The General Principles of the Criminal Law

CHAPTER 2

CHAPTER OBJECTIVES

- Examine the general elements of crimes.
- Distinguish between an act and a status.
- Examine the differences among voluntary acts, involuntary acts, and omissions, and explain the importance of those differences to the criminal law.
- Understand the four kinds of *mens rea* defined in the Model Penal Code.
- Introduce and apply the principles of *concurrence* and *causation*.
- Examine the element of harm and identify the requirements for a criminal attempt.

INTRODUCTION

As explained by legal scholar Jerome Hall (1960) in his influential treatise *General Principles of Criminal Law,* the criminal law can be analyzed or studied at different levels of abstraction. At the lowest, most detailed level are the specific *rules* defining individual crimes, such as murder, manslaughter, burglary, robbery, larceny, and the like. A step removed from the specific rules, at a higher level of abstraction, are criminal law *doctrines*. Examples of recognizable doctrines within the criminal law include insanity, duress, necessity, excuse, and attempts. Doctrines are conceptually broader than rules and sometimes override their application; for example, an "insane" person or one who acts under "duress" may be excused from criminal liability even if his or her conduct otherwise satisfies the rule defining burglary, arson, or another crime. At the highest level are the general *principles* of the criminal law, which combine to provide a theoretical framework explaining what is common to crime and which Professor Hall describes as "the ultimate norms of the penal law" (p. 10)

In Chapter 1, we considered the *legality principle* and *punishment,* which Professor Hall includes as the front and back "bookends" that encompass the general principles of the criminal law. Our focus in this chapter is on the general principles of the criminal law, the features that are common to all crime and help explain the criminal law's distinctive character. Relying on Professor Hall's framework, we examine the following general principles that underlie and help unify the substantive criminal law: (1) *actus reus* (guilty act); (2) *mens rea* (guilty mind); (3) *concurrence* (of the *actus reus* and *mens rea*); (4) *causation;* and (5) *harm*.

ACTUS REUS

Loosely translated, the Latin phrase *actus reus* means "guilty act." It may seem self-evident that there can be no crime without a guilty act; for both pragmatic and principled reasons, we do not punish people for their thoughts alone. Yet the *actus*

reus requirement, which is fundamental to the criminal law, is not free of complexities. Initially, we must be able to distinguish an individual's *act* from his or her *status*. Even when we can be certain that an act has been committed, we must further consider whether the act was committed voluntarily; as we shall see, the criminal law does not punish involuntary conduct. Finally, we must analyze whether *failing to act*—doing nothing when some sort of action arguably should have been taken—can, at least under some circumstances, be punished as a crime.

Act vs. Status

The first issue that we explore involves the difference between an act and a status. Assume that the defendant in *Robinson v. California,* presented in the following case, was a narcotics addict. Can the status of "being addicted to" drugs be criminalized, or does conviction for a crime require evidence of active drug use? In other words, does (and should) the status or condition of being a narcotics addict satisfy the criminal law's *actus reus* requirement? Consider these questions as you read the justices' opinions in this important case.

CASE

Robinson v. California, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962)

Mr. Justice STEWART delivered the opinion of the Court.

. . . . . .

A California statute makes it a criminal offense for a person to "be addicted to the use of narcotics."[1] This appeal draws into question the constitutionality of that provision of the state law, as construed by the California courts in the present case.

The trial judge instructed the jury that the statute made it a misdemeanor for a person "either to use narcotics, or to be addicted to the use of narcotics * * *. That portion of the statute referring to the 'use' of narcotics is based upon the 'act' of using. That portion of the statute referring to 'addicted to the use' of narcotics is based upon a condition or status. They are not identical. * * * To be addicted to the use of narcotics is said to be a status or condition and not an act. It is a continuing offense and differs from most other offenses in the fact that (it) is chronic rather than acute; that it continues after it is complete and subjects the offender to arrest at any time before he reforms. The existence of such a chronic condition may be ascertained from a single examination, if the characteristic reactions of that condition be found present." . . .

Under these instructions the jury returned a verdict finding the appellant "guilty of the offense charged." An appeal was taken to the Appellate Department of the Los Angeles County Superior Court, [which] . . . affirmed the judgment of conviction. . . .

The broad power of a State to regulate the narcotic drugs traffic within its borders is not here in issue. . . .

Such regulation, it can be assumed, could take a variety of valid forms. A State might impose criminal sanctions, for example, against the unauthorized manufacture, prescription, sale, purchase, or possession of narcotics within its borders. In the interest of discouraging the violation of such laws, or in the interest of the general health or welfare of its inhabitants, a State might establish a program of compulsory treatment for those addicted to narcotics. Such a program of treatment might require periods of involuntary confinement. And penal sanctions might be imposed for failure to comply with established compulsory treatment procedures. Cf. *Jacobson v. Massachusetts,* 197 U.S. 11. Or a State might choose to attack the evils of narcotics traffic on broader fronts also—through public health education, for example, or by efforts to ameliorate the economic and social conditions under which those evils might be thought to flourish. In short, the range of valid choice which a State might make in this area is undoubtedly a wide one, and the wisdom of any particular choice within the allowable spectrum is not for us to decide. . . .

It would be possible to construe the statute under which the appellant was convicted as one which is operative only upon proof of the actual use of narcotics

1. The statute is § 11721 of the California Health and Safety Code. It provides:

No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of a person licensed by the State to prescribe and administer narcotics. It shall be the burden of the defense to show that it comes within the exception. Any person convicted of violating any provision of this section is guilty of a misdemeanor and shall be sentenced to serve a term of not less than 90 days nor more than one year in the county jail. . . .

The appellant was convicted after a jury trial in the Municipal Court of Los Angeles. . . .

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within the State's jurisdiction. But the California courts have not so construed this law. Although there was evidence in the present case that the appellant had used narcotics in Los Angeles, the jury were instructed that they could convict him even if they disbelieved that evidence. The appellant could be convicted, they were told, if they found simply that the appellant's "status" or "chronic condition" was that of being "addicted to the use of narcotics." And it is impossible to know from the jury's verdict that the defendant was not convicted upon precisely such a finding. . . .

This statute, therefore, is not one which punishes a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration. It is not a law which even purports to provide or require medical treatment. Rather, we deal with a statute which makes the "status" of narcotic addiction a criminal offense, for which the offender may be prosecuted "at any time before he reforms." California has said that a person can be continuously guilty of this offense, whether or not he has ever used or possessed any narcotics within the State, and whether or not he has been guilty of any antisocial behavior there.

It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare require that the victims of these and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

We cannot but consider the statute before us as of the same category. In this Court counsel for the State recognized that narcotic addiction is an illness.[8] Indeed, it is apparently an illness which may be contracted innocently or involuntarily.[9] We hold that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment. To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold.

We are not unmindful that the vicious evils of the narcotics traffic have occasioned the grave concern of government. There are, as we have said, countless fronts on which those evils may be legitimately attacked. We deal in this case only with an individual provision of a particularized local law as it has so far been interpreted by the California courts.

Reversed. . . .

Mr. Justice HARLAN, concurring.

I am not prepared to hold that on the present state of medical knowledge it is completely irrational and hence unconstitutional for a State to conclude that narcotics addiction is something other than an illness nor that it amounts to cruel and unusual punishment for the State to subject narcotics addicts to its criminal law. Insofar as addiction may be identified with the use or possession of narcotics within the State (or, I would suppose, without the State), in violation of local statutes prohibiting such acts, it may surely be reached by the State's criminal law. But in this case the trial court's instructions permitted the jury to find the appellant guilty on no more proof than that he was present in California while he was addicted to narcotics. Since addiction alone cannot reasonably be thought to amount to more than a compelling propensity to use narcotics, the effect of this instruction was to authorize criminal punishment for a bare desire to commit a criminal act.

. . . Accordingly, I agree that the application of the California statute was unconstitutional in this case and join the judgment of reversal.

Mr. Justice CLARK, dissenting. . . .

Mr. Justice WHITE, dissenting. . . .

The Court clearly does not rest its decision upon the narrow ground that the jury was not expressly instructed not to convict if it believed appellant's use of narcotics was beyond his control. The Court recognizes no degrees of addiction. The Fourteenth Amendment is today held to bar any prosecution for addiction regardless of the degree or frequency of use, and the Court's opinion bristles with indications of further consequences. If it is "cruel and unusual punishment" to convict appellant for addiction, it is difficult to understand why it would be any less offensive to the Fourteenth Amendment to convict him for use on the same evidence of use which proved he was an addict. It is significant that in purporting to reaffirm the power of the States to deal with the narcotics traffic, the

8. In its brief the appellee stated: "Of course it is generally conceded that a narcotic addict, particularly one addicted to the use of heroin, is in a state of mental and physical illness. So is an alcoholic." Thirty-seven years ago this Court recognized that persons addicted to narcotics "are diseased and proper subjects for (medical) treatment." *Linder v. United States,* 268 U.S. 5, 18.

9. Not only may addiction innocently result from the use of medically prescribed narcotics, but a person may even be a narcotics addict from the moment of his birth. . . .

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Court does not include among the obvious powers of the State the power to punish for the use of narcotics. I cannot think that the omission was inadvertent.

The Court has not merely tidied up California's law by removing some irritating vestige of an outmoded approach to the control of narcotics. At the very least, it has effectively removed California's power to deal effectively with the recurring case under the statute where there is ample evidence of use but no evidence of the precise location of use. Beyond this it has cast serious doubt upon the power of any State to forbid the use of narcotics under threat of criminal punishment. I cannot believe that the Court would forbid the application of the criminal laws to the use of narcotics under any circumstances. But the States, as well as the Federal Government, are now on notice. They will have to await a final answer in another case. . . .

Notes and Questions

1. If *Robinson v. California* stands for the proposition that the United States Constitution forbids the criminal punishment of someone for occupying a particular status or condition, as opposed to committing some kind of prohibited act, what reasons support this conclusion? On what provisions of the Constitution does the Court rely?
2. Using the decision and rationale in *Robinson,* can you articulate the distinction between a *status* and an *act*? Could a state constitutionally punish someone for being taller than 6 feet? For having red hair? For having AIDS? For having a tattoo? For being born outside of the United States? For being an illegal immigrant? For being a Republican or a Democrat, or a member of the Bloods or the Crips street gang?
3. Robinson was convicted after being arrested by a police officer who had encountered him on a Los Angeles street. "The officer testified that . . . he had observed 'scar tissue and discoloration on the inside' of [Robinson's] right arm, and 'what appeared to be numerous needle marks and a scab which was approximately three inches below the crook of the elbow' on [his] left arm. The officer also testified that [Robinson] under questioning had admitted to the occasional use of narcotics." If one consequence of being addicted to narcotics is the compulsion to use narcotics, what do you make of Justice White's observation in his dissenting opinion: "If it is 'cruel and unusual punishment' to convict [Robinson] for addiction, it is difficult to understand why it would be any less offensive to the Fourteenth Amendment to convict him for use on the same evidence of use which proved he was an addict"? Does the Court's holding in *Robinson v. California* "cast serious doubt upon the power of any State to forbid the use of narcotics under threat of criminal punishment," as Justice White argues?

In keeping with the decision in *Robinson* that the Constitution prohibits convicting and punishing a person for a crime because of a condition or status, how do you think the Court would respond to the case of a chronic alcoholic who is convicted for public intoxication? Make note of how and why the Court distinguishes *Robinson* in the following case. Determine whether you find the rationale offered in Justice Marshall's plurality opinion, or the rationale offered in the diverse concurring and dissenting opinions, to be most persuasive.

CASE

Powell v. Texas, 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968)

Mr. Justice Marshall announced the judgment of the Court and delivered an opinion in which the Chief Justice, Mr. Justice Black, and Mr. Justice Harlan join.

.....

In late December 1966, appellant was arrested and charged with being found in a state of intoxication in a public place, in violation of Texas Penal Code, Art 477 (1952), which reads as follows:

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

Appellant was tried in the Corporation Court of Austin, Texas, found guilty, and fined $20. He appealed to the County Court . . . where a trial de novo was held. His counsel urged that appellant was "afflicted with the disease of chronic alcoholism," that "his appearance in public [while drunk was] . . . not of his own volition," and therefore that to punish him criminally for that conduct would be cruel and unusual, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

The trial judge . . . , sitting without a jury, made certain findings of fact, but ruled as a matter of law that chronic alcoholism was not a defense to the charge. He found appellant guilty, and fined him $50. There being no further right to appeal within the Texas judicial system, appellant appealed to this Court. . . .

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I.

The principal testimony was that of Dr. David Wade, a Fellow of the American Medical Association, duly certificated in psychiatry. His testimony consumed a total of 17 pages in the trial transcript. . . . Dr. Wade sketched the outlines of the "disease" concept of alcoholism; noted that there is no generally accepted definition of "alcoholism"; alluded to the ongoing debate within the medical profession over whether alcohol is actually physically "addicting" or merely psychologically "habituating"; and concluded that in either case a "chronic alcoholic" is an "involuntary drinker," who is "powerless not to drink," and who "loses his self-control over his drinking." He testified that he had examined appellant, and that appellant is a "chronic alcoholic," who "by the time he has reached [the state of intoxication] . . . is not able to control his behavior, and [who] . . . has reached this point because he has an uncontrollable compulsion to drink." Dr. Wade also responded in the negative to the question whether appellant has "the willpower to resist the constant excessive consumption of alcohol." . . .

On cross-examination, Dr. Wade admitted that when appellant was sober he knew the difference between right and wrong, and he responded affirmatively to the question whether appellant's act of taking the first drink in any given instance when he was sober was a "voluntary exercise of his will." Qualifying his answer, Dr. Wade stated that "these individuals have a compulsion, and this compulsion, while not completely overpowering, is a very strong influence, an exceedingly strong influence, and this compulsion coupled with the firm belief in their mind that they are going to be able to handle it from now on causes their judgment to be somewhat clouded."

Appellant testified concerning the history of his drinking problem. He reviewed his many arrests for drunkenness; testified that he was unable to stop drinking; stated that when he was intoxicated he had no control over his actions and could not remember them later, but that he did not become violent; and admitted that he did not remember his arrest on the occasion for which he was being tried. On cross-examination, appellant admitted that he had had one drink on the morning of the trial and had been able to discontinue drinking. In relevant part, the cross-examination went as follows:

"Q. You took that one at eight o'clock because you wanted to drink?

"A. Yes, sir.

"Q. And you knew that if you drank it, you could keep on drinking and get drunk?

"A. Well, I was supposed to be here on trial, and I didn't take but that one drink.

"Q. You knew you had to be here this afternoon, but this morning you took one drink and then you knew that you couldn't afford to drink any more and come to court; is that right?

"A. Yes, sir, that's right.

"Q. So you exercised your will power and kept from drinking anything today except that one drink?

"A. Yes, sir, that's right". . . .

On redirect examination, appellant's lawyer elicited the following:

"Q. Leroy, isn't the real reason why you just had one drink today because you just had enough money to buy one drink?

"A. Well, that was just give to me.

"Q. In other words, you didn't have any money with which you could buy any drinks yourself?

"A. No, sir, that was give to me.

"Q. And that's really what controlled the amount you drank this morning, isn't it?

"A. Yes, sir.

"Q. Leroy, when you start drinking, do you have any control over how many drinks you can take?

"A. No, sir."

Evidence in the case then closed. The State made no effort to obtain expert psychiatric testimony of its own, or even to explore with appellant's witness the question of appellant's power to control the frequency, timing, and location of his drinking bouts, or the substantial disagreement within the medical profession concerning the nature of the disease, the efficacy of treatment and the prerequisites for effective treatment. . . .

Following this abbreviated exposition of the problem before it, the trial court indicated its intention to disallow appellant's claimed defense of "chronic alcoholism." Thereupon defense counsel submitted, and the trial court entered, the following "findings of fact":

"**(1)** That chronic alcoholism is a disease which destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol.

"**(2)** That a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism.

"**(3)** That Leroy Powell, defendant herein, is a chronic alcoholic who is afflicted with the disease of chronic alcoholism."

Whatever else may be said of them, those are not "findings of fact" in any recognizable, traditional sense in which that term has been used in a court of law; they are the premises of a syllogism transparently designed to bring this case within the scope of this

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Court's opinion in *Robinson v. California*, 370 U.S. 660 (1962). Nonetheless, the dissent would have us adopt these "findings" without critical examination; it would use them as the basis for a constitutional holding that "a person may not be punished if the condition essential to constitute the defined crime is part of the pattern of his disease and is occasioned by a compulsion symptomatic of the disease."

The difficulty with that position . . . is that it goes much too far on the basis of too little knowledge. In the first place, the record in this case is utterly inadequate to permit the sort of informed and responsible adjudication which alone can support the announcement of an important and wide-ranging new constitutional principle. We know very little about the circumstances surrounding the drinking bout which resulted in this conviction, or about Leroy Powell's drinking problem, or indeed about alcoholism itself. . . .

Furthermore, the inescapable fact is that there is no agreement among members of the medical profession about what it means to say that "alcoholism" is a "disease." . . .

The trial court's "finding" that Powell "is afflicted with the disease of chronic alcoholism," which "destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol" covers a multitude of sins. Dr. Wade's testimony that appellant suffered from a compulsion which was an "exceedingly strong influence," but which was "not completely overpowering" is at least more carefully stated, if no less mystifying. Jellinek insists that conceptual clarity can only be achieved by distinguishing carefully between "loss of control" once an individual has commenced to drink and "inability to abstain" from drinking in the first place. Presumably a person would have to display both characteristics in order to make out a constitutional defense, should one be recognized. Yet the "findings" of the trial court utterly fail to make this crucial distinction, and there is serious question whether the record can be read to support a finding of either loss of control or inability to abstain. . . .

It is one thing to say that if a man is deprived of alcohol his hands will begin to shake, he will suffer agonizing pains and ultimately he will have hallucinations; it is quite another to say that a man has a "compulsion" to take a drink, but that he also retains a certain amount of "free will" with which to resist. It is simply impossible, in the present state of our knowledge, to ascribe a useful meaning to the latter statement. This definitional confusion reflects, of course, not merely the undeveloped state of the psychiatric art but also the conceptual difficulties inevitably attendant upon the importation of scientific and medical models into a legal system generally predicated upon a different set of assumptions.

II.

Despite the comparatively primitive state of our knowledge on the subject, it cannot be denied that the destructive use of alcoholic beverages is one of our principal social and public health problems. The lowest current informed estimate places the number of "alcoholics" in America (definitional problems aside) at 4,000,000, and most authorities are inclined to put the figure considerably higher. . . .

There is as yet no known generally effective method for treating the vast number of alcoholics in our society. . . . Thus it is entirely possible that, even were the manpower and facilities available for a full-scale attack upon chronic alcoholism, we would find ourselves unable to help the vast bulk of our "visible"—let alone our "invisible"—alcoholic population.

However, facilities for the attempted treatment of indigent alcoholics are woefully lacking throughout the country. It would be tragic to return large numbers of helpless, sometimes dangerous and frequently unsanitary inebriates to the streets of our cities without even the opportunity to sober up adequately which a brief jail term provides. Presumably no State or city will tolerate such a state of affairs. Yet the medical profession cannot, and does not, tell us with any assurance that, even if the buildings, equipment and trained personnel were made available, it could provide anything more than slightly higher-class jails for our indigent habitual inebriates. Thus we run the grave risk that nothing will be accomplished beyond the hanging of a new sign—reading "hospital"—over one wing of the jailhouse.

One virtue of the criminal process is, at least, that the duration of penal incarceration typically has some outside statutory limit; this is universally true in the case of petty offenses, such as public drunkenness, where jail terms are quite short on the whole. "Therapeutic civil commitment" lacks this feature; one is typically committed until one is "cured." Thus, to do otherwise than affirm might subject indigent alcoholics to the risk that they may be locked up for an indefinite period of time under the same conditions as before, with no more hope than before of receiving effective treatment and no prospect of periodic "freedom."

Faced with this unpleasant reality, we are unable to assert that the use of the criminal process as a means of dealing with the public aspects of problem drinking can never be defended as rational. The picture of the penniless drunk propelled aimlessly and endlessly through the law's "revolving door" of arrest, incarceration, release and re-arrest is not a pretty one. But before we condemn the present practice across-the-board, perhaps we ought to be able to point to some clear promise of a better world for these unfortunate

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people. Unfortunately, no such promise has yet been forthcoming. . . .

Ignorance likewise impedes our assessment of the deterrent effect of criminal sanctions for public drunkenness. . . .

III.

. . . Appellant, however, seeks to come within the application of the Cruel and Unusual Punishment Clause announced in *Robinson v. California,* which involved a state law making it a crime to "be addicted to the use of narcotics." . . .

On its face the present case does not fall within that holding, since appellant was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion. The State of Texas thus has not sought to punish a mere status, as California did in *Robinson*; nor has it attempted to regulate appellant's behavior in the privacy of his own home. Rather, it has imposed upon appellant a criminal sanction for public behavior which may create substantial health and safety hazards, both for appellant and for members of the general public, and which offends the moral and esthetic sensibilities of a large segment of the community. This seems a far cry from convicting one for being an addict, being a chronic alcoholic, being "mentally ill, or a leper. . . ."

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

It is suggested in dissent that *Robinson* stands for the "simple" but "subtle" principle that "[c]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change." In that view, appellant's "condition" of public intoxication was "occasioned by a compulsion symptomatic of the disease" of chronic alcoholism, and thus, apparently, his behavior lacked the critical element of mens rea. Whatever may be the merits of such a doctrine of criminal responsibility, it surely cannot be said to follow from *Robinson*. The entire thrust of *Robinson*'s interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some actus reus. It thus does not deal with the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, "involuntary" or "occasioned by a compulsion." . . .

Ultimately, then, the most troubling aspects of this case, were *Robinson* to be extended to meet it, would be the scope and content of what could only be a constitutional doctrine of criminal responsibility. . . . If Leroy Powell cannot be convicted of public intoxication, it is difficult to see how a State can convict an individual for murder, if that individual, while exhibiting normal behavior in all other respects, suffers from a "compulsion" to kill, which is an "exceedingly strong influence," but "not completely overpowering." . . .

Traditional common-law concepts of personal accountability and essential considerations of federalism lead us to disagree with appellant. We are unable to conclude, on the state of this record or on the current state of medical knowledge, that chronic alcoholics in general, and Leroy Powell in particular, suffer from such an irresistible compulsion to drink and to get drunk in public that they are utterly unable to control their performance of either or both of these acts and thus cannot be deterred at all from public intoxication. . . .

We cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds. The doctrines of actus reus, mens rea, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States. . . . It is simply not yet the time to write into the Constitution formulas cast in terms whose meaning, let alone relevance, is not yet clear either to doctors or to lawyers.

Affirmed.

Mr. Justice Black, whom Mr. Justice Harlan joins, concurring. . . .

I agree with Mr. Justice Marshall that the findings of fact in this case are inadequate to justify the sweeping constitutional rule urged upon us. I could not, however, consider any findings that could be made with respect to "voluntariness" or "compulsion" controlling on the question whether a specific instance of human behavior should be immune from punishment as a constitutional matter. When we say that appellant's appearance in public is caused not by "his own" volition but rather by some other force, we are clearly thinking of a force that is nevertheless "his" except in some special sense. The accused undoubtedly commits the proscribed act and the only question is whether the act can be attributed to a part of "his" personality that should not be regarded as criminally responsible. . . .

. . . [P]unishment of such a defendant can clearly be justified in terms of deterrence, isolation, and

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treatment. . . . [M]edical decisions concerning the use of a term such as "disease" or "volition," based as they are on the clinical problems of diagnosis and treatment, bear no necessary correspondence to the legal decision whether the overall objectives of the criminal law can be furthered by imposing punishment. For these reasons, much as I think that criminal sanctions should in many situations be applied only to those whose conduct is morally blameworthy, I cannot think the States should be held constitutionally required to make the inquiry as to what part of a defendant's personality is responsible for his actions and to excuse anyone whose action was, in some complex, psychological sense, the result of a "compulsion." . . .

The rule of constitutional law urged upon us by appellant would have a revolutionary impact on the criminal law, and any possible limits proposed for the rule would be wholly illusory. If the original boundaries of *Robinson* are to be discarded, any new limits too would soon fall by the wayside and the Court would be forced to hold the States powerless to punish any conduct that could be shown to result from a "compulsion," in the complex, psychological meaning of that term. . . .

The real reach of any such decision, however, would be broader still, for the basic premise underlying the argument is that it is cruel and unusual to punish a person who is not morally blameworthy. I state the proposition in this sympathetic way because I feel there is much to be said for avoiding the use of criminal sanctions in many such situations. But the question here is one of constitutional law. The legislatures have always been allowed wide freedom to determine the extent to which moral culpability should be a prerequisite to conviction of a crime.

The criminal law is a social tool that is employed in seeking a wide variety of goals, and I cannot say the Eighth Amendment's limits on the use of criminal sanctions extend as far as this viewpoint would inevitably carry them. . . .

Mr. Justice White, concurring in the result.

If it cannot be a crime to have an irresistible compulsion to use narcotics, *Robinson v. California,* I do not see how it can constitutionally be a crime to yield to such a compulsion. Punishing an addict for using drugs convicts for addiction under a different name. Distinguishing between the two crimes is like forbidding criminal conviction for being sick with flu or epilepsy but permitting punishment for running a fever or having a convulsion. Unless *Robinson* is to be abandoned, the use of narcotics by an addict must be beyond the reach of the criminal law. Similarly, the chronic alcoholic with an irresistible urge to consume alcohol should not be punishable for drinking or for being drunk.

Powell's conviction was for the different crime of being drunk in a public place. Thus even if Powell was compelled to drink, and so could not constitutionally be convicted for drinking, his conviction in this case can be invalidated only if there is a constitutional basis for saying that he may not be punished for being in public while drunk. . . .

The trial court said that Powell was a chronic alcoholic with a compulsion not only to drink to excess but also to frequent public places when intoxicated. Nothing in the record before the trial court supports the latter conclusion, which is contrary to common sense and to common knowledge. . . . Before and after taking the first drink, and until he becomes so drunk that he loses the power to know where he is or to direct his movements, the chronic alcoholic with a home or financial resources is as capable as the nonchronic drinker of doing his drinking in private, of removing himself from public places, and, since he knows or ought to know that he will become intoxicated, of making plans to avoid his being found drunk in public. For these reasons, I cannot say that the chronic alcoholic who proves his disease and a compulsion to drink is shielded from conviction when he has knowingly failed to take feasible precautions against committing a criminal act, here the act of going to or remaining in a public place. On such facts the alcoholic is like a person with smallpox, who could be convicted for being on the street but not for being ill, or, like the epileptic, who could be punished for driving a car but not for his disease.

The fact remains that some chronic alcoholics must drink and hence must drink *somewhere*. Although many chronics have homes, many others do not. For all practical purposes the public streets may be home for these unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking. This is more a function of economic station than of disease, although the disease may lead to destitution and perpetuate that condition. For some of these alcoholics I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible. As applied to them this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment—the act of getting drunk. . . .

These prerequisites to the possible invocation of the Eighth Amendment are not satisfied on the record before us. . . .

Mr. Justice Fortas, with whom Mr. Justice Douglas, Mr. Justice Brennan, and Mr. Justice Stewart join, dissenting. . . .

The sole question presented is whether a criminal penalty may be imposed upon a person suffering the

Powell v. Texas, 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968) **CASE**

disease of "chronic alcoholism" for a condition—being "in a state of intoxication" in public—which is a characteristic part of the pattern of his disease and which, the trial court found, was not the consequence of appellant's volition but of "a compulsion symptomatic of the disease of chronic alcoholism." . . .

This case does not raise any question as to the right of the police to stop and detain those who are intoxicated in public, whether as a result of the disease or otherwise; or as to the State's power to commit chronic alcoholics for treatment. Nor does it concern the responsibility of an alcoholic for criminal *acts*. We deal here with the mere *condition* of being intoxicated in public.[2]

Although there is some problem in defining the concept, its core meaning, as agreed by authorities, is that alcoholism is caused and maintained by something other than the moral fault of the alcoholic, something that, to a greater or lesser extent depending upon the physiological or psychological makeup and history of the individual, cannot be controlled by him. . . .

It is entirely clear that the jailing of chronic alcoholics is punishment. . . .

Robinson stands upon a principle which, despite its subtlety, must be simply stated and respectfully applied because it is the foundation of individual liberty and the cornerstone of the relations between a civilized state and its citizens: Criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change. . . .

In the present case, appellant is charged with a crime composed of two elements—being intoxicated and being found in a public place while in that condition. The crime, so defined, differs from that in *Robinson*. The statute covers more than a mere status. But the essential constitutional defect here is the same as in *Robinson,* for in both cases the particular defendant was accused of being in a condition which he had no capacity to change or avoid. The trial judge sitting as trier of fact . . . defined appellant's "chronic alcoholism" as "a disease which destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol." He also found that "a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism." . . .

The findings in this case, read against the background of the medical and sociological data . . . , compel the conclusion that the infliction upon appellant of a criminal penalty for being intoxicated in a public place would be "cruel and unusual punishment" within the prohibition of the Eighth Amendment. This conclusion follows because appellant is a "chronic alcoholic" who, according to the trier of fact, cannot resist the "constant excessive consumption of alcohol" and does not appear in public by his own volition but under a "compulsion" which is part of his condition. . . .

Notes and Questions

1. How significant is it to the Court's decision in *Powell v. Texas* that Leroy Powell was convicted under a statute making it a crime to be "found in a state of intoxication *in any public place*" (emphasis added)? Would a law making it a crime "for any person to be a chronic alcoholic" be constitutional? How about a law making it a crime for a chronic alcoholic to be "found in a state of intoxication" or "to drink an alcoholic beverage"? With respect to the latter questions, would you expect Justices Marshall, Black, White, and Fortas, respectively, to arrive at different conclusions? Why or why not?
2. Do you find persuasive the dissent's argument that "a person may not be punished if the condition essential to constitute the defined crime is part of the pattern of his disease and is occasioned by a compulsion symptomatic of the disease"? In this vein, would it be constitutional to punish a person for having the flu? To punish someone who has the flu for having a fever? To punish someone who has the flu for sneezing? To punish someone who has the flu for sneezing in public? Which of those questions best fits the facts underlying Powell's conviction?
3. Justice Marshall expresses concerns about importing "scientific and medical models into a legal system generally predicated upon a different set of assumptions." What different assumptions are made about human behavior by science and medicine, on the one hand, and the criminal law, on the other hand?

2. It is not foreseeable that findings such as those which are decisive here—namely that the appellant's being intoxicated in public was a part of the pattern of his disease and due to a compulsion symptomatic of that disease—could or would be made in the case of offenses such as driving a car while intoxicated, assault, theft, or robbery. Such offenses require independent acts or conduct and do not typically flow from and are not part of the syndrome of the disease of chronic alcoholism. If an alcoholic should be convicted for criminal conduct which is not a characteristic and involuntary part of the pattern of the disease as it afflicts him, nothing herein would prevent his punishment.

The Voluntary Act Requirement

If *Robinson* and *Powell* stand for the proposition that an *act* (as opposed to a *status* or *condition*) is *necessary* to justify conviction for a crime and punishment, does it follow that proof of an act also is *sufficient* to justify conviction and punishment? Or should more be required, specifically, that the act was committed *voluntarily*? If conviction and punishment for a crime presume that an actor is in some respect blameworthy, would it make sense to punish a person for engaging in conduct that is not truly voluntary? If not, whose job should it be—the legislatures or the courts—to resolve such difficult issues as whether people exercise free will and the circumstances under which they should be held morally responsible or blameworthy for their conduct?

As a preliminary matter, we might consider an act to be *voluntary* if it is "a purposeful or willed movement." Although it would be difficult to disagree with this proposition, it does not add much clarity as a definition. Others have attempted more precise refinements. The Model Penal Code (MPC) was drafted by a distinguished committee of attorneys, law professors, and judges within the American Law Institute and was widely disseminated upon its completion in 1962. As its name suggests, the MPC was designed as a model set of criminal statutes to be considered by legislatures and other policymaking bodies interested in reforming the criminal law within their jurisdictions. The MPC defines the following acts as *not* being voluntary for purposes of the criminal law's *actus reus* requirement.

> MPC §1.13 General Definitions, Section 2.01:
>
> (2) The following are not voluntary acts within the meaning of this Section:
>
> (a) a reflex or convulsion;
> (b) a bodily movement during unconsciousness or sleep;
> (c) conduct during hypnosis or resulting from hypnotic suggestion;
> (d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual.

Taken together, the general definition of *voluntary* offered earlier and the MPC identification of acts that are not voluntary in nature offer a framework for considering actions that may be defined as criminal. These are important distinctions because the law does not seek to punish individuals who are not responsible for their actions.

Consider the following two cases in which the defendants allege that they did not act voluntarily. Note the connection between the *actus reus* and the **mens rea** requirements in these cases and the significant overlap between them. While reading these cases, keep in mind the importance of the **voluntary act** requirement and how that requirement can be satisfied.

CASE

State v. Lara, 902 P.2d 1337 (Ariz. 1995)
MARTONE, Justice.

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Miguel Lara was convicted of aggravated assault. The court of appeals reversed, concluding that Lara was entitled to a "voluntary act" instruction. . . . [W]e granted review.

After having been stalked and assaulted by Lara, Al Bartlett called the Tucson police and complained that Lara would not leave his house. Tucson police officer Kucsmas answered the call and was told by Bartlett that Lara was inside. Kucsmas walked in, saw Lara lying down on a couch and asked him to stand up. Lara got up and pointed a knife at Kucsmas. Kucsmas backed off and called for help. He retreated down a corridor, drew his pistol and told Lara to stop or he would shoot. Instead, Lara continued to walk towards him, called him names and slashed at him with the knife. Lara backed Kucsmas out of the house, swung the knife at him and said he was going to kill him. Finally, with Kucsmas backed into a fence, Lara raised his knife and lunged at him. Kucsmas then shot Lara.

Lara was charged with attempted murder and aggravated assault. A defense psychologist testified that Lara was suffering from some organic brain impairment and personality disorder. In such a person, he would expect to see a reduced ability to use good judgment in social situations, increased agitation, and an increased tendency to fly off into a tantrum or rage as if by reflex. Based on this sort of testimony, Lara asked for a voluntary act instruction under A.R.S.

State v. Lara, 902 P.2d 1337 (Ariz. 1995) CASE

§ 13-201 and § 13-105(34).[1] The trial court rejected the instruction. . . . The jury found Lara guilty of aggravated assault but acquitted him of attempted first degree murder.

A.R.S. § 13-201 provides as follows:

The minimum requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform a duty imposed by law which the person is physically capable of performing.

A.R.S. § 13-105(34) defines "voluntary act" as "a bodily movement performed consciously and as a result of effort and determination." The court of appeals held that Lara was entitled to an instruction on these statutes because it believed that the expert testimony would have supported a finding that his behavior was "reflexive rather than voluntary." We disagree.

A.R.S. § 13-201 is a codification of the common law requirement of *actus reus*—that a crime requires an act. A guilty mind (*mens rea*) is not enough. And, under § 13-105(34), an act means a conscious bodily movement caused by effort and determination. This is consistent with the common law. Stating the obverse, then, a bodily movement while unconscious, asleep, under hypnosis, or during an epileptic fit, is not a voluntary act. The autonomic nervous system controls involuntary bodily functions. The heart muscle pumps without our intervention. Our lungs can ingest air without thought. Our eyes shut reflexively when the ophthalmologist tests us for glaucoma. These are the sorts of bodily movements that would not be "performed consciously and as a result of effort and determination" within the meaning of our statute.

Lara's expert testimony falls far short of this. He was not unconscious. He was relentless in his effort and determination. He was thus not entitled to a voluntary act instruction under A.R.S. § 13-201.

We acknowledge that the word "voluntary" has been used in two separate senses, and this contributes to the confusion that surrounds the issue. As we hold here, A.R.S. §§ 13-201 and 13-105(34) use the term "voluntary act" as a determined conscious bodily movement, in contrast to a knee-jerk reflex driven by the autonomic nervous system. Used this way, "voluntary act" means *actus reus*. On the other hand, "voluntary" has also been used to describe behavior that might justify inferring a particular culpable mental state. Used this way, "voluntary" gets caught up in *mens rea*. Recommended Arizona Jury Instruction Criminal Standard 17 (1989) joins these separate uses and contributes to the confusion. It provides:

> The State must prove that the defendant did a voluntary act forbidden by law. You may determine that the defendant intended to do the act if the act was done voluntarily.

The first sentence of this instruction is, as we have shown, the *actus reus* of § 13-201, which is appropriate only if there is evidence to support a finding of a bodily movement performed unconsciously and without effort and determination, within the meaning of § 13-105(34). As we have held, this is not such a case.

The second sentence has nothing to do with the first. It allows the jury to draw an inference of intent from an act that is voluntary. But intent is one of our culpable mental states descriptive of *mens rea,* not *actus reus.* The second sentence is likely to be justified in any case in which intent is an issue. Those who would use Standard 17 need to be alert to this problem. . . .

We affirm the judgment of the trial court. We vacate those parts of the opinion of the court of appeals that address the voluntary act . . . instructions.

CASE

McClain v. State, 678 N.E.2d 104 (Ind. 1997)

BOEHM, Justice. . . .

.....

On December 20, 1993, McClain was involved in an altercation with police officers in the Broad Ripple section of Indianapolis. McClain is alleged to have struck several officers before being subdued by police. On December 22, 1993, McClain was charged with aggravated battery, two counts of battery against police officers, and two counts of resisting law enforcement. On March 4, 1994, McClain filed a notice of intent to interpose an insanity defense. Discovery revealed that the basis for the defense was sleep deprivation allegedly preventing McClain from forming the necessary intent for the crimes charged. Two days before the altercation with police, McClain flew from Japan to Indianapolis and did not sleep on the flight. McClain further claims to have slept just three hours in the forty-eight hours prior to his arrest.

On July 11, 1995, McClain withdrew his insanity defense, apparently convinced after researching the

1. Defendant's Requested Instruction No. 4 was:

The State must prove that the defendant did a voluntary act forbidden by law. "Voluntary act" means a bodily movement performed consciously and as a result of effort and determination.

CASE *McClain v. State, 678 N.E.2d 104 (Ind. 1997)*

matter that evidence of "automatism" did not need to be presented as an insanity defense. On the morning trial was scheduled to begin, the court granted the State's motion in limine excluding "any expert witness testimony expressing an opinion about the capacity of the defendant to form criminal intent on the night in question" and "any expert testimony regarding sleep disorders and/or dissociative states." The court held that McClain's evidence related to automatism was a "mental disease or defect" within the meaning of Indiana Code § 35-41-3-6 and therefore had to be presented under the insanity statute. This ruling effectively precluded McClain from presenting evidence of sleep deprivation because he had withdrawn his insanity defense before trial.[2] Recognizing the possibility of having to retry the case if the ruling was later found to be reversible error, the trial court certified the following question for interlocutory appeal: "Did the trial court err in granting the State's Motion in Limine, excluding evidence of expert testimony about the capacity of the defendant to form criminal intent on the night in question and expert testimony regarding sleep disorders and/or dissociative states, because the [d]efendant had withdrawn the defense of insanity?" For the reasons explained below, we reverse.

I. AUTOMATISM BEARS ON THE VOLUNTARINESS OF MCCLAIN'S CONDUCT

. . . Automatism has been defined as "the existence in any person of behaviour of which he is unaware and over which he has no conscious control." Donald Blair, *The Medicolegal Aspects of Automatism,* 17 MED. SCI. LAW 167 (1977); *see also* BLACK'S LAW DICTIONARY 134 (6th ed. 1990) (automatism is "[b]ehavior performed in a state of mental unconsciousness . . . apparently occurring without will, purpose, or reasoned intention"). A seminal British case concisely described automatism as "connoting the state of a person who, though capable of action, is not conscious of what he is doing." *Bratty v. Attorney-General of Northern Ireland,* 3 All E.R. 523, 527 (1961). Automatism manifests itself in a range of conduct, including somnambulism (sleepwalking), hypnotic states, fugues, metabolic disorders, and epilepsy and other convulsions or reflexes.

McClain argues that his violent behavior towards police was a form of automatism caused by sleep deprivation. He contends that as a result of his condition his acts were not voluntary and therefore he has no criminal responsibility for them. McClain asserts that his condition is not a "mental disease or defect" because it was externally caused and, he claims, is unlikely to recur. The State argues that the trial court properly classified McClain's defense as a mental disease or defect and that McClain, accordingly, cannot also present evidence of automatism to negate voluntariness. Alternatively, the State contends that McClain's altercation with police cannot be described as an involuntary act because his conduct was not a convulsion or reflex.

In the states that have addressed the issue, it is well established that automatism can be asserted as a defense to a crime. Rather than questioning whether automatism is a defense at all, the debate in these states has focused on the manner in which evidence of automatism can be presented. These jurisdictions are split between recognizing insanity and automatism as separate defenses and classifying automatism as a species of the insanity defense. . . . [W]e think the approach required under Indiana's criminal statutes is to distinguish automatism from insanity and allow McClain's evidence to be presented as bearing on the voluntariness of his actions.

Indiana Code § 35-41-2-1(a) provides that "[a] person commits an offense only if he voluntarily engages in conduct in violation of the statute defining the offense." This section was enacted in 1976 pursuant to the recommendations of the Indiana Criminal Law Study Commission (hereafter "Commission"). . . . Before 1976, Indiana's criminal code lacked basic provisions governing culpability. The voluntary act statute was adopted that year in a new section titled "Basis of Liability," which also included *mens rea* definitions of "intentionally," "knowingly" and "recklessly"—terms now in familiar use in criminal cases. The voluntary act statute codified the axiom that voluntariness is a "general element of criminal behavior" and reflected the premise that criminal responsibility "postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong." As the Commission explained: "The term voluntary is used in this Code as meaning behavior that is produced by an act of choice and is capable of being controlled by a human being who is in a conscious state of mind."

The evidence McClain seeks to present on automatism bears on the voluntariness of his actions within the meaning of the statute. In essence McClain claims he was unable to form criminal intent on the night in question due to an automatistic state of mind that precluded voluntary behavior. Although the jury is obviously not required to accept this explanation, permitting McClain to make the argument is consistent with the statute's general purpose that criminal conduct be an "act of choice" by a person in a "conscious state of mind." . . . Accordingly, at trial McClain can call

2. Indiana Code § 35-36-2-1 requires criminal defendants intending to interpose an insanity defense to give notice to the court before trial.

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expert witnesses and otherwise present evidence of sleep deprivation and automatism within the confines of the Indiana Rules of Evidence. . . . If McClain's conduct is found to be involuntary, then the State has not proved every element of its case and the law requires an acquittal.

II. AUTOMATISM IS NOT A SPECIES OF THE INSANITY DEFENSE

Both the language of the insanity statute and the policies underlying the insanity defense counsel against classifying evidence of automatism as a mental disease or defect. Indiana Code § 35-41-3-6 provides:

> (a) A person is not responsible for having engaged in prohibited conduct if, as a result of mental disease or defect, he was unable to appreciate the wrongfulness of the conduct at the time of the offense.
> (b) As used in this section, "mental disease or defect" means a severely abnormal mental condition that grossly and demonstrably impairs a person's perception, but the term does not include an abnormality manifested only by repeated unlawful or antisocial conduct.

. . . While automatistic behavior could be caused by insanity, "unconsciousness at the time of the alleged criminal act need not be the result of a disease or defect of the mind." *State v. Caddell,* 215 S.E.2d 348, 360 (N.C. 1975). The decisions holding that automatism is not a species of the insanity defense have relied on this point and we find it persuasive. . . . Consistent with this view, we hold that McClain's evidence of automatism as pleaded does not need to be presented under the insanity defense. We understand McClain's defense to consist of automatism manifested in a person of sound mind. To the extent involuntary behavior is contended to result from a mental disease or defect, the insanity statute would apply. . . .

. . . The requirement that criminal defendants in Indiana be forced into commitment proceedings if found "not responsible by reason of insanity" reinforces our conclusion. *See* IND.CODE § 35-36-2-4 (1993) (requiring prosecutor to file petition seeking commitment hearing where defendant found not responsible by reason of insanity). . . . [A] sane but automatistic defendant forced to plead the insanity defense faces a choice of possible commitment or effectively presenting no defense to the crime. . . .

One important policy underlying the insanity defense is ensuring that mentally-ill criminal defendants receive treatment for their condition. . . . Although automatism could be the product of a diseased mind in need of treatment and rehabilitation, nothing in the record indicates that McClain presents such a case and McClain does not assert that he does. . . .

McClain seems uncertain exactly how to describe his allegedly automatistic condition, calling it "sleep deprivation," "sleep violence," "sleepwalking" and even a state of sleep itself. The gravamen of McClain's argument, however, is that but for a lack of sleep over the course of several days, he would not have been in this state at the time he allegedly involuntarily struck police officers on December 20, 1993. McClain's condition thus is more analogous to intoxication than insanity because it had an external cause. Unlike intoxication, the Legislature has presented no specific standard for dealing with or assessing this defense. Automatism is simply a denial of one element—voluntary action—that the Legislature has required for most crimes. It is not a disease or defect within the meaning of Indiana Code § 35-41-3-6. Accordingly, McClain was not required to give notice to the court of his intent to interpose an insanity defense. . . .

CONCLUSION

This case is remanded for proceedings in the trial court consistent with this opinion.

Notes and Questions

1. Is it possible to reconcile the decisions in *State v. Lara,* which rejected the defendant's request for an instruction to allow the jury to consider whether his acts were involuntary, and *McClain v. State,* which ruled that the defendant was entitled to offer evidence and present such a defense?
2. The decisions in both *State v. Lara* and *McClain v. State* distinguish the criminal law's requirement for a voluntary act from the *mens rea* (or guilty mind) requirement. Why is this distinction important? Couldn't Lara simply argue that the underlying conditions from which he allegedly suffered (organic brain impairment and personality disorder) prevented him from forming the intent to assault Officer Kucsmas, and couldn't McClain similarly argue that his sleep deprivation and alleged resulting state of unconsciousness precluded him from intending to strike the police officers and resist arrest?
3. The decision in *McClain* suggests that "convulsions or reflexes" stemming from epilepsy would be the product of automatism and would not satisfy the criminal law's *actus reus* requirement. Should a person

suffering an epileptic seizure, whose hands or feet hit or kick another individual, be guilty of criminal assault and battery? What about an individual who drives her car and while doing so experiences a seizure, loses control of the vehicle, and strikes and injures a pedestrian? Should the driver's involuntary epileptic seizure excuse her from criminal liability? Would it matter if she knew that she suffered from epilepsy and was prone to having seizures before driving the car and causing injury? See, for example, *Commonwealth v. Cheatham,* 615 A.2d 802 (Pa. Super. 1992); *People v. Decina,* 138 N.E.2d 799 (N.Y. 1956); *Smith v. Commonwealth,* 282 S.W.2d 840 (Ky. App. 1955).

Culpable Omissions: Can the Failure to Act Be a Crime?

Does the *actus reus* principle presume that a crime requires the commission of an affirmative act? Can a person be guilty of a crime for doing absolutely nothing, that is, for failing to act when some sort of action should have been taken? If so, under what circumstances and subject to what limitations can **omissions** be crimes?

For example, if you came upon a small child lying unconscious on the ground on a bitterly cold winter day and you had your cell phone with you, a hospital was just a block away, and you did nothing but keep walking—neither making a 911 phone call nor carrying the child to the hospital—would you be guilty of a crime if the child went undiscovered and subsequently froze to death? Would it matter if the child was your own son or daughter? Your sibling, niece, or nephew? Your next-door neighbor? Would it matter if the child had wandered 20 feet out on a frozen pond and fallen through the ice, you had no cell phone, and you chose to keep walking rather than attempting a rescue? Would it matter if the person lying on the frigid ground was an adult and not a child? An adult who was your long-time partner in an intimate relationship? A man you had accidentally knocked unconscious when you crashed into him after slipping on the ice? A man you had knocked unconscious after he had attacked you with a knife in a failed robbery attempt? Consider the following case.

CASE

State ex rel. Kuntz v. Montana Thirteenth Judicial Court, 995 P.2d 951 (Mont. 2000)

Justice JAMES C. NELSON delivered the Opinion of the Court.

.....

[Bonnie Kuntz and Warren Becker had lived together for six years but were not married. They "were in the process of ending what is described as a stormy relationship" when, according to Kuntz, Becker violently attacked her, grabbing her by the hair and slamming her into a stove. Kuntz "could not clearly remember what happened" next, but reported finding Becker lying at the end of a trail of blood on the front porch of the mobile home that they shared. She rolled him over and, finding him "unresponsive," removed the keys from his pocket and used his vehicle to drive to a friend's house where she used a telephone to call her mother. Within the hour, another relative summoned medical help and the Sheriff. The authorities arrived at the trailer to find Becker dead from a single stab wound to the chest.]

. . . Bonnie Kuntz was charged with negligent homicide . . . . Although she admitted stabbing Becker and causing his death, Kuntz entered a plea of not guilty based on the defense of justifiable use of force.

On November 6, 1998, shortly before the scheduled trial date, the State filed an amended information charging the same offense but alleging that Kuntz caused the death of Becker by stabbing him once in the chest with a knife *and* by failing to call for medical assistance. Kuntz again entered a plea of not guilty. On December 18, 1998, Kuntz filed a motion to dismiss the amended information or in the alternative to strike the allegation that the failure to seek medical assistance constituted negligent homicide.

Following a hearing . . . the District Court . . . [denied the] motion to dismiss the amended information.

Kuntz sought a writ of supervisory control and . . . this Court accepted original jurisdiction . . . .

. . . Because the issues here have far-reaching implications with respect to the affirmative defense of justifiable use of force in Montana, as well as the duty to render medical aid, we find it necessary to first establish a workable framework of legal principles and rules under the laws of Montana and other jurisdictions before proceeding.

State ex rel. Kuntz v. Montana Thirteenth Judicial Court, 995 P.2d 951 (Mont. 2000) **CASE**

For criminal liability to be based upon a failure to act, there must be a duty imposed by the law to act, and the person must be physically capable of performing the act. As a starting point in our analysis, the parties here have identified what is often referred to as "the American bystander rule." This rule imposes no legal duty on a person to rescue or summon aid for another person who is at risk or in danger, even though society recognizes that a moral obligation might exist. This is true even "when that aid can be rendered without danger or inconvenience to" the potential rescuer. Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law*, at 183 (1972). Thus, an Olympic swimmer may be deemed by the community as a shameful coward, or worse, for not rescuing a drowning child in the neighbor's pool, but she is not a criminal.

But this rule is far from absolute. Professors LaFave and Scott have identified seven common-law exceptions to the American bystander rule: 1) a duty based on a personal relationship, such as parent-child or husband-wife; 2) a duty based on statute; 3) a duty based on contract; 4) a duty based upon voluntary assumption of care; 5) a duty based on creation of the peril; 6) a duty to control the conduct of others; and 7) a duty based on being a landowner. A breach of one of these legal duties by failing to take action, therefore, may give rise to criminal liability. Our review of the issues presented here can accordingly be narrowed to two of the foregoing exceptions . . . : 1) a duty based on a personal relationship, and 2) a duty based on creation of the peril.

One of the lead authorities on the personal relationship duty arose in Montana. In . . . *State v. Mally,* 366 P.2d 868 (Mont. 1961), this Court held that under certain circumstances a husband has a duty to summon medical aid for his wife and breach of that duty could render him criminally liable. The facts of the case described how Kay Mally, who was suffering from terminal kidney and liver diseases, fell and fractured both her arms on a Tuesday evening. Her husband, Michael Mally, put her to bed and did not summon a doctor until Thursday morning. "During this period of time, as she lay there with only the extended arm of death as a companion, she received but one glass of water." *Mally,* 366 P.2d at 873. Although his wife ultimately died of kidney failure, Mally was found guilty of involuntary manslaughter, a forerunner of Montana's negligent homicide statute, because his failure to act hastened his wife's death.

In *Mally,* however, we alluded to a limitation of this rule which is a point of contention between the parties here. We cited to *People v. Beardsley,* 113 N.W. 1128 (Mich. 1907) . . . . The Michigan Supreme Court concluded that the legal duty imposed on the personal relationship of husband and wife could not be extended to a temporary, non-family relationship. The court held that a married defendant had no duty to summon medical help for his mistress, who was staying in his house for the weekend, after she took morphine following a bout of heavy drinking and fell into a "stupor."

We agree with the State, as well as myriad commentators over the years, that although not expressly disfavored in case law, *Beardsley* is indeed "outmoded," at least to the extent it should be distinguished. *See, e.g.,* . . . Graham Hughes, *Criminal Omissions,* 67 Yale L.J. 590, 624 (1958) (stating that *Beardsley* "proclaims a morality which is smug, ignorant and vindictive"); . . . *State v. Miranda,* 715 A.2d 680, 682 (Conn. 1998) (concluding that person who is not biological or legal parent of a child but who establishes a "familial relationship" with live-in girlfriend has duty to protect child from abuse). . . .

Applying the foregoing to the facts here, we conclude that Kuntz and Becker, having lived together for approximately six years, owed each other the same "personal relationship" duty as found between spouses under our holding in *Mally*. This duty, identified as one of "mutual reliance" by LaFave and Scott, would include circumstances involving "two people, though not closely related, [who] live together under one roof." LaFave & Scott, § 3.3(a)(1), at 285–286. . . . Nevertheless, this holding is far from dispositive in establishing a legal duty under the facts presented.

We agree with the District Court that the duty based on "creation of the peril" is far more closely aligned with the factual circumstances here. Undoubtedly, when a person places another in a position of danger, and then fails to safeguard or rescue that person, and the person subsequently dies as a result of this omission, such an omission may be sufficient to support criminal liability. *See State v. Morgan,* 936 P.2d 20, 23 (Wash. App. 1997) (imposing criminal liability for supplying cocaine leading to victim's overdose); *United States v. Hatatley,* 130 F.3d 1399, 1406 (10th Cir. 1997) (imposing criminal liability for leaving victim badly beaten and shirtless in a freezing, remote desert).

This duty may include peril resulting from a defendant's criminal negligence, as alleged here. . . .

The legal duty based on creation of the peril has been extended in other jurisdictions to cases involving self-defense. . . .

[T]he legal duty imposed on personal relationships and those who create peril are not absolute; i.e., there are exceptions to these exceptions. The personal relationship legal duty, for example, does not require a person to jeopardize his own life. Furthermore, the duty does not arise unless the spouse "unintentionally entered a helpless state," or was otherwise incompetent to summon medical aid on his or her own behalf.

Similarly, the law does not require that a person, who places another person in a position of peril,

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risk bodily injury or death in the performance of the legally imposed duty to render assistance. For example, the crime of negligent homicide in Montana requires a gross deviation from a reasonable standard of care. In turn, what constitutes a reasonable standard of care must be guided by the principle that "[w]hat an ordinarily prudent and careful person would do under a given set of circumstances is usually controlled by the instinctive urge to protect himself from harm." *Burns v. Fisher,* 313 P.2d 1044, 1048 (Mont. 1957).

Therefore, where self-preservation is at stake, the law does not require a person to "save the other's life by sacrificing his own," and therefore no crime can be committed by the person who "in saving his own life in the struggle for the only means of safety," causes the death of another. Even states such as Vermont that have adopted a "Good Samaritan Doctrine" which—contrary to the American bystander rule—imposes a legal duty to render or summon aid for imperiled strangers, do not require that the would-be rescuer risk bodily injury or death. *See, e.g., State v. Joyce,* 433 A.2d 271 (Vt. 1981) (holding that Vermont's Duty to Aid the Endangered Act did not require bystanders to intervene in a fight, because such intervention would expose person to risk of sustaining an injury). Thus, although a person may still be held accountable for the results of the peril into which he or she placed another, the law does not require that he or she risk serious bodily injury or death in order to perform a legal duty. . . .

ISSUE 1.

Does one who justifiably uses deadly force in defense of her person nevertheless have a legal duty to summon aid for the mortally wounded attacker? . . .

Whether inflicted in self-defense or accidentally, a wound that causes a loss of blood undoubtedly places a person in some degree of peril, and therefore gives rise to a legal duty to either 1) personally provide assistance; or 2) summon medical assistance. Even so, the performance of this legal duty, as discussed above, does not require that a person place herself at risk of serious bodily injury or death.

Accordingly, based on the legal principles gleaned from our analysis thus far, we hold that when a person justifiably uses force to fend off an aggressor, that person has no duty to assist her aggressor in any manner that may conceivably create the risk of bodily injury or death to herself, or other persons. This absence of a duty necessarily includes any conduct that would require the person to remain in, or return to, the zone of risk created by the original aggressor. We find no authority that suggests that the law should require a person, who is justified in her use of force, to subsequently check the pulse of her attacker, or immediately dial 9-1-1, before retreating to safety.

Under the general factual circumstances described here, we conclude that the victim has but one duty after fending off an attack, and that is the duty owed to one's self—as a matter of self-preservation—to seek and secure safety away from the place the attack occurred. Thus, the person who justifiably acts in self-defense is temporarily afforded the same status as the innocent bystander under the American rule.

Finally, we conclude that the duty to summon aid may in fact be "revived" as the State contends, but only after the victim of the aggressor has fully exercised her right to seek and secure safety from personal harm. Then, and only then, may a legal duty be imposed to summon aid for the person placed in peril by an act of self-defense. We further hold that preliminary to imposing this duty, it must be shown that 1) the person had knowledge of the facts indicating a duty to act; and 2) the person was physically capable of performing the act.

It must be emphasized, however, that once imposed, a proven breach of this legal duty may still fall far short of negligent homicide, pursuant to § 45-5-104, MCA, which requires a gross deviation from an ordinary or reasonable standard of care. . . .

ISSUE 2.

If a person who justifiably uses deadly force fails to summon aid for her attacker, is she criminally culpable for that failure? . . .

Our holding as to the first issue consequentially narrows the issue here. Accordingly, to find a person who justifiably acts in self-defense criminally culpable for negligently causing the death of the aggressor, the failure to summon medical aid must be the "cause in fact" of the original aggressor's death, not the justified use of force.

In a recent wrongful death case, we stated the general rule governing whether conduct is a cause-in-fact of an event:

> [A] party's conduct is a cause-in-fact of an event if "the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event, if the event would have occurred without it."

Gentry v. Douglas Hereford Ranch, Inc., 962 P.2d 1205, ¶ 25 (Mont. 1998) (quoting Prosser & Keaton on Torts § 41, at 266 (5th ed. 1984)).

We therefore hold that a person, who is found to have used justifiable force, but who nevertheless fails to summon aid in dereliction of the legal duty as defined here, may be found criminally negligent only

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where the failure to summon aid is the cause-in-fact of death, rather than the use of force itself.

Furthermore, it is important to emphasize that even where such a duty "revives" under the foregoing analysis, the breach of this duty should not be construed as constituting criminal negligence *per se*. To the contrary, it is entirely conceivable that in circumstances where such a legal duty may rightfully be imposed, a failure to summon medical assistance—due to fear, shock, or some other manifestation resulting from the confrontation—would not be a gross deviation from an ordinary standard of care as required by Montana's negligent homicide statute. Thus, a breach of the legal duty to summon aid may be the cause-in-fact of death, but is still not necessarily a crime. . . .

Determining if and to what extent this holding applies here, however, is further complicated by the procedural facts. Namely, the State brought a single charge of negligent homicide for the stabbing *and* the failure to summon medical aid. Thus, if the use of force is found to be justified, we conclude that Kuntz, as a matter of law, must be acquitted of this single charge regardless of her conduct subsequent to the stabbing. This complication necessarily leads us to the next issue.

ISSUE 3.

Should the prosecution be permitted to argue that the defendant's actions following the use of deadly force may be considered by the fact-finder in making its decision as to the validity of the justifiable use of force defense? . . .

Pursuant to § 45-3-102, MCA, a person is "justified in the use of force or threat to use force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force." Here, Kuntz will have the burden at trial of producing sufficient evidence on this issue to raise a reasonable doubt of her guilt. Ultimately, whether or not her use of force was justified will be determined by the jury. Such a determination will be made based on evidence of what Kuntz reasonably believed at the time she was confronted with the alleged imminent use of unlawful force.

. . . Accordingly, we conclude that whether Kuntz had a duty to subsequently summon medical aid and whether she failed in performing this duty are wholly immaterial in determining whether the use of force was justified. Such evidence would in no sense tend to make Kuntz's reasonable belief at the time of the attack more or less probable. . . . Therefore, the District Court shall be guided by this conclusion in its evidentiary rulings regarding post-stabbing evidence offered by the State for the purpose of rebutting Kuntz's claim of justified use of force.

ISSUE 4.

Should the prosecution be permitted to argue that even if the defendant acted with justifiable use of force, her delay in seeking medical aid for the mortally wounded attacker was a factor in causing his death?

Pursuant to the charge of negligent homicide as it currently stands, if the use of force was indeed justified, then a subsequent delay in seeking medical aid would be immaterial in addressing the factors that caused death. Again, the District Court in its evidentiary rulings should be guided by our conclusion that, as presently charged, a finding that Kuntz's use of force was justified would be a complete defense requiring acquittal, and that she had no duty to immediately render or summon aid for Becker. . . .

ISSUE 5.

May the defendant's actions following an unjustified use of deadly force be alleged as facts supporting charging the offense of negligent homicide?

This issue specifically addresses the State's case in chief, namely that the evidence will show that Kuntz's use of force was not justified, and she negligently caused Becker's death by first stabbing him and then failing to summon medical aid. To this extent, we hold that the State may, of course, allege relevant facts that may tend to prove the elements of the charged crime, negligent homicide. The evidentiary purpose of such alleged facts, however, is strictly limited by our holdings under the above issues.

For these reasons, the District Court's order denying Kuntz's motion to amend or strike the amended information is affirmed, and this case is remanded for further proceedings consistent with this opinion.

Justice TERRY N. TRIEWEILER concurring and dissenting.

. . . I disagree with, and therefore dissent from the majority's conclusion that at some point, a victim of aggression who has justifiably defended herself has a "revived" obligation to come to the assistance of the person against whom it was necessary for her to defend herself.

The majority has concluded that although circumstances occur which are so extreme that a woman is justified in the use of deadly force to defend herself, a jury can, after the fact, in the safe confines of the jury room, conclude that at some subsequent point she was sufficiently free from danger that she should have made an effort to save her assailant and that because she didn't she is still criminally liable for his death even though at some previous point in time she was justified

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in taking his life. This result is simply unworkable as a practical matter and makes poor public policy.

Section 45-3-102, MCA, provides that a person is justified in the use of deadly force only when necessary to prevent imminent death or serious bodily harm to herself or another, or to prevent commission of a forceable felony. It severely limits the circumstances under which deadly force is justified. However, it specifically recognizes that under those circumstances, the amount of force necessary may be deadly. It is inherently contradictory to provide by statute that under certain circumstances deadly force may be justified, but that having so acted, a victim has a common law duty to prevent the death of her assailant.

Furthermore, I conclude that the obligation imposed by the majority opinion is confusing. It predicates criminal liability on a finding that the failure to summon aid is the cause in fact of death. However, where a person is placed in peril by another's justified use of force it can never be said that the failure to summon aid, rather than the original act of force, is the cause in fact of death, because presumably death would never have occurred but for the original act of self-defense. For example, the majority correctly notes that in this case, Bonnie Kuntz admits that she stabbed Warren Becker in the chest and that the stab wound caused his death. How then is a jury to distinguish between the original act, which may have been justified, and a failure to summon aid for the purposes of determining the cause in fact of Becker's death? . . .

I conclude that when a person is attacked by another and reasonably believes that deadly force is necessary to prevent imminent death or serious bodily injury to herself and therefore uses deadly force to defend herself, she has no duty, "revived" or otherwise, to summon aid for her assailant. . . .

Notes and Questions

1. Assume that Bonnie Kuntz and Warren Becker did not live together but were next-door neighbors. Further assume that Kuntz discovered Becker lying on his front porch and bleeding when she paid a visit to his mobile home to borrow a cup of flour. Under "the American bystander rule" described in *State ex rel. Kuntz v. Montana Thirteenth Judicial District Court,* would Kuntz be required to render aid, call for help, or otherwise take action in order to avoid being punished for a crime? *Should* she be guilty of a crime if, being perfectly capable of doing so and facing no risk to her own safety, she failed to take action that would have saved Becker's life, and as a result he died? What policy reasons might account for "the American bystander rule"?
2. Assume that Kuntz could stand by and do nothing without risking conviction for a crime under the facts described in note 1. Now, assume that when Kuntz went next door to borrow a cup of flour from Becker, Becker became enraged, drew a knife, and tried to kill her. Assume further that following a desperate struggle, Kuntz managed to wrestle the knife from Becker and stabbed him in the chest as his hands closed around her throat in an attempt to strangle her. Under these facts, and under the court's ruling in *State ex rel. Kuntz v. Montana Thirteenth Judicial District Court,* would Kuntz be required to render aid, call for help, or otherwise take action in order to avoid being punished for a crime? Does it make sense *not* to require someone to render aid to an "innocent" victim, as posited in note 1, but require her to do so after being viciously attacked by a man intent on killing her, as posited in this note? Why or why not?
3. Citing LaFave and Scott's treatise *Criminal Law,* the court in *Kuntz* identifies "seven common-law exceptions to the American bystander rule." The existence of any of the identified circumstances can create a *legal* duty to act, rather than what might be described simply as a moral obligation (as in the hypothetical example given about the Olympic swimmer who declines to rescue a child who is drowning in a swimming pool). Note, however, that other limitations might still excuse an individual from failing to act. For example, she might not have been aware of the circumstances giving rise to the duty to act, she might not have been capable of performing the necessary act, and she might have to expose herself to great peril in order to act. In addition, her failure to act must be the cause-in-fact of the harm that is an element of the crime. How does the cause-in-fact requirement become an issue with respect to whether Kuntz is likely to be successfully prosecuted for criminally negligent homicide concerning Becker's death?
4. In *Kuntz,* the Montana Supreme Court discusses and appears to disapprove of *People v. Beardsley,* 113 N.W. 1128 (Mich. 1907). The Michigan Supreme Court ruled in this case that a man had no legal duty to act to save the life of a woman with whom he had sexual relations over the period of a few days, while his wife was out of town, and the woman had passed out and subsequently died after consuming a large amount of alcohol and drugs. If "a duty based on a personal relationship, such as . . . husband-wife" is one of the recognized exceptions to "the American bystander rule," what personal relationships in addition to marriage should create a legal duty to act? Although Kuntz and Becker were not married, they had lived together for approximately 6 years. Should a relationship of that length and nature impose a legal duty for one of the couple to act when the other is in peril? Should a relationship of the type that existed in *People v. Beardsley*? If two people went

hunting together and one accidentally was shot by another hunter, should deciding whether the other has a legal duty to act to render aid or summon help turn on whether they are married, had lived together in a romantic relationship for 6 years, had a "one-night stand" the evening before, or had not met one another until that same day?

5. For additional cases considering whether criminal liability may be imposed for failing to act under circumstances involving an alleged legal duty to do so, see *People v. Heitzman,* 886 P.2d 1229 (Cal. 1994) (adult child's alleged failure to care for dependent, elderly parent); *Peterson v. State,* 765 So.2d 861 (Fla. App. 2000) (same); *State v. Williquette,* 385 N.W.2d 145 (Wis. 1986) (child abuse prosecution of mother for failing to act to protect minor children from sexual and physical abuse allegedly inflicted by children's father); *Commonwealth v. Pestinkas,* 617 A.2d 1339 (Pa. Super. 1992) (murder conviction based on defendants' alleged breach of contract to provide food and medical care for infirm patient).

MENS REA

Imagine that the drivers of three different automobiles strike pedestrians as they attempt to cross the street, in each case causing the pedestrians' deaths. The driver of the first car, A, recognized his victim as his former boss and swerved to hit him as "payback" for firing him the day before. The driver of the second car, B, was intoxicated, had forgotten to turn on the vehicle's headlights although it was nighttime, and ran over her victim without even seeing him. The driver of the third car, C, slammed on his brakes in an attempt to avoid hitting a dog who had run into the street, lost control of the vehicle, and skidded into a pedestrian who had entered a crosswalk. Each driver, while engaging in similar *acts* (driving a car), was responsible for *causing* the same type of **harm** (the death of another person). Is each one guilty of a crime? If so, are they guilty of the same crime? If not, why not?

You probably will agree that although A, B, and C each caused a person's death by striking their victims with the car they were driving, their cases are importantly different and the law should not respond to them in the same way. What distinguishes their cases? If your answer concerns the drivers' respective mental states—what the law calls *mens rea* (guilty mind)—you would be thinking along the same lines as Oliver Wendell Holmes, Jr., the famous legal scholar and early 20th-century U.S. Supreme Court justice, when he wrote: "[E]ven a dog distinguishes between being stumbled over and being kicked." A, who deliberately ran over his former employer in retaliation for being fired, clearly appears to be guilty of a crime and deserving of punishment. On the other hand, we may well conclude that C, who lost control of his car while trying to avoid hitting a dog, was involved in a tragic accident that ought not to be considered a crime and merit punishment. Most people likely will agree that B, whose intoxication may have contributed to her failure to activate her car's headlights and to striking and killing the pedestrian in her case, is not guilt free and ought to be convicted of a crime. It may be more debatable what crime she should be convicted of committing, how severely she should be punished, and in particular whether she should be considered guilty of committing a crime of equal seriousness to A's offense.

The essential point is that the actor's mental state—his or her *mens rea*—can make all the difference concerning whether a crime has been committed and, if so, how seriously the crime should be defined and punished. We consider *mens rea* issues in the following cases.

CASE

State v. Jefferies, 446 S.E.2d 427 (S.C. 1994)

TOAL, Justice. . . .

. . . . . .

On the evening of November 25, 1988, the defendant ("Jefferies") escaped from John G. Richards Youth Detention Center located in the St. Andrews area of Richland County. After his escape, Jefferies looked for an automobile to steal so he could go home to Gaffney, South Carolina.

Shortly after Jefferies' escape, Ronald Caldwell ("Father") and his four-month-old son, Matthew,

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drove into a convenience store parking lot at Ashland and St. Andrews Roads to use the telephone. Matthew was attached to a heart monitor. He was strapped in an infant car seat. The evidence is conflicting as to whether Matthew was in the front seat or the back seat of the automobile.

The Father decided to leave Matthew in the automobile with the motor running while he used the pay telephone. Realizing that he did not have enough change, the Father started to go into the store. The Father glanced back at his automobile and saw Jefferies opening the door and getting in.

Jefferies got into the automobile and began to drive away. The Father immediately ran to the automobile and grabbed onto the partially open driver's window. Jefferies continued to drive on to Ashland Road then right on to St. Andrews Road heading towards Interstate 26. As the Father hung onto the window and car door, he pleaded with Jefferies to release the baby.

Jefferies admits that while the Father was hanging onto the moving vehicle, pleading for the release of his child, Jefferies looked around in the automobile and saw Matthew. Nevertheless, Jefferies continued towards the interstate. On the entrance ramp to Interstate 26, Jefferies increased speed and the Father fell off. . . .

Jefferies was picked up by the Gaffney police between 2:30 and 3:00 a.m. on November 26, 1988 in Cherokee County, South Carolina. He told police that he left the baby at a service station in Newberry, South Carolina, more than twenty miles from where the automobile was stolen. Matthew was found, in his car seat still attached to the heart monitor, beside the garbage dumpster of a service station in Newberry, South Carolina. . . .

At trial, Jefferies, through his attorneys, admitted stealing the automobile. Jefferies' attorneys claimed, however, that because Jefferies did not know Matthew was in the automobile at the time he stole the automobile, Jefferies could not have intended to kidnap Matthew. The trial judge refused the charge on "intent" submitted by Jefferies. . . .

On direct appeal, Jefferies claimed the trial judge erred . . . in not charging "intent" as an element of kidnapping. . . . The Court of Appeals granted Jefferies a new trial. . . . The State appeals. . . .

I. Mens Rea

"Few areas of criminal law pose more difficulty than the proper definition of the *mens rea* required for any particular crime." *United States v. Bailey,* 444 U.S. 394, 403 (1980). "Criminal liability is normally based upon the concurrence of two factors, 'an evil meaning mind [and] an evil doing hand,'" *Id.* at 402, although this Court has recognized that the legislature may declare an act criminal regardless of the mental state of the actor. Thus, we must determine what, if any, *mens rea* is required for the crime of kidnapping.

The required *mens rea* for a particular crime can be classified into a hierarchy of culpable states of mind in descending order of culpability, as purpose, knowledge, recklessness, and negligence. "At common law, crimes generally were classified as requiring either 'general intent' or 'specific intent.' This venerable distinction, however, has been the source of a good deal of confusion." *Id.* at 403. Thus, the commentators and Model Penal Code have rejected the traditional dichotomy in favor of the hierarchical approach.

The kidnapping statute does not expressly state whether a *mens rea* is required.[4] Thus, we look to common law and the development of the statute to determine whether the legislature intended the crime to require a *mens rea*.

Originally, kidnapping required the lesser degree of mental culpability of "knowledge." In 1937, the additional element of "holding for ransom" was required which indicated that the actor must have had a "purpose" or "desired result." This element, however, was deleted in 1976, clearly indicating the legislature intended to lower the standard of culpability required to hold one liable for the crime of kidnapping. While we find clear legislative intent to require a lesser *mens rea* than "purpose,"[7] we find no evidence of legislative intent to make the crime of kidnapping a crime of strict liability. . . . We find that the *mens rea* of "knowledge"[8] is required under S.C. Code Ann. § 16-3-910 (1985).

II. Jury Charge

. . . Jefferies submitted four proposed jury charges to the trial judge on the element of *mens rea*. Each of the charges submitted by Jefferies contained either the element of "specific intent" or "purpose." "Purpose" is the highest level of *mens rea* known in

4. S.C. Code Ann. § 16-3-910 (1985) provides as follows:

Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law except when a minor is seized or taken by his parent, is guilty of a felony and upon conviction, shall suffer the punishment of life imprisonment. . . .

7. "[A] person who causes a particular result is said to act purposefully if 'he consciously desires that result, whatever the likelihood of that result happening from his conduct.' " *Bailey,* 444 U.S. at 405.

8. A person "is said to act knowingly if he is aware 'that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.' " *Bailey,* 444 U.S. at 405.

criminal law and it is not required under the South Carolina kidnapping statute. . . .

In charging the jury on the law of kidnapping, the trial judge read S.C. Code Ann. § 16-3-910 to the jury. He then stated as an additional element of the crime, that kidnapping required a "positive act" on the part of the defendant. Twice during deliberations, the jury requested a definition or explanation of the term "positive act." Each time the trial judge gave the jury the original charge without explanation or elaboration. Defense counsel argued to the jury that "Positive act" was: "an affirmative, positive act is one that is made with full knowledge." Jefferies claims that the trial judge erred in failing to charge the jury on the element of *mens rea* and in failing to define "positive act." . . .

In our view, the term "positive act" generally would not encompass the element of *mens rea;* but, because the jury in this case heard a definition of "positive act" which included "knowledge," we believe the jury charge on the element of *mens rea* as given by the trial judge was inadequate rather than totally absent as Jefferies claims. . . .

The inadequate jury charge in the instant cause clearly confused the jury. . . . Nevertheless, the jury received a definition of "positive act" from defense counsel which encompassed a *mens rea* of "knowledge." . . .

Here the State proved beyond a reasonable doubt, and Jefferies admitted, that he knew the baby was in the automobile within the first six-tenths of a mile. Jefferies also knew he did not have the permission of the child's parent or guardian. Nevertheless, Jefferies continued more than twenty miles after discovering the baby in the automobile before placing a four-month-old infant, attached to a heart monitor, next to a trash dumpster at the rear of a service station located in a rural area of Newberry County.

The jury heard no evidence which would tend to show Jefferies did not possess at least the *mens rea* of knowledge. Jefferies' defense was that because he did not know the baby was in the automobile before the theft, he could not have "intended" to kidnap the baby. Jefferies' claim that his sole intent was to steal the automobile is irrelevant to the later fact of his knowing the baby was in the automobile and continuing the asportation of the child against the will of the parent.[12] The jury's confusion was over an asserted defense which is, in reality, no defense under the present facts. Jefferies cannot maintain that, simply because he was ignorant of the baby's presence to begin with, that he is not responsible for kidnapping after he realized he had the baby and kept on driving.

The jury confusion over the term "positive act" clearly evidences the jury's dilemma in determining when the requisite *mens rea* must arise to sustain a guilty verdict. Had the jury believed that kidnapping was a strict liability crime, there would have been no confusion. As Jefferies admits, and the State proved beyond a reasonable doubt, he possessed the *mens rea* of knowledge when he discovered the baby in the automobile and continued the asportation against the will of the parent; therefore, beyond a reasonable doubt, the jury verdict could not have rested on the incomplete jury charge. The only definition of "positive act" heard by the jury included the *mens rea* of "knowledge." Beyond a reasonable doubt, the impermissible jury charge did not contribute to the verdict of guilty.

The decision of the Court of Appeals . . . is REVERSED and the conviction reinstated. . . .

Notes and Questions

1. Would the result in *Jefferies* be different if the baby was sleeping peacefully in his car seat in the back of the automobile and Jefferies had been arrested before he became aware that the baby was in the car?
2. What does the court mean when it says that it "has recognized that the legislature may declare an act criminal regardless of the mental state of the actor"? What do you understand a "strict liability" offense to be? If kidnapping were a strict liability crime, would it matter whether Jefferies knew that the baby was in the car prior to his being arrested?
3. The court notes that the Model Penal Code "rejected the traditional dichotomy [between 'general intent' and 'specific intent'] in favor of the hierarchical approach," defining *mens rea* according to a "descending order of culpability, as purpose, knowledge, recklessness, and negligence." In *United States v. Zunie,* 444 F.3d 1230 (10th Cir. 2006), the court elaborated on the meaning of the terms used in the MPC.

> The Model Penal Code suggests replacing conceptions of "specific intent" and "general intent" with a "hierarchy of culpable states of mind," including (1) purpose, (2) knowledge, (3) recklessness, and (4) negligence.[1] What the common law would traditionally consider a "general intent" crime, such as assault resulting in serious bodily injury, encompasses crimes committed with purpose, knowledge, or recklessness. The Model Penal Code's approach accords with our formulation of "general intent" crimes, as a crime committed with purpose, knowledge, or recklessness amounts to an act "done voluntarily and intentionally." Similarly, our definition of "general intent" crimes specifically excludes

12. The Court of Appeals was correct in stating that "kidnapping is a continuing offense as long as the kidnapped person is deprived of his freedom." . . .

acts committed "because of mistake or accident," *id.*, just as the Model Penal Code does not include "negligence" as a relevant mens rea for "general intent" crimes. Model Penal Code § 2.02(3).

Thus, under the Model Penal Code, an individual who acts purposely, knowingly, or recklessly possesses a culpable *mens rea* with respect to general intent crimes.

4. Using the MPC framework, might Jeffries have benefited if his jury had been instructed that the *mens rea* for kidnapping is "purposely" and that "knowingly" would not suffice?
5. In *United States v. M.W.*, 890 F.2d 239 (10th Cir. 1989), a juvenile (M.W.) was found guilty of committing arson pursuant to 18 U.S.C. § 81, which provides in relevant part: "Whoever . . . willfully and maliciously sets fire to or burns . . . any building . . . shall be fined not more than $1,000 or imprisoned not more than five years, or both." M.W. had broken into the principal's office in a school on an Indian reservation, piled various papers on the floor, and set fire to the papers. The fire spread quickly to the building, causing hundreds of thousands of dollars of damage. On appeal, M.W. admitted setting fire to the *papers,* but argued that he did not "intend" to burn down the school *building* and consequently lacked the *mens rea* required to support a conviction for arson. The court thus had to determine whether the statutory requirement "willfully and maliciously sets fire to or burns . . . any building" imposed a *mens rea* of "purposely," which, in this context, would require having the "conscious object to . . . cause [the] result" of burning the building.

> [The] terms . . . "willful" or "willfully" are not self-defining in importing the requisite mental state for committing an offense. In response to the inherent ambiguity of such terms, modern criminal law, as reflected in the Model Penal Code, has settled upon four categories of mens rea which can make conduct criminal: if the act is done (1) purposely, (2) knowingly, (3) recklessly, or (4) negligently. Model Penal Code § 2.02(2). . . . The Model Penal Code follows many judicial decisions in declaring that knowing conduct is sufficient to establish willfulness. . . .
>
> In effect, defendant contends that 18 U.S.C. § 81 requires purposeful conduct as defined by the Model Penal Code. But we hold that in this context, "willfully and maliciously" includes acts done with the knowledge that burning of a building is the practically certain result: "A person acts knowingly with respect to a material element of an offense when . . . 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." Model Penal Code § 2.02(2)(b)(ii). The district court's finding that defendant was "consciously aware that his conduct would result in setting fire to or burning the school building," established knowing conduct and was, therefore, sufficient to support its conclusion that defendant acted "willfully and maliciously" within the meaning of 18 U.S.C. § 81.

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1. Section 2.02(2) of the Model Penal Code defines each level of culpability:
   (a) Purposely.
   A person acts purposely with respect to a material element of an offense when:
      (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
      (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

   (b) Knowingly.
   A person acts knowingly with respect to a material element of an offense when:
      (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
      (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

   (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.

In *State v. Jefferies* and *United States v. M.W.*, we introduced and explored the highest levels of *mens rea*—**purposely** and **knowingly**. In the following case, we turn our attention to the remaining two levels, as classified by the Model Penal Code: **recklessly** and **negligently**.

People v. Strong, 338 N.E.2d 602 (N.Y. 1975)

JASEN, Judge.

.....

Defendant was charged, in a one-count indictment, with manslaughter in the second degree (Penal Law, § 125.15) for causing the death of Kenneth Goings. At the trial, the defense requested that the court submit to the jury, in addition to the crime charged, the crime of criminally negligent homicide (Penal Law, § 125.10). The court refused, and the jury found defendant guilty as charged.

The sole issue upon this appeal is whether the trial court erred in refusing to submit to the jury the lesser crime of criminally negligent homicide. . . .

"The essential distinction between the crimes of manslaughter, second degree, and criminally negligent homicide" . . . "is the mental state of the defendant at the time the crime was committed. In one, the actor perceives the risk, but consciously disregards it. (Penal Law, § 15.05, subd. 3.) In the other, he negligently fails to perceive the risk. (Penal Law, § 15.05, subd. 4.) The result and the underlying conduct, exclusive of the mental element, are the same." . . .

In determining whether the defendant in this case was entitled to the charge of the lesser crime, the focus must be on the evidence in the record relating to the mental state of the defendant at the time of the crime. The record discloses that the defendant, 57 years old at the time of trial, had left his native Arabia at the age of 19, emigrating first to China and then coming to the United States three years later. He had lived in Rochester only a short time before committing the acts which formed the basis for this homicide charge. He testified that he had been of the Sudan Muslim religious faith since birth, and had become one of the sect's leaders, claiming a sizable following. Defendant articulated the three central beliefs of this religion as "cosmetic consciousness, mind over matter and psysiomatic psychomatic consciousness." He stated that the second of these beliefs, "mind over matter", empowered a "master", or leader, to lie on a bed of nails without bleeding, to walk through fire or on hot coals, to perform surgical operations without anesthesia, to raise people up off the ground, and to suspend a person's heartbeat, pulse, and breathing while that person remained conscious. In one particular type of ceremony, defendant, purportedly exercising his powers of "mind over matter", claimed he could stop a follower's heartbeat and breathing and plunge knives into his chest without any injury to the person. There was testimony from at least one of defendant's followers that he had successfully performed this ceremony on previous occasions. Defendant himself claimed to have performed this ceremony countless times over the previous 40 years without once causing an injury. Unfortunately, on January 28, 1972, when defendant performed this ceremony on Kenneth Goings, a recent recruit, the wounds from the hatchet and three knives which defendant had inserted into him proved fatal.

We view the record as warranting the submission of the lesser charge of criminally negligent homicide since there is a reasonable basis upon which the jury could have found that the defendant failed to perceive the risk inherent in his actions. The defendant's conduct and claimed lack of perception, together with the belief of the victim and defendant's followers, if accepted by the jury, would justify a verdict of guilty of criminally negligent homicide. There was testimony, both from defendant and from one of his followers, that the victim himself perceived no danger, but in fact volunteered to participate. Additionally, at least one of the defendant's followers testified that the defendant had previously performed this ritual without causing injury. Assuming that a jury would not believe that the defendant was capable of performing the acts in question without harm to the victim, it still could determine that this belief held by the defendant and his followers was indeed sincere and that defendant did not in fact perceive any risk of harm to the victim. . . .

Therefore, on the particular facts of this case, we conclude that there is a reasonable view of the evidence which, if believed by the jury, would support a finding that the defendant was guilty only of the crime of criminally negligent homicide, and that the trial court erred in not submitting, as requested, this lesser offense to the jury.

Accordingly, we would reverse and order a new trial.

GABRIELLI, Judge (dissenting).

I dissent. . . . The Appellate Division was correct in holding that "Defendant's belief in his superhuman powers, whether real or simulated, did not result in his failure to perceive the risk but, rather, led him consciously to disregard the risk of which he was aware".

. . . [D]efendant, the self-proclaimed leader of the Sudan Muslim sect of Rochester, New York, stabbed one of his followers, Kenneth Goings, a number of times in the heart and chest causing his death.

. . . [T]he evidence established defendant's awareness and conscious disregard of the risk his ceremony created and is entirely inconsistent with a negligent failure to perceive that risk. Testimony was adduced that just prior to being stabbed, Goings, a voluntary participant up to that point, objected to continuance of the ceremony saying "No, father" and that defendant, obviously evincing an awareness of the possible result of his actions, answered, "It will be all right, son". Defendant testified that after the ceremony, he noticed blood seeping from the victim's wounds and that he attempted to stop the flow by bandaging

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the mortally wounded Goings. Defendant further stated that when he later learned that Goings had been removed to another location and had been given something to ease the pain, he became "uptight", indicating, of course, that defendant appreciated the risks involved and the possible consequences of his acts.

Examination of the two homicide sections of the Penal Law, here involved, is important.

"A person is guilty of manslaughter in the second degree when: 1. He recklessly causes the death of another person" (Penal Law, § 125.15, subd. 1); and subdivision 3 of section 15.05 provides that a person acts "recklessly" with respect to a result when he is aware of and disregards a substantial and unjustifiable risk that such result will occur.

"A person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person" (Penal Law, § 125.10); and a person acts with "criminal negligence" with respect to a result when he fails to perceive a substantial and unjustifiable risk that such result will occur (Penal Law, § 15.05, subd. 4).

Simply stated, a reckless offender (manslaughter) is aware of the risk and consciously disregards it; whereas, on the other hand, the "criminally negligent" offender is *not* aware of the risk created and cannot thus be guilty of disregarding it.

Can it be reasonably claimed or argued that, when the defendant inflicted the several stab wounds, one of which penetrated the victim's heart and was four and three-quarter inches deep, the defendant failed to perceive the risk? The only and obvious answer is simply "no".

Moreover, the record is devoid of evidence pointing toward a negligent lack of perception on defendant's part. The majority concludes otherwise by apparently crediting the testimony of defendant, and one of his followers, that at the time defendant was plunging knives into the victim, the defendant thought "there was no danger to it". However, it is readily apparent that the quoted statement does not mean, as the majority assert, that defendant saw no risk of harm in the ceremony, but, rather, that he thought his powers so extraordinary that resultant injury was impossible. Thus, the testimony does not establish defendant's negligent perception for even a grossly negligent individual would perceive the patent risk of injury that would result from plunging a knife into a human being; instead, the testimony demonstrates defendant's conscious disregard of the possible consequences that would naturally flow from his acts.

This case might profitably be analogized to one where an individual believing himself to be possessed of extraordinary skill as an archer attempts to duplicate William Tell's feat and split an apple on the head of another individual from some distance. However, assume that rather than hitting the apple, the archer kills the victim. Certainly, his obtuse subjective belief in his extraordinary skill would not render his actions criminally negligent. Both, in the context of ordinary understanding and the Penal Law definition (§ 15.05, subd. 3), the archer was unquestionably reckless and would, therefore, be guilty of manslaughter in the second degree. The present case is indistinguishable. . . .

Courts should not invite juries to reach unwarranted or compromised verdicts by inappropriately submitting lesser charges to them. . . . There being no proper evidentiary basis for the lesser charge here, the order of the Appellate Division should be affirmed.

Notes and Questions

1. Under current New York law, manslaughter in the second degree, Penal Law § 125.15, is a class C felony punishable by 3½ to 15 years imprisonment; criminally negligent homicide, Penal Law § 125.10, is a class E felony punishable by 1½ to 4 years imprisonment. N.Y. Penal Law §§ 70.02 (3) (b), (c). Note the markedly different punishment ranges for the two crimes, which, in a case such as *Strong,* involve the same acts (inflicting knife and hatchet wounds on another), which cause the same harm (the death of a human being). The only factor distinguishing the crimes is the actor's *mens rea*. A defendant who kills another "[w]ith intent to cause death" or who causes death "[u]nder circumstances evincing a depraved indifference to human life . . . [and] recklessly engages in conduct which creates a grave risk of death to another person" is guilty of second-degree murder under New York law, a class A-I felony punishable by a minimum prison term of 15 to 25 years, and a maximum term of life imprisonment. N.Y. Penal Law §§ 125.25 (1), (2); §§ 70.00 (2) (a), (3) (a) (i).
2. Does the majority opinion or the dissent have the better argument concerning whether the jury should have been allowed to consider whether Strong acted with criminal negligence? If you were on the jury and had been presented with the described facts, would you be inclined to conclude that Strong acted "negligently" or "recklessly"? Could a case be made that he "knowingly" or "purposely" (i.e., "intentionally") caused Kenneth Goings's death?

CONCURRENCE

Assume that Jill pays a visit to her friend Jack's home, expecting to find him there. After she rings the front doorbell and no one answers, she concludes that he is not home. Not wanting to wait outside, and thinking that he will not mind, she gains entry to the house by jimmying open a window and climbing inside. While awaiting his return, she notices a gold chain on a coffee table. Wanting the chain for her own, and concluding that Jack will never know that she entered his home, Jill slips on the chain and leaves. Just as she is about to enter her car, Jack returns. Recognizing the gold chain she is wearing as his, he is outraged. Jack calls the police, who place Jill under arrest. She is charged with burglary, which is defined as "breaking and entering a dwelling with the intent to commit a felony therein." Is she guilty of committing this crime?

Although Jill "broke and entered" Jack's dwelling, and then committed felonious larceny by stealing the expensive gold chain, she is not guilty of burglary. Burglary requires that the intent to commit a felony must *concur* with the act of breaking and entering. Jill's intent to steal the gold chain arose only after she entered Jack's home. She could properly be convicted of felonious larceny for stealing the chain. She might also be convicted for a crime related to the unlawful entry of Jack's house. But because her entry of the home was not motivated by or accompanied by the *intent* to steal the chain at the time she entered, she has not committed burglary. This hypothetical case illustrates the general principle of criminal law known as the **concurrence** requirement, which we learn more about in the following case.

CASE

Jackson v. State, 85 P.3d 1042 (Alaska App. 2004)

MANNHEIMER, Judge.

. . . . . .

In early 2001, William J. Jackson was charged with driving while his license was suspended. At his arraignment, the district court set two future court dates for Jackson: a pre-trial conference scheduled for March 21st, and a trial call scheduled for April 13th. Jackson failed to appear in court on these dates, and he was subsequently charged with two counts of misdemeanor failure to appear.

At his trial, Jackson conceded that he had been notified of the two court dates. However, he asserted that he incorrectly recalled the date of his first court appearance (the pre-trial conference), and then, when he realized that he had missed his pre-trial conference, he did not understand that he was still obliged to appear for the trial call on April 13th. Jackson testified that he assumed that both hearings would be rescheduled, and that someone would notify him of the new dates.

Jackson's attorney asked the trial judge to instruct the jury that the State was obliged to prove that Jackson's culpable mental state (his conscious choice not to appear in court) coexisted simultaneously with his physical acts of failing to appear. That is, the defense attorney wanted the jury instructed that Jackson could not be found guilty unless the State proved that, on the very dates that Jackson was scheduled to appear in court (*i.e.*, March 21 and April 13, 2001), Jackson consciously considered his obligation to appear in court and decided to ignore it.[2]

The trial judge (District Court Judge Natalie K. Finn) refused to give this proposed instruction, and Jackson now argues that this was error. He contends that, in the absence of the requested instruction, the jury may have convicted him based solely on his concession that he had received notice of his two court dates, without finding a "concurrence of . . . guilty act and . . . guilty mind."

But even though Judge Finn declined to give Jackson's proposed instruction, she did not ignore these matters of law when she instructed the jury. Judge Finn informed the jurors that Jackson could be convicted of failure to appear only if he acted "knowingly", and she gave the jurors the statutory definition of this culpable mental state. Moreover, Judge Finn also instructed the jurors that Jackson could be convicted of failure to appear only if the State proved "a

2. Jackson's proposed instruction read:

I have instructed you that the required [culpable] mental state in this case is "knowingly." I have also instructed you that the State must prove that the alleged crimes occurred on or about March 21, 2001, and April 13, 2001. Therefore, the State must prove to you beyond a reasonable doubt that not only did Mr. Jackson fail to appear for required court hearings on or about March 21, 2001 and April 13, 2001, but that he knew[,] on or about those dates of March 21, 2001 and April 13, 2001, that he was failing to appear. . . . In other words, the required [culpable] mental [state] and the alleged conduct must occur simultaneously.

CASE *Jackson v. State, 85 P.3d 1042 (Alaska App. 2004)*

joint operation of [the] act or conduct and [the] culpable mental state".

Under these instructions, Judge Finn allowed Jackson's attorney to argue to the jury that Jackson should be acquitted if the jury believed that there was a reasonable possibility that Jackson made an honest mistake about the first court date, and then, having missed that first court date, Jackson did not understand his continuing obligation to appear for the second date. . . .

Jackson's appeal presents the question of what, precisely, is meant by the "joint operation" of conduct and culpable mental state when a defendant is charged with failure to appear. As explained above, Jackson contends that the State was obliged to prove that Jackson made two conscious decisions not to appear in court, and that these conscious decisions occurred on the very days of his two scheduled court appearances (March 21 and April 13, 2001). But this is not the law.

The "joint operation" requirement—the requisite concurrence of the defendant's culpable mental state with the defendant's act or omission—is satisfied if the defendant's culpable mental state actuates the prohibited conduct, even though there may not be strict simultaneity between the two. As explained in Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* (3rd ed.1982), p. 933,

> One error to be avoided is the false notion that [the] "concurrence" [of culpable mental state and prohibited conduct] means mere coincidence[.] [T]he actual requirement is that the two elements of crime must be "brought together" in the sense of a causal relation between the *mens rea* and the *actus reus*. Stated in other words, the *actus reus* must be attributable to the *mens rea*, and if this relation is clearly shown[,] it is unimportant that the two were not present at the same time, whereas [temporal] coexistence is not sufficient if the causal relationship is lacking.

Thus, Jackson would be guilty of "knowingly" failing to appear if he decided early on that he would not attend his scheduled court appearances, and he then dismissed the matter from his mind. Jackson's conscious decision not to attend court, combined with his subsequent failure to appear on the two specified days, would constitute a sufficient concurrence of culpable mental state and prohibited act or omission—even if it were true that, on the two scheduled days, Jackson gave no conscious thought to his court appearances.

Jackson's proposed instruction would have required the jury to find simultaneity of culpable mental state and prohibited conduct when, in fact, this was not required. . . .

. . . [T]he judgment of the district court is AFFIRMED.

Notes and Questions

1. While highly intoxicated, Albeiro Valencia drove his vehicle at nighttime, headed in the wrong direction on a Long Island parkway. Despite repeated warnings from oncoming traffic, Valencia continued at a high rate of speed for more than 4 miles, eventually crashing into two other cars and injuring the occupants. He was charged with multiple offenses and convicted in a bench trial of first-degree depraved indifference assault. The trial judge found that Valencia "was so drunk that he was 'oblivious' to the danger he created" while driving, but reasoned that he had acted with depraved indifference "by becoming extremely inebriated knowing that he would eventually drive himself home from his friend's house." On appeal, the Appellate Division reversed, "concluding that defendant's state of mind before he drove home was too remote in time from the car crash." The New York Court of Appeals affirmed. In a brief Memorandum opinion, the court ruled: "There is insufficient evidence to support a conviction for depraved indifference assault. The trial evidence established only that defendant was extremely intoxicated and did not establish that he acted with the culpable mental state of depraved indifference." *People v. Valencia*, 932 N.E.2d 871 (N.Y. 2010). Judge Jones elaborated in a concurring opinion.

   > . . . I write separately to express my position on the necessity of a temporal connection between mens rea and actus reus in the context of depraved indifference offenses. . . .
   >
   > . . . The trial court . . . [found] that defendant was so intoxicated at the time of the accident that he was oblivious to his circumstances. Thus, according to the court, defendant lacked the mens rea of depraved indifference at the time of the collision. . . .
   >
   > The trial court . . . [held] that a conviction . . . could be based on defendant's excessive drinking to a state of oblivion, knowing that shortly thereafter he would be driving himself home on heavily trafficked roads, "was evidence of depraved indifference to human life." In so holding, the court found that "liability for depraved conduct can be predicated on the facts of this case even though defendant was not aware or appreciative of the dangers of his conduct at the time of the collision or moments before." . . .
   >
   > With respect to crimes requiring mental culpability and an act or omission, "it is a basic premise of Anglo-American criminal law that the

physical conduct and the state of mind must concur. Although it is sometimes assumed that there cannot be such concurrence unless the mental and physical aspects exist at precisely the same moment of time, the better view is that there is concurrence when the defendant's mental state actuates the physical conduct" (LaFave, *Substantive Criminal Law* § 6.3[a], at 451 [2d ed.] [footnotes omitted]).

Based on the foregoing, the mens rea component of depraved indifference assault may not be satisfied by considering the defendant's state of mind at a point much earlier in time than the accident, in this instance when he was drinking at his friend's house. As such, it cannot be argued that defendant's mental state at the time he was drinking actuated his physical conduct. Stated differently, in this case, there is no concurrence of mens rea and actus reus. . . . [D]efendant's state of mind when he consumed the alcohol was too temporally remote from the act of driving to support a conviction of assault in the first degree. . . .

2. The defendant in *People v. Randolph,* 648 N.W.2d 164 (Mich. 2002) left a store without paying for items worth approximately $120. When security officers confronted him in the store's parking lot he swung his fist at one of them, broke free, and attempted to flee. He was apprehended and subsequently was convicted of "unarmed robbery," defined under Michigan law to apply to "Any person who shall, *by force or violence, or by assault or putting in fear, feloniously rob, steal and take from the person of another, or in his presence,* any money or other property which may be the subject of larceny, such robber not being armed with a dangerous weapon . . ." (emphasis added). The Michigan Supreme Court reversed. The majority opinion reasoned: "We base our holding on the language of the unarmed robbery statute and the common-law history of unarmed robbery. From that we conclude that the force used to accomplish the taking underlying a charge of unarmed robbery must be contemporaneous with the taking. The force used later to retain stolen property is not included." In a dissenting opinion, relying on a "transactional theory" of robbery, Judge Markman disagreed.

. . . In the criminal law, a crime is not complete until the act element and the mental element of the particular crime have concurred. In the case of unarmed robbery, the act element is the "felonious[ ] rob[bing], steal[ing] and tak[ing]" of property from the person of another or of property that is "in his presence." MCL 750.530. Further, the act element must be accomplished "by force and violence, or by assault or putting in fear." I will refer to this in the shorthand as the force element. The mental element or intent element of unarmed robbery is the intent to permanently deprive the owner of his property. Thus, the act element and the force element must concur with the perpetrator's intent to permanently deprive the owner of his property.

Because the statute, and the case law interpreting the statute, provide that the property may be "in the presence" of the victim, "actual possession" of the property by the victim at the time that the force is used is not required. The property continues to be "in [the] presence" of the victim where the property remains under his personal protection and control. It follows that, as long as the victim exercises this protection and control over the property, the requisite force element of robbery may still be used against him, because the property is still "in his presence". Thus, where an assault occurs at any time during which the property can be said to be in the victim's presence, a robbery within the meaning of the statute occurs. In this case, although defendant had initially seized items from the shelf of the Meijer's store, the security guards continued to exercise protective custody and control over that property, because they continued to monitor defendant and they still had the right to take the property back. Therefore, the property was "in [their] presence" within the meaning of M.C.L. § 750.530 when defendant, by assault, attempted to unlawfully deprive the security guards of the property. This "transactional view" of robbery[2] . . . is consistent with both the common-law definition and the statute defining robbery, and supports defendant's conviction.

CAUSATION

Assuming that the union (or *concurrence*) of an *actus reus* (guilty act) and *mens rea* (guilty mind) has been established, another step in the analysis of the essential elements of a crime is to determine whether the actor's conduct *caused* the resulting harm. The law recognizes two kinds of **causation**: cause-in-fact and proximate cause. Cause-in-fact sometimes is called "but for" causation, as in "But for the occurrence of A, B would not have happened." This type of causation is necessary but not sufficient to conclude that a defendant's conduct was the proximate cause of the harm proscribed by the criminal law. Proximate cause—essentially, a conclusion that a particular antecedent event (e.g., the defendant's conduct) should be identified as the legally relevant factor responsible for

2. The "transaction" designates the events occurring between the time of the initial seizure of the property and the eventual removal of such property from the victim's presence.

producing the resulting harm—is a prerequisite for criminal liability. If cause-in-fact were all that was required, criminal responsibility would be vast, indeed. In the following case, the defendant's conduct undoubtedly played a role in producing the victim's death (the ultimate harm). The essential dispute centers on whether the defendant's acts were fairly determined to be the *proximate* cause of the harm, instead of simply representing a cause "*in fact*."

CASE

Henderson v. Kibbe, 431 U.S. 145, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977)

.....

Mr. Justice STEVENS delivered the opinion of the Court. . . .

On the evening of December 30, 1970, respondent and his codefendant encountered a thoroughly intoxicated man named Stafford in a bar in Rochester, N. Y. After observing Stafford display at least two $100 bills, they decided to rob him and agreed to drive him to a nearby town. While in the car, respondent slapped Stafford several times, took his money, and, in a search for concealed funds, forced Stafford to lower his trousers and remove his boots. They then abandoned him on an unlighted, rural road, still in a state of partial undress, and without his coat or his glasses. The temperature was near zero, visibility was obscured by blowing snow, and snow banks flanked the roadway. The time was between 9:30 and 9:40 p. m.

At about 10 p. m., while helplessly seated in a traffic lane about a quarter mile from the nearest lighted building, Stafford was struck by a speeding pickup truck. The driver testified that while he was traveling 50 miles per hour in a 40-mile zone, the first of two approaching cars flashed its lights presumably as a warning which he did not understand. Immediately after the cars passed, the driver saw Stafford sitting in the road with his hands in the air. The driver neither swerved nor braked his vehicle before it hit Stafford. Stafford was pronounced dead upon arrival at the local hospital.

Respondent and his accomplice were convicted of grand larceny, robbery, and second-degree murder. Only the conviction of murder, as defined in N. Y. Penal Law § 125.25(2) (McKinney 1975), is now challenged. That statute provides that "[a] person is guilty of murder in the second degree" when "[u]nder circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby *causes* the death of another person." (Emphasis added.)

Defense counsel argued that it was the negligence of the truckdriver, rather than the defendants' action, that had caused Stafford's death, and that the defendants could not have anticipated the fatal accident. On the other hand, the prosecution argued that the death was foreseeable and would not have occurred but for the conduct of the defendants who therefore were the cause of death. Neither party requested the trial judge to instruct the jury on the meaning of the statutory requirement that the defendants' conduct "thereby cause[d] the death of another person," and no such instruction was given. . . .

The Appellate Division of the New York Supreme Court affirmed respondent's conviction. . . . Judge Cardamone dissented on the ground that the trial court's charge did not explain the issue of causation or include an adequate discussion of the necessary mental state. That judge expressed the opinion that "the jury, upon proper instruction, could have concluded that the victim's death by an automobile was a remote and intervening cause."[6]

The New York Court of Appeals also affirmed. It identified the causation issue as the only serious question raised by the appeal, and then rejected the contention that the conduct of the driver of the pickup truck constituted an intervening cause which relieved the defendants of criminal responsibility for Stafford's death. The court held that it was "not necessary that the ultimate harm be intended by the actor. It will suffice if it can be said beyond a reasonable doubt, as indeed it can be here said, that the ultimate harm is something which should have been foreseen as being reasonably related to the acts of the accused." . . .

Respondent then filed a petition for a writ of habeas corpus . . . . The District Court held that the respondent's attack on the sufficiency of the charge failed to raise a question of constitutional dimension . . . .

The Court of Appeals for the Second Circuit reversed. . . . [T]he court held that since the Constitution requires proof beyond a reasonable doubt of every fact necessary to constitute the crime, *In re Winship*, 397 U.S. 358, 364, the failure to instruct the jury on an essential element as complex as the causation issue in this case created an impermissible risk that the jury had not made a finding that the Constitution requires. . . .

6. ". . . The issue of causation should have been submitted to the jury in order for it to decide whether it would be unjust to hold these appellants liable as murderers for the chain of events which actually occurred. Such an approach is suggested in the American Law Institute Model Penal Code . . . ."

Henderson v. Kibbe, 431 U.S. 145, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977) CASE

. . . There can be no question about the fact that the jurors were informed that the case included a causation issue that they had to decide. The element of causation was stressed in the arguments of both counsel. The statutory language, which the trial judge read to the jury, expressly refers to the requirement that defendants' conduct "cause[d] the death of another person." The indictment tracks the statutory language; it was read to the jurors and they were given a copy for use during their deliberations. The judge instructed the jury that all elements of the crime must be proved beyond a reasonable doubt. Whether or not the arguments of counsel correctly characterized the law applicable to the causation issue, they surely made it clear to the jury that such an issue had to be decided. It follows that the objection predicated on this Court's holding in *Winship* is without merit. . . .

The New York Court of Appeals concluded that the evidence of causation was sufficient because it can be said beyond a reasonable doubt that the "ultimate harm" was "something which should have been foreseen as being reasonably related to the acts of the accused." It is not entirely clear whether the court's reference to "ultimate harm" merely required that Stafford's death was foreseeable, or, more narrowly, that his death by a speeding vehicle was foreseeable. In either event, the court was satisfied that the "ultimate harm" was one which "should have been foreseen." Thus, an adequate instruction would have told the jury that if the ultimate harm should have been foreseen as being reasonably related to defendants' conduct, that conduct should be regarded as having caused the death of Stafford.

The significance of the omission of such an instruction may be evaluated by comparison with the instructions that were given. One of the elements of respondent's offense is that he acted "recklessly." By returning a guilty verdict, the jury necessarily found, in accordance with its instruction on recklessness, that respondent was "aware of and consciously disregard[ed] a substantial and unjustifiable risk" that death would occur. A person who is "aware of and consciously disregards" a substantial risk must also foresee the ultimate harm that the risk entails. Thus, the jury's determination that the respondent acted recklessly necessarily included a determination that the ultimate harm was foreseeable to him.

In a strict sense, an additional instruction on foreseeability would not have been cumulative because it would have related to an element of the offense not specifically covered in the instructions given. But since it is logical to assume that the jurors would have responded to an instruction on causation consistently with their determination of the issues that were comprehensively explained, it is equally logical to conclude that such an instruction would not have affected their verdict.[16] Accordingly, we reject the suggestion that the omission of more complete instructions on the causation issue "so infected the entire trial that the resulting conviction violated due process." . . .

16. In fact, it is not unlikely that a complete instruction on the causation issue would actually have been favorable to the prosecution. For example, an instruction might have been patterned after the following example given in W. LaFave & A. Scott, *Criminal Law* 260 (1972):

> A, with intent to kill B, only wounds B, leaving him lying unconscious in the unlighted road on a dark night, and then C, driving along the road, runs over and kills B. Here C's act is a matter of coincidence rather than a response to what A has done, and thus the question is whether the subsequent events were foreseeable, as they undoubtedly were in the above illustration. . .

The judgment is reversed. . . .

Notes and Questions

1. If cause-in-fact were all that was required to support a criminal conviction, in a case like *Henderson v. Kibbe* it could be argued that the bartender who served Stafford drinks should be guilty of causing his death because "but for" the fact that the bartender served those drinks, Stafford would not have drunk them, would not have become intoxicated, and would not have wound up sitting helplessly in the road to be struck and killed by the pickup truck. Similarly, the driver of the pickup truck would be guilty of causing Stafford's death because "but for" the fact that he chose to drive when and where he did, and did not brake or swerve to avoid hitting Stafford, Stafford would not have been killed. Indeed, Stafford might even be held responsible for causing his own death because "but for" the fact that he got out of bed on the morning in question, went to the bar that evening, and so forth, he would not have been killed. In contrast, proximate cause demands a closer connection between the defendant's conduct and the harm that occurred; it involves a normative judgment about whether it is fair or appropriate to hold the defendant responsible for the harm that he or she allegedly produced. The challenge lies in describing the precise circumstances under which a defendant's conduct should or should not be considered to be the proximate cause of harm for purposes of the criminal law.
2. In this regard, what seems to be the critical factor that justified the jury and all of the courts considering the question in *Henderson v. Kibbe* in concluding that Kibbe's conduct in abandoning Stafford in the

roadway in his inebriated condition was the proximate cause of Stafford's death?

3. Causation analysis frequently requires a determination of whether something that occurred *between* the defendant's act and the ultimate harm is so much more directly responsible for the outcome that this intervening event and not the defendant's conduct should be recognized as the legal or proximate cause of the harm. For example, in *Henderson v. Kibbe*, Kibbe might have argued that the speeding pickup truck that came along after Kibbe helped deposit Stafford in the road represented an *intervening event* that not only was the direct cause of Stafford's death, but such a significant new occurrence that it was the proximate cause of Stafford's death, alleviating Kibbe from responsibility for causing the harm. If that argument had proven persuasive, the pickup truck would have been considered a *supervening* cause—that is, an event that insulated Kibbe's conduct from being considered the proximate cause of death. We learn more about this analytical framework in the following case.

CASE

McKinnon v. United States, 550 A.2d 915 (D.C. App. 1988)

FERREN, Associate Judge:

.....

According to the government's evidence at trial, appellant slashed the throat of his girlfriend from ear to ear. Although she survived the initial assault, she died suddenly six weeks later from hepatitis apparently contracted as a result of the treatment of her wounds. A jury convicted appellant of first degree premeditated murder while armed, and the court sentenced him to twenty years to life imprisonment. Because the victim died of hepatitis rather than directly from the wounds appellant had inflicted, appellant challenges his conviction. He claims that the hepatitis acted as an "intervening cause" between the injuries and her death and thus relieves him of criminal responsibility for her death. . . .

I.

In the early morning of July 11, 1985, appellant dragged his girlfriend, Michelle Wilkerson, into an alley and slashed her throat twice. Bleeding profusely, Ms. Wilkerson staggered into a neighboring apartment building. Later, at the hospital, she was given a tracheotomy to assist her breathing. Because Ms. Wilkerson's blood pressure was so low and she had lost 60% of her blood, she received six units of packed red blood cells during the surgery to repair her throat and two more units later. She also received a variety of medications to prevent infection, including Mefoxin, as well as medication to reduce pain, including Demerol. Her treating physician, Dr. Magnant, testified that these treatments, especially the blood transfusions, were necessary to save Ms. Wilkerson's life.

Ms. Wilkerson spent eighteen days in the hospital. By the time she was discharged, her neck wounds were healing normally although she still was breathing with the assistance of a tracheotomy. During the time she was readmitted to the hospital to close the tracheotomy, she began complaining of nausea and vomiting. She became jaundiced and went into respiratory and cardiac arrest while still at the hospital. The medical witnesses agreed that she died from fulminating hepatitis, almost total liver failure. Tests showed that the hepatitis was neither type A nor type B and thus was non-A, non-B.

The main dispute at trial concerned the causal link between the hepatitis and the injuries appellant had inflicted on Ms. Wilkerson. Dr. James Dibdin, the doctor who conducted the autopsy and an expert in forensic medicine, testified that Ms. Wilkerson died as a result of complications resulting from the neck wounds. Specifically, he stated the hepatitis was probably a result of several factors, most likely the drug therapy. Dr. Leslie Marion, an expert in internal medicine and gastrology, testified for the prosecution that in his opinion Ms. Wilkerson had contracted non-A, non-B viral hepatitis from the blood transfusions. He stated that Mefoxin can cause cholestic hepatitis but concluded that the enzyme levels in Ms. Wilkerson's blood were inconsistent with this type of hepatitis. Dr. William Brownlee, a medical expert, testified for the defense. He stated that Ms. Wilkerson's hepatitis could have had many sources, including the blood transfusions or medications, or she already could have had the hepatitis at the time she was wounded. In his opinion, she most likely contracted the hepatitis from the Mefoxin. He acknowledged, however, that hepatitis was a known risk from blood transfusions. In fact, all the doctors who testified on the subject stated that hepatitis is a known, if small, risk from blood transfusions, and Dr. Marion's testimony indicated that 2% to 5% of the patients with hepatitis die.

II.

Appellant contends the government did not prove beyond a reasonable doubt that he caused the death of Ms. Wilkerson. In every criminal case, the government has the burden of showing that the defendant's conduct not only was a cause in fact of the harm for which

he or she is charged but also was the proximate, or legal, cause of that harm. Generally speaking, a defendant's conduct will be the proximate cause of an injury, even though the particular injury was not intended, if the "variation between the result intended . . . and the result actually achieved is not so extraordinary that it would be unfair to hold the defendant responsible for the actual result." 1 W. LAFAVE & A. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 3.12, at 390 (1986). This generality, however, does not take us very far.

. . . In *Baylor v. United States,* 407 A.2d 664 (D.C.1979), we examined the problem of proximate cause in the context of the medical treatment of wounds caused by a beating. The defendant, Baylor, contended that the hospital's failure to operate on the victim until two hours after her admission to the emergency room, coupled with the surgeon's negligent laceration of the pancreas, was the proximate cause of death. We disagreed. We said that, as a general rule, medical treatment—including negligent medical treatment—that contributes to or immediately leads to death is not an intervening cause that relieves a defendant from criminal responsibility for the death, because even negligent medical treatment is a foreseeable consequence of injury. We acknowledged, however, that a physician's gross negligence can provide an exception to the rule, implying that such negligence should not be considered foreseeable. But this exception will apply only if the death resulted solely from the gross negligence. In affirming Baylor's conviction for manslaughter, we concluded that the evidence was insufficient for a finding of gross negligence in medical treatment. We added that, even if there had been such negligence, it would not have been the sole cause of death because the initial wound by the defendant substantially contributed to the death.

The gross negligence exception is not applicable to this case because appellant does not argue that the hepatitis resulted from grossly negligent, or even negligent, medical treatment. Rather, appellant argues that the victim, who had recovered and was on the mend, died from a rare form of hepatitis that was not reasonably foreseeable and thus constituted an intervening cause of death.

We have not ruled on what kinds of acts, other than grossly negligent medical treatment, caused by a third party or by non-human action, can constitute an intervening cause that relieves a defendant who causes injury from responsibility for ensuing death. But *Baylor*'s reliance on foreseeability reflects the rule on proximate cause generally followed in many jurisdictions. *See, e.g., State v. Spates,* 405 A.2d 656 (Conn. 1978), *cert. denied,* 440 U.S. 922 (1979) (death from heart attack "foreseeable and natural result" of defendant's tying up robbery victim with announced history of heart attacks); *State v. Dixon,* 387 N.W.2d 682 (Neb. 1986) (same); *People v. Flenon,* 202 N.W.2d 471 (Mich. App. 1972) (death caused by hepatitis attributable to blood transfusion necessary to treat shotgun wound was foreseeable consequence of injury, not intervening cause). . . . Although other formulations of the proximate cause rule are possible,[2] we extend the rule in *Baylor* and conclude that a criminal defendant proximately causes, and thus can be held criminally accountable for, all harms that are reasonably foreseeable consequences of his or her actions.

One authority uses a more precise approach distinguishing between intervening acts that are a "coincidence" and those that are a "response" to the defendant's acts:

> An intervening act is a coincidence when the defendant's act merely put the victim at a certain place at a certain time, and because the victim was so located it was possible for him to be acted upon by the intervening cause. . . .

By contrast, an intervening act may be said to be a *response* to the prior actions of the defendant when it involves reaction to the conditions created by the defendant.

1 W. LAFAVE & A. SCOTT JR., *supra,* § 3.12, at 406. Employing this distinction, Professors LaFave and Scott propose that an intervening act properly characterized as a coincidence "will break the chain of legal cause unless it was foreseeable," whereas an intervening act that can be called "a response will do so only if it is abnormal (and, if abnormal, also unforeseeable)." *Id.* at 407. *See also State v. Hall,* 633 P.2d 398, 403 (Ariz. 1981) (applying LaFave & Scott approach). Both appellant and the government, in their respective briefs, discuss causation using the "coincidence" and "response" terminology. We find it more appropriate to apply the test for proximate cause—foreseeability—used in *Baylor* and thus to leave for another day, if necessary, the addition of further refinements.

In this case, appellant argues that the type of hepatitis here (non-A, non-B) was so unusual that it was not reasonably foreseeable and thus broke the causal

2. Other courts have inquired whether the allegedly intervening cause was "independent" or the "natural consequence" of the harm caused by the defendant. *People v. Meyers,* 64 N.E.2d 531, 533 (Ill. 1946) (death from collapse and fall not independent of illegal abortion because it was part of a natural sequence of an illegal operation); *DeVaughn v. State,* 194 A.2d 109, 113 (Md. 1963) (exploratory laparotomy after gunshot wound not "independent supervening cause" of death), *cert. denied,* 376 U.S. 927 (1964). Still other courts have characterized an intervening cause simply as an event "so extraordinary that it would be unfair to hold the appellant responsible for the actual result." *Sims v. State,* 466 N.E.2d 24, 26 (Ind.1984) (surgery performed on victim of beating not intervening cause of death); *accord, Gibson v. State,* 515 N.E.2d 492, 496 (Ind.1987) (fatal staph infection resulting from surgery performed on victim of beating not intervening cause of death).

chain between his actions and Ms. Wilkerson's death. We disagree. All of the expert witnesses testified that the most likely cause of the hepatitis was the treatment necessitated by the wounds appellant had inflicted. . . .

Based on this evidence, we sustain the trial court's refusal to grant appellant's motion for judgment of acquittal. A jury reasonably could have found that appellant's criminal assault necessitated surgery and related treatment that, even without negligence, could have caused non-A, non-B viral hepatitis that resulted in Ms. Wilkerson's death. As the expert testimony has made clear, these were not unforeseeable consequences of appellant's attack.

AFFIRMED.

Notes and Questions

1. Assume that the blood used in Ms. Wilkerson's transfusion was tainted by hepatitis, and that she would have made a full recovery from her wounds had she instead received healthy blood. Under those circumstances, would it be fair to hold McKinnon responsible for "causing" her death and thus to convict him for murder? In other words, should the transfusion involving tainted blood—which intervened between McKinnon's act of slashing her throat and Ms. Wilkerson's death—be considered a supervening cause, replacing McKinnon's conduct as the proximate cause of death?
2. Would it matter if, instead of slashing Ms. Wilkerson's throat, McKinnon had stabbed her in the palm of her hand, which resulted in profuse bleeding and required a blood transfusion? Would it matter if the blood had been improperly screened, owing to the hospital's negligence? What is the distinction between *negligence* and *gross negligence*, and why should that distinction bear on a decision about whether the defendant's actions were the proximate cause of death?
3. With respect to the court's discussion, in footnote 2 of its opinion, about intervening acts that represent a "coincidence" or are in "response" to the defendant's conduct, does it make sense why a more demanding causation standard might be applied to coincidental intervening acts? In *State v. Hall,* 633 P.2d 398 (Ariz. 1981), the case cited in connection with this distinction, Hall and his co-defendant Hagan, both incarcerated in the Arizona State Prison, were convicted of the first-degree murder of another prisoner. They had hit their victim, Phillips, over the head with a weightlifting bar. Phillips regained consciousness after 8 days and thereafter was able to move about with assistance. He died from a pulmonary embolism, a blood clot that blocked both arteries to his lungs, 4 weeks after the attack. "The embolism's source was a thrombosis in his right femoral vein located in the right groin area. Seemingly the clot broke off the vein's wall, traveled through the vein to the heart and then to the arteries of the lung." In addressing the causation issue—that is, whether Hall and Hagan were properly held responsible for causing Phillips's death—the court stated:

> In dealing with cases where the intended death was achieved in an unintended manner because of an intervening event, courts usually distinguish cases where the intervening event was a coincidence from cases where the intervening event was a response to the defendant's prior actions. LaFave, *Criminal Law* § 35, pp. 257–261; cf. Perkins, *Criminal Law*, pp. 618–621 (distinguishing independent events from dependent events).
>
> An intervening act is a coincidence when the defendant's act merely put the victim at a certain place at a certain time, and because the victim was so located it was possible for him to be acted upon by the intervening cause.
>
> By contrast, an intervening act may be said to be a response to the prior actions of the defendant when it involves a reaction to the conditions created by the defendant. * * * But, while a response usually involves human agency, that is not necessarily the case * * *." LaFave, *Criminal Law* § 35, pp. 257–258.
>
> A defendant's actions may still be a proximate cause of death regardless of the type of intervening act that occurred, but as "common sense would suggest, the perimeters of legal cause are more closely drawn when the intervening cause was a matter of coincidence rather than response." Id. Hence an intervening cause that was a coincidence will be a superseding cause when it was unforeseeable. On the other hand, an intervening cause that was a response will be a superseding cause only where it was abnormal and unforeseeable.
>
> . . . Phillips' hospitalization and immobility were caused by blows to the head delivered by appellant Hagen with appellant Hall's assistance. A normal response to such immobility is the development of leg vein thrombosis which could result in a pulmonary embolism. Since the intervening responses of thrombosis and pulmonary embolism were not abnormal, appellants' actions were a proximate cause of Phillips' death. *State v. Hall,* 633 P.2d 398, 403-404 (Ariz. 1981).
>
> Relying on a distinction first drawn in *State v. Hall,* 633 P.2d 398, 403 (Ariz. 1981) . . . Bass argues that this jury instruction was incorrect for failing to differentiate between "coincidental" intervening acts and "responsive" intervening acts. The *Hall* . . . line of criminal cases adopted separate standards for the two types of intervening events. Under that line, courts conclude that if the intervening event in question was in response to something defendant put in motion, as when Ochoa felt compelled to grab the steering wheel, it would need to be unforeseeable as well as abnormal or extraordinary

in order to excuse liability. Where the intervening event was merely coincidental to defendant's actions, as in Farrell's lane change, it could be found superseding if merely unforeseeable.

We find this distinction strained and see no logical basis for continuing to employ a different standard in our criminal law for events that are merely coincidental. We thus dispense with the dichotomy and expressly hold, as to superseding cause, that any prior distinction between coincidental and responsive events is eliminated. Our criminal standard for superseding cause will henceforth be the same as our tort standard (an event is superseding only if unforeseeable and, with benefit of hindsight, abnormal or extraordinary). To the extent that Arizona case law differs from this standard and from our holding today, we overrule it.

We hold the trial court's written jury instruction on superseding cause set forth the proper standard by which to determine when an intervening event becomes superseding. There are no grounds for reversal. . . .

Nearly 20 years later, in *State v. Bass,* 12 P.3d 796 (Ariz. 2000), the Arizona Supreme Court overruled *State v. Hall.* Bass was speeding in the right-hand lane of a city street when a car ahead of her in the left lane, driven by Farrell, began crossing over to the right. Bass swerved onto the curb to avoid hitting Farrell's car, at which time her front seat passenger, Ochoa, jerked the steering wheel to the left. Bass's car spun out of control, resulting in a multicar collision that killed one person and injured several others. Bass was convicted of manslaughter and other offenses. She argued on appeal that the intervening acts of Farrell's crossing into her lane of traffic and of Ochoa's jerking the steering wheel were superseding causes that negated her responsibility for the crimes.

The trial court gave a jury instruction on superseding cause . . . stating that an intervening event becomes a legal excuse, *i.e.,* a superseding cause only when "its occurrence was both unforeseeable and when with benefit of hindsight it may be described as abnormal or extraordinary."

HARM

Most crimes involve a readily identifiable, concrete harm: for murder and manslaughter, the death of a human being; for arson, the burning of a building; for theft, the loss of property; and so forth. However, sometimes it is not so easy to ascertain what harm, if any, is associated with conduct that is defined as criminal. We consider two contexts that call for a somewhat more probing analysis of the criminal law's harm requirement: so-called victimless crimes, and inchoate offenses, such as solicitation, conspiracy, and attempts, where the ultimate harm that the actor intended may never even have occurred.

Victimless Crimes

Consider a group of friends who regularly get together on Friday evenings to play poker. Winners and losers typically come away from these games a few dollars richer or poorer. They enjoy the camaraderie, and the wins and losses tend to even out week in, week out. Perhaps this same group of friends participates in an office pool each March, contributing $10 apiece to a winner-take-all selection contest that revolves around the NCAA men's basketball tournament. They look forward to following the games, and their wagers just make the tournament that much more interesting. To them, the poker and the office pool are pleasant leisure activities. In the eyes of the law, their activities might be the crime of gambling. Is there demonstrable harm connected with their behavior?

Should conduct in which the participating individuals willingly engage without complaint be considered victimless and none of the criminal law's business—activities such as prostitution, smoking marijuana, or riding a motorcycle without wearing a helmet? Consider the following case.

CASE

Benning v. State, 641 A.2d 757 (Vt. 1994)

DOOLEY, Justice. . . .

. . . . . .

In 1989, plaintiff Benning was cited for a violation of [23 V.S.A.] § 1256 for operating a motorcycle without wearing approved headgear. . . . [He and others] subsequently filed suit, seeking to have § 1256 declared unconstitutional and to have the State enjoined from further enforcement of the statute. . . .

Section 1256 was enacted in 1968, and states in full:

> No person may operate or ride upon a motorcycle upon a highway unless he wears upon his head protective headgear reflectorized in part and of a type

CASE *Benning v. State, 641 A.2d 757 (Vt. 1994)*

approved by the commissioner. The headgear shall be equipped with either a neck or chin strap.

. . . Within a year of its enactment, the statute came under challenge in *State v. Solomon,* 260 A.2d 377 (Vt. 1969). . . . In *Solomon,* we upheld the validity of § 1256 against arguments that the statute exceeded the scope of the state's police power and violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. This Court concluded then that § 1256 was "directly related to highway safety" because an unprotected motorcycle operator could be affected by roadway hazards, temporarily lose control and become a menace to other motorists. The Court also concluded that "self-injury may be of such a nature to also invoke a general public concern." As a result, we held that § 1256 "bears a real and substantial relation to the public health and general welfare and it is a valid exercise of the police power."

In this case, plaintiffs attempt to distinguish their attack on § 1256 from *Solomon* on the grounds that *Solomon* was decided solely on federal constitutional grounds, whereas they challenge § 1256 on state constitutional grounds. . . .

Plaintiffs base this argument almost entirely on Chapter I, Article 1 of the Vermont Constitution, which provides:

> That all men are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety. . . .

Plaintiffs argue that both safety and liberty are among the "natural, inherent, and unalienable rights" guaranteed by the Article. As to safety, plaintiffs argue that the text gives individuals, not the government, the power to determine what is necessary for personal safety. Plaintiffs claim that they have a liberty interest in operating a motorcycle without a helmet, and since the purpose behind the statute is to protect the safety of the motorcycle operator, it offends their right to determine their own safety needs. . . .

The specific words on which plaintiffs rely lack the specificity that would show the presence of concrete rights applicable to these circumstances. Plaintiffs' right to pursue and obtain safety does not suggest the government is powerless to protect the safety of individuals. . . .

Plaintiffs also rely on their right of "enjoying and defending . . s. liberty" as expressed in the Article. The term "liberty" is, of course, a centerpiece of the Fourteenth Amendment on which *Solomon* relies. We are willing to give a broad reading to the term "liberty," but it is a vast expansion of the term to find within it a right to ride helmetless on public highways. . . .

[In *Lincoln v. Smith,* 27 Vt. 328, 361 (1855)], . . . the Court described Article 1 as "a recitation of some of the natural rights of men before entering into the social compact," but explained: "[W]hen men enter into the social compact, they give up a part of their natural rights, and consent that they shall be so far restrained in the enjoyment of them by the laws of society, as is necessary and expedient for the general advantage of the public." *Id.* at 339.

. . . Plaintiffs cite the single case that has found a motorcycle helmet law unconstitutional, specifically rejecting the *Solomon* reasoning. See *State v. Betts,* 252 N.E.2d 866 (Ohio Misc. 1969). The vast majority of state courts have adhered to reasoning similar to that of *Solomon*. See, e.g., *Picou v. Gillum,* 874 F.2d 1519 (11th Cir.1989) (construing Florida law); *Kingery v. Chapple,* 504 P.2d 831 (Alaska 1972); *State v. Beeman,* 541 P.2d 409 (Ariz. App. 1975); *Penney v. City of N. Little Rock,* 455 S.W.2d 132 (Ark. 1970); *Love v. Bell,* 465 P.2d 118 (Colo. 1970); *State v. Cotton,* 516 P.2d 709 (Haw. 1973); *State v. Albertson,* 470 P.2d 300 (Idaho 1970); *City of Wichita v. White,* 469 P.2d 287 (Kan. 1970); *State v. Quinnam,* 367 A.2d 1032 (Me.1977); *State v. Cushman,* 451 S.W.2d 17 (Mo.1970); *Robotham v. State,* 488 N.W.2d 533 (Neb. 1992). Although these decisions, like *Solomon,* are based primarily on the United States Constitution, some also reject state constitutional attacks. The United States Supreme Court has also rejected a due process attack on a helmet law, albeit by summary affirmance of a lower court decision. See *Simon v. Sargent,* 409 U.S. 1020 (1972), *aff'g* 346 F.Supp. 277 (D.Mass.). . . .

. . . [W]e reject the notion that this case can be resolved on the basis of a broad right to be let alone without government interference. We accept the federal analysis of such a claim in the context of a public safety restriction applicable to motorists using public roads. We agree with Justice Powell, recently sitting by designation with the Court of Appeals for the Eleventh Circuit, who stated:

> [T]here is no broad legal or constitutional "right to be let alone" by government. In the complex society in which we live, the action and nonaction of citizens are subject to countless local, state, and federal laws and regulations. Bare invocation of a right to be let alone is an appealing rhetorical device, but it seldom advances legal inquiry, as the "right"—to the extent it exists—has no meaning outside its application to specific activities. The [federal] Constitution does protect citizens from government interference in many areas—speech, religion, the security of the home. But the unconstrained right

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asserted by appellant has no discernable bounds, and bears little resemblance to the important but limited privacy rights recognized by our highest Court.

Picou, 874 F.2d at 1521; see also *Buhl v. Hannigan,* 16 Cal.App. 4th 1612 (1993) ("[I]t would be a stretch indeed to find the right to ride helmetless on a public highway comparable to the enumerated personal rights or implicit in the concept of ordered liberty."); *Bisenius v. Karns,* 165 N.W.2d 377, 384 (Wis. 1969) ("There is no place where any such right to be let alone would be less assertable than on a modern highway with cars, trucks, busses and cycles whizzing by at sixty or seventy miles an hour.").

We are left then with the familiar standard for evaluating police power regulations—essentially, that expressed in *Solomon.* Plaintiffs urge us to overrule *Solomon* because it was based on an analysis of the safety risk to other users of the roadway that is incredible. In support of their position, they offered evidence from motorcycle operators that the possibility of an operator losing control of a motorcycle and becoming a menace to others is remote. On the other hand, these operators assert that helmets make a motorcycle operator dangerous. Plaintiffs also emphasize that even supporters of helmet laws agree that their purpose is to protect the motorcycle operator, not other highway users.

We are not willing to abandon the primary rationale of *Solomon* because of plaintiffs' evidence. . . . Plaintiffs are not entitled to have the courts act as a super-legislature and retry legislative judgments based on evidence presented to the court. Thus, the question before us is whether the link between safety for highway users and the helmet law is rational, not whether we agree that the statute actually leads to safer highways. The *Solomon* reasoning has been widely adopted in the many courts that have considered the constitutionality of motorcycle helmet laws. We still believe it supports the constitutionality of § 1256.

There are at least two additional reasons why we conclude § 1256 is constitutional. . . . Although plaintiffs argue that the only person affected by the failure to wear a helmet is the operator of the motorcycle, the impact of that decision would be felt well beyond that individual. Such a decision imposes great costs on the public. As Professor Laurence Tribe has commented, ours is "a society unwilling to abandon bleeding bodies on the highway, [and] the motorcyclist or driver who endangers himself plainly imposes costs on others." L. Tribe, *American Constitutional Law* § 15-12, at 1372 (2d ed. 1988). This concern has been echoed in a number of opinions upholding motorcycle helmet laws. See, e.g., *Picou,* 874 F.2d at 1522 (quoting Tribe); *Simon,* 346 F.Supp. at 279 (citing public interest in minimizing resources directly involved with treating and caring for motorcyclists injured as result of riding without helmets); *Robotham,* 488 N.W.2d at 541 (citing rationale of "minimization of public expenditures for the care and welfare of seriously injured motorcyclists"). This rationale is particularly apparent as the nation as a whole, and this state in particular, debate reform of a health care system that has become too costly although many do not have access to it. Whether in taxes or insurance rates, our costs are linked to the actions of others and are driven up when others fail to take preventive steps that would minimize health care consumption. We see no constitutional barrier to legislation that requires preventive measures to minimize health care costs that are inevitably imposed on society.

A second rationale supports this type of a safety requirement on a public highway. Our decisions show that in numerous circumstances the liability for injuries that occur on our public roads may be imposed on the state, or other governmental units, and their employees. It is rational for the state to act to minimize the extent of the injuries for which it or other governmental units may be financially responsible. The burden placed on plaintiffs who receive the benefit of the liability system is reasonable. . . .

Notes and Questions

1. What are the specific public interests that support making conduct such as riding a motorcycle without a helmet, which at least at first blush appears to affect only the individual himself or herself, a violation of the criminal law? See also *Chase v. State,* 243 P.3d 1014 (Alaska App. 2010) (rejecting state constitutional challenge to a statute requiring motorists to wear seatbelts).
2. In *State v. Romano,* 155 P.3d 1102 (Haw. 2007), the Hawaii Supreme Court rejected a defendant's challenge to the constitutionality of a state statute making prostitution a crime, insofar as it applied to the behavior of consenting adults. The majority opinion noted: "Of course the legislature may alter the law to allow non-injurious sexual contact by consenting adults in a private place for a fee, conduct that is presently proscribed by HRS § 712-1200(1). . . . We only decide that the considerations before us do not compel the legal conclusion that, on *constitutional* grounds, HRS § 712-1200 must be ruled invalid." 155 P.3d, at 1115. Judge Levinson issued a lengthy dissenting opinion, arguing that:

   . . . The uncontroverted evidence in the present matter demonstrates that Romano was held

criminally accountable for wholly private, though admittedly sexual, behavior with another consenting adult. . . . [T]his case does not implicate public solicitation, streetwalking, or salacious advertising, which are not private activities. Rather, the present record reflects that the charged transaction could not conceivably have hurt anybody other than Romano, which renders her conviction under HRS § 712-1200(1)—absent a showing of a compelling interest from the prosecution—a violation of her federal and state constitutional rights to privacy. . . .

With regard to demonstrating the necessary compelling interest, . . . the prosecution did speak generally to the state's interest "in making prostitution illegal," *e.g.*, avoiding the "disruption to the marital contract," and "any sexual diseases that might get passed through promiscuous sex." However, such concerns as moral depravity, the salacious reputation of a community, and disease and their attendant impact on productivity, tourism, etc., are commonly trotted out in the name of the "general welfare," are generally speculative and attenuated, and can be moderated through "less restrictive" time, place, and manner regulations. The prosecution's unelaborated theory does not constitute evidence at all, let alone proof of a compelling state interest and narrow tailoring justifying Romano's *criminal conviction*. . . .

Inchoate Crimes

The crime of *solicitation* (such as soliciting prostitution, soliciting a bribe, soliciting [or suborning] perjury) is complete on the asking; it requires nothing beyond requesting or imploring another to commit a crime, coupled with the requisite intent. The crime has been committed whether or not the solicited individual agrees. The offense of *conspiracy* is complete when two or more people agree to commit a crime (some jurisdictions require that an overt act must take place in furtherance of the agreement, although the act need not be criminal); it is immaterial whether the plan is or is not carried out. The crime of **attempt** by definition involves the failure to cause the harm that was contemplated; had the attempt been successful, the defendant would be guilty of the contemplated crime and would not be charged simply with attempt. Solicitation, conspiracy, and attempts are known as *inchoate* crimes, a term according to *Webster's* dictionary that means "not yet completed or fully developed; just begun; incipient."

If harm is an essential element of crimes, we must determine where the harm is in the asking (solicitation), or entering into an agreement (conspiracy), or trying but failing to accomplish a result (attempt). Our focus is on criminal attempts, which involve issues that can be both intriguing and complex.

CASE

People v. Rizzo, 158 N.E. 888 (N.Y. 1927)

CRANE, J.

.....

The police of the city of New York did excellent work in this case by preventing the commission of a serious crime. It is a great satisfaction to realize that we have such wide-awake guardians of our peace. Whether or not the steps which the defendant had taken up to the time of his arrest amounted to the commission of a crime, as defined by our law, is, however, another matter. He has been convicted of an attempt to commit the crime of robbery in the first degree, and sentenced to state's prison. There is no doubt that he had the intention to commit robbery, if he got the chance. An examination, however, of the facts is necessary to determine whether his acts were in preparation to commit the crime if the opportunity offered, or constituted a crime in itself, known to our law as an attempt to commit robbery in the first degree. Charles Rizzo, the defendant, appellant, with three others, Anthony J. Dorio, Thomas Milo, and John Thomasello, on January 14th planned to rob one Charles Rao of a pay roll valued at about $1,200 which he was to carry from the bank for the United Lathing Company. These defendants, two of whom had firearms, started out in an automobile, looking for Rao or the man who had the pay roll on that day. Rizzo claimed to be able to identify the man, and was to point him out to the others, who were to do the actual holding up. The four rode about in their car looking for Rao. They went to the bank from which he was supposed to get the money and to various buildings being constructed by the United Lathing Company. At last they came to One Hundred

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and Eightieth street and Morris Park avenue. By this time they were watched and followed by two police officers. As Rizzo jumped out of the car and ran into the building, all four were arrested. The defendant was taken out from the building in which he was hiding. Neither Rao nor a man named Previti, who was also supposed to carry a pay roll, were at the place at the time of the arrest. The defendants had not found or seen the man they intended to rob. No person with a pay roll was at any of the places where they had stopped, and no one had been pointed out or identified by Rizzo. The four men intended to rob the pay roll man, whoever he was. They were looking for him, but they had not seen or discovered him up to the time they were arrested.

Does this constitute the crime of an attempt to commit robbery in the first degree? The Penal Law, § 2, prescribes:

> An act, done with intent to commit a crime, and tending but failing to effect its commission, is "an attempt to commit that crime."

The word "tending" is very indefinite. It is perfectly evident that there will arise differences of opinion as to whether an act in a given case is one *tending* to commit a crime. "Tending" means to exert activity in a particular direction. Any act in preparation to commit a crime may be said to have a tendency towards its accomplishment. The procuring of the automobile, searching the streets looking for the desired victim, were in reality acts tending toward the commission of the proposed crime. The law, however, had recognized that many acts in the way of preparation are too remote to constitute the crime of attempt. The line has been drawn between those acts which are remote and those which are proximate and near to the consummation. The law must be practical, and therefore considers those acts only as tending to the commission of the crime which are so near to its accomplishment that in all reasonable probability the crime itself would have been committed, but for timely interference. The cases which have been before the courts express this idea in different language, but the idea remains the same. The act or acts must come or advance very near to the accomplishment of the intended crime. . . .

In *Hyde v. U. S.*, 225 U. S. 347 it was stated that the act amounts to an attempt when it is so near to the result that the danger of success is very great. "There must be dangerous proximity to success." . . .

How shall we apply this rule of immediate nearness to this case? . . . Did the acts above described come dangerously near to the taking of Rao's property? Did the acts come so near the commission of robbery that there was reasonable likelihood of its accomplishment but for the interference? Rao was not found; the defendants were still looking for him; no attempt to rob him could be made, at least until he came in sight; he was not in the building at One Hundred and Eightieth street and Morris Park avenue. There was no man there with the pay roll for the United Lathing Company whom these defendants could rob. Apparently no money had been drawn from the bank for the pay roll by anybody at the time of the arrest. In a word, these defendants had planned to commit a crime, and were looking around the city for an opportunity to commit it, but the opportunity fortunately never came. Men would not be guilty of an attempt at burglary if they had planned to break into a building and were arrested while they were hunting about the streets for the building not knowing where it was. Neither would a man be guilty of an attempt to commit murder if he armed himself and started out to find the person whom he had planned to kill but could not find him. So here these defendants were not guilty of an attempt to commit robbery in the first degree when they had not found or reached the presence of the person they intended to rob.

For these reasons, the judgment of conviction of this defendant appellant must be reversed and a new trial granted. . . .

Notes and Questions

1. Does the result in *Rizzo* make sense? Should criminal liability turn on the defendants' good luck or bad luck concerning whether they were able to locate their intended victim? Would Rao's presence or absence have any bearing on their apparent dangerousness, or their apparent willingness to carry through with their intent to rob him?
2. What if the court had based its ruling on the numerous activities that the defendants already had undertaken to further their intent to rob Rao, rather than on their inability to consummate the robbery because they failed to locate him? The former approach might be described as focusing on the "substantial steps" they took to carry out the planned crime. It can be contrasted to what might be called the "proximity approach," which focuses on how close they came to accomplishing the planned crime. Which approach better serves the interests of the criminal law? Which better serves the corresponding interest of preventing the conviction of individuals who pose little threat of carrying out what might simply be idle thoughts of engaging in crime? Consider the following case.

CASE *People v. Lehnert, 163 P.3d 1111 (Colo. 2007)*

People v. Lehnert, 163 P.3d 1111 (Colo. 2007)

Justice COATS delivered the Opinion of the Court. . . .

. . . . . .

The defendant, Charity Lehnert, was charged with attempted first degree murder, possession of explosive or incendiary parts, committing a crime of violence, and two less serious offenses of drug possession. She was convicted of all but the drug charges, and she was sentenced to terms of thirty years for attempted murder and six years for possession of explosive devices, to be served concurrently.

Evidence at her trial indicated that in July 2001, the owner of a gun shop contacted the Denver Police Department and reported that a suspicious woman had attempted to buy gunpowder from him but refused to say why she wanted it. He declined to sell the gunpowder to her and instead notified the police. Through the license plate number he gave them, the police were able to identify the defendant.

Days later a friend of the defendant contacted the police, reporting that the defendant told her she was planning to kill two "pigs," using two pipe bombs. One of the officers was a male correctional officer at the Denver Women's Correctional Facility, where the defendant had been an inmate, and the other was a female officer named "Shelly." The friend testified that the defendant had borrowed a drill and made holes in the end caps of the bomb, and had asked for wooden clothespins to serve as a switch and a soldering iron to connect two small wires, saying that she only needed a few more parts to complete the bomb. The friend also testified that the defendant told her that she had learned how to construct bombs while in prison and had written instructions at her home. In addition, she testified that Lehnert had not only found out extensive family information and the home address of the correctional officer, but also had driven past his house numerous times.

The defendant's friend became concerned that the defendant was actually going to carry out the killings, and she called the police. In addition to telling the police about the defendant's statements and actions, she also told them that she had found in her home a business card for a second gun shop. By inquiring at the second gun shop, the police learned that the defendant had managed to purchase two boxes of shotgun shells.

A search warrant was issued for the defendant's apartment, where police discovered doorbell wire, electrical tape, a nine-volt battery, two metal pipes (which had been scored, weakening them and increasing their destructive potential), two metal end caps (with drilled out center holes), latex gloves, screwdrivers, wire cutters, safety glasses, magnets, two boxes of shotgun shells full of gunpowder, flashlight bulbs (sometimes used as an ignition device for a pipe bomb), and directions to the victim's house. In addition, the police found materials for making false identification cards, the defendant's driver's license, falsified birth certificates, an application for a new social security card, and a falsified high school transcript. . . .

At the close of the People's evidence, defense counsel moved for a judgment of acquittal on all counts, arguing that the evidence was insufficient to sustain the attempted first degree murder count because it did not include any evidence from which a reasonable jury could find that the defendant had yet taken a "substantial step" toward committing the murder, as required by the statute. The trial court disagreed and denied the motion. The court of appeals reversed the defendant's conviction for attempted murder, concluding that the evidence was insufficient. Largely because the pipe bombs were not fully assembled and placed in close proximity to the intended victim, the appellate court found that the defendant's conduct did not progress beyond "mere preparation."

The People petitioned this court for a writ of certiorari.

A person commits criminal attempt in this jurisdiction if, acting with the kind of culpability otherwise required for commission of a particular crime, he engages in conduct constituting a substantial step toward the commission of that crime. *See* § 18-2-101(1), C.R.S. (2006).[1] The statute immediately makes clear that by "substantial step" it means any conduct that is strongly corroborative of the actor's criminal objective. . . . [T]he statutory crime of criminal attempt is complete upon engaging, with the requisite degree of culpability, in conduct that "is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense." § 18-2-101(1).

Until 1963, Colorado had not codified the law of attempt in a general statute. In that year, the General Assembly enacted with few modifications the Model Penal Code's proposed codification, including its enumeration of specific kinds of conduct, which would,

1. Section 18-2-101(1), reads in part:

A person commits a criminal attempt, if, acting with the kind of culpability otherwise required for commission of an offense, he engages in conduct constituting a substantial step toward the commission of the offense. A substantial step is any conduct, whether act, omission, or possession, which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense.

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under certain circumstances, be considered sufficient, as a matter of law, to overcome a motion for judgment of acquittal.[2] In 1971, . . . the unadulterated Model Penal Code approach was abandoned in favor of the approach of the proposed Federal Criminal Code. Although different in certain respects, the 1971 Colorado statute, which remains largely unchanged today, retained a number of key features from the Model Penal Code proposal, most notably its description of the proscribed conduct as some act strongly corroborative of the actor's criminal purpose.

Prior to the enactment of a general criminal attempt statute, the sporadic treatment of attempt by this court focused largely on the dangerousness of the actor's conduct in terms of its proximity to, or the likelihood that it would result in, a completed crime. Emphasizing that neither preparation alone nor a "mere intention" to commit a crime could constitute criminal attempt, we described an attempt as "any overt act done with the intent to commit the crime, and which, except for the interference of some cause preventing the carrying out of the intent, would have resulted in the commission of the crime." *Lewis v. People,* 235 P.2d 348, 350 (Colo. 1951). By also making clear, however, that the overt act required for an attempt need not be the last proximate act necessary to consummate the crime, we implicitly acknowledged that acts in preparation for the last proximate act, at some point attain to criminality themselves. The question of an overt act's proximity to, or remoteness from, completion of the crime therefore remained, without detailed guidance, a matter for individual determination under the facts of each case.

By contrast, the statutory requirement of a "substantial step" signaled a clear shift of focus from the act itself to "the dangerousness of the actor, as a person manifesting a firm disposition to commit a crime." *See* Model Penal Code § 5.01 cmt. 1 (1985). While some conduct, in the form of an act, omission, or possession is still necessary to avoid criminalizing bad intentions alone; and the notion of "mere preparation" continues to be a useful way of describing conduct falling short of a "substantial step"; the ultimate inquiry under the statutory definition concerns the extent to which the actor's conduct is strongly corroborative of the firmness of his criminal purpose, rather than the proximity of his conduct to consummation of the crime. . . .

The question whether particular conduct constitutes a substantial step, of course, remains a matter of degree and can no more be resolved by a mechanical rule, or litmus test, than could the question whether the actor's conduct was too remote or failed to progress beyond mere preparation. . . .

. . . [T]he acts enumerated in the former statute and Model Penal Code, such as searching out a contemplated victim, reconnoitering the place contemplated for commission of a crime, and possessing materials specially designed for unlawful use and without lawful purpose, remain useful examples of conduct considered capable of strongly corroborating criminal purpose, and in those instances where they do, of being sufficient to establish criminal attempt. . . .

According to this standard, there was evidence at the defendant's trial from which the jury could find that she repeatedly articulated her intent to kill two law enforcement officers with pipe bombs. Unlike many prosecutions for attempt, it was therefore unnecessary for the jury to be able to infer the defendant's criminal intent or purpose from her conduct. The jury need only have been able to find that the defendant committed acts that were strongly corroborative of the firmness of that purpose.

There was also evidence from which the jury could reasonably find that the defendant was determined to make the pipe bombs she needed to implement her plan and that she made substantial efforts and overcame hurdles to do so. Over many days she not only managed to acquire almost all of the materials required to create a bomb but also feloniously altered them to suit her criminal purpose, conduct for which she was separately convicted of possessing explosive or incendiary parts.

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2. Section 40-25-1(2), C.R.S. (1963), stated:

(i) Such person's conduct shall not be held to constitute a substantial step under subsection (1)(d) of this section unless it is strongly corroborative of the actor's criminal purpose. Without negativing the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law:

(j) Lying in wait for, searching for, or following the contemplated victim of the crime;

(k) Enticing or seeking to entice the contemplated victim of the crime to go to a place contemplated for its commission;

(l) Reconnoitering the place contemplated for the commission of the crime;

(m) Unlawful entry of a vehicle, into a structure, into any enclosure, or onto any real property in which or on which it is contemplated that the crime will be committed;

(n) Possession of items or materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances;

(o) Possession, collection, or fabrication of items or materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection, or fabrication serves no lawful purpose of the actor under the circumstances; or

(p) Soliciting an accomplice or an innocent agent to engage in conduct constituting an element of the crime.

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When rebuffed in her attempt to acquire gunpowder directly from one gun shop, for example, she found a way to do so indirectly from another gun shop. There was testimony from which the jury could believe that she had eventually succeeded in acquiring all but a few necessary materials and that she had already acquired the drawings and written instructions necessary for final assembly.

Beyond the tenacity exhibited by the defendant in actually fabricating the bombs, her friend testified that she also had gathered significant personal information about one of her intended victims, including his address and information about his children and the car his family drove. There was evidence that she had reconnoitered his house and neighborhood more than once, reportedly being forced to leave on one occasion after being noticed. Finally there was evidence from which the jury could believe that she was simultaneously producing forged documents, which would permit her to assume false identities for purposes including the purchase of additional weapons.

The complexity of some criminal schemes, and the extent and uniqueness of the preparatory acts required to implement them without detection, lend themselves, by their very nature, to corroborating the actor's firmness of purpose. Regardless of the fact that the defendant was arrested before producing operational bombs or placing them within striking range of her victims in this case, there was in fact an abundance of evidence of her determined and sustained efforts to implement her plan, which could be found by reasonable jurors to be strongly corroborative of the firmness of her purpose to commit murder. Nothing more was required.

Therefore, the judgment of the court of appeals is reversed. . . .

Notes and Questions

1. By employing the "substantial step" test, do you agree that Lehnert was guilty of attempted first-degree murder? Would she be guilty of attempted murder under the "proximity" test?
2. Under the "substantial step" approach, precisely when was Lehnert guilty of attempted first-degree murder? When she went to the Denver gun shop in July 2001 seeking (but failing) to purchase gunpowder? When she told a friend that "she was planning to kill two 'pigs,' using two pipe bombs"? When she borrowed a drill and asked for wooden clothespins, saying that "she needed only a few more parts to complete the bomb"? When she acquired the home address of one of the correctional officers who was an intended victim? When she drove past the correctional officer's home? How helpful is the statutory definition: "A substantial step is any conduct . . . which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense"? C.R.S. § 18-2-101(1).
3. What precise harm did Lehnert cause? More generally, how would you describe the harm element of criminal attempts?
4. For a helpful discussion of additional approaches to defining criminal attempts, and elaboration of the underlying rationale making attempts a crime, see *Young v. State,* 493 A.2d 352 (Md. 1985).

   Both Rizzo and Lehnert were interrupted before completing all of the acts needed to accomplish their presumed objectives of, respectively, committing armed robbery and murder. Sometimes, however, defendants have done all within their power to carry out their intended crimes, yet still fail in their efforts. For example, A might point his gun at B and pull the trigger, discharging the bullet, but because he is a bad aim, the bullet misses B, who remains unscathed. Using either the "proximity" or the "substantial step" test, we would have little trouble justifying A's conviction for attempted murder. Would it matter if, unbeknown to A, the gun he was using actually was filled with blanks and could not have harmed B even if fired at point-blank range? Under those circumstances, A could not possibly have been successful in carrying out his intention to kill B. Could A therefore argue that he did not come "dangerously close" to accomplishing his plan, or that he made no more of a substantial step toward killing B than if he had approached B with a cap gun and pulled the trigger? Should A be allowed to argue that it was impossible for him to have murdered B under those circumstances, and hence that he should not be convicted of attempted murder? Consider the following case.

United States v. Heng Awkak Roman, 356 F. Supp. 434 (S.D.N.Y. 1973)

FREDERICK van PELT BRYAN, District Judge.

.....

Defendants Heng Roman (Heng) and Lee Koo (Koo) were tried before me without a jury on a two-count indictment charging them in count I with conspiracy to violate the narcotics laws, and in count II with possession of 2.5 kilograms of heroin, in the Southern District of New York on November 20, 1972, with intent to distribute. At the conclusion of the four-day trial, I found both defendants guilty on the conspiracy count (count I), and reserved decision on the substantive count (count II). . . . I now find both defendants guilty of an attempt to commit the crime charged in the substantive count.

The facts relating to the substantive count are as follows: John T. Smith, the informer in this case, after several preliminary meetings with Heng, met with both defendants on November 7, 1972 at the Strand Hotel in Singapore. The ensuing discussion concerned the importation and sale of substantial amounts of narcotics in the United States. On November 12th or 13th, the defendants picked up Smith's suitcase at his hotel. The following evening they showed it to Smith at Heng's house. Smith saw that it contained white powder, which Heng said was 2.5 kilograms of heroin. Subsequent laboratory analysis confirmed that it was indeed heroin, over 96% pure. The next day Heng drove Smith to the airport, with the suitcase in the trunk of the car, with the heroin in it. At the airport, Smith, without Heng's knowledge, gave the suitcase to an agent of the Bureau of Narcotics and Dangerous Drugs (BNDD). The heroin it contained, which is the subject of count II, was removed, and thereafter remained in the custody of law enforcement officers. Smith then flew to New York. . . .

After Smith arrived in New York City, he contacted BNDD agents here. On November 20, 1972, he picked up the suitcase, which by then contained only soap powder packaged as the heroin had been, at the BNDD office here and placed it in a locker in Pennsylvania Station. Later that evening, by prearrangement made with defendants in Singapore, Smith met them at the Hotel McAlpin in Manhattan and showed Heng the key to the locker.

That evening, November 20th, and the following day, the 21st, the defendants offered to sell the 2.5 kilograms of heroin to agents of the BNDD who were posing as buyers. . . . When it became apparent that an impasse in the negotiations had developed, the agents arrested both defendants. . . .

Had the heroin still been in the suitcase at Pennsylvania Station on November 20, 1972, and had Smith in fact been a true accomplice of the defendants, the defendants would have had constructive possession of the heroin, even though Smith retained the key to the locker containing the suitcase. . . .

The realities of the situation, however, were not as the defendants believed. The heroin was not in the suitcase, but rather safely in the custody of the BNDD. Moreover, Smith was not truly their confederate, but was instead an informer working for the BNDD. It is quite plain that the defendants did not have either actual or constructive possession of 2.5 kilograms of heroin in the Southern District of New York on November 20, 1972 as charged in count II.

Although defendants are not guilty of *possession* with intent to distribute . . . I find them guilty of attempted possession with intent to distribute.

"Attempt", as used in [21 U.S.C.] section 846, is not defined. Indeed, there is no comprehensive statutory definition of attempt in federal law. It is not necessary here, however, to deal with the complex question of when conduct crosses the line between "mere preparation" and "attempt", only the latter being a crime. For here we have a situation where the defendants' actions would have constituted the completed crime if the surrounding circumstances were as they believed them to be. Under such circumstances, their actions constitute an attempt. *People v. Siu*, 271 P.2d 575 (Cal. App. 1954) (defendant guilty of attempted possession of narcotics where he obtained possession of talcum believing it to be narcotics); *O'Sullivan v. Peters*, [1951] S.R. 54 (South Australia, 1951) (defendant who placed bet on horse which had previously been scratched held guilty of attempt of bet on horse race); *Regina v. Ring*, 17 Cox C.C. 491 (England, 1892) (reaching into empty pocket constitutes attempt to steal from pocket); *People v. Moran*, 25 N.E. 412 (N.Y. 1890) (same); *United States v. Thomas*, 13 U.S.C.M.A. 278, 32 C.M.R. 278 (1962) (defendants who had nonconsensual sexual intercourse with a woman who was dead, although they believed her to be alive, held guilty of attempted rape); *State v. Damms*, 100 N.W.2d 592 (Wis. 1960) (defendant guilty of attempted murder where he pointed gun at another, believing it to be loaded when in fact it was not loaded, and pulled trigger). *Cf.* Model Penal Code § 5.01(1) (P.O.D. 1962) ("A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he [inter alia] . . . purposefully engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be. . . ."

The defendants contend that since it was impossible for them to possess the 2.5 kilograms of heroin,

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which at the time charged was in the hands of the BNDD, they cannot be found guilty of attempted possession. This argument does not help the defendants.

The commentators and the cases generally divide the impossibility defense into two categories: legal versus factual impossibility. Sometimes a third category, "inherent impossibility", is also referred to.

"Legal impossibility" denotes conduct where the goal of the actor is not criminal, although he believes it to be. "Factual impossibility" denotes conduct where the objective is proscribed by the criminal law, but a circumstance unknown to the actor prevents him from bringing it about. "Inherent impossibility" is where the means chosen are totally ineffective to bring about the desired result, *e. g.*, voodoo.

Defendants claim their defense is one of legal impossibility. Although the categorization of a case as involving one type of impossibility or another is often difficult, the case at hand plainly involves factual not legal impossibility.

. . . "All courts are in agreement that what is usually referred to as 'factual impossibility' is no defense to a charge of attempt." LaFave & Scott, [*Handbook on Criminal Law*] 440. . . .

The defendants next contend that their conduct was not sufficiently proximate to the completed crime to constitute an attempt. They rely on the well-known dissenting opinion of Justice Holmes in *Hyde v. United States*, 225 U.S. 347, 387 (1921). . . . However, where the conduct would constitute the completed crime if the circumstances were as the defendants believed them to be, the "dangerous proximity" test of Justice Holmes does not apply. *See* Model Penal Code § 5.01(1). Moreover, the defendants plainly went far beyond "mere preparation."

Accordingly, I find both defendants guilty on count II. . . .

Notes and Questions

1. When Heng and Koo were arrested in New York City, they had (constructive) possession of 2.5 kilograms of soap powder, not heroin. Although they apparently believed that the soap powder was heroin, it is not illegal to possess soap powder, and it would be impossible to convict them under the circumstances of possessing heroin. Why, then, does the court reject their "impossibility" defense concerning the offense of attempted possession of heroin with the intent to distribute?
2. The court cites several cases rejecting "factual impossibility" as a defense to criminal attempt charges, involving circumstances as diverse as betting on a horse to win a race when the horse was not even running (attempted gambling), picking an empty pocket (attempted larceny), and having sexual relations with a woman believed to be alive and passed out, but who actually already was dead (attempted rape). In all of those cases, the intended crime could not possibly have been completed, although had the facts been as the defendants believed them to be, they would have succeeded in committing the intended crimes. Factual impossibility typically is not recognized as a defense to a charge of criminal attempt.
3. The court mentions two additional kinds of impossibility defenses occasionally raised in response to criminal attempt charges—legal impossibility and inherent impossibility. Legal impossibility involves situations where the defendant completed acts that he or she thought constituted a crime (thus, arguably attempting to commit a crime), but which as a matter of law were not criminal. For example, if A believes she is in a State that makes it a crime to drive while sending text messages and, with a guilty state of mind, she proceeds to text while driving, she thinks that she is committing a crime and in fact is "trying" to do so. However, if the jurisdiction does not make texting while driving a crime, legal impossibility would serve as a defense to a charge of "attempting to drive while texting." This defense illustrates the importance of the legality principle ("no crime without law, no punishment without law"), which we considered in Chapter 1. By intentionally engaging in behavior that she believes to be a crime, A arguably demonstrates a propensity for dangerousness as well as a culpable *mens rea*. Nevertheless, the defense of legal impossibility will spare her from conviction for attempting to commit a (nonexistent) crime.
4. Although legal impossibility almost invariably is recognized as a defense to a criminal attempt charge, inherent impossibility is not; jurisdictions take varying approaches, with some accepting the defense and others rejecting it. This category comprises actions that a defendant completes while intending to cause a harm that the criminal law forbids, but reasonable people would agree that the actions are "inherently impossible" of causing the planned harm. A traditional example is using voodoo in an attempt to kill a person. B may firmly believe that voodoo will in fact cause the death of his archenemy, and when he sticks needles in a likeness of his foe, intending to kill him, he demonstrates his dangerousness as well as his *mens rea*. Most people would agree, however, that B's actions could not possibly have resulted in the intended killing; in a jurisdiction recognizing inherent impossibility as a defense, he would not be guilty of attempted murder.
5. The following examples, offered by Chief Judge Posner in *United States v. Coffman*, 94 F.3d 330, 334–335 (7th Cir. 1996), illustrate, respectively,

legal impossibility, factual impossibility, and inherent impossibility when raised as a defense to a charge of criminal attempt.

> Attempts are punished even when the chance of success is dim—even when the facts are such that, unbeknownst to the defendant, the attempt could not possibly succeed. *United States v. Cotts,* 14 F.3d 300, 307 (7th Cir.1994). If it could not succeed because the completed act at which the defendant aimed is not criminal—as where a 13-year-old boy attempts to commit rape in a state in which you must be 14 to be charged with rape, *Foster v. Commonwealth,* 31 S.E. 503, 505 (Va. 1898)—then a defense of impossibility will lie; it is not a criminal attempt to try to do what the criminal law does not forbid you to do. But if the attempt is merely thwarted, and if completed in accordance with the defendant's understanding of the circumstances would have resulted in a crime, then the attempt is culpable even though it is certain that it would not have succeeded. *Cotts*—a case involving a conspiracy to kill a fictitious informant (of course not known to the defendant to be fictitious)—is a dramatic example of this principle . . . . There may be attempts so feeble, such as sticking a pin into a voodoo doll of your enemy in an effort to kill him, that the attempter is entitled to be acquitted, as a harmless fool. *Attorney General v. Sillem*, 159 Eng. Rep. 178, 221 (Exch.1863); American Law Institute, *Model Penal Code* § 5.05(2) (1962). The defendants' scheme [here], though harebrained, was not that harebrained. . . .

CONCLUSION

This chapter has provided us with the opportunity to explore the general principles of the criminal law: the fundamental elements that are common to all crimes and help explain why the law defines certain conduct as criminal. We thus examined issues involving the criminal law's requirements for (1) *actus reus,* (2) *mens rea,* (3) concurrence (of the act and mental elements of the crime), (4) causation, and (5) harm. Those principles help animate the definitions of specific crimes, and thus should be recognizable in offenses such as murder, burglary, larceny, fraud, and others. They also help justify why and how harshly violations of the criminal law are punished.

We nevertheless have seen that it is not always easy to decide whether the respective general principles apply at a lower level of abstraction. It may be difficult, for example, to define the line between a status or condition and an act, to determine when an act is voluntary, to separate reckless and negligent states of mind, to reach a conclusion about whether the defendant's conduct is or is not the proximate cause of harm, and even to be clear about whether a harm has been committed that is within the ambit of the criminal law.

Having introduced this framework describing the general principles of the criminal law, we consider in the next chapter the different defenses that can be raised to negate criminal responsibility.

Key Terms

actus reus
attempt
causation
concurrence
harm
knowingly
mens rea
negligently
omission
proximity test
purposely
recklessly
substantial step
voluntary act

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