

# 3

## Elements of Crimes

### TEST YOUR KNOWLEDGE: TRUE OR FALSE?

1. The criminal law punishes voluntary criminal acts but does not penalize involuntary acts or punish thoughts about committing a crime.
2. An individual may be held criminally liable for using or selling narcotics but not for the status of being a drug addict.
3. A champion Olympic swimmer has a legal duty to rescue a child in a swimming pool whom he or she sees drowning.
4. When narcotics are seized by the police in an automobile, all of the individuals in the car automatically will be held guilty of narcotics possession.
5. The same criminal act may be considered more serious or less serious based on the offender's intent.
6. The criminal intent of purposely is considered the most serious criminal intent because an offender who intentionally violates the law has not been deterred by the threat of criminal prosecution, conviction, and punishment.
7. An important difference between the criminal intent of recklessly and the criminal intent of negligently is whether the offender is aware of the substantial risk caused by his or her act.
8. Strict liability offenses do not require a criminal intent.

(Continued)

### DID THE DEFENDANT'S FAILURE TO ACT CONSTITUTE ELDER ABUSE?

Gargus quit her job . . . to care for her [eighty-one-year-old mother] full time. [She] was trained in the importance of hygiene, but isolated Victim in a mobile home infected with mice that had feces on the floor, molding food in the kitchen, and a non-working bathroom. Moreover, Gargus stated to investigators that she washed Victim's clothing in flea-ridden, foul-smelling muddy grey water. As a CNA [certified nurse assistant] trained in the importance of hygiene, . . . Gargus knew the condition of the home was certain to cause serious physical injury or harm to Victim, a diabetic with multiple bedsores in various stages of development. Indeed, Victim later died of a massive infection. . . . Gargus knew about but failed to provide the proper treatment of bedsores, failed to ensure Victim ate and drank, and failed . . . to notice the [gangrene on] the victim's leg. (*State v. Gargus*, 462 S.W.3d 417 [Mo. 2013])

In this chapter, you will learn about criminal acts and omissions and about the difference between the criminal intents of purposely, knowingly, negligently, and recklessly.

### INTRODUCTION

A crime comprises an *actus reus*, or a criminal act or omission (failure to act), and a *mens rea*, or a criminal intent. Conviction of a criminal charge requires evidence establishing beyond a reasonable doubt that the accused possessed the required mental state and performed a voluntary act that caused the social harm condemned in the statute. Shortly, I will explain how an omission or failure to act may constitute a crime. At the moment, our focus is on criminal acts.

There must be a concurrence between the *actus reus* and *mens rea*. For instance, common law burglary is the breaking and entering of the dwelling house of another at night with the intent to commit a felony. A backpacker may force his or her way into a cabin to escape the sweltering summer heat and, once having entered, find it impossible to resist the temptation to steal hiking equipment. The requisite intent to steal developed following the breaking and entering, and our backpacker is not guilty of common law burglary. The requirement of concurrence is illustrated by the California Penal Code, which provides that "in every crime . . . there must exist a union or joint operation of act and intent."<sup>1</sup>

*Actus reus* generally involves three elements or components: (1) a voluntary act or failure to perform an act (2) that causes (3) a social harm condemned under a criminal statute. Homicide, for instance, may involve the voluntary shooting or stabbing (act) of another human being that results in (causation) death (social harm). The Indiana Code, in part, provides that a "person commits an offense only if he voluntarily engages in conduct in violation of the statute defining the offense."<sup>2</sup>

Keep in mind that certain offenses are strict liability offenses. An individual is held liable for a strict liability offense who is proven beyond a reasonable

doubt to have committed a criminal act. There is no requirement of a criminal intent.

There are various other requirements to prove a criminal act in addition to an act and to an intent. First, keep in mind that an act may be innocent or criminal depending on the context or **attendant circumstances**. Entering an automobile, turning the key, and driving down the highway may be innocent or criminal depending on whether the driver is the owner or a thief. Second, crimes require differing attendant circumstances. An assault on a police officer requires an attack on a law enforcement official; an assault with a dangerous weapon involves the employment of an instrument capable of inflicting serious injury, such as a knife or firearm. A third point is that some offenses require that an act cause a specific harm. Homicide, for instance, involves an act that directly causes the death of the victim, while false pretenses require that an individual obtain title to property through the false representation of a fact or facts. In the case of these so-called **result crimes**, the defendant's act must be the "actual cause" of the resulting harm. An individual who dangerously assaults a victim who subsequently dies would not be guilty of homicide in the event that the victim would have lived had her death not been caused by the gross negligence of an ambulance driver.

In this chapter, we discuss the concepts that constitute the foundation of a criminal offense:

- Acts
- Intent
- Concurrence
- Causality

(Continued)

9. A criminal intent and a criminal act in most instances are required to concur (to be at the same time) with one another.
10. An offender whose criminal act results in the hospitalization of the victim will never be held legally responsible for any additional harm that the victim suffers as a consequence of his or her hospitalization.

Check your answers on page 73.

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## CRIMINAL ACTS AND THOUGHTS

What is an act? It is sufficient to note that the popular view is that an act involves a bodily movement, whether voluntary or involuntary.

The significant point is that the criminal law punishes voluntary acts and does not penalize thoughts. Why?

- Punishing people for their thoughts would involve an unacceptable degree of governmental intrusion into individual privacy.
- It would be difficult to distinguish between criminal thoughts that reflect momentary anger, frustration, or fantasy, and thoughts involving the serious consideration of criminal conduct.
- Individuals should be punished only for conduct that creates a social harm or imminent threat of social harm and should not be penalized for thoughts that are not translated into action.
- The social harm created by an act can be measured, and a proportionate punishment imposed. The harm resulting from thoughts is much more difficult to determine.

How should we balance the interest in freedom of thought and imagination against the social interest in the early detection and prevention of social harm in the case of an individual who records dreams of child molestation in his or her private diary?

In 2014, an interesting and controversial case raised this very issue. Federal district court judge Paul Gardephe overturned the conviction and potential life sentence of former New York City police officer Gilberto Valle for conspiracy to kidnap various women. The Second Circuit Court of Appeals agreed with Judge Gardephe that the kidnapping and sexual abuse existed only in the mind and thoughts of Valle and the individuals with whom he corresponded on "dark" internet sites. Valle used online identities like "Girlmeat Hunter" to engage in what was found by the courts to be fantasy role-play. The Second Circuit Court of Appeals accordingly affirmed Judge Gardephe's decision that "fantasizing about committing a crime, even a crime of violence, against a real person whom you know, is not a crime."<sup>3</sup>

## A VOLUNTARY CRIMINAL ACT

A more problematic issue is the requirement that a crime consist of a voluntary act. The Indiana Criminal Law Study Commission, which assisted in writing the Indiana statute on criminal conduct, explains that *voluntary* simply means a

conscious choice by an individual to commit or not to commit an act.<sup>4</sup> Professor Joshua Dressler compares an involuntary movement to the branch of a tree that is blown by the wind into a passerby. A voluntary act may involve pulling the trigger of a gun, hitting a victim, moving your mouth and inciting a riot, or offering another person money to commit a murder.<sup>5</sup>

The requirement of a voluntary act is based on the belief that it would be fundamentally unfair to punish individuals who do not consciously choose to engage in criminal activity and who therefore cannot be considered morally blameworthy. There also is the practical consideration that there is no need to deter, incapacitate, or rehabilitate individuals who involuntarily engage in criminal conduct.<sup>6</sup>

Once again, a voluntary act “requires an ability to choose which course to take—i.e., an ability to choose whether to commit the act that gives rise to criminal liability.”<sup>7</sup> Consider several cases in Table 3.1 in which courts were required to determine whether to hold defendants criminally liable who claimed that they should be acquitted because they had committed an **involuntary act**.

An individual driving an automobile is not held liable for an unanticipated stroke or heart attack that involuntarily causes an accident and the death of another. Courts reason that the death resulted from an unanticipated, involuntary act. However, these types of situations can be complicated. Consider the frequently cited case of *People v. Decina*, in which the defendant was convicted of negligent homicide. The defendant’s automobile jumped a curb and killed four children. The appellate court affirmed Decina’s conviction despite the fact that the accident resulted from an epileptic seizure. The judges reasoned that the statute “does not necessarily contemplate that the driver be conscious at the time of the accident” and that it is sufficient that the defendant “knew of his medical disability and knew that it would interfere with the operation of a motor vehicle.” In other words, Decina committed a voluntary act when he voluntarily got behind the wheel of his auto, consciously turned the key, and drove the auto, although he was aware that he might experience a seizure.<sup>8</sup>

Some defendants have been acquitted because judges or juries concluded that their crime was an involuntary act. In the well-known case of *Martin v. State*, the police removed Martin, who had been drinking, from his home, left him on the road, and arrested him for appearing in public while “intoxicated or drunk” in a “loud and boisterous fashion.” The Alabama Supreme Court overturned Martin’s conviction and explained that “an accusation of drunkenness in a . . . public place cannot be established by proof that the accused, while in an intoxicated condition, was involuntarily and forcibly carried to that place by the arresting officer.” In other words, the court found that Martin did not voluntarily appear in public in a drunken condition.<sup>9</sup>

The notion that an act may be involuntary is not an easy concept to comprehend, and you may be justifiably skeptical about whether this is humanly possible. In a famous Canadian case from 1988, twenty-four-year-old Kenneth Parks was acquitted of murder after he was found to have driven fourteen miles to his mother-in-law’s home and beat her to death with a tire iron. Parks successfully argued that he was sleepwalking, and friends testified that he had a history of sleepwalking. Expert medical witnesses testified that there were roughly thirty cases in which a “sleepwalker” committed murder.<sup>10</sup>

**TABLE 3.1**  
Involuntary Acts

| Sample of Court Decisions on Involuntary Acts |   |
|---|---|
| Involuntary Act                               | Court Decision  |
| Sleepwalking                                  | The Kentucky Supreme Court ruled that a defendant, who claimed that he was a “sleepwalker,” should not be convicted in the event that he was “unconscious when he killed the deceased.” See <i>Fain v. Commonwealth</i> , 78 Ky. 183 (1879).  |
| Reflex Action                                 | A California court of appeals concluded that the evidence supported the “inference” that a defendant who had been wounded in the abdomen had shot and killed a police officer as a reflex action and was in a “state of unconsciousness.” See <i>People v. Newton</i> , 87 Cal. Rptr. 394 (Cal. App. 1970).   |
| Drugs in Jail                                 | Eaton was arrested for driving with his headlights turned off and failed a field sobriety test. He was arrested for DUI and taken to the county jail where he was searched, the officers seized methamphetamine, and he was charged with possession of a controlled substance. The prosecutor sought a sentence enhancement because Eaton introduced the narcotics into the county jail. The Washington Supreme Court held that Eaton was “forcibly taken” to the county jail and that a sentence enhancement could not be lawfully imposed. See <i>State v. Eaton</i> , 229 P.3d 704 (Wash. 2010). An Arizona appellate court based on similar facts held that the defendant’s possession of a controlled substance was “voluntary in that, after being advised of the consequences of bringing drugs into the jail, [he] consciously chose to ignore the officers’ warnings, choosing instead to enter the jail in possession of cocaine. Under these circumstances, the [defendant] was the author of his own fate.” See <i>State v. Alvarado</i> , 200 P.3d 1037 (Ariz. App. 2008). |
| Medical Condition                             | Defendant suffered from a medical condition that caused an uncontrollable physical and verbal tic that compelled him to make lewd phone calls. <i>People v. Nelson</i> , 2 N.E.3d 613 (Ill. App. Ct. 2013).   |

Model Penal Code (MPC) Section 2.01 provides a good summary of the requirement that a criminal act must include “a voluntary act or the omission to perform an act.” The MPC avoids the difficulties involved in trying to unravel the differences between voluntary and involuntary acts by listing categories of involuntary acts.

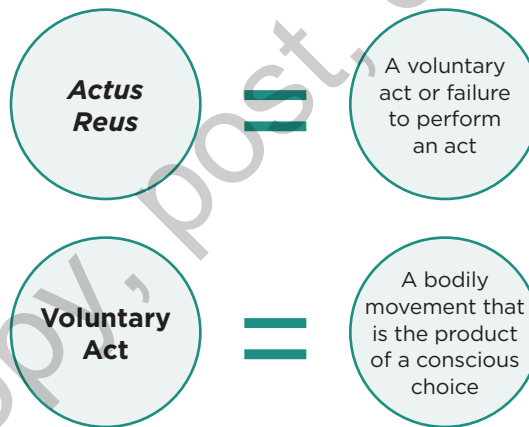
MPC Section 2.01 defines the Requirement of Voluntary Act as follows (reprinted in partial):

## Model Penal Code

### Section 2.01. Requirement of Voluntary Act

1. A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable.
2. The following are not voluntary acts within the meaning of this Section:
  - a) a reflex or convulsion;
  - b) a bodily movement during unconsciousness or sleep;
  - c) conduct during hypnosis or resulting from hypnotic suggestion;
  - d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual.

## The Legal Equation 3.1: *Actus Reus*



### YOU DECIDE 3.1

Alfred E. Brown, while drinking beer and talking with friends in the parking lot of an apartment complex, became involved in an argument with James McLean. One week earlier, Brown had been badly beaten in a fight with McLean. Brown purchased a .25-caliber handgun to protect himself and his friends from McLean, who was known to “possess and discharge firearms in the vicinity of the apartment complex” where Brown lived. Brown, on the day in question, got into a heated exchange with

McLean. Brown, who is right-handed, testified that he held the firearm in his left hand because of an injury that he had experienced to his right hand. He testified that while raising the handgun, he accidentally fired the gun when he was bumped from behind by Ryan Coleman. The shot fatally wounded one of Brown’s friends, Joseph Caraballo. Did Brown involuntarily fire the shot that killed Caraballo? What is your opinion? See *Brown v. State*, 955 S.W.2d 276 (Tex. 1997).

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## STATUS

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An individual may not be held criminally liable for a **status**. A status is defined as a “characteristic” or a “condition” or “state of being.” The rule is that you may not be criminally punished for “who you are”; you may be held liable only for “what you do.” In other words, we cannot be held criminally responsible based on our race, religion, gender, or sexual preference or the fact that we have a disease or are a former offender. In 1969, in *Wheeler v. Goodman*, a federal district court judge held that the defendants had been improperly arrested and punished because they were unemployed “hippies.”<sup>11</sup>

A man is free to be a hippie, a Methodist, a Jew, a Black Panther, a Kiwanian, or even a Communist, so long as his conduct does not imperil others, or infringe upon their rights. In short, it is no crime to be a hippie. . . . Status—even that of a gambler or prostitute—may not be made criminal. The acts of gambling, prostitution, and operating bawdy houses are criminally punishable, of course, but the state cannot create the special status of vagrant for persons who commit those illegal acts and then punish the status instead of the act.

What about the status of being a drug addict? In *Robinson v. California*, the U.S. Supreme Court was asked to determine whether Robinson could be held criminally liable for his status of being “addicted to narcotics.” The Court found the California law unconstitutional because it did not “require possession or use of narcotics, or disorderly behavior resulting from narcotics, but rather imposed liability for the mere status of being addicted.” The justices concluded that just as it would be cruel to make it a crime to be mentally ill or a leper or to be afflicted with venereal disease, it would be cruel to convict an individual for the “disease of addiction” without requiring proof of narcotics possession or antisocial behavior.<sup>12</sup>

Six years later, the Court reached a different outcome in *Powell v. Texas*. Leroy Powell was an alcoholic with roughly one hundred arrests for public intoxication. He was arrested for “being found in a state of intoxication in a public place.” Powell claimed that he could not control his urge to drink and that because of his status as an alcoholic, he should not be held guilty for being drunk in public. The Supreme Court rejected Powell’s argument that he was being punished for being a chronic alcoholic and held that he was being punished for public behavior that posed “substantial health and safety hazards, both to himself and for members of the general public.”<sup>13</sup>

Powell, according to the majority of the justices, was not suffering from a disease that made him unable to control his desire to drink. Each morning, Powell made a voluntary decision to start drinking and knew that by the end of the day, he would find himself drunk in public and subject to arrest.

In other words, although Robinson was improperly punished for being a “narcotics addict,” Powell was properly punished for being “drunk and disorderly in public.” Consider how the Court would have ruled if the scientific evidence indicated that alcoholics like Powell have a gene that makes them unable to resist drinking and getting drunk in public. Would Powell, on these facts, succeed in claiming that he was being punished for a status rather than for an act?

Julie Eldred in 2016 at the age of twenty-seven was convicted for stealing jewelry to pay for her heroin addiction. As a condition of her yearlong probation, the judge directed her to begin outpatient drug treatment. Despite entering into drug treatment, eleven days after the beginning of her probation, Julie tested positive for fentanyl. The judge responded by ordering her to undergo institutional drug treatment and to be sentenced to ten days in a medium-security prison until her institutional treatment could be arranged. Julie’s lawyers claimed that revoking her probation and ordering her to be institutionalized constituted cruel and unusual punishment because it was impossible for her to control her addiction-illness. They argued that narcotics addiction is a chronic and recurrent brain disease that is difficult to control. In Julie’s case, her birth mother had been addicted to drugs, and Julie had been addicted since she entered high school. The Massachusetts Supreme Judicial Court in a decision handed down in July 2018 avoided the issue of whether Julie had been incarcerated because of a condition or illness. The Massachusetts high court held that in “appropriate circumstances a judge may order a defendant who is addicted to drugs to remain drug free as a condition of probation and that a defendant may be found to be in violation of her probation by subsequently testing positive for an illegal drug. . . . Such decisions should be made thoughtfully and carefully, recognizing that addiction is a status that may not be criminalized. But judges cannot ignore the fact that relapse is dangerous for the person who may be in the throes of addiction and, often times, for the community in which that person lives.”<sup>14</sup>

You might be thinking about the fact that sex offenders are prohibited from living nearby a school or church and suspected terrorists are prohibited from flying on commercial airliners. Are these status offenses? The answer is that these disabilities are civil regulations designed to protect the public welfare rather than “criminal punishments” imposed on individuals. A homeless individual who is convicted of sleeping in the park is being punished for his or her act rather than his or her status. On the other hand, some commentators argue that a homeless individual is compelled by his or her homelessness and the lack of housing to sleep in the park.

## YOU DECIDE 3.2

Raymond Moore and Sherman Beverly were arrested during a police search of a hotel room from which Beverly and a co-conspirator were selling heroin. A search incident to the arrest of Moore resulted in the seizure of fifty heroin capsules. Moore claimed to have been a narcotics addict for twenty-five years and stated that he was in the hotel room to purchase heroin for his personal use. There was a lack of evidence connecting Moore to the narcotics in the hotel room, and the government accepted that he was a “nontrafficking addict” and charged him with narcotics possession. A narcotics officer testified that the possession of fifty to one hundred heroin capsules is the typical quantity possessed by a “nontrafficking” addict

and that the possession of this quantity of narcotics did not necessarily establish that Moore was engaged in heroin trafficking. Moore argued that he suffered from an overpowering compulsion to use narcotics and should be excused from criminal penalties for the possession of narcotics because he requires the narcotics to satisfy his addiction. As a judge, how would you decide this case? See *United States v. Moore*, 486 F.2d 1139 (D.C. App. 1973). What of an individual arrested for possession of computer images of child pornography who claims that his possession of child pornography is a “pathological symptom” of pedophilia (attraction to children)? See *United States v. Black*, 11 F.3d 198 (7th Cir. 1997).

You can find the answer at [edge.sagepub.com/lippmaness3e](http://edge.sagepub.com/lippmaness3e)

## OMISSIONS

Can you be held criminally liable for a failure to act? For casually stepping over the body of a dying person who is blocking the entrance to your favorite coffee shop? The MPC requires that criminal conduct be based on a “voluntary act or omission to perform an act of which [an individual] is physically capable.” An **omission** is a failure to act or a “negative act.”

### The American and European Bystander Rules

The basic rule in the United States is that an individual is not legally required to assist a person who is in peril. This principle was clearly established in 1907 in *People v. Beardsley*. The Michigan Supreme Court ruled that the married Beardsley was not liable for failing to take steps to ensure the safety of Blanche Burns, a woman with whom he was spending the weekend. The court explained that the fact that Burns was in Beardsley’s house at the time she overdosed on drugs and alcohol did not create a legal duty to assist her. The Michigan judges cited in support of this verdict the statement of U.S. Supreme Court justice Stephen Johnson Field that it is “undoubtedly the moral duty of every person to extend to others assistance when in danger . . . and, if such efforts should be omitted . . . he would by his conduct draw upon himself the just censure and reproach of good men; but this is the only punishment to which he would be subjected by society.”<sup>15</sup> Chief Justice Alonzo Philetus Carpenter of the New Hampshire Supreme Court earlier had recognized that an individual did not possess a duty to rescue a child standing in the path of an oncoming train. Justice Carpenter noted that “if he does not, he may . . . justly be styled a ruthless savage and a moral monster; but he is not liable in damages for the child’s injury, or indictable under the statute for its death.”<sup>16</sup>

This so-called **American bystander rule**, which does not impose a duty to intervene to rescue another, contrasts with the **European bystander rule**, common in Europe, that obligates individuals to intervene.<sup>17</sup>

Most Americans would likely agree that an Olympic swimmer is morally obligated to rescue a young child drowning in a swimming pool. Why, then, is this not recognized as a legal duty in the United States? There are several reasons for the American bystander rule:

- Individuals intervening may be placed in jeopardy.
- Bystanders may misperceive a situation, unnecessarily interfere, and create needless complications.
- Individuals may lack the physical capacity and expertise to subdue an assailant or to rescue a hostage and place themselves in danger. This is the role of criminal justice professionals.
- The circumstances under which individuals should intervene and the acts required to satisfy the obligation to assist another would be difficult to clearly define.

Read *People v. Kellogg* on the study site: [edge.sagepub.com/lippmaness3e](http://edge.sagepub.com/lippmaness3e).

- Criminal prosecutions for a failure to intervene would burden the criminal justice system.
- Individuals in a capitalist society are responsible for their own welfare and should not expect assistance from others.
- Most people will assist others out of a sense of moral responsibility, and there is no need for the law to require intervention.

Critics of the American bystander rule contend that there is little difference between pushing a child onto the railroad tracks and failing to intervene to ensure the child's safety and that criminal liability should extend to both acts and omissions. This also would deter crime, because offenders may be reluctant to commit crimes in situations in which they anticipate that citizens will intervene. We can see how the readiness of passengers to confront terrorists on airplanes has prevented several attacks, most notably in the case of the "shoe bomber" Richard Reid. The European rule also assists in promoting a sense of community and regard for others.<sup>18</sup>

The conflict between law and morality was starkly presented in 1964 when thirty-eight residents of New York City were awakened by the desperate screams of Kitty Genovese, a twenty-eight-year-old woman returning home from work. Kitty parked her car in a lot roughly one hundred feet from her apartment and was confronted by Winston Moseley, a married father of two young children, who later would testify that he received emotional gratification from stalking women. The thirty-eight residents of the building turned on their lights and opened their windows and watched as Moseley returned on three separate occasions over a period of thirty-five minutes to stab Kitty seventeen times. The third time Moseley returned, he found that Kitty had crawled to safety inside a nearby apartment house, and he stabbed her in the throat to prevent her from screaming, attempted to rape her, and took \$49 from her wallet. One person found the courage to persuade a neighbor to call the police, who arrived in two minutes to find Kitty's dead body. This event profoundly impacted the United States. Commentators asked whether we had become a society of passive bystanders who were concerned only with our own welfare.<sup>19</sup>

American criminal law does not impose a general duty on the individuals witnessing the murder of Kitty Genovese to intervene. There is a duty, however, to assist another under certain limited conditions. The primary requirement is that a duty must be imposed by either the common law or a statute.

- **Status.** The common law recognized that individuals possess an obligation to assist their child, spouse, or employee. In *State v. Mally*, the defendant was convicted of "hastening" the death of his wife who had fallen and broken both of her arms, precipitating severe shock and the degeneration of her kidneys. Michael Mally left his wife Kay alone in bed for two days, only bothering to provide her with a single glass of water. A Montana district court held that "the failure to obtain medical aid for one who is owed a duty is a sufficient degree of negligence to constitute involuntary manslaughter provided death results from the failure to act."<sup>20</sup>

A number of state courts have imposed a duty on an adult living with a child who has assumed a "parent-like role" and "substantial responsibility" for necessities such as "food shelter, and protection."<sup>21</sup> Other state courts have found that the standard for holding a nonbiological adult guardian criminally liable for the injury to a child is too indefinite and that the extension of criminal liability to these individuals will discourage adults from taking an interest in children.<sup>22</sup>

- **Statute. A duty to intervene** may be created by a statute that imposes a duty of care. This may be a criminal statute requiring that a doctor report child abuse or a statute that sets forth the obligations of parents. In *State v. Lenihan*, eighteen-year-old Kirby Lenihan was held liable for failing to ensure that her sixteen-year-old passenger K.G., who died when the car went off the road and crashed, was wearing her seat belt. There was evidence that Lenihan had inhaled difluoroethane to get high. Lenihan was found to have knowingly failed to fulfill a duty to protect public health and safety imposed by statute to ensure that K.G. was wearing a seat belt while recklessly operating the motor vehicle. The New Jersey Supreme Court affirmed Lenihan's conviction and three-year term of supervised probation conditioned upon serving 180 days in jail.<sup>23</sup>

- **Contract.** An obligation may be created by an agreement. An obvious example is a babysitter who agrees to care for children or a lifeguard employed to safeguard swimmers. Mary Davis was convicted of the involuntary manslaughter of her mother, Emily Carter. Carter died after admission to the hospital and was found to be suffering from pneumonia, exposure to extreme cold, a chronic state of starvation, a skull laceration, and multiple fractures. Davis had accepted sole responsibility for Carter's care. In return, Carter allowed Davis to live in her home, shared her income from social security with Davis, and authorized Davis to act as her food stamp representative, which resulted in Davis receiving food stamp benefits. The Virginia Supreme Court held that the trial court "reasonably could find the existence of an implied contract. Clearly, Davis was more than a mere volunteer; she had a legal duty, not merely a moral one, to care for her mother."<sup>24</sup>

- **Assumption of a Duty.** An individual who voluntarily intervenes to assist another is charged with a duty of care. In *People v. Oliver*, Oliver, knowing that Cornejo was extremely drunk, drove him from a bar to Oliver's

home, where she assisted him to inject drugs. Cornejo collapsed on the floor, and Oliver instructed her daughter to drag Cornejo's body outside and hide him behind a shed. The next morning, Cornejo was discovered dead. A California superior court ruled that by taking Cornejo into her home, Oliver "took charge of a person unable to prevent harm to himself," and she "owed Cornejo a duty" that she breached by failing to summon medical assistance.<sup>25</sup>

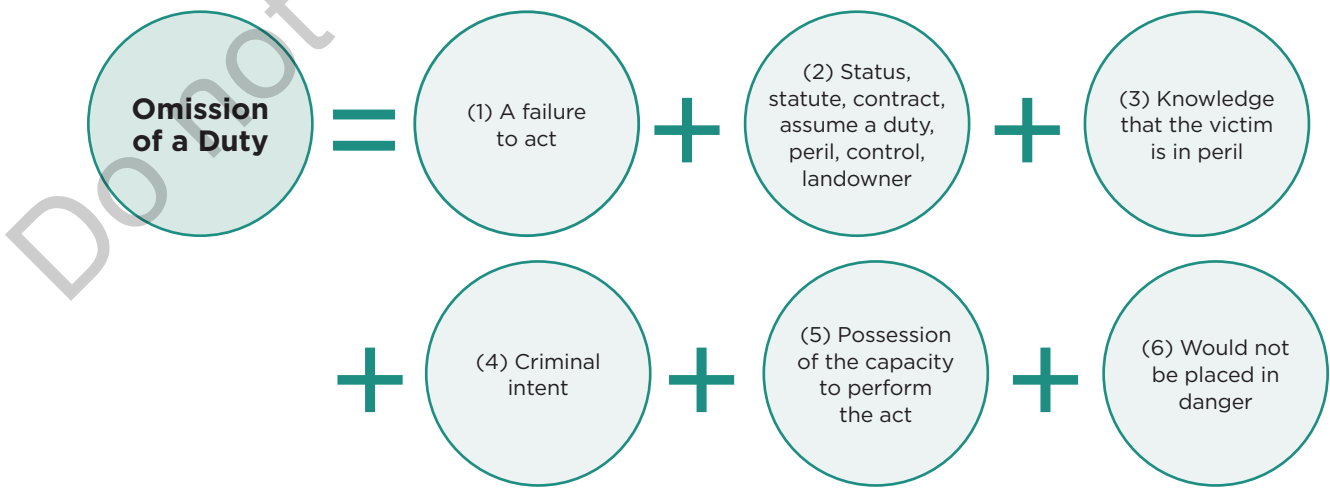
In *State v. Patterson*, the defendant was convicted of negligent homicide of a child. She assumed care for a now-deceased two-year-old child and over a four-day period restricted his access to liquids to prevent him from wetting the bed and placed hot sauce in a cup on the kitchen table to discourage him from drinking out of cups belonging to other people.<sup>26</sup>

Consider, based on your reading about criminal liability for omissions, the case of *People v. Burton*. The defendants, Sharon Burton and Leroy Locke, were convicted of first-degree murder. On January 22, 1996, Burton passively watched Locke chase her daughter Dominique with a belt, after learning that she had had a "toilet training accident" on the carpet, while shouting "the little bitch pissed again." Locke then filled the bathtub with water and forced Dominique's head under the water three times for fifteen seconds at a time. Dominique's body reportedly went limp in the water, and Locke and Burton left the three-year-old unattended in the bathtub for thirty minutes while they played cards. Burton, after discovering Dominique's lifeless body, called her mother rather than authorities and later falsely reported to investigators that the child had fallen off the toilet. An Illinois appellate court found that Burton possessed knowledge that Dominique was being subjected to an ongoing pattern of abuse and that there was a substantial likelihood that Dominique would suffer death or great bodily harm.<sup>27</sup>

A statute in at least ten states imposes criminal misdemeanor liability on individuals who fail to assist individuals in peril. A Vermont law, Title 12, Chapter 23, § 519, requires individuals who know that another is exposed to "grave physical harm" to provide "reasonable assistance" to "the extent that the assistance can be rendered without danger or peril to himself." The Vermont law, in return, relieves individuals of liability for civil damages unless their actions constitute gross negligence. Willful violation of the statute is punishable by a fine of not more than \$100. Most states have a **Good Samaritan law** that does not require individuals to intervene to assist another but provides some degree of protection from civil liability to individuals who decide to assist individuals in peril. Separate provisions typically provide a greater degree of protection from civil liability to qualified medical professionals and to the police and to first responders who intervene to protect another. Several states have passed laws that protect individuals from being charged with drug possession who seek medical assistance for individuals who have overdosed on narcotics.

Read *Jones v. United States* and *State v. Caldwell* on the study site: [edge.sagepub.com/lippmaness3e](http://edge.sagepub.com/lippmaness3e).

## The Legal Equation 3.2: Omission of a Duty





### YOU DECIDE 3.3

In May 1997, nineteen-year-old Jeremy Strohmeyer together with his friend David Cash played video games at a Las Vegas casino while Strohmeyer's father gambled. Seven-year-old Sherrice Iverson threw a wet paper towel at Strohmeyer, and a paper towel fight ensued. He followed her into the restroom to continue the game. The forty-six-pound Iverson threw a yellow floor sign at Strohmeyer and then began screaming. Strohmeyer covered her mouth and forced her into a bathroom stall. Cash wandered into the restroom to look for Strohmeyer. He peered over the stall and viewed Strohmeyer gripping and threatening to kill Iverson. Cash allegedly made an unsuccessful effort to get Strohmeyer's attention and left the bathroom. Strohmeyer then molested Iverson and strangled her to suffocate the screams. As he was about to leave, Strohmeyer decided to relieve Iverson's suffering and twisted her head and broke her neck. He placed the limp body in a sitting position on the toilet with Iverson's feet in the bowl.

Strohmeyer confessed to Cash and, after being apprehended by the police three days later, explained that he wanted to experience death. His lawyer argued

that Strohmeyer was in a "dream-like state" as a result of a combination of alcohol, drugs, and stress. In order to avoid the death penalty, Strohmeyer pled guilty to first-degree murder, first-degree kidnapping, and sexual assault of a minor, all of which carry a life sentence in Nevada.

Iverson's mother called for Cash to be criminally charged, but Nevada law required him neither to intervene nor to report the crime to the police. The administration at the University of California at Berkeley responded to a student demonstration calling for Cash's dismissal by explaining that there were no grounds to expel him from the institution because he had not committed a crime. Cash, who was studying nuclear engineering, refused to express remorse, explaining that he was concerned about himself and was not going to become upset over other people's problems, particularly a little girl whom he did not know.

Should David Cash be held criminally liable for a failure to rescue Sherrice Iverson? See Joshua Dressler, *Cases and Materials on Criminal Law*, 3rd ed. (St. Paul, MN: West, 2003), pp. 133-134.

You can find the answer at [edge.sagepub.com/lippmaness3e](http://edge.sagepub.com/lippmaness3e)

## POSSESSION

State criminal codes punish a number of crimes involving the possession of **contraband** (material that is unlawful to possess or to manufacture). Statutes typically punish the possession of narcotics, firearms, ammunition and explosives, burglar tools, stolen property, and child pornography and obscenity.

Possession is a preparatory offense. The thinking is that punishing possession deters and prevents the next step—a burglary, sale of narcotics, or the use of a weapon in a robbery. The possession of contraband such as drugs and guns may also provoke conflict and violence.<sup>28</sup> How does the possession of contraband meet the requirement that a crime involve a voluntary act or omission? This difficulty is overcome by requiring proof that the accused knowingly obtained or received the contraband (voluntary act) or failed to immediately dispose of the property.<sup>29</sup>

There are a number of central concepts to keep in mind in understanding possession.

- **Actual possession** refers to drugs and other contraband within an individual's physical possession or immediate reach.
- **Constructive possession** refers to contraband that is outside of an individual's actual physical control but over which he or she exercises control through access to the location where the contraband is stored or through the ability to control an individual who has physical control over the contraband. A drug dealer has constructive possession over narcotics stored in his or her home or under the physical control of a member of his or her gang.
- **Joint possession** refers to a situation in which a number of individuals exercise control over contraband. Several members of a gang may all live in the home where drugs are stored. There must be specific proof connecting each individual to the drugs. The fact that a gang member lives in the house is not sufficient.
- **Fleeting possession** permits an innocent individual to take momentary possession and dispose of an illegal object. An example is when a teacher removes and disposes of narcotics seized in the classroom.

Possession typically requires a criminal intent. MPC Section 2.01 provides that the “possessor” must have “knowingly procured or received the thing possessed” or “was aware of his control thereof for a sufficient period to have been able to terminate his possession.” In other words, the keys to possession are knowledge and either physical or constructive possession of the property.<sup>30</sup>

Perhaps the most difficult cases involve determining which of the residents of a house or occupants of an automobile are in constructive possession of contraband. In *State v. Cashen*, Ross Cashen was convicted of possession of marijuana, and he appealed. Cashen was one of six occupants of an automobile. Four individuals, including Cashen and his girlfriend, were in the back seat. Cashen was sitting next to a window with his girlfriend on his lap.<sup>31</sup>

An officer found a lighter and cigarette rolling papers on Cashen and cigarette rolling papers and a small baggie of marijuana seeds in his girlfriend’s pants pocket. The officers found a baggie of marijuana wedged in the rear seat on the side where Cashen and his girlfriend had been seated. Both Cashen and his girlfriend stated that she owned the marijuana. The Iowa Supreme Court held that Cashen’s physical closeness to the marijuana was not sufficient to prove possession beyond a reasonable doubt, and his conviction was overturned. His fingerprints were not on the bag of marijuana, the marijuana was not visible to the occupants of the car, and Cashen neither owned the car nor acted in a suspicious fashion when the police approached to search the automobile. Would you hold Cashen, his girlfriend, any of the passengers, or the driver liable for possession based on these facts? Would it make a difference to your answer if there was a large amount of marijuana in the back seat?

The doctrine of **willful blindness** holds an individual criminally liable who lacks actual knowledge of the existence of contraband although he or she is aware of a high probability of the existence of the contraband. Commentators note that individuals may not bury their head in the sand like an ostrich and thereby escape legal liability. Charles Jewell and a friend were approached in a Tijuana, Mexico, bar by a stranger who called himself “Ray.” Ray asked them if they wanted to buy marijuana, and when they refused, he offered to pay them \$100 for driving a car across the border. Jewell accepted the offer, although his friend refused. Customs agents stopped Jewell at the border and opened the trunk and seized 110 pounds of marijuana concealed in a secret compartment between the trunk and rear seat. Jewell testified at trial that he had seen the special compartment when he opened the trunk and that he did not investigate further. The jury convicted Jewell of drug possession and concluded that if Jewell was not actually aware of the marijuana, his “ignorance was solely and entirely a result of a conscious purpose to avoid learning the truth.”<sup>32</sup>

## The Legal Equation 3.3: Possession



### Possession of Computer Files

Christopher Worden was convicted of four counts of possession of child pornography, and of one count each of indecent exposure and of unlawful exploitation of a minor. Worden admitted to inappropriate contact with two young juveniles. The police seized and searched two computers from Worden’s home and found images of child pornography in the computer cache files.

Virgil Gattenby, a police technician who examined the computer, testified that Worden had visited certain websites containing child pornography “more than once” and that “it would have taken Worden’s computer several minutes to load the images and the images recovered had loaded completely.” Gattenby testified that although the images of child pornography were found among the cache files on the hard drive of Worden’s computer, there was no indication that Worden “had any intent to store the images—his intent was simply to view the images on his computer screen during the time that he visited a website.” The Alaska Supreme Court held that the state statute prohibiting the possession of child pornography does not prohibit viewing material on a computer screen and observed that “[i]f Worden had gone to a movie depicting child pornography, it could not be said that he possessed the child pornography depicted in the movie, even though it might be clear that he had intentionally set out to view those images.”<sup>33</sup> The Alabama Court of Criminal

Appeals in *Ward v. State* adopted a different approach. Ward was arrested for possession of child pornography on a computer at Troy State University. The police located 288 images in the cache folder of the hard drive of the computer. Similar images later were found on his home computer. Ward admitted viewing the files although there was no evidence that he downloaded, copied, or printed the photographs. The Alabama court held that Ward, whether or not aware that the images were automatically saved in cache, had intentionally sought out and exercised control over the files present in his web browser cache files. He had the ability to “view” an image and “had the potential” to “attach it to an email, post it to a newsgroup, place it on a Web site, or print a hard copy.” The evidence was sufficient “to show that Ward exercised dominion and control over child pornography and was in possession of child pornography.” As a judge, would you favor the approach in *Worden* or in *Ward*?<sup>34</sup>

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## MENS REA CRIMINAL INTENT

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In the last section, we noted that a criminal offense ordinarily requires the concurrence between a criminal act (*actus reus*) and a criminal intent (*mens rea*) that cause a social harm prohibited under the law. The prosecutor is required to establish beyond a reasonable doubt that the defendant possessed the required criminal intent.

It is said that one of the great contributions of the common law is to limit criminal punishment to “morally blameworthy” individuals who consciously choose to cause or to create a risk of harm or injury. Individuals are punished based on the harm caused by their decision to commit a criminal act rather than because they are “bad” or “evil people.” Former Supreme Court justice Robert H. Jackson observed that a system of punishment based on a criminal intent is intended to direct punishment at individuals who consciously choose between “good and evil.” Justice Jackson noted that this emphasis on individual choice and free will assumes that criminal law and punishment can deter people from choosing to commit crimes, and that those who do engage in crime can be encouraged through the application of punishment to develop a greater sense of moral responsibility in the future.<sup>35</sup>

We all pay attention to intent in evaluating individuals’ behavior. You read in the newspaper that a rock star shot and killed one of her friends. There is no more serious crime than murder; yet, before condemning the killer, you want to know what was on her mind. The rock star may have intentionally aimed and fired the weapon. On the other hand, she may have aimed and fired the gun, believing that it was unloaded. We have the same act but a different reaction, based on whether the rock star intended to kill her friend or acted in a reckless fashion. As former Supreme Court justice Oliver Wendell Holmes Jr. famously observed, “[E]ven a dog distinguishes between being stumbled over and being kicked.”<sup>36</sup>

It is a bedrock principle of criminal law that a crime requires an act or omission and a criminal intent. The importance of a criminal intent is captured by a frequently quoted phrase: “There can be no crime, large or small, without an evil mind” (*actus reus non facit reum nisi mens sit rea*).<sup>37</sup>

The common law originally punished criminal acts and paid no attention to the mental element of an individual’s act. The killing of another was murder, whether committed intentionally or recklessly. Canon, or religious law, with its stress on sinfulness and moral guilt, helped to introduce the idea that punishment should depend on an individual’s “moral blameworthiness.” This came to be fully accepted in the American colonies. In 1978, the Supreme Court observed that *mens rea* is now the “rule of, rather than the exception to, the principles of American jurisprudence.”<sup>38</sup> There are two primary reasons that explain why the criminal law requires “moral blameworthiness.”

1. **Responsibility.** It is just and fair to hold a person accountable who intentionally chooses to commit a crime.
2. **Deterrence.** Individuals who act with a criminal intent pose a threat to society and should be punished in order to discourage them from violating the law in the future and in order to deter others from choosing to violate the law.

In many instances, it is difficult to establish a criminal intent beyond a reasonable doubt because we do not know what is going on inside an individual’s mind. The easiest case is when an individual makes a statement of intent, such as “I will kill you,” or makes a confession to the police. In most instances, we do not know what an individual is thinking and must rely on circumstantial evidence or the surrounding facts. In the Illinois case of *People v. Conley*, a district court found that the defendant possessed the intent to cause “permanent disability” based on the defendant’s forcefully hitting the victim in the face with a full bottle of wine.<sup>39</sup>

Intent should not be confused with **motive**. Motive is the underlying reason that explains or inspires an individual to act. An individual who robs a bank may be motivated by greed or by a desire to feed his or her family. The individual’s motive is not considered in determining whether the individual possessed a criminal intent and committed a criminal act. Motive may be considered by a judge at sentencing.

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## GENERAL AND SPECIFIC INTENT

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The common law provided for two confusing categories of *mens rea*, a general intent and a specific intent. These continue to appear in various state statutes and decisions, although, as we shall see, a number of states have adopted the MPC framework.

A **general intent** is simply an intent to commit the *actus reus* or criminal act. There is no requirement that the prosecutors demonstrate that an offender possessed an intent to violate the law, an awareness that the act is a crime, or knowledge that the act will result in a particular type of harm. Proof of the defendant's general intent is typically inferred from the nature of the act and the surrounding circumstances. The crime of battery or a nonconsensual harmful touching provides a good illustration of a general intent crime. The prosecutor is required to establish only that the accused intended to commit an act that was likely to substantially harm another. In the case of a battery, this may be inferred from factors such as the force of the blow, the portion of the body that was targeted, and the defendant's statements and motive. Statutes that require a general intent typically use words such as *willfully* or *intentionally*.

A **specific intent** is a mental determination to accomplish a specific result. The prosecutor is required to demonstrate that the offender possessed the intent to commit the *actus reus* and then is required to present additional evidence that the defendant possessed the specific intent to accomplish a particular result. For example, a battery with an intent to kill requires proof of a battery along with additional evidence of a specific intent to murder the victim. Larceny requires the intent to take and carry away and the act of taking and carrying away property, with the added intent permanently to deprive an individual of the property. The classic example is common law burglary. This requires the *actus reus* of breaking and entering and evidence of a specific intent to commit a felony inside the dwelling. Some commentators refer to these offenses as **crimes of cause and result** because the offender possesses the intent to "cause a particular result."

The difference between a specific intent and a general intent is nicely summarized by the Michigan Supreme Court: "The distinction between specific intent and general intent crimes is that the former involve a particular criminal intent beyond the act done, while the latter involve merely the intent to do the physical act."<sup>40</sup>

Courts at times struggle with whether statutes require a general or specific intent. The consequences can be seen from the Texas case of *Alvarado v. State*. The defendant was convicted of "intentionally and knowingly" causing serious bodily injury to her child by placing him in a tub of hot water. The trial judge instructed the jury that they were merely required to find that the accused deliberately placed the child in the water to find her criminally liable. The appellate court overturned the conviction and ruled that the statute required the jury to find that the defendant possessed the intent to place the child in hot water, as well as the specific intent to inflict serious bodily harm.<sup>41</sup>

**Constructive intent** is a third type of common law intent that was developed in situations in which a defendant lacked a specific intent, although a result was substantially likely to occur. This was applied in the early twentieth century to protect the public against reckless drivers; it provides that individuals who act with conscious disregard for the consequences of their actions are considered to intend the natural consequences of their actions. A reckless driver who caused an accident that resulted in death, under the doctrine of constructive intent, is guilty of a willful and intentional battery or homicide.

In 1980, in *United States v. Bailey*, the U.S. Supreme Court complained that the common law distinction between general and specific intent had caused a "good deal of confusion." A 1972 survey of federal statutes found seventy-six different terms used to describe the required mental element of criminal offenses. This laundry list included terms such as *intentionally, knowingly, fraudulently, designedly, recklessly, wantonly, unlawfully, feloniously, willfully, purposely, negligently, wickedly, and wrongfully*.<sup>42</sup>

Justice Jackson noted "the variety . . . and confusion" of the judicial definition of the "elusive mental element" of crime. He observed that "[f]ew areas of criminal law pose more difficulty than the proper definition of *mens rea* required for a particular crime."

The MPC introduced a new approach to determining criminal intent, which is discussed in the next section. Professor Dressler writes that "[n]o aspect of the Model Penal Code has had greater influence on the direction of American criminal law than Section 2.02 [on criminal intent]."<sup>43</sup>

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## INTENT UNDER THE MODEL PENAL CODE

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The MPC attempted to clearly define the mental intent required for crimes by providing four easily understood levels of responsibility. All crimes requiring a mental element (strict liability offenses do not) must include one of the four mental states provided in Section 2.02 of the MPC. These four types of intent, in descending order of culpability (responsibility), are as follows:

Purposely

Knowingly

Recklessly  
Negligently

These criminal intents are illustrated in Table 3.2.

**TABLE 3.2**  
Criminal Intent Under the Model Penal Code

| Mental State | Illustration   |
|--------------|--|
| Purposely    | "You borrowed my car and wrecked it on purpose."   |
| Knowingly    | "You may not have purposely wrecked my car, but you knew that you were almost certain to get in an accident because you had never driven such a powerful and fast automobile."   |
| Recklessly   | "You may not have purposely wrecked my car, but you were driving over the speed limit on a rain-soaked and slick road in heavy traffic and certainly realized that you were extremely likely to get into an accident."   |
| Negligently  | "You may not have purposely wrecked my car and apparently did not understand the power of the auto's engine, but I cannot overlook your lack of awareness of the risk of an accident. After all, any reasonable person would have been aware that such an expensive sports car would pack a punch and would be difficult for a new driver to control." |

### Purposely

The MPC established **purposely** as the most serious category of criminal intent. *Purposely* merely means that a defendant acted "on purpose" or "deliberately." In legal terms, the defendant must possess a specific intent or "conscious object" to cause a result. A person acts purposely when his or her conscious object is to achieve a result. A murderer pulls the trigger with the purpose of killing the victim, a burglar breaks and enters with the purpose of committing a felony inside the dwelling, and a thief possesses the purpose of permanently depriving an individual of the possession of his or her property.

In *State v. Sanborn*, Sanborn attacked his wife, from whom he was separated, when she threatened to call his mother if he did not leave her apartment. Sanborn held his wife's head in an arm lock, hit her in the face four times, and beat her multiple times with a stainless steel toaster oven, a stainless steel coffee maker and carafe, and a microwave oven. Sanborn, while beating his wife, threatened to make her head explode and to kill her. The prosecution was required to establish that Sanborn acted with the "purpose" to cause serious bodily injury. The judge concluded that when Sanborn "slugs a five-foot-two-inch, 135-pound woman in the eye and side of the head and back of the head several times, and then attempts to smash down a microwave on her head, and then hits her with a toaster oven in the head, that is clearly . . . an attempt, a purposeful attempt . . . to cause serious bodily injury."<sup>44</sup>

## Criminal Law in the News

On June 17, 2015, Dylann Storm Roof, 21, a slight young Caucasian man with a bowl haircut, entered Emanuel African Methodist Episcopal Church in Charleston, South Carolina, during bible study and asked for and took a seat next to Pastor Clementa C. Pinckney. An hour after arriving, Roof suddenly stood and pulled out a pistol and in response to an effort to calm him down

announced, "You [African Americans] are raping our women and taking over the country. And you have to go." When Tywanza Sanders, 26, told Roof to shoot him rather than his 87-year-old aunt Susie Jackson, Roof replied, "It doesn't matter. I'm going to shoot all of you." Roof told one woman that he would allow her to live "so she can tell the story of what happened."

All of the African American victims were shot multiple times by Roof, whose image was captured by a number of security cameras.

Nine people, three men and six women ages 29 to 87, were killed by Roof, including pastor, state senator, and civil rights leader Clementa C. Pinckney, 41. Pinckney was a highly respected voice for justice and a conciliatory figure in South Carolina. The other deceased individuals included a library manager, a former county administrator, a speech therapist who also worked for the church, and two ministers.

Emanuel African Methodist Episcopal Church, known as “Mother Emanuel,” is the oldest African American congregation south of Baltimore. The members of the congregation convened in secret in the years prior to the Civil War when African American churches were prohibited, and the church contains a shrine to one of its founders, Denmark Vesey, who helped to organize a slave revolt in 1822. Vesey, along with 35 other African American slaves, was executed when the plans for a slave revolt were uncovered, and 313 suspected conspirators were arrested. The church was burned down by a white mob in retribution and subsequently was rebuilt in 1891. In the 1960s, Mother Emanuel was a center of civil rights activity, and the Reverend Dr. Martin Luther King Jr. spoke at the church in 1962. Observers were struck by the fact that at Roof’s arraignment, family members of the victims, while wanting to see Roof punished, expressed forgiveness and prayed for Roof’s soul.

Roof, who had not finished high school, purchased a .45-caliber handgun with money given to him by his parents. According to friends, in the days leading to the killings, he seemed obsessed with defending the white race against what he viewed as the rising power of African Americans and advocated segregation between African Americans and whites. Roof’s friends reportedly did not take him seriously when he talked about starting a race war by undertaking the mass killing of African Americans. He had been arrested five months earlier for unlawful possession of a prescription drug and was arrested two weeks later for misdemeanor trespass at a shopping mall from which he earlier had been banned. At the time of Roof’s arrest, the police seized assault rifle parts and six forty-round magazines from his trunk. A federal grand jury indicted Roof on thirty-three charges, including twelve hate crime charges, eighteen of which carried the death penalty. South Carolina is one of five states that does not enhance penalties for bias-motivated offenses. U.S. Department of Justice officials pointed out that Roof had knowingly entered a renowned

African American church and had intentionally selected African American victims. Nationally, roughly one-half of hate crimes are based on race, 20 percent are motivated by religion, 18 percent are directed against individuals because of their sexual orientation, and the remainder are based on ethnicity or an individual’s disability. Some commentators called for Roof to be charged with terrorism and pointed out that similar acts when carried out by Muslims are labeled as terrorism but are considered ordinary crimes when committed by non-Muslims. In December 2016, Roof was convicted in federal court, and he was sentenced to death a month later.

There was little question of Roof’s guilt after the prosecution introduced Roof’s FBI interview in which he confessed to the killings and complained that he had been “worn out” after firing more than seventy rounds at the victims. Roof told interrogators that he “had to” kill African Americans to protect white people and that he had selected Mother Emanuel after researching possible targets because it was the South’s oldest African American church and he knew that a number of African Americans would be gathered in the area.

The jury in the sentencing phase of the trial heard excerpts from Roof’s jailhouse journal in which he expressed no regret and wrote that he had not “shed a tear for the innocent people I killed.” The jury determined that Roof should receive the death penalty. There are sixty-one federal prisoners, including Boston Marathon bomber Dzhokhar Tsarnaev, who have been sentenced to death. Three federal prisoners have been executed since the federal death penalty was reinstated in 1988 after a sixteen-year moratorium. Roof is the first federal defendant convicted of a hate crime to be sentenced to death.

South Carolina subsequently indicted and prosecuted Roof for nine counts of murder, one count of possession of a firearm during commission of a felony, and three counts of attempted murder. He pled guilty to nine murder charges to avoid a death sentence and in April 2017 was sentenced to nine terms of life imprisonment.

What was the basis for convicting Roof of a hate crime? Would you have prosecuted Roof for a hate crime? Can crimes like those committed by Roof be deterred? In 2017, Joshua Vallum, 29, was sentenced to forty-nine years in prison and became the first person convicted under the federal Hate Crimes Prevention Act for violence against a transgender person. Louisiana in 2016 adopted a “Blue Lives Matter” law that makes attacks on the police, firefighters, and first responders a felony hate crime.

## Knowingly

When he or she acts **knowingly**, an individual is aware that circumstances exist or a result is practically certain to follow from his or her conduct. An example of knowledge that circumstances exist is knowingly to “possess a firearm” or knowingly to possess narcotics. An illustration of a result that is practically certain to occur is a terrorist who bombs a public building knowing the people inside are likely to be maimed or injured, or to die.

Another example of a result that is practically certain to occur is *State v. Fuelling*. Michelle Fuelling left her twenty-three-month-old son, Raven, at home with her son’s father, Carlos Mendoza. Mendoza beat Raven and inflicted severe brain injury and bruises resulting in Raven’s death. An autopsy indicated that Raven’s death resulted from severe head trauma. Mendoza was convicted of child abuse and murder.<sup>45</sup>

The evidence indicated that Fuelling knew that Mendoza had abused Raven in the past and that her family had warned her about leaving Raven with Mendoza. Fuelling was convicted of having “knowingly acted in a manner that created a substantial risk to the life, body and health of Raven . . . by leaving [him] in the care of Carlos Mendoza, knowing that said Mendoza abused the child.” The prosecution established that Fuelling knew that her conduct was “practically certain to endanger the child.” Keep in mind that she likely did not have the purposeful intent of Mendoza injuring Raven, although she was held liable for being aware that he likely would endanger Raven.

## Recklessly

A person acts **recklessly** when he or she is personally aware of a severe and serious risk and acts in such a fashion that demonstrates a clear lack of judgment and concern for the consequences. This is an objective test, and the defendant’s behavior must be a clear departure from what would be expected of law-abiding individuals.

In *Durkovitz v. State*, Gary Durkovitz was convicted of the offense of recklessly causing serious bodily injury to a child. Durkovitz, an experienced animal trainer, took his 350-pound grown lion to a flea market in Houston on eight occasions and charged patrons to be photographed with the lion. The court found that the defendant was aware that there were a number of children at the flea market and that the lion posed a danger to the children because of the animal’s predatory instincts. The animal had injured two children in the past. Durkovitz nonetheless took the lion into the flea market and secured him only with a short, heavy chain. Durkovitz lost control of the lion, which grabbed and attempted to crush a child’s head in its mouth.<sup>46</sup>

In *Williams v. State*, the Texas Court of Criminal Appeals noted other cases in which the court found the defendant possessed a reckless intent.<sup>47</sup>

These include holding a child’s feet under extremely hot water, ramming a parked car that had an 18-month-old child in it, twisting and pulling a baby’s leg, . . . and speeding and running through stop signs with a child passenger. In other reckless injury cases, the defendant failed to perform an act that directly resulted in the injury. In one case the defendant was held to have recklessly caused bodily injury to her children by failing to report to the authorities that her boyfriend had violently kidnapped them. In still other cases, the actors have left a disabled victim lying in bleach for at least an hour; failed to immediately seek medical help for a lethargic child; and left four-year-old twins unsupervised and wandering around an apartment complex.

Read *Hranicky v. State* on the study site: [edge.sagepub.com/lippmaness3e](https://edge.sagepub.com/lippmaness3e).

## Negligently

An individual who acts **negligently** is unaware of and disregards a substantial and unjustifiable risk that other individuals would be aware of and, like the reckless individual, grossly deviates from the standard of care that a reasonable person would exhibit under a similar set of circumstances.

Latrece Jones, 18, was riding in the front passenger seat of a rented Chevrolet Cavalier in Chattanooga, Tennessee. Her two-year-old son, Carlon Bowens Jr., was asleep in her lap. Carlon’s aunt, Letitia Abernathy, had rented the car and was driving the automobile; five children and one adult sat in the backseat. A car failed to yield the right of way, causing an accident, which led the passenger-side air bag to deploy.<sup>48</sup>

The air bag struck Carlon, breaking his neck and killing him. Jones was charged with criminally negligent homicide. At the time of the accident, Tennessee’s child restraint law required children under four years old to be in a “child passenger restraint system meeting federal motor vehicle standards.” There also was evidence that a widespread media campaign in the past year had been directed at educating parents of the need to use child restraints and on the danger posed by air bags. This campaign, in part, was a recognition that it was only in 1999 that all automobiles were required to have air bags and that parents generally lacked knowledge of the danger posed by air bags. A newspaper study twelve

days prior to the accident indicated that only 60 percent of children observed in motor vehicles were restrained and that a number of children continued to be seated in the front seat.

The Tennessee court concluded that the fact that there was a need for a large-scale public information campaign aimed at educating parents about child car safety indicates “how many people in the community simply were not using child safety restraints at the time of the accident. . . . If 40% of the children being transported in Ms. Jones’ community were being transported without being properly restrained at the time of the accident, it would be difficult for a rational trier of fact to conclude that it was a gross deviation from the standard of care at the time of the accident for Ms. Jones to transport her child improperly.”

As you might have concluded, it often is challenging to determine whether a defendant possessed a reckless or a negligent intent. In *People v. Stanfield*, Stanfield was convicted of reckless homicide. An appellate court held that the jury should have been provided the opportunity to determine whether the defendant was negligent rather than reckless. Stanfield pointed a pistol at his wife, whom he accused of being involved with another man during his absence. She told him to stop “fooling and slapped his hand.” The gun discharged, fatally shooting his wife. Stanfield claimed that he neither pulled the trigger nor intended that she should be fatally shot. The appellate court held that “[i]t is obvious that one who fails to perceive the possible danger inherent in holding a gun to another when he has no intention of pulling a trigger is at least negligent. If he perceives the possibility that an outside blow, i.e., a slap of the hand, might discharge the weapon, then he is reckless. . . . It is the perception of possible risk to others which governs. On the evidence, the jury could easily have found that defendant was no more than negligent in not foreseeing the possibility of the slap.”<sup>49</sup>

Another example of the difficulty of distinguishing between a reckless and negligent intent is *People v. Baker*. In *Baker*, a New York court “reduced” the defendant’s conviction for the death of a three-year-old child from hyperthermia from depraved indifference murder to criminally negligent homicide. The defendant was a young mentally challenged babysitter who had remained in the living room for nine hours as temperatures in the apartment soared to as high as 130 degrees Fahrenheit in the child’s locked bedroom and between 102 and 120 degrees Fahrenheit in the living room. The defendant remained in the apartment on a hot summer evening as the temperature gradually rose as a result of a short circuit in the wiring of the furnace. Baker later testified that the heat made her dizzy and uncomfortable although she denied a conscious awareness of the risk of the child’s death. The appellate court held that the “risk of serious physical injury or death was not so obvious under the circumstances that it demonstrated defendant’s actual awareness.” The court nonetheless concluded that a jury could reasonably conclude that the defendant “should have perceived a substantial and unjustifiable risk that the heat would likely lead to the child’s death.” As she was the victim’s caretaker, Baker’s failure to appreciate the risk of death constituted a “gross deviation from the standard of care that a reasonable person in the same circumstances would observe in such a situation.”<sup>50</sup>

Keep in mind that purpose generally corresponds to the common law standard of specific intent and knowledge is thought to correspond to a general intent. Recklessness and negligence are based on the concept of constructive intent. New Jersey is a state that has adopted the MPC approach to criminal intent in order to achieve a clearer definition of the intent required for various crimes.<sup>51</sup> New Jersey statute 2C:2-2 provides that “a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.”

In 1978, Arizona adopted the MPC mental states for all offenses in the criminal code.<sup>52</sup> In reading the text, keep in mind that you will encounter statutes that rely on both the common law and the MPC approaches to criminal intent.

The next section discusses transferred intent, a doctrine that imposes liability on an individual whose criminal act harms an individual who was not the intended victim of the crime.

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## TRANSFERRED INTENT

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The doctrine of **transferred intent** was first developed in England in 1575 in the case of *Regina v. Saunders and Archer*. Saunders gave his wife a poison apple. She took a bite out of the apple and handed it to her daughter, who died after finishing the apple. Saunders’s intent to kill his wife was transferred to his daughter, and the judge convicted him of the intentional killing of his daughter, although his intent was to poison his wife.<sup>53</sup>

The doctrine of transferred intent subsequently was adopted by courts in the United States. Transferred intent primarily is applied to cases of homicide and battery, although it applies to other types of crimes as well.

The California case of *People v. Scott* is one of the most important American cases on transferred intent. Calvin Hughes and Elaine Scott went through a bitter breakup of their relationship. Scott’s two sons, Damien Scott and Derrick Brown, retaliated by attempting to shoot and kill Hughes. The bullet hit Hughes in the heel of his shoe and inadvertently killed Jack Gibson, an innocent teenager who was sitting in a nearby car.<sup>54</sup>



The California Supreme Court relied on transferred intent to hold Scott and Brown liable for the death of Gibson. The court explained that a “defendant who shoots with an intent to kill but misses and hits a bystander instead should be punished for a crime of the same seriousness as the one he tried to commit against his intended victim.” A shorthand way to understand transferred intent is to remember that the defendant’s intent follows the bullet. Why does the law recognize transferred intent in “wrong aim” cases?

*Individual accountability.* Defendants should be held responsible for the result (murder) that they intended to achieve (murder) and did achieve (murder).

*Justice.* There is a social interest in punishing defendants whose acts create the social harm that they intended to commit despite the fact that the wrong individual is victimized.

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## STRICT LIABILITY OFFENSES

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We all have had the experience of telling another person that “I don’t care why you acted in that way; you hurt me, and that was wrong.” This is similar to a strict liability offense.

A **strict liability offense** is a crime that does not require a *mens rea*, and an individual may be convicted based solely on the commission of a criminal act.

Strict liability offenses have their origin in the industrial development of the United States in the middle of the nineteenth century. The U.S. Congress and various state legislatures enacted a number of **public welfare offenses** that were intended to protect society against impure food, defective drugs, pollution, and unsafe working conditions, trucks, and railroads. These *mala prohibita* offenses (an act is wrong because it is prohibited) are distinguished from those crimes that are *mala in se* (inherently wrongful, such as rape, robbery, and murder).

The common law was based on the belief that criminal offenses required a criminal intent; this ensured that offenders were morally blameworthy. The U.S. Supreme Court has pronounced that the requirement of a criminal intent, although not required under the Constitution, is “universal and persistent in mature systems of law.”<sup>55</sup> Courts, however, have disregarded the strong policy in favor of requiring a criminal intent in upholding the constitutionality of *mala prohibita* laws. Congress and state legislatures typically indicate that these are strict liability laws by omitting language such as “knowingly” or “purposely” from the text of the law. Courts look to several factors in addition to the textual language in determining whether a statute should be interpreted as providing for strict liability:

- The offense is not a common law crime.
- A single violation poses a danger to a large number of people.
- The risk of the conviction of an “innocent” individual is outweighed by the public interest in preventing harm to society.
- The penalty is relatively minor.
- A conviction does not harm a defendant’s reputation.
- The law does not significantly impede the rights of individuals or impose a heavy burden. Examples are the prohibition of acts such as “selling alcohol to minors” or “driving without a license.”
- These are acts that most people avoid, and individuals who engage in such acts generally possess a criminal intent.

The argument for strict liability offenses is that these laws deter unqualified people from participating in potentially dangerous activities, such as the production and selling of pharmaceutical drugs, and that those who engage in this type of activity will take extraordinary steps to ensure that they proceed in a cautious and safe fashion. There is also concern that requiring prosecutors to establish a criminal intent in these relatively minor cases will consume time and energy and divert resources from other cases.

Courts traditionally have read an intent requirement into criminal statutes punishing common law *mala in se* offenses such as murder, robbery, kidnapping, and larceny. Judges reason that these serious offenses should be punished only when accompanied by an intent to violate the law. In *Morissette v. United States*, the defendant trespassed on an old government bombing range and was convicted of carting three truckloads of old bomb casings that appeared to have been abandoned.<sup>56</sup> The Supreme Court held that the lower court judge had improperly concluded that because the statute did not mention a criminal intent, this was a strict liability offense. The Court reasoned that Congress had modeled the statute punishing “whoever steals government property” on the common law crime of larceny, and the fact that the statute did not mention intent did not mean that Congress had intended to omit an intent requirement. Larceny historically had required an “evil-meaning mind and an evil-doing hand.”

There is a trend toward expanding strict liability into the non-public welfare crimes that carry relatively severe punishment. Many of these statutes are criticized for imposing prison terms without providing for the fundamental requirement of a criminal intent.

The U.S. Supreme Court indicated in *Staples v. United States* that it may not be willing to continue to accept the growing number of strict liability public welfare offenses.<sup>57</sup> The National Firearms Act was intended to restrict the possession of dangerous weapons and declared it a crime punishable by up to ten years in prison to possess a “machine gun” without legal registration. The defendant was convicted for possession of an AR-15 rifle, which is a semiautomatic weapon that can be modified to fire more than one shot with a single pull of the trigger. The Supreme Court interpreted the statute to require a *mens rea*, explaining that the imposition of a lengthy prison sentence has traditionally required that a defendant possess a criminal intent. The Court noted that gun ownership is widespread in the United States and that a strict liability requirement would result in the imprisonment of individuals who lacked the sophistication to determine whether they purchased or possessed a lawful or unlawful weapon.

A Michigan appellate court held that John Wesley Janes should not be held criminally liable for possession of a dangerous animal based on his pit bull’s attack on an infant absent Janes’s knowledge that the dog was dangerous. The court reasoned that dog ownership is widespread in the United States and the incidence of aggressive behavior by dogs is not so widespread to alert individuals that they should assume that absent a history of violent behavior, a dog is a “dangerous animal.” The court observed that “we find it unthinkable that the Legislature intended to subject law-abiding, well-intentioned citizens to a possible four-year prison term if, despite genuinely and reasonably believing their animal to be safe around other people and animals, the animal nevertheless harms someone. . . . [W]e are reluctant to impute to our Legislature the intent of dispensing with the criminal-intent requirement when it would mean easing the path to convicting persons whose conduct would not even alert them to the probability of strict regulation” under the statute.<sup>58</sup>

MPC Section 1.04(5) accepts the need for strict liability crimes, while limiting these crimes to what the code terms “violations.” Violations are not subject to imprisonment and are punishable only by a fine, forfeiture, or other civil penalty; and they may not result in the type of legal disability (e.g., loss of the right to vote) that flows from a criminal conviction. You can find some examples of strict liability offenses in Table 3.3.

**TABLE 3.3**  
Strict Liability Offenses

| Offense                                   | Case Example   |
|---|--|
| Open Bottle                               | Steven Mark Loge was cited for a violation of a Minnesota statute that declares it a misdemeanor for the owner of a motor vehicle, or the driver 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.” Loge borrowed his father’s pickup truck and was stopped by two police officers while on his way home from work. One of the officers observed and seized an open beer bottle underneath the passenger’s side of the seat and also found one full unopened can of beer and one empty beer can in the truck. Loge was issued a citation for a violation of the open bottle statute. See <i>State v. Loge</i> , 608 N.W.2d 152 (Minn. 2000).   |
| Student’s Possession of Weapons in School | A juvenile court ordered C.R.M. to attend an Anoka County, Minnesota, juvenile day school. Students’ coats are hung outside the classroom and inspected in the morning for contraband. A folding knife with a four-inch blade was discovered in C.R.M.’s coat. C.R.M. immediately reacted, “Oh man, I forgot to take it out, I was whittling this weekend.” C.R.M. was convicted under a statute that makes possession of a dangerous weapon on school property a strict liability offense. The Minnesota statute provides that “[w]hoever possesses, stores, or keeps a dangerous weapon or uses or brandishes a replica firearm or a BB gun on school property is guilty of a felony and may be sentenced to imprisonment for not more than two years or to payment of a fine of not more than \$5,000, or both.” See <i>In re C.R.M.</i> , 611 N.W.2d 802 (Minn. 2000).   |
| Teacher’s Possession of Weapons in School | A Virginia law makes it a felony for an individual to possess a firearm “upon any public . . . elementary school, including building and grounds.” Deena Esteban, a fourth-grade elementary school teacher, left a zippered yellow canvas bag in a classroom; the bag was found to contain a loaded .38-caliber revolver. Esteban explained that she placed the gun in the bag and took it to the store on the previous Saturday, and then she forgot that the pistol was in the bag and inadvertently carried it into the school. The Virginia Supreme Court affirmed Esteban’s conviction on appeal. The court stressed that the fact that Esteban “innocently” brought a loaded revolver into the school “does not diminish the danger.” A footnote in the decision indicated that Esteban possessed a concealed handgun permit that specifically did not authorize possession of a handgun on school property. See <i>Esteban v. Commonwealth</i> , 587 S.E.2d 523 (Va. 2003). |

## CONCURRENCE OF ACT AND INTENT

We now have discussed both *actus reus* and *mens rea*. The next step is to understand that there must be a **concurrence** between a criminal act and a criminal intent. *Chronological concurrence* means that a criminal intent must exist at the same time as a criminal act. An example of chronological concurrence is the requirement that a burglary involves breaking and entering into the dwelling house of another at night with the intent to commit a felony therein. A defendant who claimed that he entered his mother's home with the intent to escape the cold and contended that he only later developed the intent to kill his mother would not be guilty of burglary, if he was believed by the jury.<sup>59</sup> The principle of concurrence is reflected in Section 20 of the California Penal Code, which provides that in "every crime . . . there must exist a union or joint operation of act and intent or criminal negligence."<sup>60</sup>

### The Legal Equation 3.4: Concurrence



#### YOU DECIDE 3.4

Scott Jackson administered what he believed was a fatal dose of cocaine to Pearl Bryan in Cincinnati, Ohio. Bryan was pregnant, apparently as a result of her intercourse with Jackson. Jackson and a companion then transported Bryan to Kentucky and cut off her head to prevent identification of the body. Bryan, in fact, was still alive when she

was brought to Kentucky, and she died as a result of the severing of her head. A state possesses jurisdiction over offenses committed within its territorial boundaries. Can Jackson be prosecuted for the intentional killing of Bryan in Ohio? In Kentucky? See *Jackson v. Commonwealth*, 38 S.W. 422 (Ky. App. 1896).

You can find the answer at [edge.sagepub.com/lippmaness3e](http://edge.sagepub.com/lippmaness3e)

## Criminal Law and Public Policy

Various courts have looked to rap music as evidence of a defendant's criminal intent or as evidence that the defendant committed a criminal act. In 2014, Vonte Skinner was convicted of attempted murder and aggravated assault for allegedly attempting to carry out a contract killing of a narcotics dealer who had withheld the proceeds from narcotics sales from a drug gang. A search of the defendant's car led to the seizure of three notebooks

filled with rap lyrics authored by Skinner. A number of the lyrics are described as "violent" and were written under the moniker "Real Threat." Skinner has the word "Threat" tattooed on his arm.

The jury was unable to reach a verdict at Skinner's first trial. He was convicted at a second trial in which a detective testifying for the state of New Jersey read excerpts from the defendant's lyrics, testimony that ran

for thirteen pages in the **trial transcript**. The prosecution successfully argued that although none of the lyrics mentioned the victim by name and that all of the lyrics had been composed prior to the shooting, the lyrics provided evidence of the defendant's criminal motive and intent and capacity for violence. Several of the lyrics are reprinted below.

On the block, I can box you down or straight  
razor ox you down, run in your crib with a four  
pound and pop your crown. Checkmate, put  
your face in the ground. I'll drop your queen and  
pawn, f---f--- wastin' around. They don't call  
me Threat for nothin'.

You pricks goin' to listen to Threat tonight.  
'Cause feel when I pump this P-89 into your head  
like lice. Slugs will pass ya' D, like Montana and  
rice, that's five hammers, 16 shots to damage  
your life, leave you f-----s all bloody.

After you die, I'll go to your Mom's house and f---  
her until tomorrow and make ya' little brother  
watch with his face full of sorrow.

So get them answers right. Where's the case and  
stash of white. I got ya wife tied to the bed and  
at her throat a knife.

An appellate court reversed Skinner's conviction and expressed doubt whether the jurors would have found the defendant guilty if they had not listened to an "extended reading" of these lyrics.

The New Jersey Supreme Court found that there was no connection between the various crimes and bad acts recounted in the lyrics and the crime with which the defendant had been convicted. "We reject the proposition that probative evidence about a charged offense can be found in an individual's artistic endeavors absent a strong nexus between specific details of the artistic composition and the circumstances of the offense for which the evidence is being adduced." The court also noted the risk that the introduction of the lyrics had prejudiced the jury against the defendant.

In other cases, courts have found a strong connection between rap lyrics and a defendant's mental intent to kill. In *Bryant v. State*, 802 N.E.2d 486 (Ind. Ct. App. 2004), the defendant was convicted of the murder of his stepmother. His lyrics were admitted to establish his intent to kill: "'Cuz the 5-0 won't even know who you are when they pull yo ugly ass out of the trunk of my car." In the South Carolina trial of Gonzales Wardlaw (Snoop), the defendant's lyrics were introduced as

an admission of guilt to a murder, and in a Pittsburgh case, two men were sentenced to prison after posting a rap video that threatened to harm two police officers who had arrested them. In the Nevada case of *Holmes v. State*, the defendant was charged with robbery. The court held that the lyrics were properly admitted at the defendant's trial. "We recognize, as did the district court, that defendant-authored rap lyrics may employ metaphor, exaggeration, and other artistic devices." However, "these features do not exempt such writings from jury consideration where, as here, the lyrics describe details that mirror the crime charged." See *Holmes v. State*, 306 P.3d 415 (Nev. 2017).

Law enforcement officials now are trained to use rap lyrics to assist them in investigating crimes. The *New York Times* identified thirty-six cases between 2012 and 2014 in which prosecutors attempted to introduce rap music at a defendant's trial. The American Civil Liberties Union of New Jersey found that courts admitted lyrics roughly 80 percent of the time. Studies find that juries are more likely to believe that defendants who have written violent rap lyrics are capable of committing a murder than defendants who have not written violent lyrics.

Keep in mind that rap artists have been prosecuted based on allegations that the content of their lyrics constitute a criminal threat. In 2018, the Pennsylvania Supreme Court held that Mayhem Mal in a music video titled "F--- the Police" threatened to kill two police officers. The court found it significant that the lyrics named the officers and stated how and where the officers were to be executed and concluded that the lyrics were "both threatening and highly personalized to the victims." Providing First Amendment freedom of expression protection to these types of sentiments "would be to interpret the Constitution to provide blanket protection for threats . . . so long as they are expressed within that musical style" (*Commonwealth v. Knox*, \_\_\_ N.E.2d \_\_\_ (Pa. 2018)).

Commentators familiar with the culture of rap music point out that the lyrics are not necessarily autobiographical and that gangsta rap is characterized by exaggeration and violent and sexual language. Artists remain in "character" even when not performing to persuade their audience that they are "authentic" and "credible." Commentators also note that law enforcement officials are able to distinguish between reality and fiction when it comes to other forms of music but do not seem willing to make this distinction when it comes to young African American artists. Under what circumstances should rap music be viewed as evidence of criminal intent and motive rather than artistic expression?

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## CAUSALITY

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You now know that a crime entails a *mens rea* that *concur*s with an *actus reus*. The defendant must be shown to have *caused* the victim's death or injury, or to have damaged the property.

**Causation** is central to criminal law and must be proven beyond a reasonable doubt. The requirement of causality is based on two considerations:

1. **Individual Responsibility.** The criminal law is based on individual responsibility. Causality connects a person's acts to the resulting social harm and permits the imposition of the appropriate punishment.
2. **Fairness.** Causality limits liability to individuals whose conduct produces a prohibited social harm. A law that declares that all individuals in close proximity to a crime are liable regardless of their involvement would be unfair and would penalize people for being in the wrong place at the wrong time. If such a law were enacted, individuals might hesitate to gather in crowds or bars or to attend concerts and sporting events.

Establishing that a defendant's criminal act caused harm to the victim can be more complicated than you might imagine. Should an individual who commits a rape be held responsible for the victim's subsequent suicide? What if the victim attempted suicide a week before the rape and then killed herself following the rape? Would your answer be the same if the stress induced by the rape appeared to have contributed to the victim's contracting cancer and dying a year later? What if doctors determine that a murder victim who was hospitalized would have died an hour later of natural causes?

We can begin to provide an answer to these hypothetical situations by reviewing the two types of causes that a prosecutor must establish beyond a reasonable doubt at trial in order to convict a defendant: cause in fact and legal or proximate cause.

You will find that most causality cases involve defendants charged with murder who claim that they should not be held responsible for the victim's death.

### Cause in Fact

The **cause in fact** or factual cause simply requires you to ask whether "but for" the defendant's act, the victim would have died. An individual aims a gun at the victim, pulls the trigger, and kills the victim. "But for" the shooter's act, the victim would be alive. In most cases, the defendant's act is the only factual cause of the victim's injury or death and is clearly the direct cause of the harm. This is a simple cause-and-effect question. The legal or proximate cause of the victim's injury or death may not be so easily determined.

A defendant's act must be the cause in fact or factual cause of a harm in order for the defendant to be criminally convicted. This connects the defendant to the result. The cause in fact or factual cause is typically a straightforward question. Note that the defendant's act must also be the legal or proximate cause of the resulting harm.

### Legal or Proximate Cause

Just when things seem simple, we encounter the challenge of determining the legal or **proximate cause** of the victim's death. Proximate cause analysis requires the jury to determine whether it is fair or just to hold a defendant legally responsible for an injury or death. This is not a scientific question. We must consider questions of fairness and justice. There are few rules to assist us in this analysis.

In most cases, a defendant is clearly both the cause in fact and the legal cause of the victim's injury or death. However, consider the following scenarios: You pull the trigger, and the victim dies. You point out that it was not your fault, since the victim died from the wound you inflicted in combination with a minor nonlethal gun wound that she suffered earlier in the day. Should you be held liable? In another scenario, an ambulance rescues the victim, the ambulance's brakes fail, and the vehicle crashes into a wall, killing the driver and victim. Are you or the driver responsible for the victim's death? You later learn that the victim died after the staff of the hospital emergency room waited five hours to treat the victim and that she would have lived had she received timely assistance. Who is responsible for the death? Would your answer be different in the event that the doctors protested that they could not operate on the victim because of a power outage caused by a hurricane? What if the victim was wounded from the gunshot and, although barely conscious, stumbled into the street and was hit by an automobile or by lightning? In each case, "but for" your act, the victim would not have been placed in the situation that led to his or her death. On the other hand, you might argue that in each of these examples you were not legally liable, because the death resulted from an

**intervening cause** or outside factor rather than from the shooting. As you can see from the previous examples, an intervening cause may arise from any of the following:

- The act of the victim wandering into the street
- An act of nature, such as a hurricane
- The doctors who did not immediately operate
- A wound inflicted by an assailant in combination with a previous injury

Another area that complicates the determination of proximate cause is a victim's preexisting medical condition. This arises when you shoot an individual and the shock from the wound results in the failure of the victim's already seriously weakened heart.

## Intervening Cause

Professor Dressler helps us address these causation problems by providing two useful categories of intervening acts: coincidental intervening acts and responsive intervening acts.

### Coincidental Intervening Acts

A defendant is not considered legally responsible for a victim's injury or death that results from a **coincidental intervening act**. (Some texts refer to this as an *independent intervening cause*.) A coincidental intervening act is a cause that is unrelated to a criminal act of the accused. *Coincidental intervening acts arise when a defendant's act places a victim in a particular place where the victim is harmed by an unforeseeable event.*

The Ninth Circuit Court of Appeals offered an example of an unforeseeable event as hypothetical in the case of *United States v. Main*. The defendant in this example drives in a reckless fashion and crashes his car, pinning the passenger in the automobile. The defendant leaves the scene of the accident to seek assistance, and the semiconscious passenger is eaten by a bear. The Ninth Circuit Court of Appeals observed that reckless driving does not create a foreseeable risk of being eaten by a bear and that this intervening cause is so out of the ordinary that it would be unfair to hold the driver responsible for the victim's death.<sup>61</sup> Another example of an unforeseeable coincidental intervening event involves a victim who is wounded, taken to the hospital for medical treatment, and then killed in the hospital by a knife-wielding mass murderer. Professor Dressler notes that in this case, the unfortunate victim has found himself or herself in the "wrong place at the wrong time."<sup>62</sup>

### Responsive Intervening Acts

The response of a victim to a defendant's criminal act is termed a **responsive intervening act** (some texts refer to this as a *dependent intervening act*). In most instances, the defendant is considered responsible because his or her behavior caused the victim to respond. A defendant is relieved of responsibility only in those instances in which the victim's reaction to the crime is both abnormal and unforeseeable. Consider the case of a victim who jumps into the water to evade an assailant and drowns. The assailant will be charged with the victim's death despite the fact that the victim could not swim and did not realize that the water was dangerously deep. The issue is the *foreseeability* of the victim's response rather than the *reasonableness* of the victim's response. Again, courts generally are not sympathetic to defendants who set a chain of events in motion, and they generally will hold such defendants criminally liable.

In *People v. Armitage*, David Armitage was convicted of "drunk boating causing [the] death" of Peter Maskovich. Armitage was operating his small aluminum speedboat at a high rate of speed while zigzagging across the river, when it flipped over. There were no flotation devices on board, and the intoxicated Armitage and Maskovich clung to the capsized vessel. Maskovich disregarded Armitage's warning, decided to try to swim to shore, and drowned. A California appellate court ruled that Maskovich's decision did not break the chain of causation. The "fact that the panic stricken victim recklessly abandoned the boat and tried to swim ashore was not a wholly abnormal reaction to the peril of drowning," and Armitage could not exonerate himself by claiming that the "victim should have reacted differently or more prudently."<sup>63</sup>

Defendants have also been held liable for the response of individuals other than the victim. For instance, in the California case of *People v. Schmies*, defendant Schmies fled on his motorcycle from a traffic stop at speeds of up to ninety miles an hour and disregarded all traffic regulations. During the chase, one of the pursuing patrol cars struck another vehicle, killing the driver and injuring the officer. Schmies was convicted of grossly negligent vehicular manslaughter and of reckless driving. A California court affirmed the defendant's conviction based on the fact that the officer's response and the resulting injury were reasonably foreseeable. The officer's reaction, in other words, was not so extraordinary that it was unforeseeable, unpredictable, and statistically extremely improbable.<sup>64</sup>

In *State v. Pelham*, the New Jersey Supreme Court upheld the defendant's conviction for vehicular manslaughter. Five months after the accident, the victim's family in accordance with his wishes removed him from a ventilator, and he died four

hours later. The New Jersey Supreme Court held that the removal of life-sustaining equipment was an individual's right and that it is foreseeable that a victim may exercise his or her right not to be placed on, or to be removed from, life support systems.<sup>65</sup>

Medical negligence has also consistently been viewed as foreseeable and does not break the chain of causation. In *People v. Saavedra-Rodriguez*, the defendant claimed that the negligence of the doctors at the hospital rather than the knife wound he inflicted was the proximate cause of the death and that he should not be held liable for homicide. The Colorado Supreme Court ruled that medical negligence is "too frequent to be considered abnormal" and that the defendant's stabbing of the victim started a chain of events, the natural and probable result of which was the defendant's death. The court added that only the most gross and irresponsible medical negligence is so removed from normal expectations as to be considered unforeseeable.<sup>66</sup>

In sum, a defendant who commits a crime is responsible for the natural and probable consequences of his or her actions. A defendant is responsible for foreseeable responsive intervening acts.

The MPC eliminates legal or proximate causation and requires only "but-for" causation. The code merely asks whether the result was consistent with the defendant's intent or knowledge or was within the scope of risk created by the defendant's reckless or negligent act. In other words, under the MPC, you merely look at the defendant's intent and act and ask whether the result could have been anticipated. In cases of a resulting harm or injury that is "remote" or "accidental" (e.g., a lightning bolt or a doctor who is a serial killer), the MPC requires that we look to see whether it would be unjust to hold the defendant responsible.

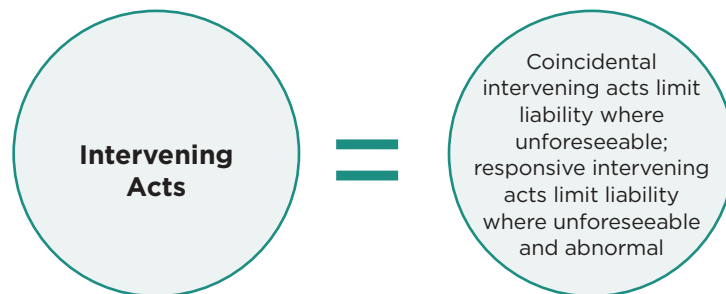
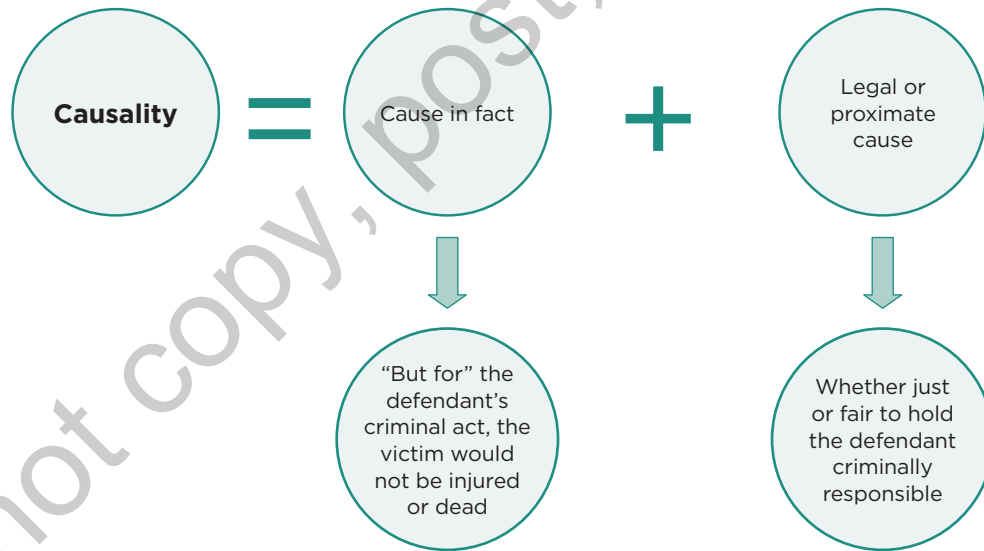
You can find more cases on causality in Table 3.4.

**TABLE 3.4**  
Causality

| Act and Intent           | Case Examples   |
|--------------------------|---|
| Apparent Safety Doctrine | In an 1856 North Carolina case, Preslar kicked and choked his wife and beat her over the head with a thirty-inch-thick piece of wood. He also threatened to kill her with his axe. The victim gathered her children and walked over two miles to her father's home. Reluctant to reveal her bruises and injuries to her family, she spread a quilt on the ground and covered herself with cotton fabric and slept outside. The combination of the exhausting walk, her injuries, and the biting cold led to a weakened condition that resulted in her death. The victim's husband was acquitted by the North Carolina Supreme Court, which ruled that the chain of causation was broken by the victim's failure to seek safety. The court distinguished this case from the situation of a victim who in fleeing is forced to wade through a swamp or jump into a river. Is it relevant that the victim likely feared that her family would force her to return to her marital home and that she would have to face additional physical abuse from her husband? See <i>State v. Preslar</i> , 48 N.C. 421 (1856).  |
| Drag Racing              | In <i>Velazquez v. State</i> , the defendant Velazquez and the deceased Alvarez agreed to drag race their automobiles over a quarter-mile course on a public highway. Upon completing the race, Alvarez suddenly turned his automobile around and proceeded east toward the starting line. Velazquez also reversed direction. Alvarez was in the lead and attained an estimated speed of 123 miles per hour. He was not wearing a seat belt and had a blood alcohol level of between .11 and .12. Velazquez had not been drinking and was traveling at roughly 90 miles per hour. As both approached the end of the road, they applied their brakes, but Alvarez was unable to stop. He crashed through the guardrail and was propelled over a canal and landed on the far bank. Alvarez was thrown from his car, was pinned under the vehicle when it landed, and died. The defendant crashed through the guardrail, landed in the canal, and managed to escape. A Florida district court of appeal determined that the defendant's reckless operation of his vehicle in the drag race was technically the cause in fact of Alvarez's death under the "but for" test. There was no doubt that "but for" the defendant's participation, the deceased would not have recklessly raced his vehicle and would not have been killed. The court, however, ruled that the defendant's participation was not the proximate cause of the deceased's death because the "deceased, in effect, killed himself by his own volitional reckless driving," and that it "would be unjust to hold the defendant criminally responsible for this death." The race was completed when Alvarez turned his car around and engaged in a "near-suicide mission." See <i>Velazquez v. State</i> , 561 So.2d 347 (Fla. Dist. Ct. App. 1990). |
| Medical Negligence       | In <i>United States v. Hamilton</i> , the defendant knocked the victim down and jumped on him and kicked his face. The victim was rushed to the hospital, where nasal tubes were inserted to enable him to breathe, and his arms were restrained. During the night, the nurses changed his bedclothes and negligently failed to reattach the restraints on the victim's arms. Early in the morning the victim went into convulsions, pulled out the nasal tubes, and suffocated to death. The federal court held that regardless of whether the victim accidentally or intentionally pulled out the tubes, the victim's death was the ordinary and foreseeable consequence of the attack and affirmed the defendant's conviction for manslaughter. See <i>United States v. Hamilton</i> , 182 F. Supp. 548 (D.D.C. 1960).   |

| Act and Intent        | Case Examples  |
|-----------------------|--|
| Children and Handguns | <p>Douglas Bauer left a .45-caliber registered handgun on the dresser in a downstairs bedroom where he slept with his girlfriend. His girlfriend's nine-year-old son TC was spending the night and removed the handgun from the dresser. TC, who had never before held a loaded firearm and had not been instructed on how to use a gun, took the firearm with him to school and accidentally shot a classmate, AK-B. TC told the police that TC and his siblings often slept in the bedroom and had complete access to the downstairs portion of the house. TC stated that there were several guns in the house, including a shotgun in the downstairs bedroom, a handgun on the downstairs dresser, a handgun on a computer desk, a handgun under the couch, and a handgun in the glove compartment of the car. TC had been warned by Bauer and by his mother never to touch the guns because they were loaded. Bauer told the police that he did not know that TC took the gun although he was aware that TC had taken money from the glove compartment of Bauer's car. Washington law at the time did not impose any requirements for the storage of firearms. Bauer was charged with the assault of AK-B. The court held that the firearm had been taken without Bauer's knowledge or permission and that the shooting had not occurred until two days after the gun had been stolen, and that under these circumstances Bauer should not be held liable for the assault. See <i>State v. Bauer</i>, 295 P.2d 1227 (Wash. Ct. App. 2013).</p> |

## The Legal Equation 3.5: Causality





### YOU DECIDE 3.5

Defendant Israel Cervantes and fellow gang members of the Highland Street gang went to a birthday party for a member of the Alley Boys gang. The two gangs were not enemies. Cervantes approached a woman named Grace who refused his invitation to go to another party. Cervantes called her a “ho,” and the two exchanged insults. Juan Cisneros, a member of the Alley Boys, told Cervantes that he was disrespecting his “homegirl.” Richard Linares, a member of the Alley Boys, tried to calm the situation. Cisneros, however, drew a gun and threatened to “cap” Cervantes. Cervantes pulled out his own gun. Linares responded by “pushing or touching”

Cervantes in an effort to separate him from Cisneros. The defendant Cervantes stated that “nobody touches me” and shot Linares through the arm and chest. A large-scale fight ensued between the gangs, and gang “challenges were exchanged.”

A short time later, a group of Highland Street gang members saw Hector Cabrera, a member of the Alley Boys, entering his car. Five gang members fired shots and participated in killing Cabrera.

Would you hold Cervantes liable for the murder of Cabrera? See *People v. Cervantes*, 29 P.3d 225 (Cal. 2001).

You can find the answer at [edge.sagepub.com/lippmaness3e](http://edge.sagepub.com/lippmaness3e).

### CASE ANALYSIS

In *Commonwealth v. Pestinikas*, a Pennsylvania appellate court decided whether the defendants’ failure to provide shelter, food, and medical care for Joseph Kly breached their duty of care for Kly and caused Kly’s death from dehydration and starvation.

## Did the defendants have a duty of care toward Joseph Kly, and were the defendants guilty of his murder?

### COMMONWEALTH V. PESTINIKAS

617 A.2D 1339 (PA. SUPER. 1992)

The jury . . . found Walter and Helen Pestinikas guilty of murder of the third degree in connection with the starvation and dehydration death of ninety-two (92) year old Joseph Kly. . . .

Joseph Kly met Walter and Helen Pestinikas 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 which 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 appellants that he wanted to speak with them. As a consequence,

arrangements were made for appellants 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 appellants came for him on that day they were instructed by medical personnel regarding the care which 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 appellants’ home to administer vitamin B-12 supplements to Kly. Appellants agreed orally to follow the medical instructions and to supply Kly with food, shelter, care and the medicine which he required.

According to the evidence, the prescription was never filled, and the visiting nurse was told by appellants 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, appellants 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 nine feet by thirty feet, with no insulation, no refrigeration, no bathroom, no sink and no telephone. The walls contained cracks which exposed the room to outside weather conditions. Kly's predicament was compounded by appellants' 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, appellants 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 Pestinikas, pursuant to which monies could be withdrawn without Kly's signature. Bank records reveal that from May, 1982, to July, 1983, appellants withdrew amounts roughly consistent with the three hundred (\$300) dollars per month which Kly had agreed to pay for his care. Beginning in August, 1983 and continuing until Kly's death in November, 1984, however, appellants withdrew much larger sums so that when Kly died, a balance of only fifty-five dollars (\$55) remained. In the interim, appellants had withdrawn in excess of thirty thousand (\$30,000) dollars.

On the afternoon of November 15, 1984, when police and an ambulance crew arrived in response to a call by appellants, Kly's dead body appeared emaciated, with his ribs and sternum greatly pronounced. Mrs. Pestinikas told police that she and her husband had taken care of Kly for three hundred dollars 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 thirty-nine 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, appellants 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 appellants 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 . . . 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. . . . Unless you find beyond a reasonable doubt that an oral contract imposed a duty to act upon Walter and Helen Pestinikas, you must acquit the defendants. . . .

In *Jones v. United States*, 308 F.2d 307 (C.A.D.C. 1962), the court stated:

"There are at least four situations in which the failure to act may constitute breach of a legal duty. One can be held criminally liable: first, where a statute imposes a duty to care for another; second, where one stands in a certain status relationship to another; third, where one has assumed a contractual duty to care for another; and fourth, where one has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid. . . . The omission or neglect to perform a legal duty resulting in death may constitute murder where the omission was willful and there was deliberate intent to cause death. So also, willfully allowing one to be exposed to conditions which will probably result in death, where there is a duty to protect such person, constitutes murder." . . .

[W]e hold that when in 18 Pa.C.S. § 301(b)(2) 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 appellants' 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, and the trial court was correct when it instructed the jury accordingly.

Our holding is not that every breach of contract can become the basis for a finding of homicide resulting from

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an omission to act. A criminal act involves both a physical and mental aspect. An omission to act can satisfy the physical aspect of criminal conduct only if there is a duty to act imposed by law. A failure to provide food and medicine, in this case, could not have been made the basis for prosecuting a stranger who learned of Kly's condition and failed to act. Even where there is a duty imposed by contract, moreover, the omission to act will not support a prosecution for homicide in the absence of the necessary criminal intent. . . . In the instant case, therefore, the jury was required to find that appellants, by virtue of contract, had undertaken responsibility for providing necessary care for Kly to the exclusion of the members of Kly's family. This would impose upon them a legal duty to act to preserve

Kly's life. If they . . . [with criminal intent] set upon a course of withholding food and medicine and thereby caused Kly's death, appellants could be found guilty of murder. . . .

Appellants 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. . . . [I]t 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 appellants to post-trial relief.

## CHAPTER SUMMARY

A crime requires the concurrence of a criminal intent (*mens rea*) and a criminal act (*actus reus*). An act, for purposes of the criminal law, must be a voluntary act. An individual also may be held liable for a failure to act in those instances in which law imposes a duty to act. A duty arises when there is a status relationship, statute, or contract, or when an individual assumes a duty. The possession of contraband constitutes an act.

A significant contribution of the common law is limiting criminal punishment to individuals who possess a "guilty mind." The common law established three types of criminal intent: specific intent, general intent, and constructive criminal intent. These intent standards proved confusing, and the Model Penal Code attempted to simplify the intent standard by establishing a hierarchy of criminal intent standards. The most serious intent standard is purposely, followed by knowingly, recklessly, and the least serious form of intent, negligently. A fifth type of intent is strict liability.

As noted, there must be a concurrence between a criminal act and a criminal intent. The criminal act must be the cause or proximate cause of a prohibited harm. This analysis is complicated by intervening causes. Individuals are not held liable for coincidental intervening causes, although they are held liable for responsive intervening causes.

## CHAPTER REVIEW QUESTIONS

1. What are the elements of a crime?
2. Why are criminal thoughts not penalized by the criminal law?
3. Give some examples of behavior that is considered to be an involuntary act. Why are involuntary acts not criminally punished?
4. What is a status offense? Why are status offenses not criminally punished?
5. Define the American bystander rule. When is an individual criminally liable for an omission?
6. List the various types of possession. What factors are important for establishing constructive possession?
7. Distinguish between specific intent and general intent and constructive intent.
8. Define the criminal intents of purposely, knowingly, recklessly, and negligently. Provide an example of each of these types of criminal intent.
9. What are the characteristics of a strict liability offense?
10. Discuss the significance of concurrence.
11. Why is the criminal law concerned with causality?
12. Define cause in fact, proximate cause, intervening cause, coincidental intervening cause, and responsive intervening cause. Provide an example of a factual situation involving an intervening cause and an example of a case involving a responsive intervening cause.

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## LEGAL TERMINOLOGY

|                                 |                            |                               |
|---------------------------------|----------------------------|-------------------------------|
| actual possession 54            | European bystander rule 51 | public welfare offenses 62    |
| <i>actus reus</i> 46            | fleeing possession 54      | purposely 58                  |
| American bystander rule 51      | general intent 57          | recklessly 60                 |
| attendant circumstances 47      | Good Samaritan law 53      | responsive intervening act 67 |
| causation 66                    | intervening cause 67       | result crimes 47              |
| cause in fact 66                | involuntary act 48         | specific intent 57            |
| coincidental intervening act 67 | joint possession 54        | status 50                     |
| concurrence 64                  | knowingly 60               | strict liability offense 62   |
| constructive intent 57          | <i>mens rea</i> 46         | transferred intent 61         |
| constructive possession 54      | motive 56                  | trial transcript 65           |
| contraband 54                   | negligently 60             | willful blindness 55          |
| crimes of cause and result 57   | omission 51                |                               |
| duty to intervene 52            | proximate cause 66         |                               |

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## TEST YOUR KNOWLEDGE: ANSWERS

- |           |           |          |            |
|-----------|-----------|----------|------------|
| 1. True.  | 4. False. | 7. True. | 10. False. |
| 2. True.  | 5. True.  | 8. True. |            |
| 3. False. | 6. True.  | 9. True. |            |



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