

Mens Rea, Concurrence, Causation

5

Did the defendant know that his pet tiger cats endangered his daughter?

By June 6, 1999, the tigers were two years old. Lauren was ten. She stood fifty-seven inches tall and weighed eighty pounds. At dusk that evening, Lauren joined Hranicky in the tiger cage. Suddenly, the male tiger attacked her. It mauled the child's throat, breaking her neck and severing

her spinal cord. She died instantly . . . Hranicky testified . . . [that] he did not view the risk to be substantial because he thought the tigers were domesticated and had bonded with the family. . . . Thus, he argues, he had no knowledge of any risk.

Core Concepts and Summary Statements

Introduction

One of the common law's great contributions is to limit blameworthy individuals' criminal guilt to "morally blameworthy" individuals.

- A. A criminal offense requires a criminal intent.
- B. The requirement of a criminal intent is based on "moral blameworthiness," a conscious decision to intentionally or knowingly engage in criminal conduct or to act in a reckless or negligent fashion.
- C. *Mens rea*, or criminal intent, includes four possible states of mind. The most blameworthy crimes are said

to have been done *purposely*; others, in descending order of culpability, are crimes committed *knowingly*, *recklessly*, or *negligently*.

- D. Strict liability offenses require an *actus reus*, but do not incorporate a *mens rea* requirement. These typically are public welfare offenses or acts designated as crimes to protect public safety and security by regulating food, drugs, and transportation.

Concurrence

There must be a concurrence between a criminal intent and a criminal act that causes a prohibited harm or injury.

Causation

- A. A criminal act must be the cause in fact or "but for" cause of a harm or injury, as well as the legal or proximate cause.
- B. A coincidental intervening act breaks the chain of causation caused by a defendant's criminal act, unless the intervening act was foreseeable.
- C. A responsive intervening act does not break the chain of causation caused by a defendant's criminal act, unless the intervening act was both abnormal and unforeseeable.

Introduction

In the last chapter we noted that a criminal act or *actus reus* is required to exist in unison with a criminal intent or *mens rea*, and as you soon will see, these two components must combine to *cause* a prohibited injury or harm. This chapter completes our introduction to the basic elements of a crime by introducing you to criminal intent, concurrence, and causation.

One of the common law's great contributions to contemporary justice 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 Jackson observed that a system of punishment based on intent is a celebration of the



“freedom of the human will” and the “ability and duty of the normal individual to choose between good and evil.” 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 those who do engage in crime can be encouraged to develop a greater sense of moral responsibility and avoid crime in the future.¹

Mens Rea

You read in the newspaper that your favorite 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 rifle. 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 manner. As Oliver Wendell Holmes, Jr. famously remarked, “Even a dog distinguishes between being stumbled over and being kicked.”²

As we have seen, it is the bedrock principle of criminal law that a crime requires an act or omission and a criminal intent. The appropriate punishment of an act depends to a large extent on whether the act was intentional or accidental. Law texts traditionally have repeated that *actus non facit rum nisi mens sit rea*: “There can be no crime, large or small, without an evil mind.” The “mental part” of crimes is commonly termed *mens rea* (“guilty mind”) or *scienter* (“guilty knowledge”) or criminal intent. The U.S. Supreme Court noted that the requirement of a “relation between some mental element and punishment for a harmful act is almost as instinctive as the child’s familiar exculpatory (not responsible) plea, ‘But I didn’t mean to.’”³

The common law originally punished criminal acts and paid no attention to the mental element of an individual’s conduct. The killing of an individual 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, and, as observed by the U.S. Supreme Court, *mens rea* is now the “rule of, rather than the exception to, the principles... of American criminal jurisprudence.” There are some good reasons for requiring moral blameworthiness.

- *Responsibility*. It is just and fair to hold a person accountable who intentionally chooses to commit a crime.
- *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.
- *Punishment*. The punishment should fit the crime. The severity of criminal punishment should depend on whether an individual’s act was intentional, reckless, or accidental.

The concept of *mens rea* has traditionally been a source of confusion, and the first reaction of students and teachers has been to flee from the topic. This is understandable when it is realized that in 1972, U.S. statutes employed seventy-six different terms to describe the required mental element of federal crimes. This laundry list included terms such as *intentionally, knowingly, fraudulently, designedly, recklessly, wantonly, unlawfully, feloniously, willfully, purposely, negligently, wickedly, and wrongfully*. These are what Justice Jackson termed “the variety, disparity and confusion” of the judicial definition of the “elusive mental element” of crime.⁴

The Evidentiary Burden

The prosecution must establish the required *mens rea* beyond a reasonable doubt. Professor Hall observed that we cannot observe or record what goes on inside an individual’s mind. The most reliable indication of intent is a defendant’s confession or statement to other individuals. Witnesses may also testify that they saw an individual take careful aim when shooting or that a killing did not appear to be accidental.⁵

In most cases, we must look at the surrounding circumstances and apply our understanding of human behavior. In *People v. Conley*, a high school student at a party hit another student with a

wine bottle, breaking the victim's upper and lower jaws, nose, and cheek and permanently numbing his mouth. The victim and his friend were alleged to have made insulting remarks at the party and were leaving when one of them was assaulted with a wine bottle. The attacker was convicted of committing an aggravated battery that "intentionally" or "knowingly" caused "great bodily harm or permanent disability or disfigurement." The defendant denied possessing this intent. An Illinois appellate court held that the "words, the weapon used, and the force of the blow . . . the use of a bottle, the absence of warning and the force of the blow are facts from which the jury could reasonably infer the intent to cause permanent disability." In other words, the Illinois court held that the defendant's actions spoke louder than his words in revealing his thoughts. Evidence that helps us indirectly establish a criminal intent or criminal act is termed **circumstantial evidence**.⁶

The Model Penal Code Standard

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.

A **general intent** is simply an intent to commit the *actus reus* or criminal act. There is no requirement that prosecutors demonstrate that an offender possessed an intent to violate the law, an awareness that the act is a crime, or 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 only required to demonstrate 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 dangerous nature of the weapon, the number of blows, and the statements uttered by the accused. A statute that provides for a general intent typically employs terms such as *intentionally* or *willfully* to indicate that the crime requires a general intent.

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. 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."

Courts often 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. 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.⁷

You may encounter two additional types of common law intent. A **transferred intent** applies when an individual intends to attack one person but inadvertently injures another. In *People v. Conley*, Conley intended to hit Marty but instead struck and inflicted severe injuries on Sean. Nevertheless, he was convicted of aggravated battery. The classic formulation of the common law doctrine of transferred intent states that the defendant's guilt is "exactly what it would have been had the blow fallen upon the intended victim instead of the bystander." Transferred intent also applies to property crimes in cases where, for example, an individual intends to burn down one home, and the wind blows the fire onto another structure, burning the latter dwelling to the ground.

Constructive intent is a fourth type of common law intent. This was applied in the early twentieth century to protect the public against reckless drivers and provides that individuals who are grossly and wantonly reckless are considered to intend the natural consequences of their actions. A reckless driver who caused an accident that resulted in death is, under the doctrine of constructive intent, guilty of a willful and intentional battery or homicide.

In 1980, the U.S. Supreme Court complained that the common law distinction between general and specific intent had caused a "good deal of confusion."⁸ The Model Penal Code attempted to clearly define the mental intent required for crimes by providing four easily understood levels of responsibility. All crimes requiring a mental element (some do not, as we shall see) must include



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one of the four mental states provided in the Model Penal Code. These four types of intent, in descending order of culpability, are

- purposely,
- knowingly,
- recklessly, and
- negligently.

Model Penal Code

Section 2.02. General Requirements of Culpability

- (1) Minimum Requirements of Culpability. . . . [A] person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently . . . with respect to each material element of the offense.
- (2) Kinds of Culpability Defined.
 - (a) **Purposely.**
A person acts purposely with respect to material elements of an offense when:
 - (i) . . . it is his conscious object to engage in conduct of that nature or to cause such a result. . . .
 - (b) **Knowingly.**
A person acts knowingly . . . when:
 - (i) If the element involves the nature of his conduct . . . he is aware of the existence of such circumstances or he believes or hopes that they exist; and
 - (ii) If the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.
 - (c) **Recklessly.**
A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.
 - (d) **Negligently.**
A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

Analysis

- *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."

We now turn our attention to a discussion of each type of criminal intent.

Purposely

The Model Penal Code established *purposely* as the most serious category of criminal intent. This merely means that a defendant acted “on purpose” or “deliberately.” In legal terms, the defendant must possess a specific intent or “conscious object” to commit a crime or cause a result. A murderer pulls the trigger with the purpose of killing the victim, the 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.

Did the defendant intend to engage in ethnic intimidation?

COMMONWEALTH V. BARNETTE, 699 N.E.2D 1230 (MASS. APP. 1988), OPINION BY: LENK, J.

This case arises out of an altercation between next door neighbors in Lexington. The victims, Maria Acuna and her son Israel Rodriguez, are Mexican Americans. The defendant is predominately African American. During the incident, the defendant allegedly threatened to kill Acuna and Rodriguez, calling them, among other things, “damn Mexicans,” and telling them to “get out of here.” After trial, a jury convicted the defendant of two counts of assault or battery for the purpose of intimidation . . . and two counts of threatening to commit a crime . . . We affirm.

Facts

In the early evening of September 21, 1995, Maria Acuna was working at her computer on the second floor of her home in Lexington, where she had been living with her son, Israel Rodriguez, since May 1995. The defendant was next door at his sister’s house babysitting his niece. Acuna heard a loud noise, like someone banging or shaking a wooden fence, looked out her window, and saw the defendant trying to enter her back yard to retrieve his niece’s ball. Concerned that the defendant was going to break her fence, Acuna called through the window to the defendant to please not trespass, and that she would come downstairs to help him out.

The defendant shouted, “You b__ I just came to pick up my ball.” Acuna went downstairs and walked into her backyard, and observed that the defendant had entered her yard, and was turning to leave. As the defendant left her yard, he repeatedly called her a “b__” and told her that she could keep the ball the next time. Acuna walked toward the fence to latch the gate, and the defendant said,

You b__. You don’t fit here. What are you doing here, you damn Mexican? Why don’t you go back to your country? All of you come and get our jobs and our houses. Get out of here. You don’t fit here. I’ll kill you, and your son.

While standing next to the fence shouting at Acuna, the defendant thrust his fist toward her face so that she

“could almost feel the hit of his fist” in her nose and face. The defendant then threw his fingers in a forking motion toward her, coming to within an inch of her eyes. The defendant was yelling at Acuna so loudly that Rodriguez awoke from his nap and came outside to the backyard. Rodriguez testified that he could hear the defendant shouting “f__,” “s__,” “Mexican,” “get the hell out of the country,” “you don’t belong here,” and “Mexicans don’t belong here” at his mother. He pulled his mother away from the fence and demanded to know from the defendant what was going on. The defendant now attempted to hit Rodriguez with his fists, from the other side of the fence, rattling the gate, trying to enter the backyard, and saying, “You little s__. Come up here. I’m going to take the f__ing s__ out of you and your mother together. I will beat you both to death.” The defendant continued saying, “Damn Mexicans. What are you doing here?” Acuna and Rodriguez both testified that they felt afraid and threatened by the defendant’s rage and determination to hit them.

At the time of the incident, the defendant’s neighbor, Michael Townes, was barbecuing in his backyard, approximately twenty feet away. Townes heard the defendant yell at Acuna and Rodriguez, “You should go back to where you’re from” and refer to “whupping” Rodriguez’s ass. Townes came over and, smelling alcohol on the defendant’s breath, told the defendant to “Let it go” and to go home and “sleep it off.” Townes put his hands on the defendant and led him away. Rodriguez went inside and, after calling Townes to express his gratitude, called the police.

Officer Paul Callahan responded to the call and arrived at Acuna’s residence to find her and her son visibly upset. Callahan filed an incident report and tried, unsuccessfully, to locate the defendant. The next day, Detective Charles Mercer returned to the neighborhood and interviewed the defendant.

In response to the detective’s questions, the defendant asserted that he entered the yard to retrieve the ball only after knocking on the fence and not receiving

a response, that Acuna had appeared and yelled at him for not going around to ring the bell, and that he did not swear at or threaten Acuna. Nonetheless, the defendant did admit that he had said that Acuna should “go back to where she came from,” but claims to have said it to his neighbor Townes, not directly to Acuna.

Issue

The defendant argues that the judge erred in denying his motion for a required finding of not guilty on the two counts of assault or battery for the purpose of intimidation. The defendant claims that the Commonwealth presented insufficient evidence that he acted “for the purpose of intimidation. . . .”

Massachusetts General Laws chapter 265 section 39, is a so-called hate crime statute. It provides that “whoever commits an assault or a battery upon a person . . . for the purpose of intimidation because of said person’s race, color, religion, or national origin, shall be punished. . . .” As described to the jury by the trial judge, the essential elements of the crime are (1) the commission of an assault or battery (2) with the intent to intimidate (3) because of a person’s race, color, religion, or national origin. In general, a hate crime is “crime in which the defendant’s conduct was motivated by hatred, bias, or prejudice, based on the actual or perceived race, color, religion, national origin, ethnicity, gender, or sexual orientation of another individual or group of individuals.” . . . Thus, hate crime laws . . . operate to “enhance the penalty of criminal conduct when it is motivated by racial hatred or bigotry.” It is not the conduct but the underlying motivation that distinguishes the crime.

Here, the defendant was convicted of assaulting the victims for the purpose of intimidation. The intent required . . . was not only that required to establish the underlying assault, that is, the intent either to cause a battery or to cause apprehension of immediate bodily harm, but also the intent to intimidate because of the victim’s membership in a protected class. . . .

Reasoning

At trial, Acuna and Rodriguez both testified that throughout the altercation that gave rise to this case, the defendant repeatedly called them “damn Mexicans” and demanded that they “get out of here.” Acuna testified that the defendant verbally attacked her, saying that she should go back to her country and that he would kill her and her son. Rodriguez testified that the defendant told him that he was going to beat up Rodriguez and his “b__y” mother. Both Acuna and Rodriguez also testified that they felt threatened by the defendant’s behavior. The Commonwealth presented ample evidence that the defendant assaulted Acuna and Rodriguez with the intent to intimidate them because of their national origin. . . . A rational trier of fact could find that the defendant’s repetition of the phrase “damn Mexican,” accompanied by his repeated demand that Acuna and Rodriguez “get out of here,” demonstrated a purpose of intimidation because of the victims’ national origin. . . .

Holding

The defendant contends that his outburst at Acuna and Rodriguez was motivated by his anger at being called a trespasser and was not motivated by any anti-Mexican sentiment. The defendant believes that the fact that his niece is of Puerto Rican descent demonstrates that he lacks any anti-Hispanic bias or prejudice. The uncontroverted evidence at trial, however, was that the defendant was shouting specifically anti-Mexican slurs at Acuna and Rodriguez, not that he expressed any more generalized anti-Hispanic animus. Moreover, the evidence submitted in conjunction with the defendant’s motion for new trial established merely that the defendant’s niece was of Puerto Rican descent, not that the defendant thought favorably of Puerto Ricans or Hispanics in general. . . . The trial judge did not err in denying the defendant’s motion for new trial. . . .

Questions for Discussion

1. In your own words, explain the “purpose” or specific intent that the prosecution must establish beyond a reasonable doubt under the hate crimes statute in order to convict a defendant.
2. List the facts relied on by the prosecution to prove that the defendant possessed a purpose or intent to intimidate. As the defense attorney, what would you argue to persuade the court that your client did not possess the required intent?
3. Had Barnette uttered the same remarks and not physically threatened his neighbors, would he have been found guilty of a hate crime involving a threat to inflict serious bodily harm? Would the police have arrested Barnette for ethnic intimidation had he said nothing and physically threatened his neighbors? Is it significant that this was the first time that Barnette had made these types of statements to his neighbors?
4. As a prosecutor, would you have devoted time and energy to prosecuting Barnette?
5. Would you have considered prosecuting him for assault and battery rather than for a hate crime?

You Decide

5.1 Craig Johnson was convicted of the misdemeanor of making harassing phone calls to his former girlfriend G.B. from February through March 2006. G.B. then obtained a restraining order, which resulted in Johnson discontinuing

the calls. G.B. testified that when she ended their relationship in February 2006, she told Johnson that she did not want to see or hear from him again, and that if he bothered her, she would obtain a restraining order.

Johnson placed 119 calls to G.B.'s home, work, and cell phone numbers during a thirty-day period following the breakup. Most of the calls were brief. G.B. did not answer, and Johnson left messages. Johnson admitted that he knew that the calls were "frustrating" to G.B. and admitted that she had asked him not to call. G.B. testified that Johnson "would break [her] down" and that she had switched jobs to different buildings

several times to try to avoid the calls. Johnson also tried to contact G.B. by appearing uninvited at her home, at a training class that she was attending, and at her child's birthday party.

An individual is liable for making harassing phone calls under Minnesota law if he or she "repeatedly makes telephone calls" or "makes or causes the telephone of another repeatedly or continuously to ring" when these acts are undertaken "with the specific intent to abuse, disturb or cause distress." Johnson argues that the evidence is insufficient to infer that he possessed the specific intent to harass G.B. by telephoning her. He contends that his intent was to express his love and that he wanted to resume their seven-year relationship.

Would you convict Johnson of making harassing phone calls? See *State v. Johnson*, 2008 Minn. App. Unpub. LEXIS 913.

You can find the answer at www.sagepub.com/lippmancl2e

Knowingly

An individual satisfies the knowledge standard when he or she is "aware" that circumstances exist or a result is practically certain to follow from his or her conduct. Examples of knowledge of circumstances are to knowingly "possess narcotics" or to knowingly "receive stolen property." It is sufficient that a person is aware that there is a high probability that property is stolen; he or she need not be certain. 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.

The commentary to the Model Penal Code uses the example of treason to illustrate the difference between purpose and knowledge. In *United States v. Haupt*, Chicago resident Hans Haupt was accused of treason during World War II based on the assistance he provided to his son, whom he knew was a German spy. The U.S. Supreme Court ruled that treason requires a specific intent (purpose) to wage war on the United States. Haupt claimed that as a loving father, he knowingly assisted his son, who unfortunately happened to be sympathetic to the German cause, and he did not possess the purpose to injure the U.S. government. The Supreme Court, however, pointed to Haupt's statements that "he hoped that Germany would win the war" and that "he would never permit his son to fight for the United States" as indicating that Haupt's "son had the misfortune of being a chip off the old block."⁹

In the next case in the chapter, *State v. Nations*, the defendant remained "willfully blind" or deliberately unaware of the criminal circumstances and claims that she did not knowingly violate the law. This type of situation typically arises in narcotics prosecutions in which drug couriers claim to have been unaware that they were transporting drugs.¹⁰



For an international perspective on this topic, visit the study site.

Did the defendant know the dancer's age?

STATE V. NATIONS, 676 S.W.2D 282 (MO. APP. 1984), OPINION BY: SATZ, J.

Issue

Defendant, Sandra Nations, owns and operates the Main Street Disco, in which police officers found a scantily clad

sixteen-year-old girl dancing for tips. Consequently, defendant was charged with endangering the welfare of a child "less than seventeen years old." Defendant was convicted and fined \$1,000. Defendant appeals. We reverse.

Specifically, defendant argues the State failed to show she knew the child was under seventeen and, therefore, failed to show she had the requisite intent to endanger the welfare of a child “less than seventeen years old.” We agree.

Reasoning

The pertinent part of section 568.050 provides as follows:

- (1) A person commits the crime of endangering the welfare of a child if:

- (2) He knowingly encourages, aids or causes a child less than seventeen years old to engage in any conduct which causes or tends to cause the child to come within the provisions of subdivision (1)(c) . . . of section 211.031, RSMo. . . .”

Thus, section 568.050 requires the State to prove the defendant “knowingly” encouraged a child “less than seventeen years old” to engage in conduct tending to injure the child’s welfare, and “knowing” the child to be less than seventeen is a material element of the crime.

“Knowingly” is a term of art, whose meaning is limited to the definition given to it by our present criminal code. Literally read, the code defines “knowingly” as actual knowledge—“A person ‘acts knowingly,’ or with knowledge, (1) with respect . . . to attendant circumstances when he is aware . . . that those circumstances exist. . . .” So read, this definition of “knowingly” or “knowledge” excludes those cases in which “the fact [in issue] would have been known had not the person willfully ‘shut his eyes’ in order to avoid knowing.” The Model Penal Code, the source of our criminal code, does not exclude these cases from its definition of “knowingly.” Instead, the Model Penal Code proposes that “[when] knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence.” . . .

The additional or expanded definition of “knowingly” proposed in section 2.02(7) of the Model Penal Code “deals with the situation British commentators have denominated **willful blindness** or connivance,” the case of the actor who is aware of the probable existence of a material fact but does not satisfy himself that it does not in fact exist. . . . The inference of “knowledge” of an existing fact is usually drawn from proof of notice of substantial probability of its existence, unless the defendant establishes an honest, contrary belief. . . .

Our legislature, however, did not enact this proposed definition of “knowingly.” . . . The sensible, if not compelling, inference is that our legislature rejected the expansion of the definition of “knowingly” to include

willful blindness of a fact, and chose to limit the definition of “knowingly” to actual knowledge of the fact. Thus, in the instant case, the State’s burden was to show defendant actually was aware the child was under seventeen, a heavier burden than showing there was a “high probability” that the defendant was aware that the child was under seventeen. . . .

Facts

The record shows that, at the time of the incident, the child was sixteen years old. When the police arrived, the child was dancing on stage for tips with another female. The police watched her dance for some five to seven minutes before approaching defendant in the service area of the bar. Believing that one of the girls appeared to be “young,” the police questioned defendant about the child’s age. Defendant told them that both girls were of legal age and that she had checked the girls’ identification when she hired them. When the police questioned the child, she initially stated that she was eighteen but later admitted that she was only sixteen. She had no identification.

The State also called the child as a witness. Her testimony was no help to the State. She testified the defendant asked her for identification just prior to the police arriving, and she was merely crossing the stage to get her identification when the police took her into custody. Nor can the State secure help from the defendant’s testimony. She simply corroborated the child’s testimony; i.e., she asked the child for her identification; the child replied she would “show it to [her] in a minute”; the police then took the child into custody.

Holding

These facts simply show defendant was untruthful. Defendant could not have checked the child’s identification, because the child had no identification with her that day, the first day defendant hired the child. This does not prove that defendant knew the child was less than seventeen years old. At best, it proves defendant did not know or refused to learn the child’s age. . . . Having failed to prove defendant knew the child’s age was less than seventeen, the State failed to make a . . . case.

Admittedly, a person in defendant’s shoes can easily avoid conviction of a crime under section 568.050 by simply refusing to check the age of dancers. This result is to be rectified, however, by the legislature, not by judicial redefinition of already precisely defined statutory language or by improper inferences from operative facts. The Model Penal Code’s expanded definition of “knowingly” attracts us by its logic. Apparently, it was not as attractive to our legislature for use throughout our criminal code. . . .

Questions for Discussion

1. Why does the court conclude that the defendant is not guilty under the statute of endangering the welfare of the young dancer?
2. In your view, was the defendant aware that there was a “high probability” that the dancer was under seventeen and for that reason intentionally avoided checking her age?
3. How does the Missouri statute differ from the Model Penal Code in regard to willful blindness? What is the impact of the court decision for offenses involving the possession of narcotics?
4. How would you amend the Missouri statute to eliminate the willful blindness defense?
5. If you were a judge, how would you rule in *Nations*?

You Decide



5.2 Defendant Andy Hypolite is a citizen of Trinidad and Tobago. His cousin and his cousin’s friend offered him a round-trip airline ticket to fly to New York and transport \$70,000 back to Trinidad.

Hypolite was to receive \$6,000 on his return. At the airport in Trinidad, his cousin’s friend gave Hypolite “drink packets” that appeared to be milk products. U.S. Customs officials in New York found that the packets actually contained 2.9 kilograms of cocaine, and they arrested

Hypolite. Hypolite claimed that he was unaware that he was transporting illegal drugs. He conceded that he had a “strong suspicion” that the packets contained narcotics, but he did not ask whether the packages contained drugs, because he “blanked it out” and tried “not to pry too much.”

Was Hypolite guilty of knowingly importing illegal drugs into the United States? See *United States v. Hypolite*, 81 F. App’x 751 (2003).

You can find the answer at www.sagepub.com/lippmancl2e

Recklessly

We all know people who enjoy taking risks and skirting danger and who are confident that they will beat the odds. These reckless individuals engage in obviously risky behavior that they know creates a risk of substantial and unjustifiable harm and yet do not expect that injury or harm will result.

Why does the law consider individuals who are reckless less blameworthy than individuals who act purposely or knowingly?

- Individuals who act purposely deliberately create a harm, and individuals who act knowingly are aware that injury is certain to follow.
- Individuals acting recklessly, in contrast, disregard a strong probability that harm will result.

Recklessness is big, bold, and outrageous. Recklessness involves a conscious disregard of a substantial and unjustifiable risk. This must constitute a gross deviation from the standard of conduct that a law-abiding person would observe in a similar situation. The reckless individual speeds down a street where children usually play, builds and sells to an uninformed buyer a house that is situated on a dangerous chemical waste dump, manufactures an automobile with a gas tank that likely will explode in the event of an accident, or locks the exit doors of a rock club during a performance in which a band ignites fireworks.

The Model Penal Code provides a two-fold test for reckless conduct:

- *A Conscious Disregard of a Substantial and Unjustifiable Risk.* The defendant must be *personally aware* of a severe and serious risk. *Unjustifiable* means that the harm was not created in an effort to serve a greater good, such as speeding down the street in an effort to reach the hospital before a passenger who was in auto accident bleeds to death.
- *A Gross Deviation From the Standard That a Law-Abiding Person Would Observe in the Same Situation.* The defendant must have acted in a fashion that demonstrates a clear lack of judgment and concern for the consequences. This must clearly depart from the behavior that would be expected of other law-abiding individuals. Note this is an *objective test based on the general standard of conduct.*

In *Hranicky v. State*, the next case in the chapter, the court is confronted with the challenge of determining whether the defendant recklessly caused serious bodily injury to his stepdaughter.

*Was the defendant aware of the risk posed by the tigers to his daughter?***Hranicky v. State**, 13–00–431-CR (TEX. APP. 2004), OPINION BY: CATILLO, J.

Bobby Lee Hranicky appeals his conviction for the second-degree felony offense of recklessly causing serious bodily injury to a child. A jury found him guilty, sentenced him to eight years confinement in the Institutional Division of the Texas Department of Criminal Justice, and assessed a \$5,000 fine. On the jury's recommendation, the trial court suspended the sentence and placed Hranicky on community supervision for ten years.

Facts

A newspaper advertisement offering tiger cubs for sale caught the eye of eight-year-old Lauren Villafana. She decided she wanted one. She expressed her wish to her mother, Kelly Dean Hranicky, and to Hranicky, her stepfather. Over the next year, the Hranickys investigated the idea by researching written materials on the subject and consulting with owners of exotic animals. They visited tiger owner and handler Mickey Sapp several times. They decided to buy two rare tiger cubs from him, a male and a female whose breed is endangered in the wild. . . .

Sapp trained Hranicky in how to care for and handle the animals. In particular, he demonstrated the risk adult tigers pose for children. Sapp escorted Hranicky, Kelly Hranicky, and Lauren past Sapp's tiger cages. He told the family to watch the tigers' focus of attention. The tigers' eyes followed Lauren as she walked up and down beside the cages.

The Hranickys raised the cubs inside their home until they were six or eight months old. Then they moved the cubs out of the house, at first to an enclosed porch in the back and ultimately to a cage Hranicky built in the yard. The tigers matured into adolescence. The male reached 250 pounds, the female slightly less. Lauren actively helped Hranicky care for the animals.

By June 6, 1999, the tigers were two years old. Lauren was ten. She stood fifty-seven inches tall and weighed eighty pounds. At dusk that evening, Lauren joined Hranicky in the tiger cage. Suddenly, the male tiger attacked her. It mauled the child's throat, breaking her neck and severing her spinal cord. She died instantly.

The record reflects four different versions of the events that led to Lauren's death. Hranicky told the grand jury that he and Lauren were sitting side-by-side in the cage about 8:00 P.M., petting the female tiger. A neighbor's billy goat cried out. The noise attracted the male tiger's attention. He turned toward the sound. The cry also caught Lauren's attention. She stood and looked at the male tiger. When Lauren turned her head toward the male tiger, "That was too much," Hranicky told the grand jury. The tiger attacked. Hranicky yelled. The tiger grabbed Lauren by the throat and dragged her across

the cage into a water trough. Hranicky ran after them. He struck the tiger on the head and held him under the water. The tiger released the child.

Kelly Dean Hranicky testified she was asleep when the incident occurred. She called for emergency assistance. Through testimony developed at trial, she told the dispatcher her daughter had fallen from a fence. She testified she did not remember giving that information to the dispatcher. However, police officer Daniel Torres, who responded to the call, testified he was told that a little girl had cut her neck on a fence.

Hranicky gave Torres a verbal statement that evening. Torres testified Hranicky told him that he had been grooming the female tiger. He asked Lauren to come and get the brush from him. Lauren came into the cage and grabbed the brush. Hranicky thought she had left the cage, because he heard the cage door close. Then, however, Hranicky saw Lauren's hand "come over and start grooming the female, start petting the female cat, and that's when the male cat jumped over." The tiger grabbed the child by the neck and started running through the cage. It dragged her into the water trough. Hranicky began punching the tiger in the head, trying to get the tiger to release Lauren.

Justice of the Peace James Dawson performed an inquest at the scene of the incident. Judge Dawson testified Hranicky gave him an oral statement also. Hranicky told him Lauren went to the cage on a regular basis and groomed only the female tiger. He then corrected himself to say she actually petted the animal. Hranicky was "very clear about the difference between grooming and petting." Hranicky maintained that Lauren never petted or groomed the male tiger. Hranicky told Dawson that Lauren asked permission to enter the cage that evening, saying "Daddy, can I come in?"

Sapp, the exotic animal owner who sold the Hranickys the tigers, testified Hranicky told him yet another version of the events that night. When Sapp asked Hranicky how it happened, Hranicky replied, "Well, Mickey, she just snuck in behind me." Hranicky admitted to Sapp he had allowed Lauren to enter the cage. Hranicky told Sapp he had lied because he did not want Sapp to be angry with him.

Hranicky told the grand jury that Sapp and other knowledgeable sources had said "there was no problem in taking a child in the cage." He did learn children were especially vulnerable, because the tigers would view them as prey. However, Hranicky told the grand jury, he thought the tigers would view Lauren differently than they would an unfamiliar child. He believed the tigers would not attack her, he testified. They would see her as "one of the family." Hranicky also told the grand jury

the tigers' veterinarian allowed his young son into the Hranickys' tiger cage.

Several witnesses at trial contradicted Hranicky's assessment of the level of risk the tigers presented, particularly to children. Sapp said he told the Hranickys it was safe for children to play with tiger cubs. However, once the animals reached forty to fifty pounds, they should be confined in a cage and segregated from any children. "That's enough with Lauren, any child, because they play rough, they just play rough." Sapp further testified he told the Hranickys to keep Lauren away from the tigers at that point, because the animals would view the child as prey. He also said he told Lauren directly not to get in the cage with the tigers. Sapp did not distinguish between children who were strangers to the tigers and those who had helped raise the animals. He described any such distinction as "ludicrous." In fact, Sapp testified, his own two children had been around large cats all of their lives. Nonetheless, he did not allow them within six feet of the cages. The risk is too great, he told the jury. The Hranickys did not tell him that purchasing the tigers was Lauren's idea. Had he known, he testified, "that would have been the end of the conversation. This was not for children." He denied telling Hranicky that it was safe for Lauren to be in the cage with the tigers.

Charles Curren, an animal care inspector for the U.S. Department of Agriculture (USDA), met Hranicky when Hranicky applied for a USDA license to exhibit the tigers. Curren also denied telling Hranicky it was permissible to let a child enter a tiger's cage. He recalled giving his standard speech about the danger big cats pose to children, telling him that they "see children as prey, as things to play with."

On his USDA application form, Hranicky listed several books he had read on animal handling. One book warned that working with exotic cats is very dangerous. It emphasized that adolescent males are particularly volatile as they mature and begin asserting their dominance. Big cat handlers should expect to get jumped, bit, and challenged at every juncture. Another of the listed books pointed out that tigers give little or no warning when they attack. The book cautioned against keeping large cats such as tigers as pets.

Veterinarian Dr. Hampton McAda testified he worked with the Hranickys' tigers from the time they were six weeks old until about a month before the incident. McAda denied ever allowing his son into the tigers' cage. All large animals present some risk, he testified. He recalled telling Hranicky that "wild animals and female menstrual periods . . . could cause a problem down the road" once both the animals and Lauren matured. Hranicky seemed more aware of the male tiger, the veterinarian observed, and was more careful with him than with the female. . . .

James Boller, the chief cruelty investigator for the Houston Society for the Prevention of Cruelty to Animals, testified that tigers, even those raised in captivity, are wild animals that act from instinct. Anyone who enters a cage with a conscious adult tiger should bring a prop to use as

a deterrent. Never take one's eyes off the tiger, Evans told the jury. Never make oneself appear weak and vulnerable by diminishing one's size by crouching or sitting. Never bring a child into a tiger cage. The danger increases when the tigers are in adolescence, which begins as early as two years of age for captive tigers. Entering a cage with more than one tiger increases the risk. Entering with more than one person increases the risk further. Entering with a child increases the risk even more. Tigers' activity level depends on the time of day. . . . Boller identified eight o'clock on a summer evening as a high activity time. A child should never enter a tiger cage in the first place, Boller testified. Taking a child into a tiger cage "during a high activity time for the animal is going to increase your risk dramatically."

Dr. Richard Villafana, Lauren's biological father, told the jury he first learned of the tigers when his daughter told him over the phone she had a surprise to show him at their next visit. When he came to pick her up the following weekend, he testified, she took him into the house and showed him the female cub. Villafana described his reaction as "horror and generalized upset and dismay, any negative term you care to choose." He immediately decided to speak to Kelly Hranicky about the situation. He did not do so in front of Lauren, however, in an effort to avoid a "big argument." Villafana testified he later discussed the tigers with Kelly Hranicky, who assured him Lauren was safe. . . . As the tigers matured, no one told Villafana the Hranickys allowed Lauren in the cage with them. Had he known, he "would have talked to Kelly again" and "would have told her that [he] was greatly opposed to it and would have begged and pleaded with her not to allow her in there." He spoke to his daughter about his concerns about the tigers "almost every time" he saw her.

Kelly Hranicky told the jury Lauren was a very obedient child. Villafana agreed. Lauren would not have gone into the tiger cage that evening without Hranicky's permission.

Issue

. . . Did Hranicky act in a reckless fashion?

Reasoning

The record reflects that each of the witnesses who came into contact with Hranicky in connection with the tigers testified they told him that (1) large cats, even those raised in captivity, are dangerous, unpredictable wild animals; and (2) children were particularly at risk from adolescent and adult tigers, especially males. Expert animal handlers whom Hranicky consulted and written materials he claimed to have read warned Hranicky that the risks increased with adolescent male tigers, with more than one person in the cage, with more than one tiger in the cage, at dusk during the animals' heightened activity period, and when diminishing one's size by sitting or crouching on the ground. They each cautioned that

tigers attack swiftly, without warning, and are powerful predators.

Further, Hranicky's initial story to Sapp that Lauren had sneaked into the cage evidences Hranicky's awareness of the risk. The jury also could have inferred his awareness of the risk when he concealed from Sapp that the family was purchasing the tigers for Lauren. The jury also could have inferred Hranicky's consciousness of guilt when he gave several different versions of what happened.

On the other hand, the record shows that before buying the tigers, Hranicky researched the subject and conferred with professionals. He received training in handling the animals. Further, Kelly Hranicky testified she also understood the warnings about not allowing children in the tiger cage to apply to strangers, not to Lauren. Hranicky told the grand jury he did not think the warnings applied to children, like Lauren, who had helped raise the animal. He said he had seen other handlers, including Sapp and McAda, permit Lauren and other children to go into tiger cages. He testified Currer told him it was safe to permit children in tiger cages. Further, while the State's witness described zoo policies for handling tigers, those policies

were not known to the general public. Finally, none of the significant figures in Lauren's life fully appreciated the danger the tigers posed for Lauren. Hranicky was not alone in not perceiving the risk. . . .

Holding

Hranicky testified to the grand jury he did not view the risk to be substantial, because he thought the tigers were domesticated and had bonded with the family. He claimed not to have any awareness of any risk. The tigers were acting normally. Lauren had entered the cage numerous times to pet the tigers with no incident. Further, he asserted, other than a minor scratch by the male as a cub, the tigers had never harmed anyone. Thus, he argues, he had no knowledge of any risk.

Viewing all the evidence neutrally, favoring neither Hranicky nor the State, we find that proof of Hranicky's guilt of reckless injury to a child is not so obviously weak as to undermine confidence in the jury's determination. Nor do we do not find that the proof of his guilt is greatly outweighed by contrary proof.

Questions for Discussion

1. Did Hranicky's disregard constitute a substantial and unjustifiable risk? Did his actions constitute a gross deviation from the standard of conduct that a law-abiding person would observe in a similar situation?
2. Why does the court consider it to be a close call as to whether Hranicky was aware of the risk posed by the tigers to Lauren?
3. Would the result be the same in the event that the tigers attacked Lauren when they were tiger cubs and were first living in the home?
4. What if Bobby Lee Hranicky had been mauled and killed by the tiger? Would a court convict Kelly Hranicky of recklessly causing Bobby Lee's death?

You Decide



5.3 Norma Suarez left home with her son P and her daughters N.E. and A.E. in the car. She stopped to visit Michelle Dominguez and then drove to the home of Violanda Corral, P's grandmother. Suarez left P at Corral's home and started toward home. N.E. was in the front passenger seat and A.E. was in the back seat. Suarez arrived home to find that A.E. was not in the auto. It later was learned that A.E. had fallen from the car as the vehicle crossed the Continental Bridge, was struck by another car, and died of head injuries. Suarez was convicted of recklessly endangering A.E., who was three years old at the time, by failing to properly supervise her child. It was a crime in Texas at the time of this incident for the operator of a motor vehicle to fail to secure a child over two and younger than four years of age by a seat belt or child seat.

An investigating police officer testified that A.E. fell out of the front passenger window. The officer also found that the

seat belt clips in the back seat were "pushed down . . . along the crease" indicating "non-use." Suarez contended that A.E. put the belt on herself when they left home. Dominguez testified that she later buckled A.E. in the car. Corral stated that she told Suarez to "make sure you buckle up the girls" and testified that she saw Suarez look toward the back seat and then put N.E. in the front seat. Corral indicated that she had no doubt that A.E. was properly secured with a seat belt. There was testimony that A.E. could unbuckle the seat belt herself. Other evidence indicated that Suarez stopped at a red light before driving across the bridge to ensure that A.E. was asleep.

Did Suarez recklessly cause A.E.'s death? See *Suarez v. State*, Tex. App. LEXIS 10799 (2003).

You can find the answer at www.sagepub.com/lippmancl2e

Negligently

Recklessness entails creating and disregarding a risk. The reckless individual consciously lives on the edge, walking on a ledge above the street. Negligence, in contrast, involves engaging in harmful and dangerous conduct while being unaware of a risk that a reasonable person would appreciate. The reckless individual would “play around” and push someone off a cliff into a pool of water that he or she knows contains a string of dangerous boulders and rocks. The negligent individual simply does not bother to check whether the water conceals a rock quarry before pushing another person off the cliff. Recklessness involves an awareness of harm that is lacking in negligence, and for that reason is considered to be of greater “moral blameworthiness.”

In considering negligence, keep the following in mind:

- *Mental State.* The reckless individual is aware of and disregards the substantial and unjustifiable risk; the negligent individual is not aware of the risk.
- *Objective Standard.* Recklessness and negligence ask juries to decide whether the individual’s conduct varies from that expected of the general public. The reckless individual grossly deviates from the standard of care that a law-abiding person would demonstrate in the situation; the negligent individual grossly deviates from the standard of care that a reasonable person would exhibit under a similar set of circumstances.

It is not always easy to determine whether a defendant was unaware of a risk and is guilty of negligence rather than recklessness. In *Tello v. State*, the defendant was convicted of criminally negligent homicide after a trailer that he was pulling came unhitched, jumped a curb, and killed a pedestrian. Tello argued that he had not previously experienced difficulties with the trailer and claimed to have been unaware that safety chains were required or that the hitch was clearly broken and in need of repair. The court convicted Tello of negligent homicide based on the fact that a reasonable person would have been aware that the failure to safely secure the trailer hitch constituted a gross deviation from the standard of care that an ordinary person would have exhibited and posed a substantial risk of death. Is it credible to believe that Tello regularly used the trailer and yet lacked awareness that the trailer was secured so poorly that a bump in the road was able to separate the trailer from the truck?¹¹

People v. Baker illustrates the difficulty of distinguishing negligence from recklessness.

Was the babysitter guilty of negligent or reckless homicide?

PEOPLE V. BAKER, 771 N.Y.S.2D 607 (2004), OPINION BY: ROSE, J.

Facts

After a three-year-old child died while defendant was babysitting in the child’s home, she was charged with both intentional and depraved indifference murder. At trial, the evidence established that, on a warm summer night, the victim died of hyperthermia as a result of her prolonged exposure to excessive heat in a bedroom of her foster parents’ apartment. The excessive heat was caused by the furnace having run constantly for many hours as the result of a short circuit in its wiring. The victim was unable to leave her bedroom, because defendant engaged the hook and eye latch on its door after putting her to bed for the night. Defendant then remained in the apartment watching television while the furnace ran

uncontrollably. The victim’s foster parents and another tenant testified that when they returned in the early morning hours and found the victim lifeless in her bed, the living room of the apartment where defendant sat waiting for them felt extremely hot, like an oven or a sauna, and the victim’s bedroom was even hotter. Temperature readings taken later that morning during a police investigation while the furnace was still running indicated that the apartment’s living room was 102 degrees Fahrenheit, the victim’s bedroom was 110 degrees Fahrenheit, and the air coming from the vent in the bedroom was more than 130 degrees Fahrenheit.

In characterizing defendant’s role in these events, the prosecutor argued that the key issue for the jury was whether or not defendant had intended to kill the victim.

The prosecution's proof on this issue consisted primarily of the second of two written statements given by defendant to police during a four-hour interview conducted a few hours after the victim was found. In the first statement, defendant related that she had been aware of the oppressive heat in the victim's bedroom, kept the victim latched in because the foster parents had instructed her to do so, had not looked at or adjusted the thermostat even though the furnace was running on a hot day, heard the victim kicking and screaming to be let out, and felt the adverse effects of the heat on herself. The second statement, which defendant disavowed at trial, described her intent to cause the victim's death by turning up the thermostat to its maximum setting, closing all heating vents except the one in the victim's bedroom, and placing additional clothing on the victim, which she then removed after the victim died. Because these actions differed from those described in the first statement, and each reflects an intent to kill the victim, the jurors' initial task, as proposed by the prosecutor during summation, was to decide which statement they would accept.

After trial, the jury acquitted defendant of intentional murder, thereby rejecting the second statement, and instead convicted her of depraved indifference murder of a child. County court sentenced her to a prison term of fifteen years to life, and she now appeals.

Issue

Could the jury reasonably infer from the evidence a culpable mental state greater than criminal negligence due to the unique combination of events that led to the victim's death, as well as the lack of proof that defendant actually perceived and ignored an obvious and severe risk of serious injury or death?

Reasoning

The jury's finding that defendant was not guilty of intentional murder clearly indicates that it rejected defendant's second statement containing an explicit admission of an intent to kill. Although the excessive heat ultimately proved fatal, and defendant failed to remove the victim from her bedroom and made no effort to reduce the heat, the evidence does not establish that the defendant created dangerous conditions supporting the jury verdict of a wanton indifference to human life or a depravity of the mind.

Is the defendant guilty of reckless or negligent homicide? There is no evidence that defendant knew the actual temperature in any portion of the apartment or subjectively perceived a degree of heat that would have made her aware that serious injury or death from hyperthermia would almost certainly result. Put another way, the risk of serious physical injury or death was not so obvious under the circumstances that it demonstrated defendant's actual awareness. There was only circumstantial evidence on this point, consisting of the subjective perceptions of other persons who later came into the apartment from cooler outside temperatures. Defendant, who had been in the

apartment as the heat gradually intensified over many hours, and who was described by others as appearing flushed and acting dazed, could not reasonably be presumed to have had the same perception of oppressive and dangerous heat. Rather, defendant testified that she knew only that the heat made her feel dizzy and uncomfortable, and she denied any awareness of a risk of death. Most significantly, there is no dispute that defendant remained in a room that was nearly as hot as the victim's bedroom for approximately nine hours and checked on the victim several times before the foster parents returned. This evidence of defendant's failure to perceive the risk of serious injury stands unrefuted by the prosecution.

Defendant's ability to appreciate such a risk was further brought into doubt by the prosecution's own expert witness, who described her as having borderline intellectual function, learning disabilities, and a full-scale IQ of only seventy-three. We also note that here, unlike where an unclothed child is shut outside in freezing temperatures, the circumstances are not of a type from which it can be inferred without a doubt that a person of even ordinary intelligence and experience would have perceived a severe risk of serious injury or death. . . .

A person is guilty of manslaughter in the second degree when he or she recklessly causes the death of another person and of criminally negligent homicide when, with criminal negligence, he or she causes the death of another person. Reckless criminal conduct occurs when the actor is aware of and consciously disregards a substantial and unjustifiable risk, and criminal negligence is the failure to perceive such a risk.

As we have noted, there is no support for a finding that defendant perceived and consciously disregarded the risk of death that was created by the combination of the "runaway" furnace and her failure to release the victim from her bedroom. None of defendant's proven conduct reflects such an awareness, and the fact that she subjected herself to the excessive heat is plainly inconsistent with a finding that she perceived a risk of death.

Holding

However, the evidence was sufficient to establish defendant's guilt beyond a reasonable doubt of criminally negligent homicide. A jury could reasonably conclude from the evidence that defendant should have perceived a substantial and unjustifiable risk that the excessive heat, in combination with her inaction, would be likely to lead to the victim's death. . . . Since defendant was the victim's caretaker, this risk was of such a nature that her failure to perceive it constituted a gross deviation from the standard of care that a reasonable person in the same circumstances would observe in such a situation. Thus, defendant's conduct was shown to constitute criminal negligence, and such a finding would not be against the weight of the evidence. Accordingly, we reduce the conviction from depraved indifference murder to criminally negligent homicide and remit the matter to county court for sentencing on the reduced charge.

Questions for Discussion

1. Explain the court's factual basis for determining that the defendant should be held liable for negligent rather than reckless homicide.
2. Should the appellate court overturn the verdict of the jurors who actually observed the trial?
3. As a judge, what would be your ruling in this case?



See more cases on the study site: [Koppersmith v. State, www.sagepub.com/lippmancc12e](http://Koppersmith.v.State,www.sagepub.com/lippmancc12e)

You Decide



5.4 The fifty-seven-year-old defendant Strong emigrated from Arabia to China and then to the United States. He testified that he was a member of the Sudan Muslim religious faith since birth and became one of the sect's leaders. The

three central beliefs of the religion are "cosmetic consciousness, mind over matter, and psysiomatic psychomatic consciousness." Mind over matter empowers a master or leader to lie on a bed of nails without bleeding, walk through fire or on hot coals, perform surgical operations without anesthesia, raise people off the ground, and suspend a person's heartbeat, pulse, and breathing while the individual remained conscious. The defendant claimed that he could stop a follower's heartbeat and breathing and plunge knives into an adherent's chest without injuring the person. Strong testified that he performed this ceremony countless times over the previous forty years.

On January 28, 1972, Strong performed this ceremony on Kenneth Goings, a recent recruit to the sect. The wounds

from the hatchet and three knives that Strong inserted into Goings proved fatal. Prior to being stabbed, Goings objected, and the defendant stated that "it will be all right, son." The defendant and one of his adherents testified that they perceived no danger and, in fact, the adherent had volunteered to participate. Another member of the sect claimed that Strong had performed this ritual on another occasion without harming the individual involved in the ritual.

The defendant was convicted of reckless manslaughter at trial and appealed the refusal of the trial judge to instruct the jury to consider a conviction for criminally negligent homicide. Should the judge remand the case for a new trial and instruct the trial court judge to permit the jurors to decide for themselves whether the defendant is guilty of either reckless or negligent homicide? See *People v. Strong*, 338 N.E.2d 602 (N.Y. 1975).

You can find the answer at www.sagepub.com/lippmancc12e

Strict Liability

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."¹² 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.

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. For instance, in *State v. York*, the defendant was sentenced to one year in prison in Ohio after he was convicted of having touched the buttocks of an eleven-year-old girl. The appellate court affirmed his conviction for "gross sexual imposition" and ruled that this was a strict liability offense and that the prosecutor was required to demonstrate only a prohibited contact with an individual under thirteen that could be perceived by the jury as sexually arousing or gratifying to the defendant.¹³

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. 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.¹⁴

The Model Penal Code, in 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., result in loss of the right to vote) that flows from a criminal conviction.

In the next case in the chapter, *State v. Walker*, Walker was convicted of knowingly or intentionally delivering cocaine within 1,000 feet of a school. The Indiana Supreme Court was asked to decide whether the trial court was correct in ruling that the prosecution was not required to establish that Walker knew that there was a school nearby, because this is a strict liability offense. The answer was important to Walker, because delivering the cocaine within 1,000 feet of a school enhanced his sentence from ten to twenty years in prison. Pay attention to the majority and to the dissenting opinion, and ask yourself whether this should be a strict liability offense.

Is dealing in cocaine within 1,000 feet of a school a strict liability offense?

STATE V. WALKER, 668 N.E.2D 243 (IND. 1996), OPINION BY: SHEPHARD, C. J.

Issue

Appellant Aaron Walker contends that to sustain a conviction for dealing in cocaine within 1,000 feet of a school, as a class A felony, the State must prove that the defendant had actual knowledge that the sale was occurring within 1,000 feet of a school.

Facts

The State charged Walker with dealing in cocaine after he sold the drug to an undercover police officer, Ernie Witten. Armed with a \$20 bill to make a purchase and a microphone taped to his chest, Witten drove to the parking lot of an Indianapolis apartment complex near

Public School No. 114. He noticed a group of young men sitting under a shade tree. One of these motioned to Witten, a sign the officer interpreted as asking what the officer wanted. Witten held up one finger, intending to indicate that he wanted one rock of cocaine. The young man made another motion that Witten construed as an instruction to pull around. The officer did so.

Once Witten had parked his truck, Walker approached and asked what he was looking for. Witten replied he wanted “a twenty,” which is street slang for \$20 worth of crack cocaine. Walker reached into his pocket, took out a plastic bag containing “several rocky hard white substances,” and handed one to Witten. Witten gave Walker the marked \$20 bill and the transaction was over.

Walker was eventually arrested and charged. A jury found him guilty of dealing in cocaine as a class A felony and determined that he was a habitual offender. The trial judge gave him the presumptive sentence for dealing, thirty years, and added thirty years for the habitual offender finding.

The statute under which Walker was convicted declares that “(a) A person who: (1) Knowingly or intentionally . . . (C) Delivers . . . cocaine . . . commits dealing in cocaine, a Class B felony punishable by ten years in prison.” The statute elevates the offense to a class A felony punishable by thirty years in prison if the person “delivered . . . the drug in or on school property or within one thousand (1,000) feet of school property or on a school bus.”

Reasoning

Walker does not dispute the evidence offered at trial that the transaction occurred 542 feet from the school. The statute does not contain any express requirement that a defendant know that a transaction is occurring within 1,000 feet of a school, but Walker argues that permitting enhancement of the crime to a class A felony without such proof violates the due process requirement that a conviction rest on proof of each element of the crime. While Walker’s argument is difficult to assess in its summary form, we perceive the question to be whether we should interpret the statute as requiring separate proof of scienter with respect to an element for which the legislature has not specifically required proof of knowledge. We have encountered this question in a variety of settings, including statutes we concluded were meant to establish strict liability for so-called white collar crimes. Conversely, Indiana courts have required proof of mental culpability in a number of [other] crimes where statutes did expressly provide that element (e.g., a statute punishing possession of a handgun with an altered serial number requires proof of knowledge of modification of serial number).

Professors LaFave and Scott accurately describe this question as “whether the legislature meant to impose liability without fault or, on the other hand, really meant to require fault, though it failed to spell it out clearly.” We noted with approval the seven factors LaFave and Scott have suggested be balanced in deciding this question. One of these factors, the severity of the punishment,

suggests that the legislature might have intended to require proof of mental state for the enhancement of dealing in cocaine. Other factors, particularly the great danger of the prohibited conduct and the great number of expected prosecutions, suggest that the General Assembly likely did intend to create a strict liability enhancement. These factors are

1. the legislative history, title, or context of a criminal statute;
2. similar or related statutes;
3. the severity of punishment (greater penalties favor a culpable mental state requirement);
4. the danger to the public of the prohibited conduct (greater danger disfavors need for culpable mental state requirement);
5. the defendant’s opportunity to ascertain the operative facts and avoid the prohibited conduct;
6. the prosecutor’s difficulty in proving the defendant’s mental state; and
7. the number of expected prosecutions (greater numbers suggest that crime does not require a culpable mental state).

Holding

Our assessment of these factors makes it difficult to conclude that the General Assembly intended to require separate proof the defendant knew that the dealing occurred near a school but failed to articulate its intent. Moreover, we can imagine an altogether rational reason the legislature might decide to write a statute with a strict liability punishment provision. As Judge Staton wrote for the court of appeals, “A dealer’s lack of knowledge of his proximity to the schools does not make the illegal drug any less harmful to the youth in whose hands it may eventually come to rest.” Accordingly, we hold that the conviction was not deficient for failure to prove that Walker knew he was within 1,000 feet of a school when he committed the crime. Accordingly, we affirm the judgment of the trial court.

Dissenting, *DeBruler, J.*

The pertinent language of the Indiana Dealing in Cocaine statute reads as follows:

- (a) A person who knowingly or intentionally . . . delivers . . . cocaine or a narcotic drug, pure or adulterated, classified in schedule I or II . . . : commits dealing in cocaine or a narcotic drug, a Class B felony, except as provided in subsection (b).

Subsection (b) further provides that

the offense is a Class A felony if the amount of the drug involved weighs three (3) grams or

more; the person delivered or financed the delivery of the drug to a person under eighteen (18) years of age at least three (3) years junior to the person; or the person delivered or financed the delivery of the drug in or on school property or within one thousand (1,000) feet of school property or on a school bus.

Given this language, we are confronted with the question of which parts of the statute the “knowingly or intentionally” language is supposed to modify. The “knowingly or intentionally” phrase in Indiana’s Dealing in Cocaine statute, as well as the lack of any language manifesting a contrary purpose, causes it to be more plausibly read to target the drug trade involving children near schools rather than to create a drug free zone around our state’s schools. However, its purpose is rather to target those who would sell to school age children and, worse still, recruit them as distributors of illicit drugs. The intent language actually used in the statute indicates a legislative intent to punish the schoolyard pusher more harshly than those who sell to adults in their apartments and homes that merely happen to be within a zone. The legislature could have reasonably believed that drug dealers who sell to adults are bad enough, but those who lurk in the playgrounds of our nation’s school to prey upon school age children are

worse still. By this reading of the statute, the greater harm created by this particular form of drug trafficking and the greater moral culpability of one involved in such trafficking led the legislature to require proof of a greater level of knowledge for the Class A felony conviction than for the Class B conviction under the Dealing in Cocaine statute. I therefore believe that this reading of the statute clearly requires the State to prove that evil intent by showing that appellant knew that he was dealing within 1,000 feet of a school when he was dealing cocaine.

When the State fails to prove all the elements of a criminal statute, the conviction cannot stand. In the present case, the prosecution made no showing at trial that appellant knew his distance from the school. The only proof addressing the “within 1,000 feet of a school” element of the statute was Detective Witten’s testimony that he and his colleagues measured the distance from the site of the controlled buy to the front of Public School 114. Therefore, even the evidence most favorable to the verdict and the reasonable inferences therefrom fail to provide probative evidence from which a reasonable trier of fact could infer the requisite scienter beyond a reasonable doubt.

I would remand this case to the trial court for appellant to be sentenced for the Class B felony of dealing in cocaine.

Questions for Discussion

1. What are the facts in *Walker* that resulted in the enhancement of his sentence for the narcotics offense?
2. Discuss the impact on Walker’s prison sentence of his having been convicted of selling narcotics within 1,000 feet of a school.
3. Why does the majority opinion conclude that the selling of cocaine within 1,000 feet of a school is a strict liability offense? Does the arrest of Walker fit within the purpose of the statute?
4. Summarize the argument of the dissenting judge.
5. How would you decide this case?

Cases and Comments

1. **Handguns.** A Virginia statute, §18.2–308.1(B), makes it a felony for an individual to possess “any firearm designed or intended to expel a projectile . . . while such person is upon . . . any public . . . elementary . . . school, including buildings and grounds. . . .” Deena Estaban, 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. She had taught a class in the room earlier in the day; the class was composed primarily of children in wheelchairs. The defendant claimed that she inadvertently left the gun in the bag that she used to carry various teaching aids. After teaching in the classroom, Estaban took the teaching aids with her but left the yellow bag. Estaban explained that she placed the gun in the bag and took it to the store on the previous Saturday and then forgot that the

pistol was in the bag and inadvertently carried it into the school.

The trial court interpreted the statute as providing for a strict liability offense and ruled that the prosecution was not required to demonstrate criminal intent. Estaban was convicted and received a suspended term of incarceration and a fine. The Virginia Supreme Court ruled that the legislature intended to assure that a safe environment exists on or about school grounds and that the presence of a firearm creates a danger for students, teachers, and other school personnel. The court stressed that the fact that Estaban “innocently” brought a loaded revolver into the school “does not diminish the danger.” A footnote in the decision indicated that Estaban possessed a concealed handgun permit that specifically did not authorize possession of a handgun on school property.

Would requiring a criminal intent impede the safety and security of the school? Should teachers be permitted to arm themselves? See *Esteban v. Commonwealth*, 587 S.E.2d 523 (Va. 2003).

2. **An Open Bottle of Intoxicating Liquor.** 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.” This does not extend to the trunk or to other areas not normally occupied by the driver or passengers. 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 passed all standard field sobriety tests and was issued a citation for a violation of the open bottle statute.

At trial, Loge testified that the bottle was not his, but he nevertheless was convicted based on a determination by the trial and appellate court that this was a strict liability offense. The Minnesota Supreme Court affirmed that the plain language of the statute indicated that the legislature intended this to be a strict liability offense and that a knowledge requirement would make conviction for possession difficult, if not insurmountable. The Supreme Court also observed that drivers who are aware of this statute will carefully check any case of packaged alcohol before driving in order to ensure that each container’s seal is not broken. The dissent noted that the language “allow to be kept” clearly indicated a knowledge requirement. Absent a provision for intent, there is a risk that individuals will be convicted “not simply for an act that the person does not know is criminal, but also for an act the person does not even know he is committing.”

Does the prevention of “drinking and driving” justify the possible conviction of innocent individuals? See *State v. Loge*, 608 N.W.2d 152 (Minn. 2000).

You Decide



5.5 In July 1995, Ronnie Polk was the passenger in an automobile that was stopped for a moving violation in close proximity to Highland Christian School in Lafayette, Indiana. A police officer’s search led to the seizure of crack

cocaine and several tablets of diazepam. In Indiana, possession of more than three grams of cocaine within 1,000 feet of a school is enhanced from a Class D felony to a Class A felony punishable by thirty years in prison, and possession of a “Schedule IV” drug without a doctor’s prescription within 1,000 feet of a school is enhanced from a Class D to a Class C felony, punishable by four years in prison.

Polk was convicted and sentenced for both offenses, and his two sentences were to run concurrently. Polk also was

convicted of being a habitual offender, and his combined sentence for the three convictions totaled fifty years. Polk maintains that the legislature did not intend for the possession of cocaine within 1,000 feet of a school to be a strict liability offense that applied to passengers possessing narcotics in automobiles, because this did not advance Indiana’s interest in protecting schoolchildren. Applying the statute to individuals in automobiles would allow the police to wait to stop automobiles suspected of containing narcotics as they approached within 1,000 feet of a school.

How would you decide *Polk v. State* in light of the precedent established in *State v. Walker*? See *Polk v. State*, 683 N.E.2d 567 (Ind. 1997).

You can find the answer at www.sagepub.com/lippmancl2e

Concurrence

We now have covered 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 with an intent to commit a felony therein. The classic example is an individual who enters a cabin to escape the cold and after entering decides to steal food and clothing. In this instance, the intent did not coincide with the criminal act and the defendant will not be held liable for burglary.

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.” The next case is *State v. Rose*. Can you explain why the defendant’s guilt for manslaughter depends on the prosecution’s ability to establish a concurrence between the defendant’s act and intent?

The Legal Equation

Concurrence

=

Mens rea (in unison with)

+

actus reus.

Was there a concurrence between the defendant's criminal act and criminal intent?

STATE V. ROSE, 311 A.2D 281 (R.I. 1973), OPINION BY: ROBERTS, J.

These are two indictments, one charging the defendant, Henry Rose, with leaving the scene of an accident, death resulting . . . and the other charging the defendant with manslaughter. The defendant was tried on both indictments to a jury in the superior court, and a verdict of guilty was returned in each case. Thereafter the defendant's motions for a new trial were denied. . . .

Facts

These indictments followed the death of David J. McEnery, who was struck by defendant's motor vehicle at the intersection of Broad and Summer Streets in Providence at about 6:30 P.M. on April 1, 1970. According to the testimony of a bus driver, he had been operating his vehicle north on Broad Street and had stopped at a traffic light at the intersection of Summer Street. While the bus was standing there, he observed a pedestrian starting to cross Broad Street, and as the pedestrian reached the middle of the southbound lane he was struck by a "dirty, white station wagon" that was proceeding southerly on Broad Street. The pedestrian's body was thrown up on the hood of the car. The bus driver further testified that the station wagon stopped momentarily, the body of the pedestrian rolled off the hood, and the car immediately drove off along Broad Street in a southerly direction. The bus operator testified that he had alighted from his bus, intending to attempt to assist the victim, but was unable to locate the body.

Subsequently, it appears from the testimony of a police officer, about 6:40 P.M. the police located a white station wagon on Haskins Street, a distance of some 610 feet from the scene of the accident. The police further testified that a body later identified as that of David J. McEnery was wedged beneath the vehicle when it was found and that the vehicle had been registered to defendant. . . .

Issue

The defendant is contending that if the evidence is susceptible of a finding that McEnery was killed upon impact, he was not alive at the time he was being dragged under defendant's vehicle, and defendant could not be found guilty of manslaughter. An examination of the testimony of the only medical witness makes it clear that, in his opinion, death could have resulted immediately upon impact by reason of a massive fracture of the skull. The medical witness also testified that death could have resulted a few minutes after the impact but conceded that he was not sure when it did occur.

Reasoning

We are inclined to agree with defendant's contention in this respect. Obviously, the evidence is such that death could have occurred after defendant had driven away with McEnery's body lodged under his car and, therefore, be consistent with guilt. On the other hand, the medical testimony is equally consistent with a finding that McEnery could have died instantly upon impact and, therefore, be consistent with a reasonable conclusion other than the guilt of defendant.

Holding

It is clear, then, that, the testimony of the medical examiner lacking any reasonable medical certainty as to the time of the death of McEnery, we are unable to conclude that on such evidence defendant was guilty of manslaughter beyond a reasonable doubt. Therefore, we conclude . . . that it was error to deny defendant's motion for a directed verdict of acquittal. . . .

We are unable, however, to reach the same conclusion concerning the denial of the motion for a directed verdict of acquittal . . . in which defendant was charged with leaving the scene of an accident. . . .

Questions for Discussion

1. Why is it important to determine whether the victim died on impact with Rose's automobile or whether the victim was alive at the time he was dragged under the defendant's automobile? What is the ruling of the Rhode Island Supreme Court?
2. How does this case illustrate the principle of concurrence?

You Decide



5.6 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 brought to

Kentucky and 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 www.sagepub.com/lippmancl2e

Causation

You now know that a crime entails a *mens rea* that concurs with an *actus reus*. Certain crimes (termed *crimes of criminal conduct causing a criminal harm*) also require that the criminal act cause a particular harm or result: the death or maiming of a victim, the burning of a house, or damage to property.

Causation is central to criminal law and must be proven beyond a reasonable doubt. The requirement of causality is based on two considerations:¹⁵

- *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.
- *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 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 appears to have contributed to the victim 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 in any event? We can begin to answer 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**.

As noted, causality arises in prosecutions for crimes that require a particular result, such as murder, maiming, arson, and damage to property. The prosecution must prove beyond a reasonable doubt that the harm to the victim resulted from the defendant's unlawful act. 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, would the victim 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 seemed 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 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 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 protest 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

- 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 causes 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 Joshua Dressler helps us answer 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*). The classic case is an individual who runs from a mugger and is hit by and dies from injuries sustained when a tree that has been struck by lightning falls on him. It is true that “but for” the robbery, the victim would not have fled. The defendant nevertheless did not order or compel the victim to run and certainly had nothing to do with the lightning strike that felled the tree. As a result, the perpetrator generally is not held legally liable for a death that results from this unpredictable combination of an attempted robbery, bad weather, and a tree.

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 a 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.¹⁶ 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 Joshua Dressler notes that in this case the unfortunate victim has found himself or herself in the "wrong place at the wrong time."¹⁷

Defendants will be held responsible for the harm resulting from coincidental causes in those *rare* instances in which the event is "normal and foreseeable" or could have been reasonably predicted. In *Kibbe v. Henderson*, two defendants were held liable for the death of George Stafford, whom they robbed and abandoned on the shoulder of a dark, rural two-lane highway on a cold, windy, and snowy evening. Stafford's trousers were down around his ankles, his shirt was rolled up toward his chest, and the two robbers placed his shoes and jacket on the shoulder of the highway and did not return Stafford's glasses. The near-sighted and drunk Stafford was sitting in the middle of a lane on a dimly lit highway with his hands raised when he was hit and killed by a pickup truck traveling ten miles per hour over the speed limit that coincidentally happened to be passing by at the precise moment that Stafford wandered into the highway.¹⁸

The defendant generally is legally liable for foreseeable coincidental intervening acts.

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 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 floatation devices on board, and the intoxicated Armitage and Maskovich clung to the capsized vessel. Maskovich disregarded Armitage's warning and 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."¹⁹

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.²⁰

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.²¹

In *United States v. Hamilton*, the defendant knocked the victim down and jumped on 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 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.²²

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 Model Penal Code

The Model Penal Code 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 Model Penal Code, 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 Model Penal Code requires that we look to see whether it would be unjust to hold the defendant responsible.²³

The next two cases, *Banks v. Commonwealth* and *People v. Kern*, ask whether it is just and fair to hold a defendant liable as the legal or proximate cause of the victim’s death.

The Legal Equation

| | | | | |
|--------------------------|---|--|---|---------------------------|
| Causality | = | Cause in fact | + | legal or proximate cause. |
| Cause in fact | = | “But for” the defendant’s criminal act, the victim would not be injured or dead. | | |
| Legal or proximate cause | = | Whether just or fair to hold the defendant criminally responsible. | | |
| Intervening acts | = | Coincidental intervening acts limit liability where unforeseeable; responsive intervening acts limit liability where unforeseeable and abnormal. | | |

Was the defendant's act the proximate cause of the victim's death?

BANKS v. COMMONWEALTH, 586 S.E.2D 876 (VA. CT. APP. 2003), OPINION BY: CLEMENTS, J.

Damon Lynn Banks was convicted in a jury trial of involuntary manslaughter. . . . On appeal, he contends the trial court erred in finding the evidence sufficient to sustain his conviction. We disagree and affirm the conviction. . . .

Facts

The evidence established that in the early morning hours of September 10, 2000, Banks and four other marines, Terrance Jenkins, Francisco Ortez, Khaliah Freeman, and Tory Benjamin, left the Coppermine Club in Petersburg, Virginia. As they walked down Washington Street in the direction of the Howard Johnson Hotel, the victim, Keith Aldrich, came up behind them. The marines stopped so that some of them could urinate, and Aldrich walked past them. The marines began to talk and joke with Aldrich. Aldrich joked back. Benjamin threw a twenty-ounce plastic coke bottle at Aldrich, who thereafter began walking in the middle of the street. Cars coming down the street honked and flashed their lights at him.

As the marines approached the intersection with Interstate 95 (I-95), Aldrich asked them if they were in the army. They told Aldrich they were in the marines, and Aldrich responded that he too was in the marines. Believing Aldrich was lying, Banks stood in front of Aldrich and began to question him about Marine Corps values and the chain of command. Aldrich tried to get around Banks, but Banks got in front of him again. When Aldrich put his hands up, Ortez tackled him and hit him in the face. Aldrich then stumbled and started running down the I-95 off-ramp toward the interstate. Banks ran after Aldrich. Benjamin and Freeman followed Banks, and Ortez and Jenkins remained at the top of the ramp.

Benjamin ran part way down the ramp after Banks. There, he observed Banks standing over Aldrich, who was “all balled up” on the ground in the middle of the road in a fetal position. Benjamin then saw Banks hit Aldrich in the face. At that point, Benjamin saw headlights approaching up the ramp and observed Banks “running to the side of the road.” Benjamin started going back up the ramp and then heard a “boom, boom.” Turning around, he saw Aldrich had been hit by a car. Benjamin returned to the other marines and told them that Aldrich had been hit by a car. Rejoined by Banks, the group then ran to the Howard Johnson Hotel. None of them contacted the police or called for an ambulance.

At the hotel, Banks admitted to Ortez that he had knocked Aldrich down after chasing him. He also admitted to Benjamin that he had hit Aldrich, saying Aldrich deserved it for lying about being in the marines.

The car that struck Aldrich was driven by Nina Ann Campbell. Campbell testified she was exiting off I-95, going

thirty miles an hour, when all of a sudden she saw something “all balled up” in the middle of the off-ramp two feet in front of her. There were no streetlights illuminating the roadway. Observing “it was pitch black” at the time and that she “didn’t expect to see anything in the middle of the road,” Campbell stated it was too late for her to stop by the time she saw the object in the road, despite her last-second efforts to avoid it. Immediately after hitting Aldrich, Campbell stopped her car, determined that she had run over a body lying on the ramp, and found a nearby policeman.

Dr. William G. Gormley, the medical examiner who performed Aldrich’s autopsy, testified that Aldrich, who was found dead at the scene of the accident, sustained severe crushing injuries to his chest and thoracic area and had several abrasions on the side of his body, which Dr. Gormley described as “road burn.” Gormley concluded that the cause of death was “multiple blunt-force injuries to the chest” consistent with being run over by a car. Gormley could not give an opinion, based on the autopsy, to confirm whether Aldrich had been assaulted prior to being run over. He did opine, however, that the injuries were consistent with Aldrich being struck by the car while in a reclining position, rather than standing up. On cross-examination, Gormley testified Aldrich had a blood alcohol content of .12 percent. The legal limit for lawfully driving a motor vehicle was .08 percent. Based on this legal limit for intoxication, a general average indicator to correlate the effect of alcohol on judgment, Dr. Gormley said Aldrich’s consumption of alcohol was “likely to have had an effect [on his] judgment.”

Testifying in his own defense, Banks admitted he got “upset” and “angry” when Aldrich stated he was in the marines. He further admitted that, when chasing Aldrich, he tried to trip him but missed and fell himself. He got up and continued the chase down the ramp. Catching up to Aldrich, Banks “grabbed him and he fell” in the roadway. Banks then hit Aldrich in the face. Leaving Aldrich lying “in the middle of the road,” Banks started back up the ramp. He then heard the car strike Aldrich, but did nothing to help the victim and did not call the police.

Issue

Banks contends the evidence was insufficient, as a matter of law, to convict him of involuntary manslaughter. The Commonwealth, he argues, failed to prove beyond a reasonable doubt that his conduct amounted to criminal negligence or that it was the proximate cause of Aldrich’s death.

Reasoning

We conclude that assaulting Aldrich and leaving him lying apparently injured on the unlit exit ramp in the

dark, with a vehicle approaching, was conduct so wanton and willful that it showed utter disregard for the safety of human life. Furthermore, a reasonable person would have known that these circumstances would likely lead to Aldrich's injury or death. Accordingly, the evidence proved that Banks' acts of commission and omission rose to the level of criminal negligence.

To convict Banks of involuntary manslaughter, the Commonwealth also had to prove beyond a reasonable doubt that Banks's "criminally negligent acts were a proximate cause of the victim's death." . . .

Banks asserts that notwithstanding his role in the confrontation with Aldrich, the actual causes of Aldrich's death were Ortez's hitting Aldrich, which "sent him running down the expressway ramp"; the negligent driving of Campbell; and Aldrich's own voluntary intoxication. Each of those acts, he maintains, was an independent, intervening cause of the victim's death. Accordingly, he concludes, the Commonwealth failed to prove that his conduct was the proximate cause of Aldrich's death. Again, we disagree.

Banks' argument disregards the applicable principles of proximate cause. To be an intervening cause, the act in question must have been an event that the accused could not have foreseen. "An intervening act which is reasonably foreseeable cannot be relied upon as breaking the chain of causal connection between an original act of negligence and subsequent injury." . . .

It is clear from the evidence in this case that Banks's "negligent acts and omissions exposed [Aldrich] to the subsequent . . . act that ultimately resulted in his death." Indeed, but for Banks's assault on Aldrich, the decedent would not have been lying helpless in the middle of the exit ramp of I-95 at night. Banks himself admitted that, after catching Aldrich, knocking him down, and hitting him in the face while he was on the ground, he left him lying in the middle of the exit ramp.

It is also clear that Ortez hit Aldrich before Banks chased Aldrich down the ramp, assaulted him, and left him lying in the middle of the exit ramp. Thus, Ortez's hitting Aldrich had no bearing on the "chain of causal connection between [Banks's] original acts of negligence and [Aldrich's] subsequent [death]." . . . Hence, Ortez's hitting Aldrich does not constitute an independent, intervening cause.

For Campbell's conduct to constitute an independent, intervening cause, as Banks suggests, Campbell's driving on the exit ramp must have been an event that Banks could not have foreseen. It was readily foreseeable, however, that vehicles traveling on I-95 would use the off-ramp to exit the interstate and that a driver so exiting may not be able to see a "balled up" body in the roadway, because it was dark and the road was not lit.

Therefore, irrespective of whether Ortez's hitting Aldrich or Campbell's driving was criminally negligent or not, the evidence proved that Banks's conduct was a proximate cause of Aldrich's death. He is, thus, criminally liable.

Finally, we find no merit in Banks's argument that Aldrich was to blame for his own death because he ran down a highway exit ramp in an intoxicated condition. The evidence did indicate that Aldrich had a blood alcohol level of .12. However,

contributory negligence has no place in a case of involuntary manslaughter, [and] if the criminal negligence of the [accused] is found to be the cause of death, [he] is criminally responsible, whether the decedent's failure to use due care contributed to the injury or not. . . . Only if the conduct of the deceased amounts to an independent, intervening act alone causing the fatal injury can the accused be exonerated from liability for his or her criminal negligence. In such case, the conduct of the accused becomes a remote cause.

Here, as discussed above, the evidence makes clear that Banks's negligent acts were not merely a "remote" cause of Aldrich's death. While Aldrich's level of intoxication may have affected his judgment in fleeing down the interstate exit ramp, the record plainly shows that it was Banks's assault that left Aldrich lying in the road to be subsequently hit by an oncoming car.

Holding

For these reasons, we hold the trial court did not err in finding the evidence sufficient, as a matter of law, to prove beyond a reasonable doubt that Banks's conduct amounted to criminal negligence and was a proximate cause of Aldrich's death. Accordingly, we affirm Banks's conviction of involuntary manslaughter.

Questions for Discussion

1. Is this case an example of a coincidental intervening act or a responsive intervening act?
2. Did Aldrich's inebriated condition and confrontation with the marines and running down the highway ramp constitute the legal or proximate cause of his death? Is it possible that he would have been hit by a car without Banks chasing and hitting him?
3. Was Ortez the proximate cause of the victim's death? What about Campbell?
4. Did Banks reasonably believe that Aldrich would get up before he was hit by an oncoming automobile? What would be the result if Banks hit Aldrich and carried him to the side of the road, and Aldrich later wandered onto the street and was killed?
5. Why did the Virginia court convict Banks of negligent rather than reckless homicide?

Compare and contrast *Banks* with *People v. Kern*.

PEOPLE V. KERN, 554 N.E.2D 1235 (N.Y. 1990), OPINION BY: ALEXANDER, J.

Facts

Defendants were convicted, after a highly publicized trial, of manslaughter and other charges arising out of their participation in an attack by a group of white teenagers upon three black men in the community of Howard Beach in Queens. This so-called Howard Beach incident occurred during the early morning hours of December 20, 1986, after the three victims, Michael Griffith, Cedric Sandiford, and Timothy Grimes left their disabled car on the nearby Cross Bay Boulevard and walked into the Howard Beach neighborhood to seek assistance.

At the same time that Griffith, Sandiford, and Grimes left their car, a birthday party was being held in Howard Beach and was attended by approximately thirty teenagers, including defendants Kern, Lester, and Ladone, their codefendant Michael Pirone, and the individual who testified against them, Robert Riley. At approximately 12:20 A.M., Kern's girlfriend, Claudia Calogero, left the party and was driven home by Salvatore DeSimone, accompanied by Lester and a fourth youth. As DeSimone turned the corner from Cross Bay Boulevard onto 157th Avenue, Griffith, Grimes, and Sandiford started to cross the street, heading toward the New Park Pizzeria. Calogero testified that three black men darted in front of the car, forcing DeSimone to stop suddenly. An argument ensued between the pedestrians and the occupants of the car. According to Calogero, Sandiford stuck his head into the car window and stared at the teenagers. According to Sandiford's testimony, however, the occupants of the car stuck their heads out of the window and yelled, "N__, get [out of] the neighborhood." Following that confrontation, the three men crossed the street and entered the pizzeria, while the youths continued on their way. After driving Calogero home, DeSimone, Lester, and the other youth returned to the party.

Robert Riley was sitting on the steps outside the house where the party was being held when DeSimone, Lester, and the other youth arrived. Lester shouted "There were some n__s on the boulevard; lets go up there and kill them." A few minutes later, a number of youths, including Kern, Lester, Ladone, and Pirone, left the party to track down the three black men. DeSimone led the caravan of cars from the party to the New Park Pizzeria in his car with Lester and Ladone. Riley followed in his own car with three male teenagers and Laura Castagna, whom Riley intended to escort home. John Saggese followed the group in his car. Although Riley did not know in which car Kern and Pirone traveled, he testified that he observed the two when the group eventually arrived at the pizzeria.

Meanwhile, at approximately 12:45 A.M., Grimes, Sandiford, and Griffith left the New Park Pizzeria. At that point, the cars containing the teenagers pulled into the parking lot and the youths, with the exception of Laura Castagna, emerged from the cars. The group, wielding bats and sticks, confronted Griffith, Grimes, and Sandiford and yelled at them to get out of the neighborhood. Riley testified that Kern was banging a baseball bat on the ground as the teenagers formed a semicircle around the three men, who, according to Riley, were each holding a knife. According to Grimes, several of the youths were carrying bats and sticks, and one youth held "something that looked like an iron pipe." Sandiford testified that he did not have a weapon and that he did not observe whether Griffith or Grimes displayed any weapons. Grimes testified that he pulled out a knife and held it in front of him as the youths approached. At that point, Sandiford was struck in the back by a bat. Although Riley never saw Kern swing the bat that Kern had been holding, he did testify that after Sandiford was struck, Riley grabbed the bat from Kern because he (Riley) could swing it "harder." As Griffith, Grimes, and Sandiford fled across Cross Bay Boulevard, Riley, Kern, Ladone, Lester, Pirone, and several other youths gave chase.

Griffith, Grimes, and Sandiford each ran in a different direction. Grimes headed north on Cross Bay Boulevard and managed to escape his attackers. Sandiford was struck several times with bats and tree limbs as his assailants chanted "N__s, get . . . out of the neighborhood." Sandiford was able to break away from the youths and was eventually joined by Griffith as they ran down an alleyway behind several stores parallel to Cross Bay Boulevard. The two men were followed by Kern, Ladone, Lester, Riley, Pirone, and two other youths. The alleyway ended at a three-foot-high barricade where it intersected with 156th Avenue. Both Sandiford and Griffith jumped over the barricade and made a left turn onto 156th Avenue. The group of teenagers followed approximately thirty feet behind, jumped the barricade, and continued the chase.

At the time, Saggese pulled up in the westbound lane on 156th Avenue, and after clearing the barricade, Riley got into the backseat. The car followed closely behind the youths on foot, who turned right on 90th Street, following Griffith. At the end of 90th Street, a three-foot-high guardrail separated that street from the Belt Parkway, a six-lane highway that runs east and west. Shore Parkway, a service road for the Belt Parkway that also runs east and west, partially intersects 90th Street at the guardrail and leads to Cross Bay Boulevard. The Saggese car, which had pulled ahead of the youths on foot, stopped

three-quarters of the way down 90th Street. Lester ran to the car, grabbed a bat from Riley, and he, Riley, Kern, and Ladone ran toward the end of 90th Street after Griffith. Griffith jumped over the guardrail and ran onto the Belt Parkway. When the youths reached the guardrail, Riley observed Griffith run across the three eastbound lanes of the highway, jump the center median and enter the westbound lanes where he was struck by a car driven by Dominic Blum. Griffith was killed in the accident; his body was thrown a distance approximately 75 to 125 feet, and Blum left the scene without realizing that he had hit a person. He later returned to the scene of the accident and spoke to the police.

After the youths observed Griffith being struck by a car, Lester, Kern, and Ladone ran back toward 156th Avenue where they met up with two other youths. Riley, Pirone, Saggese, and another youth returned in Saggese's car to the pizzeria, where they picked up Castagna and headed toward 156th Avenue.

Sandiford, who had managed to temporarily escape his assailants, was walking west on 156th Avenue when he was attacked from behind by the group of teenagers who beat him with bats and tree limbs. Sandiford testified that he managed to grab the bat being wielded by Lester as he pleaded with Lester not to kill him. At that point, a car pulled up, and, as its occupants approached, Sandiford released the bat, which Lester then swung at him, striking him in the head and causing blood to run down the back of his head. He further testified that he “[felt] like [his] brain . . . busted apart.”

Sandiford broke away from his attackers, who continued to chase him. The chase ended when Sandiford tried to climb a chain link fence that ran parallel to the Belt Parkway. The youths pulled Sandiford down from the fence, kicking and beating him with bats and tree limbs. Sandiford cried for help to Theresa Fisher, who was standing in the doorway of a house across the street. In response, Fisher called the police. A tape recording of her 911 call was admitted into evidence at the trial. The beating of Sandiford continued and the final attack was witnessed by George and Marie Toscano, who also called the police.

After his assailants left him, Sandiford was picked up by a police car on the belt Parkway and driven to the site

where Griffith's body was located, where he identified the body. He was later taken to the hospital and treated for his injuries. . . .

Issue

We also reject defendants' contentions that the evidence adduced at trial was legally insufficient to support their convictions of second degree manslaughter and first degree assault.

Holding

Viewed in the light most favorable to the people . . . the evidence supports the jury's finding that the defendants recklessly caused Griffith's death, because they were aware of the risk of death to Griffith as they continued to chase him on 90th Street and onto a six-lane highway, they consciously disregarded that risk, and, in so doing, grossly deviated from the standard of care that reasonable persons would have observed under the circumstances. The evidence was also sufficient to support findings that defendants' actions were a “sufficiently direct cause” of Griffith's death, and that although it was possible for Griffith to escape his attackers by turning onto Shore Road rather than attempting to cross the Belt Parkway, it was foreseeable and indeed probable that Griffith would choose the escape route most likely to dissuade his attackers from pursuit. The evidence was sufficient to prove, beyond a reasonable doubt, that Blum's operation of his automobile on the Belt Parkway was not an intervening cause sufficient to relieve defendants of criminal liability for the directly foreseeable consequences of their actions.

The evidence is also legally sufficient to support defendants' conviction of first degree assault. Contrary to defendants' contention . . . the evidence supports the jury's determination that Sandiford suffered “serious physical injury” as a result of their attack upon him. Their determination that Sandiford suffered a “protracted impairment of [his] health” was supported by the testimony of Sandiford and the doctors who treated him that Sandiford suffered severe injuries to his back and right eye that affected him for nearly a year after the incident.

Questions for Discussion

1. Explain why Griffith's running onto the expressway did not constitute an intervening event that was the proximate cause of his death. Is it significant that Griffith chose to escape on Belt Parkway rather than Shore Road?
2. Was Dominic Blum the proximate cause of Griffith's death? If not, can you name the individuals who were the proximate cause of Griffith's death?
3. Is there a meaningful difference between the facts in *Banks* and *Kern*?
4. Was this a hate crime?

Cases and Comments

1. **Apparent Safety Doctrine.** 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 *State v. Preslar*, 48 N.C. 421 (1856).

2. **Drag Racing.** In *Velasquez v. State*, 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 mph. He was not wearing a seat belt and had a blood alcohol content of between .11 and .12. Velazquez had not been drinking and was traveling at roughly 90 mph. 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, 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."

From the point of public policy, would it have been advisable to hold Velazquez liable? Was Alvarez's death foreseeable? See *Velazquez v. State*, 561 So. 2d 347 (Fla. Ct. App. 1990).

3. **The Year-and-a-Day Rule.** Defendant Wilbert Rogers stabbed James Bowdery in the heart with a butcher knife on May 6, 1994. During an operation to repair Bowdery's heart, he suffered a cardiac arrest. This led to severe brain damage as a result of a loss of oxygen. Bowdery remained in a coma and died on August 7, 1995, from kidney complications resulting from remaining in a vegetative condition for such a lengthy period of time. Rogers was convicted of second-degree murder and appealed on the grounds that the prosecution was barred by the **year-and-a-day rule**, which prohibits a murder conviction when more than a year has transpired between the defendant's criminal act and the victim's death. The Tennessee Supreme Court observed that the rule was based on the fact that thirteenth-century medical science was incapable of establishing causation beyond a reasonable doubt when a significant amount of time elapsed between the injury to the victim and the victim's death. The rule has also been explained as an effort to moderate the common law's automatic imposition of the death penalty for felonies.

The Tennessee Supreme Court, in abolishing the year-and-a-day rule, noted that almost one-half of the states had now eliminated the rule. The court explained that medical science now possessed the ability to determine the cause of death with greater accuracy and that it no longer made sense to terminate a defendant's liability after a year. In addition, medicine was able to sustain the life of a victim of a criminal act for a lengthy period of time, and the year-and-a-day rule would result in the perpetrators of slow-acting poisons or viruses escaping criminal prosecution and punishment. The court declined to adopt a revised period in which prosecutions for murder must be undertaken and, instead, stressed that prosecutors possessed the burden of establishing causation. The U.S. Supreme Court later ruled that the Tennessee court's abolition of the year-and-a-day rule was not in violation of the *Ex Post Facto* Clause of the U.S. Constitution. See *State v. Rogers*, 992 S.W.3d 393 (Tenn. 1999), *aff'd* 532 U.S. 451 (2001).

Should there be a time limit on prosecutions for homicide? See *Commonwealth v. Casanova*, 708 N.E.2d 86 (Mass. 1999).

You Decide

5.7 Larry Roberts along with other inmates was convicted of the murders of a fellow inmate, Charles Gardner, and of a correctional officer, Albert Path. Gardner was an inmate at the California Medical Facility in Vacaville and was

attacked by Roberts and other inmates and was stabbed eleven times. The knife fell to the ground and was grabbed by Gardner, who pursued one of his assailants up a flight of stairs where Gardner plunged the knife into the chest of a prison guard, Officer Patch. Patch died within an hour at the prison clinic. Gardner died shortly thereafter.

It was established that Gardner was dazed and in shock from the loss of blood as he staggered up the stairs and that Patch was the first individual that he encountered. Several witnesses alleged that Roberts had stabbed Gardner. Gardner was described as a well-behaved inmate who had no motive to intentionally kill Patch. Roberts was charged with killing Gardner and claimed that the cause of Gardner's death was medical negligence.

Will this defense prove successful? Should Roberts be held criminally liable for causing the death of Path? See *People v. Roberts*, 826 P.2d. 274 (Cal. 1992).

You can find the answer at www.sagepub.com/lippmancc12e

Crime in the News?

The excitement of racing cars along local streets has been part of the rite of passage to adulthood for generations of young people. The adrenalin rush of speed racing was mythologized by Hollywood in the 2001 film *The Fast and the Furious*, which smashed box office records in the opening week. The film takes its place alongside classic films such as *Rebel Without a Cause* (1955) and *American Graffiti* (1973) that portrayed the close connection between American teenagers and their high-performance cars.

In recent years, so-called speed racing or drag racing on local streets and highways has been described by law enforcement as having reached epidemic proportions. These races have evolved from friendly competitions between friends into large-scale events that involve large-scale betting and expensive supercharged racing machines. There is no central database that records arrests for drag racing, but it is estimated that in California alone in 2006, over 6,000 people were arrested for participating in speed racing and that roughly one hundred individuals die each year while participating in races. The California Highway Patrol reports that officers intervened to stop 697 speed contests in 2006; this figure does not include races on local surface streets. Nationally, the National Highway Traffic Safety Administration reports that forty-nine people are injured for every 1,000 individuals who participate in drag racing. The injuries and deaths are concentrated among the young people who are involved in the races.

As early as 2002, the *New York Times* reported that cities and localities were taking extraordinary measures to combat street racing. The *Times* documented the human cost of drag racing over the course of several weeks in Portland, Oregon. Donald Ickes was killed as he was returning home after Christmas shopping for his grandchildren when he was blindsided by a GMC Yukon sport utility vehicle whose driver was speed racing at over seventy-five miles per hour. The driver of the Yukon was a twenty-year-old with a suspended license who had his daughter in the car. Several days later, Krystal Pomante, age eleven, died after her sister's teenaged boyfriend accepted a challenge

to race from a passing car and lost control of his vehicle. Two weeks later, Trisha Ann Thornton, nineteen, died after her boyfriend wrapped his car around a street-light pole. The same night two other young women were killed in a car crash resulting from a drag race.

Spectators also are at risk. In 2008, eight spectators were killed in Prince George's County, Maryland, while watching an illegal street race. In August 2008, an automobile ran a red light during a drag race in Phoenix, Arizona, killing the occupant of a third vehicle. A police officer noted that "in a matter of only 20 or 30 seconds [the driver] changed the course of the lives of numerous families. . . . This man, he's 22 years old, his life will never be the same. Obviously the lives of the victims' families will never be the same."

In August 2008, the issue of speed racing took on additional notoriety when Nick Bollea, the seventeen-year-old son of wrestling star Hulk Hogan, was arrested and pled guilty to charges stemming from street racing. Nick's crash of his father's Toyota Supra resulted in the paralysis of his passenger. Bollea, who had been drinking prior to losing control of the auto, was wearing a seat belt and emerged unscathed from the accident.

California has one of the most detailed laws on speed racing. Section 23109 prohibits speed contests in which motor vehicles race against one another or against a clock as well speed exhibitions (e.g. peeling or screeching of tires). Individuals are prohibited from engaging in speed contests or aiding and abetting a contest. Aiding and abetting includes obstructing a highway through the placement of a barrier. Conviction of participation in speed racing may result in imprisonment in a county jail for not less than twenty-four hours nor more than ninety days and a fine of not less than \$355 nor more than \$1,000, or by both fine and imprisonment. An individual also may be required to perform community service. An individual's license may be suspended or restricted for between nine days and six months. A second offense within five years of a conviction is punishable by a more severe penalty.

Section 23109.1 imposes a term in jail or in state prison on an individual who engages in a speed contest that proximately causes one or more specified injuries, including loss of consciousness, a concussion, bone fractures, protracted loss or impairment of a body function or member, disfigurement, or a wound requiring extensive suturing and causing disfigurement or paralysis. California also provides for the impoundment of vehicles for up to thirty days and the suspension or restriction of an individual's license. Local jurisdictions in California authorize the forfeiture of vehicles, which often are crushed and sold to junkyards. States such as Texas explicitly extend legal liability to spectators at speed races, while Florida imposes criminal responsibility on individuals who knowingly ride as passengers or who collect money related to a race. Speed racing also may lead to prosecution for reckless driving or for manslaughter in the event of death.

The law of criminal responsibility stemming from speed contests was discussed in the Virginia case of *O'Connell v. Commonwealth* (634 S.E.2d 379 (Va. App. 2006)). In February 2004, defendant David O'Connell challenged David Moore to a race. The two drivers' Corvettes were traveling in excess of one hundred miles per hour when Moore's vehicle careened off the highway and struck a tree, killing Moore and his passenger, William Hogan. Both drivers had been drinking prior to the race, and they entered into the race despite the fact that it was rush hour on a weekday afternoon on a busy road adjacent to a residential community. The shoulders of the roads were piled with snow and sand.

Defendant O'Connell argued that he should not be held criminally responsible for the deaths of Moore and

Hogan because he had not made contact with Moore's vehicle prior to Moore's loss of control, and that the deaths had resulted from Moore's negligent loss of control of his automobile. O'Connell explained to a police officer that Moore's car had fishtailed in front of him, that he had applied his brakes to avoid hitting Moore, and that as a consequence his car had crashed into the wall at entrance to a subdivision.

Judge Frederick Rockwell III of the Circuit Court of Chesterfield County noted that courts in Florida, Georgia, Oregon, and Pennsylvania have held that the negligence of a competing driver who dies in an auto accident relieves a defendant of criminal liability. Judge Rockwell, however, held that the better reasoned rule is that Moore's negligence "should have been foreseen by both drivers in the reckless circumstances under which they were operating their vehicle" and that under these circumstances, an "intervening act which is reasonably foreseeable cannot be relied upon as breaking the chain of causation." Judge Rockwell held that it was foreseeable that Moore might lose control of his automobile and that Moore's negligence therefore did not relieve O'Connell of criminal liability for homicide. O'Connell would be free of responsibility only in the event that Moore died as a result of an unforeseeable act, such as a storm that forced his vehicle off the road.

Would you hold O'Connell criminally responsible for the deaths of Moore and Hogan in addition to reckless driving and other criminal charges? Should a judge consider the impact of his or her judgment on the willingness of drivers to engage in speed racing? How would you rule in the event that Moore's vehicle killed an innocent child?

Chapter Summary

It is a fundamental principle of criminal law that a criminal offense requires a criminal intent that occurs concurrently with a criminal act. The requirement of a *mens rea*, or the mental element of a criminal act, is based on the concept of "moral blameworthiness." The notion of blameworthiness, in turn, reflects the notion that individuals should be subject to criminal punishment and held accountable only when they consciously choose to commit a crime or to create a high risk of harm or injury.

We cannot penetrate into the human brain and determine whether an individual harbored a criminal intent. In some cases, a defendant may confess to the police or testify as to his or her intent in court. In most instances, prosecutors rely on circumstantial evidence and infer an intent from a defendant's motives and patterns of activity.

The Model Penal Code proposed four levels of *mens rea* or criminal intent. The four in order of severity or culpability are as follows:

- *Purposely*. You aimed and shot the arrow at William Tell with the purpose of killing him rather than with the intent of hitting the apple on his head. (Tell is the national hero of Switzerland who was required to shoot an apple off his son's head.)
- *Knowingly*. You know that you are a poor shot, and when shooting at the apple on William Tell's head, you knew that you were practically certain to kill him.
- *Recklessly*. You clearly appreciated and knew the risk of shooting the arrow at William Tell with your eyes closed. Nevertheless, you proceeded to shoot the arrow despite the fact that this was a gross deviation from the standard of care that a law-abiding person would exhibit.

- *Negligently.* You claim that you honestly believed that you were such an experienced hunter that there was no danger in shooting the apple from William Tell's head. This was a gross deviation from the standard of care that a reasonable person would practice under the circumstances.

Strict liability crimes require only an *actus reus* and do not require proof of a *mens rea*. These offenses typically are public welfare crimes whose creation is meant to protect the safety and security of society by regulating food, drugs, and transportation. These offenses are *mala prohibita* rather than *mala in se* and usually are punishable by a small fine. Strict liability offenses are criticized as inconsistent with the traditional concern with "moral blameworthiness."

A criminal act requires the unison or concurrence of a criminal intent and a criminal act. This means that the intent must dictate the act.

Crimes such as murder, aggravated assault, and arson require the achievement of a particular result. Particularly in the case of homicide, defendants may claim that their act did not cause the victim's death. The prosecution must establish beyond a reasonable doubt that an individual's act was the cause in fact, or "but for" cause, that set the chain of causation in motion. The defendant's act must also be the legal or proximate cause of the death. Normally this is not difficult. Cases involving complex patterns of causation, however, may require judges to make difficult decisions concerning whether it is fair and just to hold an individual responsible for the consequences of intervening acts.

We saw that two types of intervening acts are important in examining the chain of causation:

- A *coincidental intervening act* is unforeseeable and breaks the chain of causation.
- A *responsive intervening act* breaks the chain of causation only when the reaction is both abnormal and unforeseeable.

Chapter Review Questions

1. What is the reason that the law requires a *mens rea*?
2. Why is it difficult to prove *mens rea* beyond a reasonable doubt? Discuss some different ways of proving *mens rea*.
3. Explain the difference between purpose and knowledge. Which is punished more severely? Why?
4. Distinguish recklessness from negligence. Which is punished more severely? Why?
5. What is the difference between a crime requiring a criminal intent and strict liability?
6. Explain the "willful blindness" rule.
7. What is the importance of the principle of concurrence? Provide an example of a lack of concurrence.
8. Disputes over causation typically arise in prosecutions for what types of crimes?
9. Explain the statement that an individual's criminal act must be shown to be both the cause in fact and the legal or proximate cause.
10. What is meant by the statement that legal or proximate cause is based on a judgment of what is just or fair under the circumstances? How does this differ from the determination of a cause in fact or a "but for" analysis?
11. What is the difference between a coincidental intervening act and a responsive intervening act? Provide examples.
12. Discuss the test for determining whether coincidental intervening acts and responsive intervening acts break the chain of causation.
13. Provide concrete examples illustrating a coincidental intervening act and a responsive intervening act that do not break the chain of causation. Now provide examples of coincidental and intervening acts that do break the chain of causation.
14. What is the year-and-a-day rule? Why are states now abandoning this principle?
15. What are the arguments for and against strict liability offenses?
16. What is the approach of the Model Penal Code toward causality? Use some of the cases in the text to illustrate your answer.
17. Are we too concerned with criminal intent? Why not impose the same punishment on criminal acts regardless of an individual's intent? Is the father or mother of a child hit by a car concerned whether the driver was acting intentionally, knowingly, recklessly, or negligently?

Legal Terminology

| | | |
|------------------------------|------------------------|----------------------------|
| causation | intervening cause | responsive intervening act |
| cause in fact | knowingly | scienter |
| circumstantial evidence | <i>mens rea</i> | specific intent |
| coincidental intervening act | negligently | strict liability |
| concurrence | proximate cause | transferred intent |
| constructive intent | public welfare offense | willful blindness |
| crimes of cause and result | purposely | year-and-a-day rule |
| general intent | recklessly | |

Criminal Law on the Web

Log on to the Web-based student study site at www.sagepub.com/lippmancl2e to assist you in completing the Criminal Law on the Web exercises, as well as for additional features such as podcasts, Web quizzes, and audio/video links.

1. In *Staples v. United States* in 1994, the U.S. Supreme Court decided whether the prosecution must establish that a defendant knowingly possessed an unregistered machine gun or whether this is a strict liability offense. Explore the decision and reasoning of the Supreme Court.
2. The Kansas Supreme Court considered whether a defendant is responsible for a death caused by a police officer during a high-speed chase in *State v. Anderson*. In another interesting case, *State v. Pelham* in 2003, a New Jersey court considered whether a defendant was guilty of vehicular homicide when the victim of a car crash was voluntarily removed from life support following the accident. Explain the analysis of the courts in these cases.

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