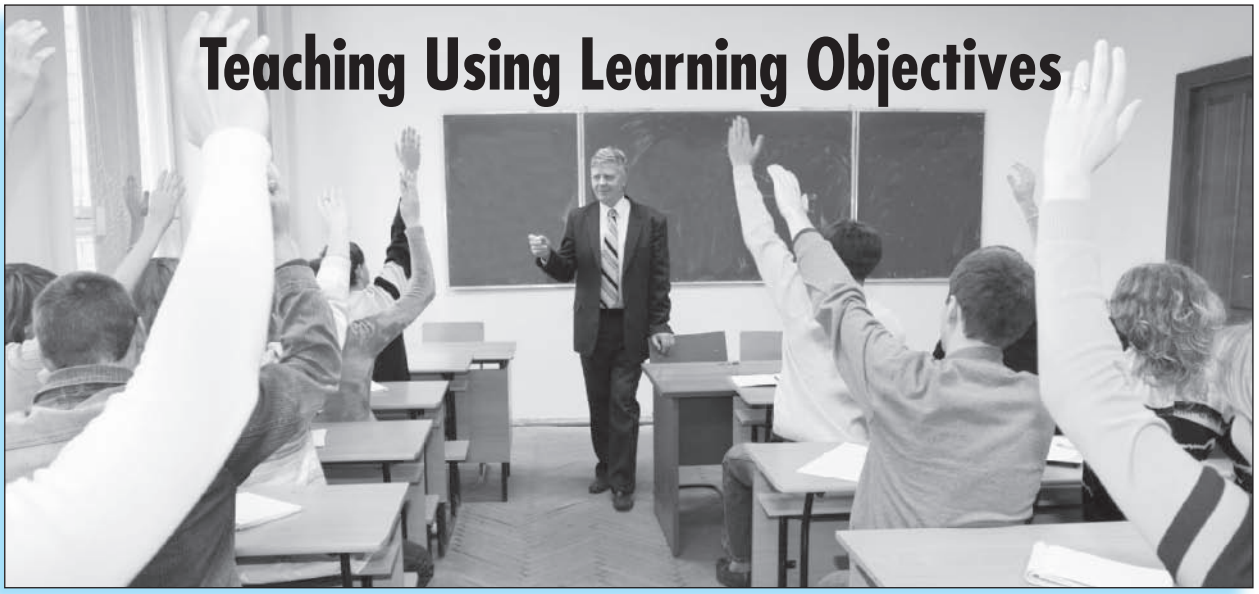
ELEMENTS OF MATERIAL SUPPORT TO TERRORISTS



ELEMENTS OF MATERIAL SUPPORT TO TERRORIST ORGANIZATIONS



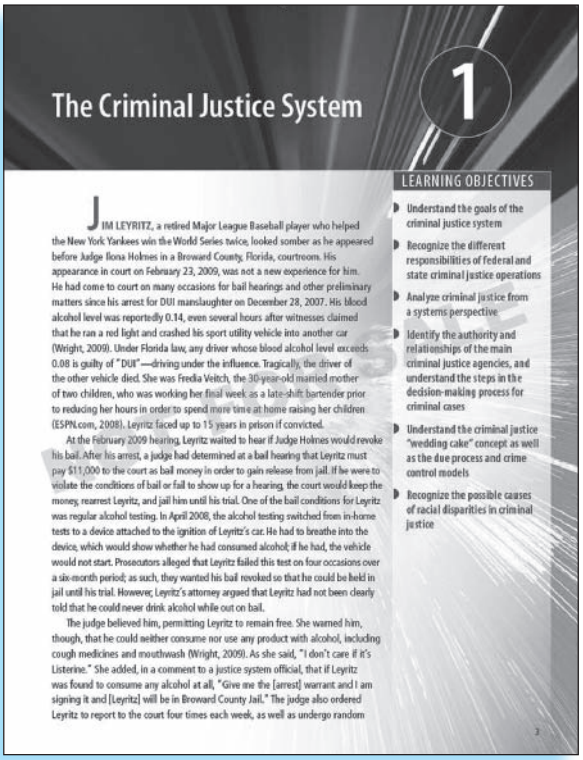
Teaching Using Learning Objectives



Section One:

Introduction and Overview of Supplements that Contain Learning Objectives

Cengage Learning recognizes the challenges of teaching and seeks to support faculty in their efforts to educate students. In pursuit of this goal, this supplement has been provided to aid faculty in using the Learning Objectives included in the textbooks and supplementary materials adopted for your class. Learning Objectives can make teaching and learning an easier and more profitable exercise. This supplement is intended to assist you in incorporating the Learning Objectives into your classroom.



The Criminal Justice System 1

LEARNING OBJECTIVES

- Understand the goals of the criminal justice system
- Recognize the different responsibilities of federal and state criminal justice operations
- Analyze criminal justice from a systems perspective
- Identify the authority and relationships of the main criminal justice agencies, and understand the steps in the decision-making process for criminal cases
- Understand the criminal justice "wedding cake" concept as well as the due process and crime control models
- Recognize the possible causes of racial disparities in criminal justice

JIM LEYRITZ, a retired Major League Baseball player who helped the New York Yankees win the World Series twice, looked somber as he appeared before Judge Ilona Holmes in a Broward County, Florida, courtroom. His appearance in court on February 23, 2009, was not a new experience for him. He had come to court on many occasions for bail hearings and other preliminary matters since his arrest for DUI manslaughter on December 28, 2007. His blood alcohol level was reportedly 0.14, even several hours after witnesses claimed that he ran a red light and crashed his sport utility vehicle into another car (Wright, 2009). Under Florida law, any driver whose blood alcohol level exceeds 0.08 is guilty of "DUI"—driving under the influence. Tragically, the driver of the other vehicle died. She was Fredia Veitch, the 30-year-old married mother of two children, who was working her final week as a late-shift bartender prior to reducing her hours in order to spend more time at home raising her children (ESPN.com, 2008). Leyritz faced up to 15 years in prison if convicted.

At the February 2009 hearing, Leyritz waited to hear if Judge Holmes would revoke his bail. After his arrest, a judge had determined at a bail hearing that Leyritz must pay $11,000 to the court as bail money in order to gain release from jail. If he were to violate the conditions of bail or fail to show up for a hearing, the court would keep the money, rearrest Leyritz, and jail him until his trial. One of the bail conditions for Leyritz was regular alcohol testing. In April 2008, the alcohol testing switched from in-home tests to a device attached to the ignition of Leyritz's car. He had to breathe into the device, which would show whether he had consumed alcohol; if he had, the vehicle would not start. Prosecutors alleged that Leyritz failed this test on four occasions over a six-month period; as such, they wanted his bail revoked so that he could be held in jail until his trial. However, Leyritz's attorney argued that Leyritz had not been clearly told that he could never drink alcohol while out on bail.

The judge believed him, permitting Leyritz to remain free. She warned him, though, that he could neither consume nor use any product with alcohol, including cough medicines and mouthwash (Wright, 2009). As she said, "I don't care if it's Listerine." She added, in a comment to a justice system official, that if Leyritz was found to consume any alcohol at all, "Give me the [arrest] warrant and I am signing it and [Leyritz] will be in Broward County Jail." The judge also ordered Leyritz to report to the court four times each week, as well as undergo random

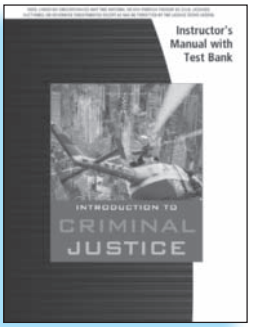
How do Learning Objectives make teaching easier? Learning Objectives can be the organizing framework for all of the information taught in class. This supplement will show you how the ancillary materials tie all of the textbook information together for you using the Learning Objectives for each chapter in our instructor and student resources. These resources are available in print and electronically via various products, downloads, and companion websites provided by Cengage Learning.

How do Learning Objectives make learning easier? Students who know what is expected of them are more likely to succeed. Learning Objectives let the student know exactly what you expect them to learn, while the Study Guide and various tutorials available in our products and on our companion websites show them how to achieve the Learning Objectives. Making students aware of these materials provides them with a roadmap to successful completion of the class.

Learning Objectives make it a simple process to communicate what students are expected to know by the end of the class, thus making your job easier. Additionally, the Learning Objectives are used repeatedly in the textbook and study materials, and on the companion website available to each student. Repetition of this information promotes student success.

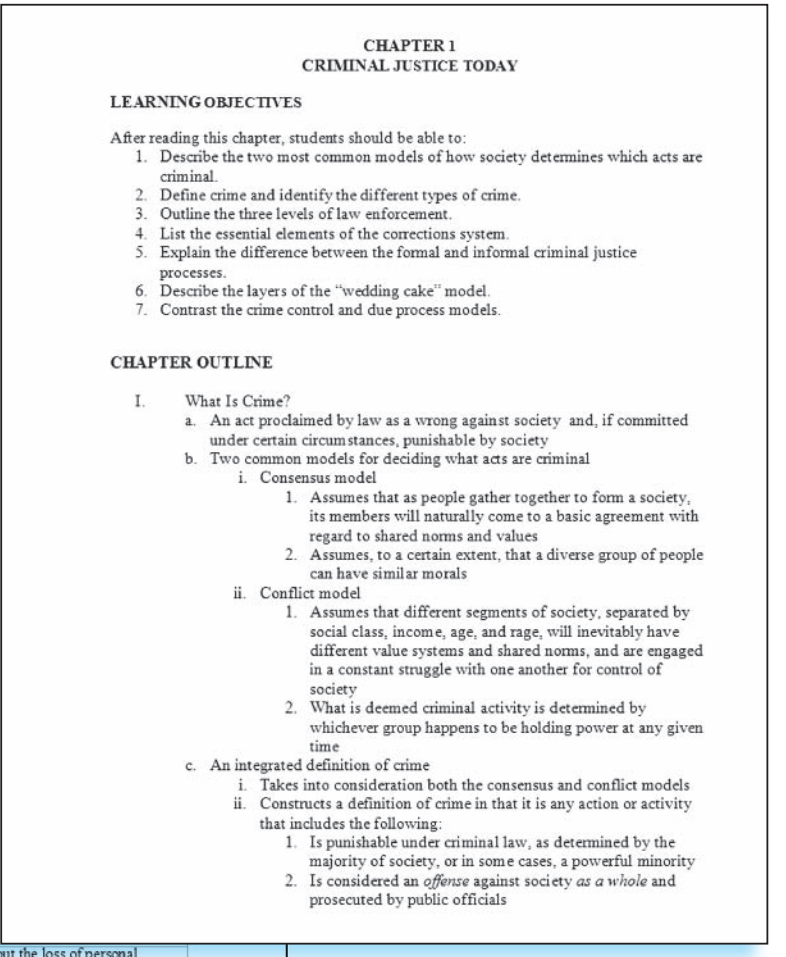
Instructor Resources

Learning Objectives are available in a variety of materials for you and your students. An Annotated Instructor's Edition is available for some titles, and includes a list of all of the tools we offer for instructors and students. Some of the key features of the **Annotated Instructor's Edition** include Teaching Tips, Discussion Tips,Web Tips, and Media Tips for each chapter. These tips are specifically designed to assist you in incorporating the Learning Objectives into the classroom through assignments, discussion, and use of the internet. Additionally, these tips are highlighted in blue in the margins of the textbook to help you spot them easily when preparing for classes.



The **Instructor's Manual with Test Bank** includes Learning Objectives, a Chapter Outline, Key Terms, and a Test Bank. Each question in the Test Bank is coded to the appropriate Learning Objective for that question. This allows you the opportunity to focus on the Learning Objectives you feel are most important for your students to understand.

► The Lesson Plans include two sample syllabi, Learning Objectives, Lecture Notes, Discussion Topics, Class Activities, tips for classroom presentation of the chapter material, and Assignments.



CHAPTER 1
CRIMINAL JUSTICE TODAY

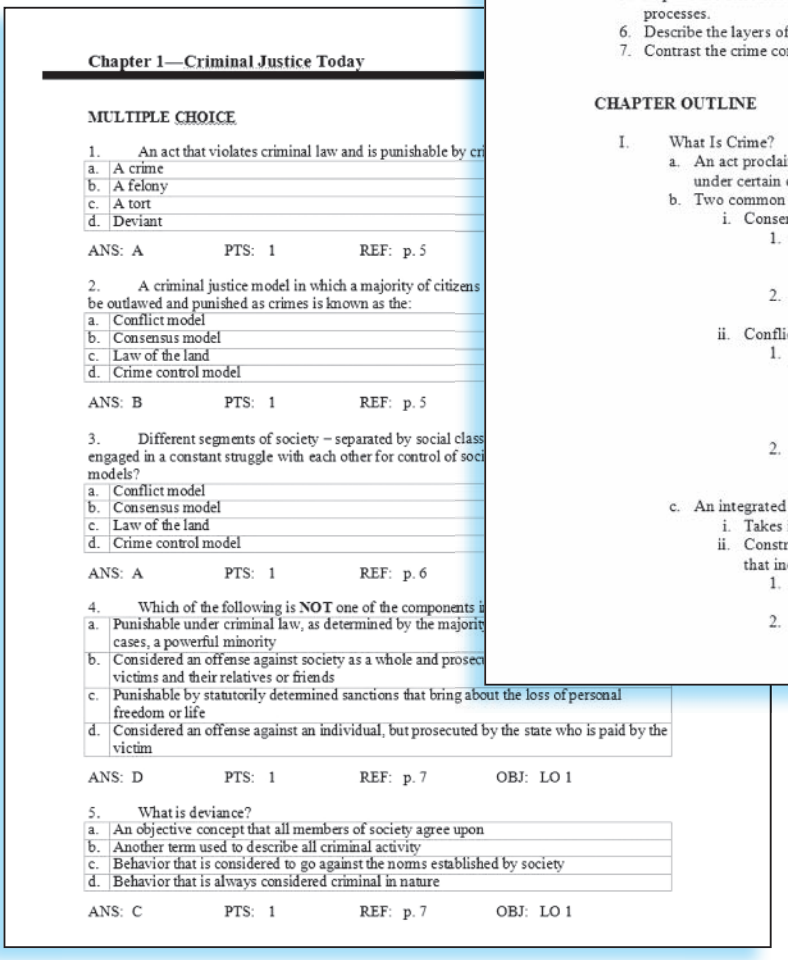
LEARNING OBJECTIVES

After reading this chapter, students should be able to:

1. Describe the two most common models of how society determines which acts are criminal.
2. Define crime and identify the different types of crime.
3. Outline the three levels of law enforcement.
4. List the essential elements of the corrections system.
5. Explain the difference between the formal and informal criminal justice processes.
6. Describe the layers of the "wedding cake" model.
7. Contrast the crime control and due process models.

CHAPTER OUTLINE

I. What Is Crime?
   a. An act proclaimed by law as a wrong against society and, if committed under certain circumstances, punishable by society
   b. Two common models for deciding what acts are criminal
      i. Consensus model
         1. Assumes that as people gather together to form a society, its members will naturally come to a basic agreement with regard to shared norms and values
         2. Assumes, to a certain extent, that a diverse group of people can have similar morals
      ii. Conflict model
         1. Assumes that different segments of society, separated by social class, income, age, and rage, will inevitably have different value systems and shared norms, and are engaged in a constant struggle with one another for control of society
         2. What is deemed criminal activity is determined by whichever group happens to be holding power at any given time
   c. An integrated definition of crime
      i. Takes into consideration both the consensus and conflict models
      ii. Constructs a definition of crime in that it is any action or activity that includes the following:
         1. Is punishable under criminal law, as determined by the majority of society, or in some cases, a powerful minority
         2. Is considered an *offense* against society *as a whole* and prosecuted by public officials



Chapter 1—Criminal Justice Today

MULTIPLE CHOICE

1. An act that violates criminal law and is punishable by cri
   a. A crime
   b. A felony
   c. A tort
   d. Deviant

ANS: A PTS: 1 REF: p. 5

2. A criminal justice model in which a majority of citizens be outlawed and punished as crimes is known as the:
   a. Conflict model
   b. Consensus model
   c. Law of the land
   d. Crime control model

ANS: B PTS: 1 REF: p. 5

3. Different segments of society – separated by social class engaged in a constant struggle with each other for control of soci models?
   a. Conflict model
   b. Consensus model
   c. Law of the land
   d. Crime control model

ANS: A PTS: 1 REF: p. 6

4. Which of the following is **NOT** one of the components i
   a. Punishable under criminal law, as determined by the majorit cases, a powerful minority
   b. Considered an offense against society as a whole and prosec victims and their relatives or friends
   c. Punishable by statutorily determined sanctions that bring about the loss of personal freedom or life
   d. Considered an offense against an individual, but prosecuted by the state who is paid by the victim

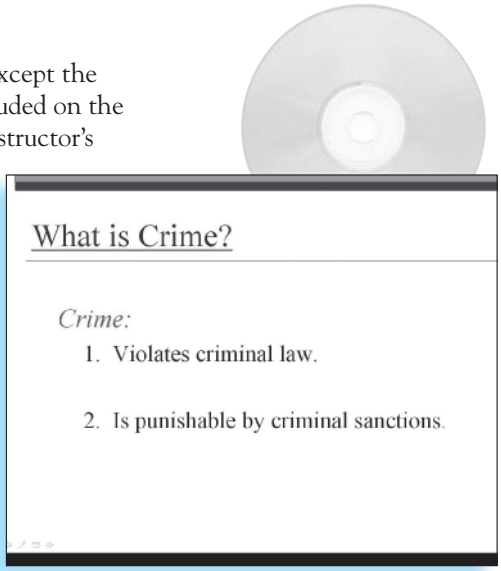
ANS: D PTS: 1 REF: p. 7 OBJ: LO 1

5. What is deviance?
   a. An objective concept that all members of society agree upon
   b. Another term used to describe all criminal activity
   c. Behavior that is considered to go against the norms established by society
   d. Behavior that is always considered criminal in nature

ANS: C PTS: 1 REF: p. 7 OBJ: LO 1

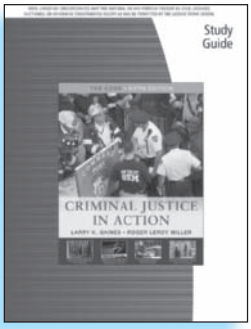
PowerLecture™

The **PowerLecture DVD** is a compilation of all of the above tools except the Annotated Instructor's Edition, plus some additional resources. Included on the **PowerLecture DVD** are PowerPoint slides, an Image Library, the Instructor's Manual, the Test Bank, the Lesson Plans, ExamView, JoinIn for Clickers, and videos. ExamView includes all of the Test Bank questions from the Instructor's Manual with Test Bank in customizable electronic format. It creates tests for you and allows you to choose multiple choice, true/false, fill-in-the-blank and essay questions that focus on the Learning Objectives of your choice. Using ExamView, you can view the test results as you create the test, and edit the test as you create it.



► Microsoft® PowerPoint® slide presentations are available for each chapter of the textbook and provide a lecture presentation focused on the Learning Objectives.

Student Resources

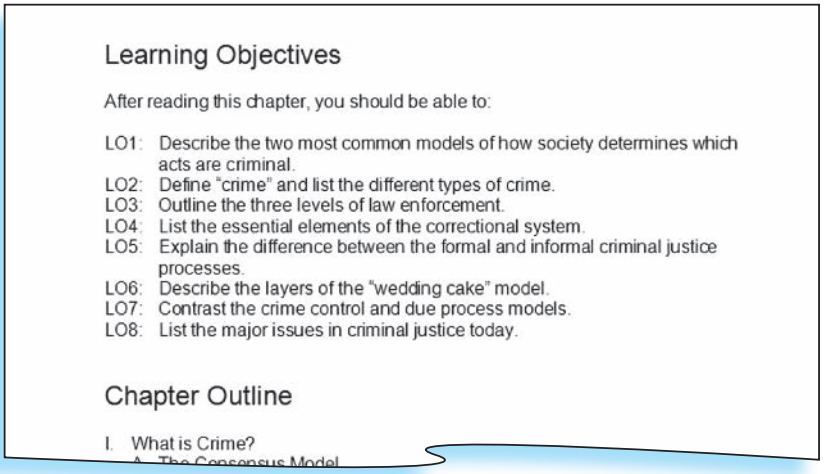


The **Study Guide** is the student's version of the Instructor's Manual. It provides the student with the Learning Objectives for each chapter, a Chapter Outline, Key Terms and the pages on which they can be found in the textbook, special projects that can be used as assignments for class, and a Practice Test Bank with answers coded to the Learning Objectives.

CENGAGENOW

CengageNOW is an interactive online learning resource for students. This tool provides students with study tools for each chapter such as essay questions, flashcards, and tutorial quizzes, all of which are centered on the Learning Objectives to ensure that students understand what material to focus on while studying.

Both the Study Guide and CengageNOW allow you to target your students' study time on the Learning Objectives while enabling you to communicate the focus of each chapter in the text to your students, as well as where you want them to be at the end of the term.


Learning Objectives

After reading this chapter, you should be able to:

LO1: Describe the two most common models of how society determines which acts are criminal.
LO2: Define "crime" and list the different types of crime.
LO3: Outline the three levels of law enforcement.
LO4: List the essential elements of the correctional system.
LO5: Explain the difference between the formal and informal criminal justice processes.
LO6: Describe the layers of the "wedding cake" model.
LO7: Contrast the crime control and due process models.
LO8: List the major issues in criminal justice today.

Chapter Outline

I. What is Crime?
A. The Consensus Model

Section Two:

Using the Supplements to Integrate Learning Objectives into Your Classroom

One of the first tasks for you in teaching using Learning Objectives is to tie them into the Chapter Outline and lecture materials. This process is made easy through the use of the supplementary materials discussed in Section One. Let's take a look at how each of these supplements can work for you.

The Instructor's Manual with Test Bank is available to instructors in print and electronically. The Instructor's Manual portion can be downloaded from the companion website for the book, and the full version is available electronically as part of the PowerLecture DVD or through a download by contacting your Cengage Learning sales representative. The Lesson Plans and PowerPoint slides are both available electronically as a download by contacting your Cengage Learning sales representative, or as part of the PowerLecture DVD.

The Instructor's Manual with Test Bank includes a Chapter Outline for each chapter of the textbook adopted for your class. A quick look at each of the headings for the Outline provides you with the ability to tie each section of the Outline to the Learning Objectives for that chapter. For example, in *Criminal Justice in Action: The Core*, the Learning Objectives for Chapter One can be linked directly to the sections in the Outline. Table 2.1 demonstrates how each of the Learning Objectives for this chapter connects to the Outline in the Instructor's Manual.

Table 2.1 Connection Between Learning Objectives and Outline Sections

Learning Objective	Outline Section
1. Describe the two most common models that show how society determines which acts are criminal.	3. Values of the Criminal Justice System
2. Define crime and identify the different types of crime.	1. What is Crime
3. Outline the three levels of law enforcement.	2. The Criminal Justice System
4. List the essential elements of the corrections system.	2. The Criminal Justice System
5. Explain the difference between the formal and informal criminal justice processes.	2. The Criminal Justice System
6. Describe the layers of the "wedding cake" model.	2. The Criminal Justice System
7. Contrast the crime control and due process models.	3. Values of the Criminal Justice System

The Annotated Instructor's Edition is another powerful tool to help you teach using Learning Objectives. The marginal callouts mentioned in the first section (Teaching Tips, Discussion Tips, Web Tips, and Media Tips) correlate to the Learning Objectives, and can provide you with ideas as to how to generate discussion on the Learning Objectives and be creative in incorporating them into your classes. For example, regarding Learning Objective One from above, one of the Teaching Tips suggests having students research how violent crimes are classified in your state. It suggests asking students to name the specific circumstances required for each degree of an offense. Such an assignment not only explores the deeper meaning of crime but also investigates the criminal justice system in a way that can be more meaningful to the student as she or he considers the criminal justice system in her or his own local area.


ies, including Baltimore, Boston, Chicago, Cincinnati, New Orleans, and Philadelphia, had similarly consolidated police departments, modeled on the Metropolitan Police of London.

Like their modern counterparts, many early police officers were hard working, honest, and devoted to serving and protecting the public. On the whole, however, in the words of historian Samuel Walker, "The quality of American police service in the nineteenth century could hardly have been worse."[6] This poor quality can be attributed to the fact that the recruitment and promotion of police officers were intricately tied into the politics of the day. Police officers received their jobs as a result of political connections, not because of any particular skills or knowledge. Whichever political party was in power in a given city would hire its own cronies to run the police department; consequently, the police were often more concerned with serving the interests of the political powers than with protecting the citizens.[7]

▲ A horse-drawn police wagon used by the New York City Police Department, circa 1886. In the 1880s a number of American cities introduced patrol wagons, which transported prisoners and drunks and also performed ambulance duties. Along with signal service, or "call boxes," the police wagon represented a "revolution" in police methods. If a patrol officer made an arrest far from headquarters, he could now call the station and request a police wagon to pick up and deliver the arrested person (instead of having to deliver the arrestee himself).

The Spoils System Corruption was rampant during this *political* era of policing, which lasted roughly from 1840 to 1930. (See ■ Figure 5.2 on the next page for an overview of the three eras of policing, which are discussed in this chapter and referred to throughout the book.) Police salaries were relatively low; thus, many police officers saw their positions as opportunities to make extra income through any number of illegal activities. Bribery was common, as police would use their close proximity to the people to request "favors," which went into the police officers' own pockets or into the coffers of the local political party as "contributions."[8] This was known as the patronage system, or the "spoils system," because to the political victors went the spoils.

LO2

The political era also saw police officers take an active role in providing social services for their bosses' constituents. In many instances, this role even took precedence over law enforcement duties. Politicians realized that they could attract more votes by offering social services to citizens than by arresting them, and they required the police departments under their control to act accordingly.

Teaching Tip: To have students gain a better understanding of policing in early America, have them work together to brainstorm the social issues that may have affected police prior to 1850. Have them consider issues like immigration, urbanization, and industrialization.

Teaching Tip: Have students respond to "Questions for Critical Analysis" number 1, in which they are asked to analyze the problems

THE MODERNIZATION OF THE AMERICAN POLICE

The abuses of the political era of policing did not go unnoticed. It was not until 1929 that President Herbert Hoover appointed the

Discussion Tips also help focus the class on Learning Objectives by providing topics for group and class discussion directly related to the Learning Objectives. One such Discussion Tip relates to Learning Objectives One and Three from above.
The Discussion Tip suggests having students work in small groups to brainstorm examples of offenses that fit the conflict model of criminal justice, focusing on which groups hold the power and which do not. A discussion such as this not only focuses the students on the Learning Objectives, but also helps them understand how the different concepts in the Learning Objectives are applied in the criminal justice system.

The Annotated Instructor's Edition also provides an End of Chapter Summary with links to the Learning Objectives. This summary offers a synopsis of all of the Learning Objectives, providing a quick reference for review of the Learning Objectives prior to class discussion. Additionally, the End of Chapter Summary can be used as a tool in class to review the topics covered with students at the end of class, and reinforce discussion of any or all of the Learning Objectives covered.

The Study Guide incorporates the Learning Objectives as well as a Chapter Outline, Key Terms, and Practice Test Bank. Students can be assigned to group the Learning Objectives to the Outline, per the example above, prior to each class so they will come prepared. Additionally, just as the Instructor's Manual includes a Test Bank with answers mapped to the Learning Objectives, the Study Guide also provides the appropriate Learning Objectives with each answer to the Practice Test Bank questions, and the questions in the CengageNOW online tutorials test the student's knowledge of the Learning Objectives as well.

Using the PowerPoint slides allows you to lecture based on a PowerPoint presentation created specifically for each of the chapters in the book. The slides are prepared for you by instructors who teach the material, so they reflect what instructors using the book want to see in their classrooms. The Learning Objectives are incorporated into the PowerPoint slides, making it quick and easy for you to lecture in the classroom using the Learning Objectives as your focus.

For those who prefer not to use PowerPoint slides, the Lesson Plans also include the Learning Objectives as the foundation for lectures, as well as discussion questions and possible activities to use in the classroom.

Including the Learning Objectives in your syllabus can also aid students in understanding the focus for each class session and help them to be prepared prior to class. These materials can all work together to allow you to organize classes easily and enable you to have a greater impact. See Figure 2.1 below for an example of a syllabus based on the information from Table 2.1.
The materials included in the Instructor's Manual with Test Bank can differ slightly from book to book. They always include Learning Objectives, Key Terms, a Chapter Outline, Discussion Topics, Student Activities, and the Test Bank, but can also include Activity Suggestions for Online Courses, Internet Connections, and Using Media in the Classroom resources.

Figure 2.1 – Incorporating the Learning Objectives into a Class Syllabus

Professor Bell Fall Semester – 2009

Syllabus – Criminal Justice in Action

Date	Text Book Chapter	Topics	Learning Objective(s)
9/12/2009	One	What is Crime?	Two
		The Criminal Justice System	Three, Four, Five, Six
		Values of the Criminal Justice System	One, Seven

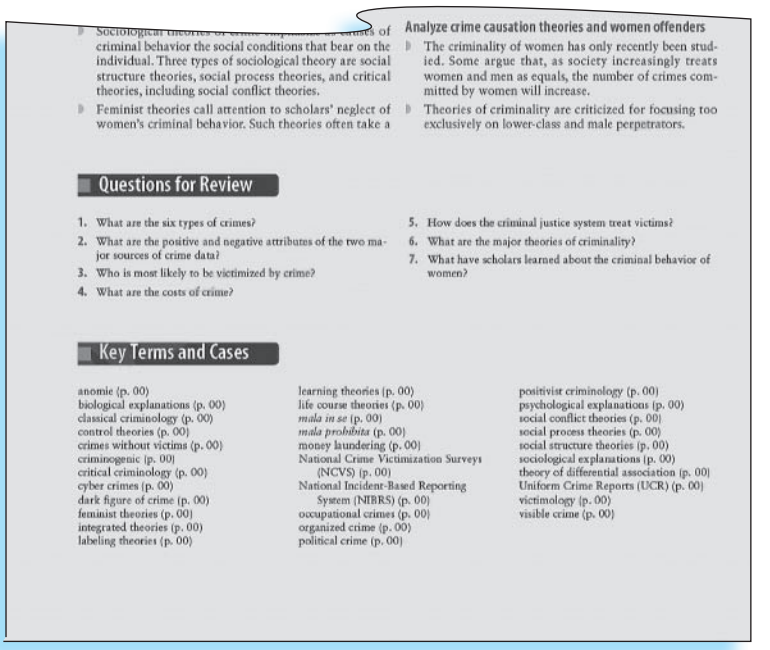
The Lesson Plans can help you integrate Learning Objectives into your teaching style in the classroom. The Learning Objectives are included in the sample syllabi and can also easily be integrated into the Chapter Outline as shown above.

Now that we have covered some of the materials available to assist you in Teaching Using Learning Objectives, we will discuss some other ways you can use the material included in these resources in your classroom.

Section Three:

Key Terms

Key Terms are a very helpful tool for implementing Learning Objectives while teaching in the classroom, and are provided in almost all of the supplemental materials we've discussed. As you read this supplement, think about the different classes you took as a student in college. In order to acquire an undergraduate degree it is almost always necessary to take classes known as "core" classes. These classes are not directly related to the major you are taking, but are required of many undergraduate programs to ensure that students are well-rounded when they receive their degree.



- Sociological theories of [illegible] of criminal behavior the social conditions that bear on the individual. Three types of sociological theory are social structure theories, social process theories, and critical theories, including social conflict theories.
- Feminist theories call attention to scholars' neglect of women's criminal behavior. Such theories often take a

Analyze crime causation theories and women offenders

- The criminality of women has only recently been studied. Some argue that, as society increasingly treats women and men as equals, the number of crimes committed by women will increase.
- Theories of criminality are criticized for focusing too exclusively on lower-class and male perpetrators.

Questions for Review

1. What are the six types of crimes?
2. What are the positive and negative attributes of the two major sources of crime data?
3. Who is most likely to be victimized by crime?
4. What are the costs of crime?
5. How does the criminal justice system treat victims?
6. What are the major theories of criminality?
7. What have scholars learned about the criminal behavior of women?

Key Terms and Cases

anomie (p. 00)
biological explanations (p. 00)
classical criminology (p. 00)
control theories (p. 00)
crimes without victims (p. 00)
criminogenic (p. 00)
critical criminology (p. 00)
cyber crimes (p. 00)
dark figure of crime (p. 00)
feminist theories (p. 00)
integrated theories (p. 00)
labeling theories (p. 00)
learning theories (p. 00)
life course theories (p. 00)
mala in se (p. 00)
mala prohibita (p. 00)
money laundering (p. 00)
National Crime Victimization Surveys (NCVS) (p. 00)
National Incident-Based Reporting System (NIBRS) (p. 00)
occupational crimes (p. 00)
organized crime (p. 00)
political crime (p. 00)
positivist criminology (p. 00)
psychological explanations (p. 00)
social conflict theories (p. 00)
social process theories (p. 00)
social structure theories (p. 00)
sociological explanations (p. 00)
theory of differential association (p. 00)
Uniform Crime Reports (UCR) (p. 00)
victimology (p. 00)
visible crime (p. 00)

One of the first things necessary when taking a class in a field you are not familiar with is to learn the language. Medical students must learn medical terminology, psychology students must learn psychological terminology, and criminal justice students must learn criminal justice terminology. Therefore, for a student to be able to gain a firm grasp of the concepts in the Learning Objectives, it is necessary to understand the language of that material. One of the best ways to understand the language is to first learn the Key Terms.

Each of the Key Terms can be directly categorized under a Learning Objective. Although each of the Key Terms are directly related to one particular Learning Objective, some of them may apply to more than one. Table 3.1 shows an example of how the Key Terms connect to the Learning Objectives in Chapter One of *Criminal Justice in Action: The Core*.

Table 3.1 Connection between Learning Objectives and Key Terms

Learning Objective	Key Terms
1. Describe the two most common models that show how society determines which acts are criminal.	Consensus model, conflict model
2. Define crime and identify the different types of crime.	Crime, deviance, murder, sexual assault, assault, larceny, battery, public order crime, white-collar crime, organized crime, terrorism
3. Outline the three levels of law enforcement.	Homeland Security
4. List the essential elements of the criminal justice system.	Federalism, criminal justice system
5. Explain the difference between the formal and informal criminal justice processes.	Federalism, criminal justice system, discretion, Civil Rights
6. Describe the layers of the "wedding cake" model.	"Wedding Cake" Model
7. Contrast the crime control and due process models.	Crime Control Model, Due Process Model

A good example of an ongoing homework assignment is to have the students list each Learning Objective with the Key Terms that are related to it and explain how they are related. The assignment should be due on the day of class that each topic is to be covered. This provides an opportunity for class discussion as well as opening students up to interject a fresh perspective on the material. Although the Key Terms do apply to some Learning Objectives more than others, it is important to remember that such an assignment is primarily about getting the student to think about the Key Terms and the Learning Objectives, and how they apply to the subject of that particular chapter. Thus, it is possible that more than one answer is correct in such an assignment.

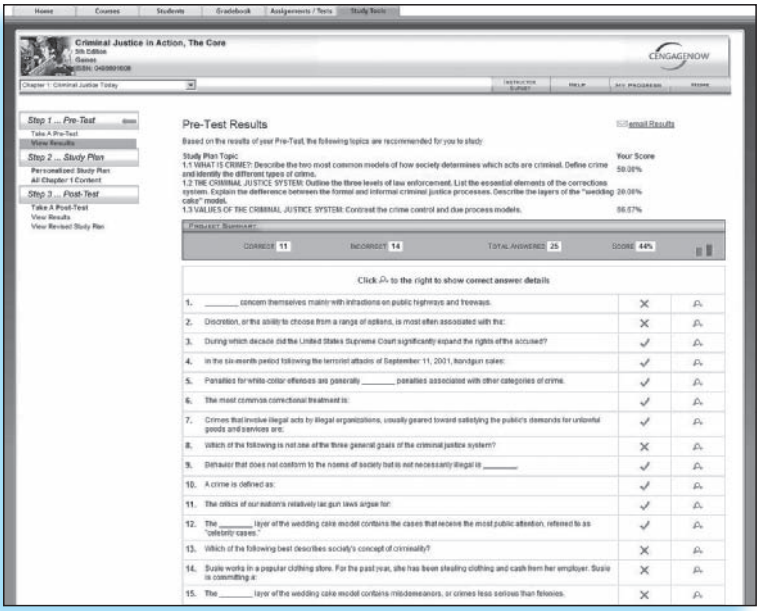
The Key Terms can also be used in class or as a homework assignment using some of the study tools available to the student through CengageNOW.

Flashcards of Key Terms are available for students and instructors, and can be used as an activity in class to keep students involved.

Students can be asked to define a Key Term and then relate it to the appropriate Learning Objective. One way to increase participation with this kind of exercise is to offer extra credit points for correlating the definitions with the correct Learning Objectives. The amount of extra credit does not have to be large, and an activity such as this accomplishes several goals at the same time. First, students quickly learn that the way to gain extra credit is to come to class. Second, the students will relate the Key Terms to the Learning Objectives and develop an understanding of the language necessary to understand the information. Finally, students are encouraged to participate in class. It's a good idea to limit the number of times each student can answer, so as to allow all students the opportunity to participate.

Section Four:
Online Study Tools

CengageNOW provides online study tools that allow students to take Pre- and Post-tests with questions that correlate directly to the Learning Objectives. As you can see in the figure below, the student can take a Pre-test on material related to the Learning Objectives, and the program offers them a personalized study plan based on the results of the Pre-test. After the student has completed the personalized study plan, a Post-test evaluates her or his improved comprehension of the chapter content. The student has electronic access to all of the information from the chapter as he or she is studying, and can access video information as well.



Use of tools such as these can not only help you incorporate Learning Objectives into your teaching in the classroom, but can also help make the material more compelling for the student. Reviewing material in more than one format can help students gain a better grasp of the material by reinforcing the same information in various contexts.

Additionally, making the material available to students in more than one format helps ensure that all students are presented the material in a format which is most conducive to their learning style.

Section Five:
Conclusion

Although we have covered a number of ways that Learning Objectives can be used as part of teaching in the classroom, there are many more possibilities. The goal of this supplement is to provide you with a few examples of how you can incorporate Learning Objectives into your teaching style to make teaching easier and more productive.

All of the tools provided to instructors by Cengage Learning can aid you in teaching using Learning Objectives. These tools are available in a number of different platforms to enable you to choose the version you're most comfortable with, that best suits your teaching style and the various learning styles of your students. Whether you prefer using print supplements such as the Instructor's Manual with Test Bank or Annotated Instructor's Edition, the electronic option of the PowerLecture that includes everything on a single DVD, or the CengageNOW convenience of interactive online tools, Cengage Learning has a resource for you and your students. Incorporating the tools created specifically for use with the textbook you use in your class can make teaching more rewarding for you and more effective for your students.

Teaching using Learning Objectives has the potential to make your classroom, whether traditional or online, a learning-friendly environment in which students can get the most out of the academic experience. Providing students with alternatives to traditional lecture formats can make for a more dynamic and successful learning experience. Teaching a class that is enjoyable for students makes the teaching experience enjoyable as well. We hope that this supplement has provided you with some ideas on how to incorporate Learning Objectives into your classroom and how to make better use of the tools available to you to help your students learn the material you present in class.