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ACTUS REUS

Did the defendant act voluntarily in killing his sister's boyfriend?

Family members testified to a substantial history going back to defendant's childhood of defendant's acting as if he were "in his own world." . . . Dr. Harrell clearly testified that in his opinion defendant was unable to exercise conscious control of his physical actions at the moment of the fatal shooting. He stated further, "I think he was acting sort of like a robot. He was acting like an automaton. . . . When he goes into the altered state of consciousness, . . . then he engages in a motor action." This testimony . . . if accepted by the jury, "exclude[d] the possibility of a voluntary act without which there can be no criminal liability."

Learning Objectives

1. State why the criminal law punishes voluntary criminal acts and does not penalize thoughts or involuntary acts.
2. List some examples of involuntary acts.
3. Explain why it is unconstitutional to punish a defendant for a status or condition.
4. Describe when an individual may be held liable for an omission to act.
5. State the definition of possession and the difference between actual and constructive possession.

INTRODUCTION

A crime comprises an *actus reus*, or a criminal act or omission, and a *mens rea*, or a criminal intent. Conviction of a criminal charge requires evidence establishing beyond a reasonable doubt that the accused possessed the required mental state and performed a voluntary act that caused the social harm condemned in the statute.¹

There must be a concurrence between the *actus reus* and *mens rea*. For instance, common law burglary is the breaking and entering of the dwelling house of another at night with the intent to commit a felony. A backpacker may force his or her way into a cabin to escape the sweltering summer heat and, once having entered, find it impossible to resist the temptation to steal hiking equipment. The requisite intent to steal developed following the breaking and entering, and our backpacker is not guilty of common law burglary.² The requirement of concurrence is illustrated by the

California Penal Code, which provides that "in every crime . . . there must exist a union or joint operation of act and intent . . ."³

Actus reus generally involves three elements or components: (1) a voluntary act or failure to perform an act (2) that causes (3) a social harm condemned under a criminal statute. Homicide, for instance, involves the voluntary shooting or stabbing (act) of another human being that results in (causation) death (social harm).⁴ The Indiana Criminal Code provides that a "person commits an offense only if he voluntarily engages in conduct in violation of the statute defining the offense . . . [A] person who omits to perform an act commits an offense only if he has a statutory, common law, or contractual duty to perform the act."⁵

First, keep in mind that an act may be innocent or criminal depending on the context or **attendant**

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

This chapter covers *actus reus*. We first discuss the requirement of an act and then turn our attention to status offenses, omissions, and possession. Chapter 5 addresses criminal intent, concurrence, and causality, and we will apply these concepts to specific crimes in Chapters 10 through 16. At this point, merely appreciate that a crime consists of various "elements" or components that the prosecution must prove beyond a reasonable doubt.

CRIMINAL ACTS

Scholars have engaged in a lengthy and largely philosophical debate over the definition of an "act." It is sufficient to note that the modern view is that an act involves a bodily movement, whether voluntary or involuntary.⁶ The significant point is that *criminal law punishes voluntary acts and does not penalize thoughts*. Why?

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

An exception to this rule was the historical English crime of "imagining the King's death." How should we balance the interest in freedom of thought and imagination against the social interest in the early detection and prevention of social harm in the case of an individual who records dreams of child molestation in his or her private diary?

In 2014, an interesting case raised this very issue. Federal district court judge Paul Gardephe overturned the conviction and potential life sentence of former New York City police officer Gilberto Valle for conspiracy to kidnap. The judge held that Valle communicated in a "fantasy role-play" over the Internet with individuals in other states and overseas with whom he had never met, whose name and location he did not know. Valle and his alleged co-conspirators described the abduction, sexual abuse, and degradation of women targeted by Valle. Judge Gardephe stressed that no steps ever were taken in furtherance of these discussions and that the plot was limited to the realm of fantasy. The kidnapping and abuse existed only in the mind and thoughts of Valle and the individuals with whom he corresponded.⁷

A Voluntary Criminal Act

A more problematic issue is the requirement that a crime consist of a **voluntary act**. The Indiana Criminal Law Study Commission, which assisted in writing the Indiana statute on criminal conduct, explains that *voluntary* simply means a conscious choice by an individual to commit or not to commit an act.⁸ In an often-cited statement, Supreme Court Justice Oliver Wendell Holmes Jr. observed that a "spasm is not an act. The contraction of the muscles must be willed."⁹ Professor Joshua Dressler compares an involuntary movement to the branch of a tree that is blown by the wind into a passerby.¹⁰

The requirement of a voluntary act is based on the belief that it would be fundamentally unfair to punish individuals who do not consciously choose to engage in criminal activity and who therefore cannot be considered morally blameworthy. There also is the practical consideration that there is no need to deter, incapacitate, or rehabilitate individuals who involuntarily engage in criminal conduct.¹¹

A North Carolina court of appeals ruled that a jury hearing the case of a defendant charged with taking indecent liberties with his girlfriend's 8-year-old daughter should have been instructed that "if they found that defendant was unconscious or, more specifically, asleep, they must find the defendant not guilty."¹² In another case, the Kentucky Supreme Court ruled that a defendant, who claimed that he was a "sleepwalker," should not be convicted in the event that he was "unconscious when he killed the deceased."¹³

The criminal defense of involuntariness has been unsuccessfully invoked by individuals charged with criminal negligence while operating a motor vehicle. In the frequently cited case of *People v. Decina*, the defendant's automobile jumped a curb and killed four children. The appellate court affirmed Decina's conviction despite the fact that the accident resulted from an epileptic seizure. The judges reasoned that the statute "does not necessarily contemplate that the driver be conscious at the time of the accident" and that it is sufficient that the defendant knew of his medical disability and knew that it would interfere with the operation of a motor vehicle.¹⁴

Some defendants have actually managed to be acquitted by persuading judges or juries that their crimes were **involuntary acts**. A California court of appeals concluded that the evidence supported the "inference" that a defendant who had been wounded in the abdomen had shot and killed a police officer as a reflex action and was in a "state of unconsciousness."¹⁵

The next case in the textbook, *State v. Fields*, challenges you to determine whether the defendant's act should be considered involuntary or voluntary.

Model Penal Code

The Model Penal Code section 2.01 defines the Requirement of Voluntary Act as follows:

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

Analysis

The Model Penal Code requires that the guilt of a defendant should be based on conduct that includes a voluntary act or omission. An individual who is aware of a serious heart defect who voluntarily drives an automobile may be liable for harm resulting from an accident he or she causes while having a heart attack, based on the fact that he or she voluntarily drove the automobile or failed to stop as he or she began to feel ill. The Model Penal Code avoids the difficulties involved in defining voluntary conduct and, instead, lists the type of conditions that are not voluntary. Section 2(d) encompasses a range of unspecified conditions.

The Legal Equation

<i>Actus reus</i>	≡	A voluntary act or failure to perform an act.
Voluntary act	≡	A bodily movement that is the product of a conscious choice.

Was the defendant entitled to a jury instruction on unconsciousness?

State v. Fields, 376 S.E.2d 740 (N.C. 1989). Opinion by: Whichard, J.

Defendant was convicted of first degree murder. . . . The trial court sentenced him to life imprisonment. We award a new trial for error in refusing a requested jury instruction.

Facts

The State's evidence, in pertinent summary, showed the following: Connie Williams, defendant's half-sister, testified that she had been dating Isaiah Barnes, the victim, for two years at the time of his death. On September 18, 1986, the couple was drinking liquor at Robert Cobb's house. . . .

Cobb testified that defendant and his girlfriend were at his house when Williams and Barnes arrived. Defendant offered Williams a drink and left soon thereafter. Before leaving, defendant "played some numbers" with Cobb. Williams and Barnes also left Cobb's house, but returned later that evening. Williams and Barnes were sitting on a trunk in Cobb's bedroom, drinking and talking. Cobb and his friend, Joyce Ann Pettaway, also were talking in the bedroom. Defendant entered the bedroom about midnight. He called Cobb by a nickname, "Snow." Defendant asked Cobb to keep the ticket for the numbers he had played, saying, "If I hit, I want you to get the money and keep it until you see me." Cobb asked why defendant could not keep it himself, and defendant answered, "You'll see."

Defendant and Barnes had not spoken to one another . . . defendant then walked around the foot of the bed, pulled a gun out of his belt, and shot Barnes. Barnes fell on the floor. Pettaway cried, "Oh, Lord have mercy. Please don't shoot that man anymore." Defendant turned toward her and said, "Shut up," then shot Barnes again as he lay on the floor gasping for breath. Cobb told defendant to get out of his house because he was calling "the law." Defendant said, "Okay, Snow," and walked out.

Wallace Fields, defendant's brother, testified on defendant's behalf. He recounted the difficult circumstances of their childhood. Their stepfather, called "Dump," drank regularly and beat the children and their mother. They had little money and were often hungry. When Dump was on a rampage, the mother and children would often sleep outside to avoid him.

One night when defendant was fourteen, Dump held a knife to defendant's mother's throat and threatened to kill her. Defendant grabbed a gun and shot Dump, killing him. Wallace Fields testified that up to the time of this incident, defendant was a normal boy

who liked to play and go to school. After the shooting, defendant had nightmares and became "a different person," acting as if he were "in his own world." Defendant was extremely devoted to his mother, helping her cook and clean and giving her money.

Wallace Fields further testified that his sister, Connie Williams, had become a different person since beginning her relationship with Barnes. She often appeared bruised and beaten and cared little for her appearance.

Willard Mills, defendant's stepbrother, also testified regarding defendant's devotion to his mother. Mills stated that Connie Williams became dependent on alcohol or drugs and lost all interest in her family and appearance after she became involved with Barnes. Defendant and his brothers were worried about Connie and frequently discussed how to help her.

Mills reported that defendant had become very morose after the childhood shooting incident. As defendant grew older, Mills advised him to put it all behind him and join the service. While in service, another soldier performed a trick in which the soldier put lighter fluid in his mouth, lit it, and blew out the flames. Defendant saw his stepfather's face in the flames and ran away. He was hospitalized for several months following this episode. Mills testified that defendant was concerned about Barnes's drinking and tried to persuade him to stop, but that defendant bore Barnes no malice. Ten days after shooting Barnes, defendant called Mills. Mills picked up defendant at the bus station and took him to the Tarboro police station to turn himself in.

Agnes Williams, defendant's mother, testified that defendant's nerves had been bad ever since the incident with Dump. Defendant had a nervous breakdown in the service and was never the same afterward. Defendant's nerves were "just racked all to pieces" over Connie Williams's problems.

Dr. Evans Harrell, a psychologist, testified on defendant's behalf. . . . He stated that after defendant killed Dump, he felt very protective toward his mother and sisters. Defendant felt guilty about the family being left without a father figure, and he tried to assume that role. Defendant suffered from frequent nightmares featuring Dump and often felt Dump's presence even when awake. In Dr. Harrell's opinion, defendant suffered from post-traumatic stress disorder, and certain aspects of his behavior were characteristic of a disassociative state. Dr. Harrell described a disassociative state as a sudden temporary alteration in the state of consciousness, during which defendant

would not remember what happened and did not intend to do anything, “like his mind and his body weren’t connected.”

Dr. Harrell recounted what defendant related to him about the killing of Isaiah Barnes. Defendant told Dr. Harrell he had tried to get his sister Connie to leave Cobb’s house that night, because he was worried about her drinking. Connie’s arm was bandaged from a burn, which she attributed to an accident but which defendant and the family suspected Barnes inflicted. Defendant saw Barnes reach out and grab Connie, and Connie grimaced in pain. At this point defendant pulled out the gun and shot Barnes. Defendant told Dr. Harrell he had not planned to kill Barnes, had not thought of killing Barnes, and even as he shot him, was not thinking of killing Barnes. Defendant denied any memory of firing a second shot. Instead, defendant was seeing Dump and his mother “and all of these things flashing before [him] in a blur.”

Dr. Harrell testified that defendant perceived Barnes to be treating Connie the same way Dump had treated defendant’s mother. . . . In Dr. Harrell’s opinion, defendant did not plan or intend to shoot Barnes and was unable to exercise conscious control of his physical actions at that moment. Dr. Harrell concluded, “I think he was acting sort of like a robot. He was acting like an automaton.” Dr. Harrell testified that defendant told him he had been drinking on the night of the shooting but did not tell him how much he had had to drink.

Issue

Defendant assigns error to the trial court’s refusal to instruct the jury on the defense of unconsciousness. This defense, also called automatism, has been defined as

connoting the state of a person who, though capable of action, is not conscious of what he is doing. It is to be equated with unconsciousness, involuntary action [and] implies that there must be some attendant disturbance of conscious awareness. Undoubtedly automatic states exist, and medically they may be defined as conditions in which the patient may perform simple or complex actions in a more or less skilled or uncoordinated fashion without having full awareness of what he is doing. . . .

Reasoning

Defendant’s evidence tended to show that immediately preceding and during the killing of his victim, he was unconscious. Family members testified to a substantial history going back to defendant’s childhood

of defendant’s acting as if he were “in his own world.” In the context of this testimony, and on the basis of a personal and family history obtained from defendant and members of his family, Dr. Harrell testified that in his opinion defendant suffered from post-traumatic stress disorder and was prone to experiencing disassociative states. In Dr. Harrell’s opinion, defendant was in a disassociative state when he shot the victim. Dr. Harrell testified that the defendant “was acting sort of like a robot” and “like an automaton.” . . . “When Isaiah reached out and grabs Connie’s arm and Connie grimaces, and his whole past life and material that is so similar in his mind to what he’s seen, flashes before him, then he engages in a motor action. . . .”

This testimony, if believed, permits a jury finding that defendant was unable to exercise conscious control of his physical actions when he shot the victim. The defendant thus was entitled to the unconsciousness or automatism jury instruction stating that the defense of unconsciousness does not apply to a case in which the mental state of the person in question is

due to insanity, mental defect or voluntary intoxication resulting from the use of drugs or intoxicating liquor, but applies only to cases of the unconsciousness of persons of sound mind as, for example, sleepwalkers or persons suffering from the delirium of fever, epilepsy, a blow on the head or the involuntary taking of drugs or intoxicating liquor, and other cases in which there is no functioning of the conscious mind and the person’s acts are controlled solely by the subconscious mind. . . .

Holding

The defendant’s evidence . . . merited the requested instruction on unconsciousness or automatism. . . . As noted above, family members testified to a substantial history going back to defendant’s childhood of defendant’s acting as if he were “in his own world.” . . . Dr. Harrell clearly testified that in his opinion defendant was unable to exercise conscious control of his physical actions at the moment of the fatal shooting. He stated further, “I think he was acting sort of like a robot. He was acting like an automaton. . . . When he goes into the altered state of consciousness, . . . then he engages in a motor action.” This testimony, combined with the family members’ testimony, if accepted by the jury, “exclude[d] the possibility of a voluntary act without which there can be no criminal liability.” . . . Therefore, an instruction on the legal principles applicable to the unconsciousness or automatism defense was required.

Questions for Discussion

1. Why is unconsciousness or automatism a criminal defense? What facts support the defendant's contention that the killing of Barnes was an unconscious automatic act?
2. What facts undermine the contention that Fields shot Barnes as an act of unconsciousness or automatism? Why, for instance, was Fields carrying a pistol? Did he have a motive for killing Barnes? Was his conduct consistent with an individual displaying "disassociation"? Are the witnesses cited by the court neutral and objective or biased? Were you persuaded by Dr. Harrell's testimony?
3. Should unconsciousness or automatism reduce the seriousness of an offense rather than constitute an absolute defense? What about holding Fields guilty for reckless homicide based on the fact that he was irresponsible for not seeking medical treatment for his severe emotional problems?
4. The North Carolina Supreme Court distinguishes unconsciousness or automatism from insanity. What is the difference between these two concepts? Under what circumstances is a defendant entitled to the jury receiving an unconsciousness or automatism jury instruction?

Cases and Comments

1. **Sleepwalking.** The first American case to recognize the defense of sleepwalking or somnambulism involved the acquittal in 1846 of Albert Tirrell for the murder of his mistress and the arson of her Boston brothel. This was followed in 1879 by the Kentucky case, *Fain v. Commonwealth*, 78 Ky. 183, in which sleepwalking was recognized as a defense for homicide. Over 120 years later, Adam Kieczkowski, age 19, was acquitted of the burglary of a number of dorm rooms at the University of Massachusetts Amherst and of sexual assault. In 2003, 24-year-old Marc Reider was acquitted of aggravated manslaughter based on a jury's determination that he was "sleep-driving." An even more startling case was an English jury's 2005 acquittal of British bartender James Bilton for raping a woman three times.

In 2002, Timothy Stowell was convicted by a California appellate court of digital penetration and of lewd actions "upon a four-year-old female." Stowell was found in bed with Tracie and her daughter Taylor, who were spending the night with Stowell and his girlfriend LeeAnne. Stowell and LeeAnne were sleeping in the living room while Tracie and Taylor slept in the bedroom. At trial, Stowell testified that he did not know "how he came to be in bed" with Taylor and that the last thing that he recalled from that evening was watching a film on television and then "waking up to Tracie yelling, 'What the hell is going on?'"

The appellate court affirmed the trial court judge's refusal to instruct the jury that they should acquit Stowell if after reviewing the evidence "you have a reasonable doubt that the defendant was conscious at the time the alleged crime was committed." The appellate court noted that while Stowell and LeeAnne had testified that Stowell had walked in his

sleep on various occasions, he did not claim that he had been sleepwalking on the night of the molestation. There also was no testimony that he had engaged in similar types of sexual behavior when he previously had been sleepwalking. At the time of his arrest, Stowell did not explain to the police that he had been sleepwalking, and he raised the sleepwalking defense for the first time at trial. The last point made by the appellate court was that while studies indicate that sleepwalkers are able to unlock doors and operate machinery, there was no expert testimony presented at trial documenting that a sleepwalker could have undressed and sexually molested a 4-year-old. The appellate court concluded that Stowell's claim that he had been sleepwalking and had unconsciously molested Taylor simply was not supported by substantial evidence. Should the criminal law recognize the "involuntariness" defense of sleepwalking? See *People v. Stowell*, 2002 WL 1068259 (Cal. Ct. App. 2002).

2. **Drugs in jail.** On September 22, 2005, Vancouver, Washington, Police Department Officer Jeff Starks stopped Eaton for driving with his headlights turned off and made a traffic stop. After performing field sobriety tests, Officer Starks concluded that Eaton was impaired and arrested him for DUI and took him to the county jail. He was searched, and the officers seized "what appeared to be a plastic bag taped to the top of [Eaton's] sock." Eaton was charged with one count of DUI and one count of possession of a controlled substance. The state sought a sentence enhancement because the narcotics were discovered in the county jail. The jury found Eaton guilty of both counts and found that Eaton possessed methamphetamine in a county jail. Eaton's standard sentencing range would have

been 0 to 6 months, but with the sentence enhancement, his range was increased to 12 to 18 months. The trial court sentenced Eaton to 12 months and 1 day. Eaton claimed that the prosecution failed to prove that he acted voluntarily in bringing the narcotics into the jail and that the sentencing enhancement could not be imposed for an involuntary act.

The Washington Supreme Court held that once Eaton was arrested, he no longer had control over his location. "From the time of arrest, his movement from street to jail became involuntary: involuntary not because he did not wish to enter the jail, but because he was forcibly taken there by State authority. He no longer had the ability to choose his own course of action. Nor did he have the ability

through some other course of action to avoid entering the area that would increase the penalty for the underlying crime." See *State v. Eaton*, 229 P.3d 704 (Wash. 2010).

In contrast, an Arizona appellate court based on similar facts held that the defendant's possession of a controlled substance was "voluntary in that, after being advised of the consequences of bringing drugs into the jail, the Appellant consciously chose to ignore the officers' warnings, choosing instead to enter the jail in possession of cocaine. Under these circumstances, the [defendant] was the author of his own fate." See *State v. Alvarado*, 200 P.3d 1037 (Ariz. Ct. App. 2008).

How would you decide these cases?

You Decide 4.1

Brown, while drinking beer and talking with friends in the parking lot of an apartment complex, became involved in an argument with James McLean. One week earlier, Brown had been badly beaten in a fight with McLean. Brown purchased a .25 caliber handgun to protect himself and his friends from McLean, who was known to "possess and discharge firearms in the vicinity of the apartment complex" where Brown lived. Brown, on the day in question, got into a heated exchange with McLean. Brown, who is right-handed, testified that he held the firearm in his left hand

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

You can find the answer at
<http://edge.sagepub.com/lippmancl4e>

You Decide 4.2

Thomas F. Martino, and his wife, Carmen Keenon, got into an argument. Martino shoved his wife down the front stairs of the home. He fell on Keenon and began choking her. The police arrived and observed Martino on top of Keenon on the stair landing outside of the couple's apartment. The officers ordered Martino to get off of Keenon who replied in a combative tone, "[Y]ou ain't going to ----ing do anything." After the police repeated these orders several more times, threatened to tase Martino, and began moving up the stairs, Martino stood up, moved to the front of the landing, and "squared off" against the police in a way that indicated that he wanted to fight." Martino yelled at the police, "Come on." One of the officers tased Martino who dropped to the ground,

having lost control of his muscles because of being tased. He fell backward on top of Keenon, breaking her arm. The trial court found Martino guilty of aggravated domestic battery, aggravated battery, unlawful restraint, and two counts of resisting or obstructing a police officer. The defendant was sentenced to concurrent terms totaling 180 days in jail and 4 years of probation. Martino claims that his breaking of Keenon's arm was an involuntary act and that he may not be held criminally liable for a battery. Do you agree? *People v. Martino*, 970 N.E.2d 123 (Ill. Ct. App. 2012).

You can find the answer at
<http://edge.sagepub.com/lippmancl4e>

STATUS OFFENSES

Can you be criminally convicted of being a drunk or drug addict or a common thief? Or for a violent personality? The commentary to Model Penal Code section 2.01 stresses that a crime requires an act and that individuals may not be punished based on a mere status or condition. The code cites as an example the 1962 U.S. Supreme Court decision in *Robinson v. California*, which, as you might recall from Chapter 3, held that it was cruel and unusual punishment under the Eighth and Fourteenth Amendments to convict Robinson of the **status offense** of being “addicted to the use of narcotics.”¹⁶

In *Robinson*, Los Angeles police officers observed scar tissue and discoloration on Robinson’s arms that was consistent with the injection of drugs. Robinson was convicted by a jury under a statute that declared it a misdemeanor for a person “either to use narcotics or to be addicted to the use of narcotics.” The verdict was based on Robinson’s status as a narcotics addict rather than for the act of using narcotics or for other illegal acts such as the manufacture, selling, transport, or purchase of narcotics. The Supreme Court reversed Robinson’s criminal conviction and condemned the fact that Robinson could be held “continuously guilty . . . whether or not he ever used or possessed any narcotics within the State, and whether or not he has been guilty of any antisocial behavior [in California].”

Holding Robinson liable for his status as an addict seemed particularly unfair given that four judges viewed narcotics addiction as a disease. Justice Potter Stewart explained that it was “cruel and unusual punishment to condemn Robinson for an illness, which like being mentally or physically challenged or leprosy, may be contracted innocently or involuntarily.”

Six years later, the U.S. Supreme Court issued a decision in *Powell v. Texas*. Powell was arrested for “being found in a state of intoxication in a public place.”¹⁷ The Texas law was aimed at preventing the disruptive behavior accompanying public drunkenness. Powell claimed that his conviction was based on his status as a chronic alcoholic and that the law constituted cruel and unusual punishment. The Supreme Court rejected this argument and ruled in a 5-4 decision that Powell was convicted not for being a chronic alcoholic, but for his public behavior that posed “substantial health and safety hazards, both to himself and for members of the general public.” Justice White was the fifth justice in the *Powell* majority. White agreed with the dissent that alcoholism was a disease but concurred in the majority decision based on his determination that Powell was capable of “making plans to avoid his being found drunk in public.” Justice White cautioned that he believed that it would constitute cruel and unusual punishment to convict and punish chronic alcoholics who were homeless, because such individuals “have no place else to go and no place else to be when they are drinking.”

The Supreme Court majority in *Powell* dismissed the argument that alcoholism was a disease similar to drug addiction and that *Robinson’s* condemnation of status offenses should be expanded to encompass Powell’s irresistible compulsion to appear drunk in public. A shift of Justice White’s vote would have resulted in a different outcome. Would this prove a dangerous doctrine? The next step might involve sex offenders claiming that their criminal acts are an expression of a sexually dysfunctional personality or violent offenders contending that their behavior resulted from their antisocial personalities.

In 1969, in *Wheeler v. Goodman*, a federal district court held that the defendants had been improperly arrested and punished because they were unemployed “hippies.”

A man is free to be a hippie, a Methodist, a Jew, a Black Panther, a Kiwanian, or even a Communist, so long as his conduct does not imperil others, or infringe upon their rights. In short, it is no crime to be a hippie. . . .

Status—even that of a gambler or prostitute—may not be made criminal. . . . The acts of gambling, prostitution, and operating bawdy houses are criminally punishable, of course, but the states cannot create the special status of vagrant for person who commit those illegal acts and then punish the status instead of the act.¹⁸

In *People v. Kellogg*, the Superior Court of San Diego, California, confronted an appellant who contended that his criminal convictions for public intoxication unconstitutionally punished him for his status as a homeless, chronic alcoholic. Is Kellogg’s claim persuasive?

Was Kellogg convicted for the status of being a homeless, chronic alcoholic?

People v. Kellogg, 14 Cal. Rptr. 3d 507 (Cal. Ct. App. 2004). Opinion by: Haller, J.

Facts

On January 10, 2002, Officer Heidi Hawley, a member of the Homeless Outreach Team, responded to a citizen's complaint of homeless persons camping under bridges and along State Route 163. She found Kellogg sitting on the ground in some bushes on the embankment off the freeway. Kellogg appeared inebriated and was largely incoherent. He was rocking back and forth, talking to himself, and gesturing. Officer Hawley arrested Kellogg for public intoxication. He had \$445 in his pocket from disability income.

In February 2001, Kellogg had accepted an offer from the Homeless Outreach Team to take him to Mercy Hospital. However, on three other occasions when Officer Hawley had offered Kellogg assistance from the Homeless Outreach Team, he had refused.

After his arrest on January 10, 2002, Kellogg posted \$104 cash bail and was released. Because he was homeless, he was not notified of his court date, and he did not appear for his January 31 arraignment. A warrant for his arrest was issued on February 11, 2002; he was arrested again for public intoxication on February 19 and 27 and subsequently charged with three violations of section 647, subdivision (f) [prohibiting public intoxication].

After a pretrial discussion in chambers about Kellogg's physical and psychological problems, the trial court conditionally released Kellogg on his own recognizance and ordered that he be escorted to the Department of Veterans Affairs hospital [VA] by Officer Hawley. He was not accepted for admission at the hospital and accordingly was returned to county jail. Kellogg pleaded not guilty and filed a motion to dismiss the charges based on his constitutional right to be free of cruel and unusual punishment.

Psychologist Gregg Michel and psychiatrist Terry Schwartz testified on behalf of Kellogg. These experts explained that Kellogg had a dual diagnosis. In addition to his severe alcohol dependence, which caused him to suffer withdrawal symptoms if he stopped drinking, he suffered from dementia, long-term cognitive impairment, schizoid personality disorder, and symptoms of post-traumatic stress disorder. He had a history of seizure disorder and a closed head injury, and he reported anxiety, depressive symptoms, and chronic pain. He was estranged from his family. Physically, he had peripheral edema, gastritis, acute liver damage, and ulcerative colitis requiring him to wear a colostomy bag. To treat his various conditions and symptoms, he had been prescribed Klonopin and Vicodin,

and it was possible that he suffered from addiction to medication.

Dr. Michel opined that Kellogg was gravely disabled and incapable of providing for his basic needs and that his degree of dysfunction was life-threatening. His mental deficits impeded his executive functioning (planning, making judgments) and memory. . . . Drs. Michel and Schwartz opined that Kellogg's homelessness was not a matter of choice but a result of his gravely disabled mental condition. His chronic alcoholism and cognitive impairment made it nearly impossible for him to obtain and maintain an apartment without significant help and support. . . . Dr. Schwartz explained that for a person with Kellogg's conditions, crowded homeless shelters can be psychologically disturbing and trigger post-traumatic stress or anxiety symptoms, causing the person to prefer to hide in a bush where minimal interactions with people would occur. Additionally, a homeless person such as Kellogg, particularly when intoxicated, might refuse offers of assistance from authorities, because he has difficulty trusting people and fears his situation, although bad at present, will worsen.

In Dr. Michel's view, Kellogg's incarceration provided some limited benefit in that he obtained medication for seizures, did not have access to alcohol, received some treatment, and was more stable during incarceration than he was when homeless on the streets. However, such treatment was insufficient to be therapeutic, and medications prescribed for inmate management purposes can be highly addictive and might not be medically appropriate.

Testifying for the prosecution, physician James Dunford stated that at the jail facility, medical staff assess the arrestee's condition and provide treatment as needed, including vitamins for nutritional needs and medication to control alcohol withdrawal symptoms or other diseases such as hypertension, seizure disorders, and diabetes. . . . Dr. Dunford opined that between March 2 and 7, Kellogg's condition had improved, because his seizure medicine was restarted, his alcohol withdrawal was treated, his vital signs were stable, his colostomy bag was clean and intact, his overall cleanliness was restored, and he was interacting with people in a normal way.

After the presentation of evidence, the trial court found that Kellogg suffered from both chronic alcohol dependence and a mental disorder and was homeless at the time of his arrests. Further, his alcohol dependence was both physical and psychological and caused him to be unable to stop drinking or to engage in rational choice-making. Finding that before his arrest Kellogg was offered assistance on at least three

occasions and that his medical condition improved while in custody, the court denied the motion to dismiss the charges. On April 2, 2002, the court found Kellogg guilty of one charge of violating section 647, subdivision (f) arising from his conduct on January 10, 2002. At sentencing on April 30, the probation officer requested that the hearing be continued for another month so Kellogg could be evaluated for a possible conservatorship.

After expressing the difficult “Hobson’s choice” whereby there were no clear prospects presented to effectively assist Kellogg, the court sentenced him to 180 days in jail, with execution of sentence suspended for three years on the condition that he complete an alcohol treatment program and return to court on June 4, 2002, for a progress review. . . .

After Kellogg’s release from jail, defense counsel made extensive, but unsuccessful, efforts to place Kellogg in an appropriate program and to find a permanent residence for him. On May 25 and 28, 2002, he was again arrested for public intoxication. After he failed to appear at his June 4 review hearing, his probation was summarily revoked. Kellogg was rearrested on June 12. After a probation revocation hearing, Kellogg’s probation was formally revoked, and he was ordered to serve the 180-day jail sentence. The court authorized that his sentence be served in a residential rehabilitation program. However, no such program was found. According to defense counsel, the VA concluded Kellogg could not benefit from its residential treatment program due to his cognitive defects. Further, his use of prescribed, addictive narcotics precluded placement in other residential treatment programs, and his ileostomy precluded placement in board and care facilities. On July 11, 2003, the appellate division of the superior court affirmed the trial court’s denial of Kellogg’s motion to dismiss on Eighth Amendment grounds. We granted Kellogg’s request to have the matter transferred to this court for review.

Issue

Section 647, subdivision (f) defines the misdemeanor offense of disorderly conduct by public intoxication as occurring when a person

is found in any public place under the influence of intoxicating liquor . . . in such a condition that he or she is unable to exercise care for his or her own safety or the safety of others, or by reason of his or her being under the influence of intoxicating liquor . . . interferes with or obstructs or prevents the free use of any street, sidewalk, or other public way.

Kellogg argues that this statute, as applied to him, constitutes cruel and/or unusual punishment prohibited by the Eighth Amendment to the U.S. Constitution and

article 1 section 17 of the California Constitution. He asserts that his chronic alcoholism and mental condition have rendered him involuntarily homeless and that it is impossible for him to avoid being in public while intoxicated. He argues because his public intoxication is a result of his illness and beyond his control, it is inhumane for the state to respond to his condition by subjecting him to penal sanctions.

Reasoning

It is well settled that it is cruel and unusual punishment to impose criminal liability on a person merely for having the disease of addiction. In *Robinson v. California* 370 U.S. 660, 666–667 (1962), the U.S. Supreme Court invalidated a California statute that made it a misdemeanor to “be addicted to the use of narcotics.” The *Robinson* Court recognized that a state’s broad power to provide for the public health and welfare made it constitutionally permissible for it to regulate the use and sale of narcotics, including, for example, such measures as penal sanctions for addicts who refuse to cooperate with compulsory treatment programs. But the Court found the California penal statute unconstitutional, because it did not require possession or use of narcotics, or disorderly behavior resulting from narcotics, but rather imposed criminal liability for the mere status of being addicted. *Robinson* concluded that just as it would be cruel and unusual punishment to make it a criminal offense to be mentally ill or a leper, it was likewise cruel and unusual to allow a criminal conviction for the disease of addiction without requiring proof of narcotics possession or use or antisocial behavior.

In *Powell v. Texas*, 392 U.S. 514 (1968), the U.S. Supreme Court, in a five-to-four decision, declined to extend *Robinson’s* holding to circumstances where a chronic alcoholic was convicted of public intoxication, reasoning that the defendant was not convicted merely for being a chronic alcoholic but rather for being in public while drunk. That is, the state was not punishing the defendant for his mere status, but rather was imposing “a criminal sanction for public behavior which may create substantial health and safety hazards, both for [the defendant] and for members of the general public.” . . . In the plurality decision, four justices rejected the proposition set forth by four dissenting justices that it was unconstitutional to punish conduct that was “involuntary” or “occasioned by a compulsion.”

The fifth justice in the *Powell* plurality, Justice White, concurred in the result only, concluding that the issue of involuntary or compulsive behavior could be pivotal to the determination of cruel and unusual punishment, but the record did not show the defendant (who had a home) suffered from any inability to refrain from drinking in public. Justice White opined that punishing a homeless alcoholic

for public drunkenness could constitute unconstitutional punishment if it was impossible for the person to resist drunkenness in a public place. Relying on Justice White's concurring opinion, Kellogg argues that Justice White, who was the deciding vote in *Powell*, would have sided with the dissenting justices had the circumstances of his case (i.e., an involuntarily homeless chronic alcoholic) been presented, thus resulting in a finding of cruel and unusual punishment by a plurality of the Supreme Court.

We are not persuaded. Although in *Robinson* the U.S. Supreme Court held it was constitutionally impermissible to punish for the mere condition of addiction, the Court was careful to limit the scope of its decision by pointing out that a state may permissibly punish disorderly conduct resulting from the use of narcotics. This limitation was recognized and refined by the plurality opinion in *Powell*, where the Court held it was permissible for a state to impose criminal punishment when the addict engages in conduct that spills into public areas. . . .

Here, the reason Kellogg was subjected to misdemeanor culpability for being intoxicated in public was not because of his condition of being a homeless alcoholic but rather because of his conduct that posed a safety hazard. If Kellogg had merely been drunk in public in a manner that did not pose a safety hazard (i.e., if he were able to exercise care for his own and the public's safety and was not blocking a public way), he could not have been adjudicated guilty under section 647(f). The state has a legitimate need to control public drunkenness when such drunkenness creates a safety hazard. It would be neither safe nor humane to allow intoxicated persons to stumble into busy streets or to lie unchecked on sidewalks, driveways, parking lots, streets, and other such public areas where they could be trampled upon, tripped over, or run over by cars. The facts of Kellogg's public intoxication in the instant case show a clear potential for such harm. He was found sitting in bushes on a freeway embankment in an inebriated state. It is not difficult to imagine the serious possibility of danger to himself or others had he wandered off the embankment onto the freeway. . . .

Holding

We conclude that the California legislature's decision to allow misdemeanor culpability for public intoxication, even as applied to a homeless chronic alcoholic such as Kellogg, is neither disproportionate to the offense nor inhumane. In deciding whether punishment is unconstitutionally excessive, we consider the degree of the individual's personal culpability as compared to the amount of punishment imposed. To the extent Kellogg has no choice but to be drunk in public given the nature of his impairments, his culpability is low; however, the penal sanctions imposed on him

under section 647(f) are correspondingly low. Given the state's interest in providing for the safety of its citizens, including Kellogg, imposition of low-level criminal sanctions for Kellogg's conduct does not tread on the federal or state constitutional proscriptions against cruel and/or unusual punishment.

In presenting his argument, Kellogg points to the various impediments to his ability to obtain shelter and effective treatment, apparently caused by a myriad of factors including the nature of his condition and governmental policies and resources, and asserts that these impediments do not justify criminally prosecuting him. He posits that the Eighth Amendment "mandates that society do more for [him] than prosecute him criminally and repeatedly incarcerate him for circumstances which are beyond his control." We are sympathetic to Kellogg's plight; however, we are not in a position to serve as policy maker to evaluate societal deficiencies and amelioration strategies. . . . The judgment is affirmed.

Dissenting, McDonald, J.

Because Kellogg is involuntarily homeless and a chronic alcoholic with a past head injury who suffers from dementia, severe cognitive impairment, and a schizoid personality disorder, and there is no evidence he was unable by reason of his intoxication to care for himself or others, other than inability inherent in intoxication, or interfered in any manner with a public way, his section 647(f) conviction solely for being intoxicated in public constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. . . . As Justice Fortas stated in his dissenting opinion in *Powell*:

It is entirely clear that the jailing of chronic alcoholics is punishment. It is not defended as therapeutic, nor is there any basis for claiming that it is therapeutic (or indeed a deterrent). The alcoholic offender is caught in a "revolving door"—leading from arrest on the street through a brief, unprofitable sojourn in jail, back to the street and, eventually, another arrest. The jails, overcrowded and put to a use for which they are not suitable, have a destructive effect upon alcoholic inmates. . . .

The scope of the California Constitution's prohibition of cruel or unusual punishment is not well-defined. . . . Nevertheless, the California Supreme Court has consistently followed the principle that "a sentence is cruel or unusual as applied to a particular defendant . . . [when] the punishment shocks the conscience and offends fundamental notions of human dignity." . . .

A section 647(f) public intoxication offense, both in the abstract and as committed by Kellogg, is a nonviolent,

fairly innocuous offense. . . . It is a nonviolent offense, does not require a victim, and poses little, if any, danger to society in general. As committed by Kellogg, the offense was nonviolent, victimless, and posed no danger to society. Kellogg was found intoxicated sitting under a bush in a public area. He was rocking back and forth, talking to himself, and gesturing. The record does not show that Kellogg's public intoxication posed a danger to other persons or society in general. His motive in drinking presumably was merely to fulfill his physical and psychological compulsion as an alcoholic to become intoxicated. Because Kellogg is involuntarily homeless and did not have the alternative of being intoxicated in private, he did not have

any specific purpose or motive to be intoxicated in a public place. Rather, it was his only option. . . . As an involuntarily homeless person, Kellogg cannot avoid appearing in public. As a chronic alcoholic, he cannot stop drinking and being intoxicated. Therefore, Kellogg cannot avoid being intoxicated in a public place.

Based on the nature of the offense and the offender, Kellogg's section 647(f) public intoxication conviction "shocks the conscience and offends fundamental notions of human dignity," and therefore constitutes cruel or unusual punishment in violation of . . . the . . . U.S. Constitution and . . . California Constitution. I would reverse the judgment.

Questions for Discussion

1. Summarize the opinions of the U.S. Supreme Court in *Robinson v. California* and in *Powell v. Texas*.
2. Why does Kellogg argue that his arrest and incarceration constitute unconstitutional cruel and unusual punishment? How does the California court respond to this argument? What is the basis for Judge McDonald's dissent? Is the majority or the dissent more consistent with Supreme Court precedents?
3. In terms of public policy, discuss the impact of the majority decision on the criminal justice system. How would the minority decision affect public policy?

You Decide 4.3

An FBI search of Bruce Black's home and home computer resulted in the seizure of photographs and computer diskettes portraying unlawful child pornography. Black pled guilty to the receipt, possession, and distribution of child pornography that had been transmitted in interstate commerce. He was sentenced to 18 months in prison and to three years of supervised release. The government stipulated in the plea agreement that Black was a "pedophile and/or ephebophile [sexually attracted to young men]" and that "the receipt, collection and distribution of child pornography was a pathological symptom of the defendant's pedophilia and/or ephebophilia." Psychiatric

reports concluded that Black was able to appreciate the wrongfulness of his acts and that he was able to control his impulses and limit his involvement in child pornography to those periods in which his roommate was absent. Black appealed and claimed that he was unable to control his sexual urges and that he was being punished for his status as a pedophile and/or ephebophile. Do you agree with Black? Will his appeal be successful? See *United States v. Black*, 116 F.3d 198 (7th Cir. 1997).

You can find the answer at
<http://edge.sagepub.com/lippmancl4e>.

OMISSIONS

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

The criminal law is generally concerned with punishing individuals who engage in voluntary acts that violate the law. The law, on occasion, imposes a duty or obligation on individuals to act and punishes a failure to act. For example, we are obliged to pay taxes, register for the draft, serve on juries, and report an accident. These duties are required in the interests of society and are limited exceptions to the requirement that a crime requires a voluntary act.

See more cases on the study site: *Powell v. Texas*, <http://edge.sagepub.com/lippmancl4e>.

The American and European Bystander Rules

The basic rule in the United States is that an individual is not legally required to assist a person who is in peril. This principle was clearly established in 1907 in *People v. Beardsley*. The Michigan Supreme Court ruled that the married Beardsley was not liable for failing to take steps to ensure the safety of Blanche Burns, a woman with whom he was spending the weekend. The court explained that the fact that Burns was in Beardsley's house at the time she overdosed on drugs and alcohol did not create a legal duty to assist her.¹⁹ The Michigan judges cited in support of this verdict the statement of U.S. Supreme Court Justice Joseph Stephen Field that it is "undoubtedly the moral duty of every person to extend to others assistance when in danger . . . and, if such efforts should be omitted . . . he would by his conduct draw upon himself the just censure and reproach of good men; but this is the only punishment to which he would be subjected by society."²⁰ Chief Justice Carpenter of the New Hampshire Supreme Court earlier had recognized that an individual did not possess a duty to rescue a child standing in the path of an oncoming train. Justice Carpenter noted that "if he does not, he may . . . justly be styled a ruthless savage and a moral monster; but he is not liable in damages for the child's injury, or indictable under the statute for its death."²¹

This so-called **American bystander rule** contrasts with the **European bystander rule** common in Europe that obligates individuals to intervene. Most Americans would likely agree that an Olympic swimmer is morally obligated to rescue a young child drowning in a swimming pool. Why then is this not recognized as a legal duty in the United States? There are several reasons for the American bystander rule:²²

- Individuals intervening may be placed in jeopardy.
- Bystanders may misperceive a situation, unnecessarily interfere, and create needless complications.
- Individuals may lack the physical capacity and expertise to subdue an assailant or to rescue a hostage and place themselves in danger. This is the role of criminal justice professionals.
- The circumstances under which individuals should intervene and the acts required to satisfy the obligation to assist another would be difficult to clearly define.
- Criminal prosecutions for a failure to intervene would burden the criminal justice system.
- Individuals in a capitalist society are responsible for their own welfare and should not expect assistance from others.
- Most people will assist others out of a sense of moral responsibility, and there is no need for the law to require intervention.

Critics of the American bystander rule contend that there is little difference between pushing a child onto the railroad tracks and failing to intervene to ensure the child's safety and that criminal liability should extend to both acts and omissions. This also would deter crime, because offenders may be reluctant to commit crimes in situations in which they anticipate that citizens will intervene. We can see how the readiness of passengers to confront terrorists on airplanes has prevented several attacks, most notably in the case of the "shoe bomber," Richard Reid. The Good Samaritan rule also assists in promoting a sense of community and regard for others.²³

The conflict between law and morality was starkly presented in 1964 when 38 residents of New York City were awakened by the desperate screams of Kitty Genovese, a 28-year-old woman returning home from work. Kitty parked her car in a lot roughly 100 feet from her apartment and was confronted by Winston Moseley, a married father of two young children, who later would testify that he received emotional gratification from stalking women. The 38 residents of the building turned on their lights and opened their windows and watched as Moseley returned on three separate occasions over a period of 35 minutes to stab Kitty 17 times. The third time Moseley returned, he found that Kitty had crawled to safety inside a nearby apartment house, and he stabbed her in the throat to prevent her from screaming, attempted to rape her, and took \$49 from her wallet. One person found the courage to persuade a neighbor to call the police, who arrived in two minutes to find Kitty's dead body. This event profoundly impacted the United States. Commentators asked whether we had become a society of passive bystanders who were concerned only with our own welfare.²⁴

The Duty to Intervene

American criminal law does not impose a general duty on the individuals witnessing the murder of Kitty Genovese to intervene. There is a duty, however, to assist another under certain limited conditions.²⁵ The primary requirement is that a duty must be recognized under either the common law or a statute.

- *Status.* The common law recognized that individuals possess an obligation to assist their child, spouse, or employee. In *State v. Mally*, the defendant was convicted of “hastening” the death of his wife who had fallen and broken both of her arms, precipitating severe shock and the degeneration of her kidneys. Michael Mally left his wife, Kay, alone in bed for two days, bothering only to provide her with a single glass of water. A Montana district court held that “the failure to obtain medical aid for one who is owed a duty is a sufficient degree of negligence to constitute involuntary manslaughter provided death results from the failure to act.”²⁶

- *Statute.* A **duty to intervene** may be created by a statute that imposes a duty of care. This may be a criminal statute requiring that a doctor report child abuse or a statute that sets forth the obligations of parents. In *Craig v. State*, the defendants followed the dictates of their religion and treated their child’s fatal illness with prayer rather than medicine and were subsequently convicted of failing to obtain medical care for their now-deceased 6-year-old daughter. The court ruled that the parents had breached their duty under a statute that provided that a father and mother are jointly and individually responsible for the “support, care, nurture, welfare and education of their minor children.” The statute failed to mention medical care, but the court had “no hesitancy in holding that it is embraced within the scope of the broad language used.”²⁷

- *Contract.* An obligation may be created by an agreement. An obvious example is a babysitter who agrees to care for children or a lifeguard employed to safeguard swimmers. In *Commonwealth v. Pestinikas*, Walter and Helen Pestinikas verbally agreed to provide shelter, food, and medicine to 92-year-old Joseph Kly, who had been hospitalized with a severe weakness of the esophagus. Kly agreed to pay the Pestinikas \$300 a month in return for food, shelter, care, and medicine. Kly was found dead of dehydration and starvation roughly 19 months later. A Pennsylvania superior court ruled that although failure to provide food and medicine could not have been the basis for prosecuting a stranger who learned of Kly’s condition, a “duty to act imposed by contract is legally enforceable and, therefore, creates a legal duty.”²⁸

- *Assumption of a Duty.* An individual who voluntarily intervenes to assist another is charged with a duty of care. In *People v. Oliver*, Oliver, knowing that Cornejo was extremely drunk, drove him from a bar to Oliver’s home, where she assisted him to inject drugs. Cornejo collapsed on the floor, and Oliver instructed her daughter to drag Cornejo’s body outside and hide him behind a shed. The next morning Cornejo was discovered dead. A California superior court ruled that by taking Cornejo into her home, Oliver “took charge of a person unable to prevent harm to himself,” and she “owed Cornejo a duty” that she breached by failing to summon medical assistance.²⁹

- *Creation of Peril.* An individual who intentionally or negligently places another in danger has a duty of rescue. In *Jones v. State*, the defendant raped a 12-year-old girl who almost immediately jumped or fell off a bridge into a stream. The defendant waded into the water, but neglected to rescue the young woman. The court asked, “Can it be doubted that one who by his own overpowering criminal act has put another in danger of drowning has the duty to preserve her life?”³⁰

- *Control.* An individual has a duty to direct and to care for those under his or her supervision and command, including employees or members of the military. A California criminal statute provides that parents or legal guardians of any person under 18 “shall have the duty to exercise reasonable care, supervision, protection, and control over their minor child.”³¹ The California Supreme Court noted that this act was part of an effort to combat gangs and that the law applies to parents who intentionally or with criminal negligence fail to fulfill their duty to control their child and, as a result, contribute to child delinquency.³²

- *Property Owner*. Property owners owe a duty of care to those invited onto their land. The defendants, in *Commonwealth v. Karetny*, operated a nightclub on a pier in Philadelphia, knowing that the pier was in imminent danger of collapse. The pier subsequently collapsed, killing three persons, and the Pennsylvania Supreme Court held that there was sufficient evidence to warrant a jury in finding the appellees' "reckless creation of a risk of catastrophe."³³

In addition to establishing a duty, the prosecutor must demonstrate a number of other facts beyond a reasonable doubt:

- *Possession of Knowledge of the Peril*. The prosecution must establish that an individual was actually aware or should have been aware that another person was in danger. A mother cannot be held liable for her boyfriend's molestation of her child unless she knew or ought to have known that her child was being sexually mistreated.³⁴
- *Acted With the Required Intent*. Most omission cases involve death and are prosecuted as either murder or manslaughter (reckless disregard).³⁵ As we will see in Chapter 10, homicide requires a specific intent to kill, while manslaughter requires knowledge that death is substantially certain to result. Poor judgment, a reasonable mistake, or a debatable decision is generally not sufficient to establish criminal guilt.³⁶
- *Caused the Harm to the Victim*. The defendant's failure to assist the victim must have caused the harm.³⁷

We can see the interrelationship between these three factors in *Craig v. State*. In *Craig*, two parents were held not to be *grossly negligent* in causing their daughter's death because they were found not to have possessed *knowledge* of her serious illness, which was not apparent until two or three days prior to her death. The evidence indicated at this point that medical assistance would not have saved her life. As a result, the parents were *held not to have caused* the child's death.³⁸

Last, individuals are not expected to "accomplish the impossible." *The law excuses persons from fulfilling their duty in those instances in which they would be placed in peril*. Individuals, however, must take whatever action is feasible under the circumstances. In *State v. Walden*, the defendant observed the beating of her infant son by his biological father. The North Carolina Supreme Court recognized that parents cannot be expected or required to exhibit unreasonable courage and heroism in protecting their children. However, the defendant was convicted based on the fact that she neglected to take every reasonable step under the circumstances to avert the harm, such as protesting, alerting authorities, or seeking assistance.³⁹

In serious cases of family abuse, duty, knowledge, intent, causality, and a failure to intervene are easily established. In *People v. Burton*, the defendants Sharon Burton and Leroy Locke were convicted of first-degree murder. On January 22, 1996, Sharon Burton passively watched Leroy Locke chase her daughter Dominique with a belt after learning that she had a "toilet training accident" on the carpet while shouting "the little bitch pissed again." Locke then filled the bathtub with water and forced Dominique's head under the water 3 times for 15 seconds at a time. Dominique's body reportedly went limp in the water, and Locke and Burton left the 3-year-old unattended in the bathtub for 30 minutes while they played cards. Burton, after discovering Dominique's lifeless body, called her mother rather than authorities and later falsely reported to investigators that the child had fallen off the toilet. An Illinois appellate court found that Burton possessed knowledge that Dominique was being subjected to an ongoing pattern of abuse and that there was a substantial likelihood that Dominique would suffer death or great bodily harm.⁴⁰

In several states, a **Good Samaritan statute** requires individuals to aid individuals in peril. A Vermont law, Title 12, Chapter 23, § 519, requires individuals to provide reasonable medical assistance and, in return, relieves individuals of liability for civil damages unless their actions constitute gross negligence. Willful violation of the statute is punishable by a fine of not more than \$100. This has the advantage of focusing on medical assistance and of not requiring individuals to intervene to prevent harm or to rescue individuals. Most state Good Samaritan laws do not require individuals to intervene, although people who do intervene are provided some degree of protection from civil liability.

The next case in the textbook, *Jones v. United States*, challenges you to determine whether the defendant possessed a duty of care to the children in her home.

Model Penal Code

Section 2.01. Requirement of a Voluntary Act, Omission as Basis of Liability

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

Analysis

The Model Penal Code adopts the conventional position and does not generally impose criminal liability for omissions.

Section (1) excuses an individual from liability when the intervention is beyond his or her physical capacities or would place him or her in peril.

Section (3)(a) recognizes that the definition of some crimes requires an omission. This would encompass a doctor who fails to fulfill the duty to report child abuse. Section (3)(b) provides that an omission may be committed by a failure to fulfill a legal duty. This may arise from statute or the common law. A duty, however, may not arise under a moral or religious code.

The Legal Equation

Omission of a duty	=	(1) A failure to act
	+	(2) status, statute, contract, assume a duty, peril, control, landowner
	+	(3) knowledge that the victim is in peril
	+	(4) criminal intent
	+	(5) possession of the capacity to perform the act
	+	(6) would not be placed in danger.

Did the appellant breach a legal duty to Robert Lee Green and Anthony Lee Green?

Jones v. United States, 308 F.2d 307 (D.C. Cir. 1962). Opinion by: Wright, J.

Appellant, together with one Shirley Green, was tried on a three-count indictment charging them jointly with (1) abusing and maltreating Robert Lee Green, (2) abusing and maltreating Anthony Lee Green, and (3) involuntary manslaughter through failure to perform their legal duty of care for Anthony Lee Green, which failure resulted in his death. At the close of evidence, after a trial before a jury, the first two counts were dismissed as to both defendants. On the third count,

appellant was convicted of involuntary manslaughter. Shirley Green was found not guilty.

Appellant argues that there was insufficient evidence as a matter of law to warrant a jury finding of breach of duty in the care she rendered Anthony Lee. Alternatively, appellant argues that the trial court committed plain error in failing to instruct the jury that it must first find that appellant was under a legal obligation to provide food and necessities to Anthony Lee

before finding her guilty of manslaughter in failing to provide them. The first argument is without merit. Upon the latter we reverse.

Facts

A summary of the evidence, which is in conflict upon almost every significant issue, is necessary for the disposition of both arguments. In late 1957, Shirley Green became pregnant, out of wedlock, with a child, Robert Lee, subsequently born August 17, 1958. Apparently to avoid the embarrassment of the presence of the child in the Green home, it was arranged that appellant, a family friend, would take the child to her home after birth. Appellant did so, and the child remained there continuously until removed by the police on August 5, 1960. Initially appellant made some motions toward the adoption of Robert Lee, but these came to naught, and shortly thereafter it was agreed that Shirley Green was to pay appellant \$72 a month for his care. According to appellant, these payments were made for only five months. According to Shirley Green, they were made up to July 1960.

Early in 1959 Shirley Green again became pregnant, this time with the child Anthony Lee, whose death is the basis of appellant's conviction. This child was born October 21, 1959. Soon after birth, Anthony Lee developed a mild jaundice condition. . . . The jaundice resulted in his retention in the hospital for three days beyond the usual time, or until October 26, 1959, when, on authorization signed by Shirley Green, Anthony Lee was released by the hospital to appellant's custody. Shirley Green, after a two or three day stay in the hospital, also lived with appellant for three weeks, after which she returned to her parents' home, leaving the children with appellant. She testified she did not see them again, except for one visit in March, until August 5, 1960. Consequently, though there does not seem to have been any specific monetary agreement with Shirley Green covering Anthony Lee's support, appellant had complete custody of both children until they were rescued by the police.

With regard to medical care, the evidence is undisputed. In March 1960, appellant called a Dr. Turner to her home to treat Anthony Lee for a bronchial condition. Appellant also telephoned the doctor at various times to consult with him concerning Anthony Lee's diet and health. In early July 1960, appellant took Anthony Lee to Dr. Turner's office where he was treated for "simple diarrhea." At this time the doctor noted the "wizened" appearance of the child and told appellant to tell the mother of the child that he should be taken to a hospital. This was not done.

On August 2, 1960, two collectors for the local gas company had occasion to go to the basement of appellant's home, and there saw the two children. Robert Lee and Anthony Lee at this time were age two years and ten months respectively. Robert Lee was in a "crib"

consisting of a framework of wood, covered with a fine wire screening, including the top which was hinged. The "crib" was lined with newspaper, which was stained, apparently with feces, and crawling with roaches. Anthony Lee was lying in a bassinet and was described as having the appearance of a "small baby monkey." One collector testified to seeing roaches on Anthony Lee.

On August 5, 1960, the collectors returned to appellant's home in the company of several police officers and personnel of the Women's Bureau. At this time, Anthony Lee was upstairs in the dining room in the bassinet, but Robert Lee was still downstairs in his "crib." The officers removed the children to the D.C. General Hospital, where Anthony Lee was diagnosed as suffering from severe malnutrition and lesions over large portions of his body, apparently caused by severe diaper rash. Following admission, he was fed repeatedly, apparently with no difficulty, and was described as being very hungry. His death, 34 hours after admission, was attributed without dispute to malnutrition. At birth, Anthony Lee weighed six pounds, fifteen ounces—at death at age ten months, he weighed seven pounds, thirteen ounces. Normal weight at this age would have been approximately fourteen pounds.

Appellant argues that nothing in the evidence establishes that she failed to provide food to Anthony Lee. She cites her own testimony and the testimony of a lodger, Mr. Wills, that she did in fact feed the baby regularly. At trial, the defense made repeated attempts to extract from the medical witnesses opinions that the jaundice, or the condition that caused it, might have prevented the baby from assimilating food. The doctors conceded this was possible but not probable, since the autopsy revealed no condition that would support the defense theory. It was also shown by the disinterested medical witnesses that the child had no difficulty in ingesting food immediately after birth, and that Anthony Lee, in the last hours before his death, was able to take several bottles, apparently without difficulty, and seemed very hungry. This evidence, combined with the absence of any physical cause for nonassimilation, taken in the context of the condition in which these children were kept, presents a jury question on the feeding issue.

Moreover, there is substantial evidence from which the jury could have found that appellant failed to obtain proper medical care for the child. Appellant relies upon the evidence showing that on one occasion she summoned a doctor for the child, on another took the child to the doctor's office, and that she telephoned the doctor on several occasions about the baby's formula. However, the last time a doctor saw the child was a month before his death, and appellant admitted that on that occasion the doctor recommended hospitalization. Appellant did not hospitalize the child, nor did she take any other steps to obtain medical care in the last crucial month. Thus there was sufficient

evidence to go to the jury on the issue of medical care, as well as failure to feed.

Issue

Appellant takes exception to the failure of the trial court to charge that the jury must find beyond a reasonable doubt, as an element of the crime, that appellant was under a legal duty to supply food and necessities to Anthony Lee. . . .

Reasoning

The problem of establishing the duty to take action that would preserve the life of another has not often arisen in the case law of this country. The most commonly cited statement of the rule is found in *People v. Beardsley*, 150 Mich. 206, 113 N.W. 1128, 1129 (1962), which provides that the

law recognizes that . . . the omission of a duty owed by one individual to another, where such omission results in the death of the one to whom the duty is owing, will make the other chargeable with manslaughter. . . . It must be a duty imposed by law or by contract, and the omission to perform the duty must be the immediate and direct cause of death.

There are at least four situations in which the failure to act may constitute breach of a legal duty. One can be held criminally liable first, where a statute imposes a

duty to care for another; second, where one stands in a certain status relationship to another; third, where one has assumed a contractual duty to care for another; and fourth, where one has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid.

It is the contention of the government that either the third or the fourth ground is applicable here. However, it is obvious that in any of the four situations, there are critical issues of fact that must be passed on by the jury—specifically in this case, whether appellant had entered into a contract with the mother for the care of Anthony Lee or, alternatively, whether she assumed the care of the child and secluded him from the care of his mother, his natural protector. On both of these issues, the evidence is in direct conflict, appellant insisting that the mother was actually living with appellant and Anthony Lee, and hence should have been taking care of the child herself, while Shirley Green testified she was living with her parents and was paying appellant to care for both children.

Holding

In spite of this conflict, the instructions given in the case failed even to suggest the necessity for finding a legal duty of care. The only reference to duty in the instructions was the reading of the indictment, which charged, inter alia, that the defendants “failed to perform their legal duty.” A finding of legal duty is the critical element of the crime charged, and failure to instruct the jury concerning it was plain error.

Reversed and remanded.

Questions for Discussion

1. Why was this case remanded to the trial court?
2. Did both Jones and Shirley Green breach a duty of care?
3. Would you acquit Jones in the event that she informed Shirley Green that she no longer desired to take care of Robert and Anthony, and Shirley Green made no effort to remove the children from Jones's home?
4. Is it significant that Jones did not call Shirley Green as suggested by the doctor? Did the doctor breach a duty in this case?
5. What if Shirley Green left Anthony on Ms. Jones's porch with a note asking Ms. Jones to care for him, and Ms. Jones ignored Anthony? In the event that Anthony froze to death, would both Green and Jones be criminally liable?

You Decide 4.4

In May 1997, 19-year-old Jeremy Strohmeyer together with his friend David Cash played video games at a Las Vegas casino while Strohmeyer's father gambled. Seven-year-old Sherrice Iverson threw a wet paper towel at Strohmeyer, and a paper towel fight ensued. He followed her into the restroom to continue the game. The 46-pound Iverson threw a yellow floor sign at Strohmeyer

and then began screaming. Strohmeyer covered her mouth and forced her into a bathroom stall. David Cash wandered into the restroom to look for Strohmeyer. He peered over the stall and viewed Strohmeyer gripping and threatening to kill Sherrice. Cash allegedly made an unsuccessful effort to get Strohmeyer's attention and left the bathroom. Strohmeyer then molested Sherrice

and strangled her to suffocate the screams. As he was about to leave, Strohmeyer decided to relieve Sherrice's suffering and twisted her head and broke her neck. He placed the limp body in a sitting position on the toilet with Sherrice's feet in the bowl.

Strohmeyer confessed to Cash and, after being apprehended by the police three days later, explained that he wanted to experience death. His lawyer argued that Strohmeyer was in a "dream-like state" as a result of a combination of alcohol, drugs, and stress. In order to avoid the death penalty, Strohmeyer pled guilty to first-degree murder, first-degree kidnapping, and the sexual assault of a minor, all of which carry a life sentence in Nevada.

Iverson's mother called for Cash to be criminally charged, but Nevada law neither required him to intervene nor to report the crime to the police. The administration

at the University of California at Berkeley responded to a student demonstration calling for Cash's dismissal by explaining that there were no grounds to expel him from the institution because he had not committed a crime. Cash, who was studying nuclear engineering, refused to express remorse, explaining that he was concerned about himself and was not going to become upset over other people's problems, particularly a little girl whom he did not know.

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

You can find the answer at
<http://edge.sagepub.com/lippmancl4e>.

CRIME IN THE NEWS

In June 2012, 68-year-old Jerry Sandusky, former Penn State University assistant football coach, was convicted of 45 counts of sexual abuse against 10 juveniles and was sentenced to 60 years in prison.

An investigation by former FBI director Louis Freeh in July 2012 found that then Penn State president Graham Spanier, athletic director Tim Curley, vice president Gary Schultz, and famed, late football coach Joe Paterno all had known about accusations of child abuse against Sandusky as early as 1998. Freeh concluded that all three had "failed to protect children against a 'sexual predator' for 'over a decade'" and concealed Sandusky's criminal behavior from the university community. "Our most saddening and sobering finding is the total disregard for the safety and welfare of Sandusky's child victims . . . They exhibited a striking lack of empathy for Sandusky's victims by failing to inquire as to their safety and well-being, especially by not attempting to determine the identity of the child who Sandusky assaulted in . . . 2001." Several university custodians who witnessed Sandusky's molestation of children over the years also remained silent out of fear of losing their jobs.

In July 2012, less than two weeks after the Freeh report, Penn State entered into a consent decree with the National Collegiate Athletic Association (NCAA) admitting to the findings of the report. The NCAA penalized Penn State by imposing a fine of \$60 million, banning Penn State from bowl games, limiting football scholarships, and vacating all of the football team's victories between 1998 and 2011.

In 1998, the university police investigated charges of sexual abuse against Sandusky although criminal charges were not filed. Three years later, assistant

coach Mike McQueary entered the locker room and witnessed Sandusky sexually abusing a juvenile. McQueary reported the incident to Paterno who informed Curly and Schultz. They conferred with Spanier, and the three of them responded by directing Sandusky not to bring children into the football building in the future. They also prohibited him from conducting a summer camp for juveniles at a satellite campus. The three officials later denied before a grand jury that McQueary had stated that Sandusky was involved in sexual activity with the juvenile. The three high-level administrators were indicted for obstruction of justice and other charges stemming from their alleged cover-up of Sandusky molestation of juveniles.

In 2008, a mother of a freshman student at a local high school reported that her son had been sexually abused by Sandusky, and the resulting investigation led to an avalanche of allegations against Sandusky.

U.S. Education Secretary Arne Duncan announced that he was launching an investigation into whether Penn State campus administrators had failed to meet their responsibilities under the federal Clery Act, which requires colleges and universities to report criminal activity to the federal government. A violation can result in fines or the loss of federal student aid.

The Pennsylvania reporting law requires a state employee who "suspects" that a "child coming before them in their professional or official capacity is a victim of child abuse" immediately to notify his or her supervisor. The supervisor then has 48 hours to communicate the report to the Department of Public Welfare.

McQueary has been roundly condemned for not intervening to protect the child that he witnessed being molested by Sandusky. McQueary and Paterno

also were criticized for looking to university administrators to contact governmental authorities concerning Sandusky's criminal conduct rather than acting themselves. Critics concede that while McQueary and Paterno may have adhered to the letter of the law, they utterly failed to fulfill their moral responsibility.

On July 22, 2012, Joe Paterno's statue was removed from the entrance to the Penn State football stadium while leaving Paterno's name on the library that he had helped to fund. The decision to vacate Paterno's victories meant that he no longer would be the football coach with the most lifetime victories.

Former U.S. senator George Mitchell was appointed by the NCAA to monitor Penn State's progress in reforming the athletic program. In his second

report in 2014, he found that the university had made "remarkable" progress in reforming its athletic programs. The steps taken by Penn State include a settlement of nearly \$60 million with 25 victims. In response to Mitchell's recommendations, the NCAA announced that Penn State would be eligible for a postseason bowl game and that all of its scholarships would be reinstated. The NCAA a short time later restored Joe Paterno's football victories.

Should the entire Penn State football program have been penalized for the failure of a small number of individuals to inform state governmental officials of Sandusky's child abuse? Do you agree with rescinding the nonmonetary punishments imposed on Penn State?

POSSESSION

Possession is a **preparatory offense**. The thinking is that punishing possession deters and prevents the next step—a burglary, the sale of narcotics, or the use of a weapon in a robbery. The possession of contraband such as drugs and guns may also provoke conflict and violence.⁴¹

How does the possession of contraband meet the requirement that a crime involve a voluntary act or omission? This difficulty is overcome by requiring proof that the accused knowingly obtained or received the contraband (a voluntary act) or failed to immediately dispose of the property (failure to fulfill a duty).⁴²

The challenge in the crime of possession is to balance the competing values of punishing the guilty while at the same time protecting the innocent. There is little difficulty in convicting an individual who is found to have drugs in his or her pocket. Complications are created when drugs are discovered in the glove compartment of a car or in the living room of a house with four occupants. There is a temptation to charge all four with drug possession. On the other hand, there is the risk that individuals who had no knowledge of the contraband will be convicted.

Possession is typically defined as the ability to exercise "dominion and control over an object." This means that a drug dealer has the ability to move, sell, or transfer the contraband. There are several other central concepts to keep in mind.

- **Actual possession** refers to drugs and other contraband within an individual's physical possession or immediate reach.
- **Constructive possession** refers to contraband that is outside of an individual's actual physical control but over which he or she exercises control through access to the location where the contraband is stored or through ability to control an individual who has physical control over the contraband. A drug dealer has constructive possession over narcotics stored in his or her home or under the physical control of a member of his or her gang.
- **Joint possession** refers to a situation in which a number of individuals exercise control over contraband. Several members of a gang may all live in the home where drugs are stored. There must be specific proof connecting each individual to the drugs. The fact that a gang member lives in the house is not sufficient.
- **Knowing possession** refers to an individual's awareness that he or she is in possession of contraband. A drug dealer, for instance, is aware that marijuana is in his or her pocket.
- **Mere possession** refers to physical control without awareness of contraband. An individual may be paid by a drug dealer to carry a suitcase across international borders and lack awareness that the luggage contains drugs.

Criminal statutes punishing possession are typically interpreted to require that an individual (1) know of the presence of the item, (2) exercise actual or constructive possession, and (3) know the general character of the material. There may be individual or joint possession. An individual is required to know that the material is contraband but is not required to know the precise type of contraband involved.⁴³

Hawkins v. State is an example of conviction for actual possession of a firearm by a felon. The case illustrates how courts use circumstantial, or indirect, evidence to find possession. The defendant was apprehended following a high-speed chase, and the police seized a loaded shotgun in the back seat within reach of the driver. The Texas District Court stated that possession is a voluntary act if the possessor “knowingly obtains or receives the thing possessed or is aware of his control of the thing for a sufficient time to permit him to terminate his control.” The court concluded that the prosecution affirmatively established Hawkins’s knowledge and control over the firearm. The gun was in plain view in the back seat and was within easy reach, and Hawkins was the sole occupant of the vehicle. His guilty state of mind was indicated by his effort to escape.⁴⁴

The **fleeing possession** rule is a limited exception to criminal possession. This permits an innocent individual to momentarily possess and dispose of an illegal object. In *People v. Mijares*, the defendant removed and disposed of narcotics that he took from an unconscious friend whom he was driving to the hospital. The California Supreme Court, citing a fleeing possession exception, ruled that to hold Mijares liable would “result in manifest injustice to admittedly innocent individuals.”⁴⁵

The concept of constructive possession is illustrated by the federal appellate court decision in *United States v. Byfield*. Byfield traveled from New York to Washington, D.C., with a young female who carried a tote bag. The two separated after arriving at the train station, and Byfield was alleged to have directed her movements through hand signals. The police detained and searched the young woman’s bag and found that it contained men’s clothing in Byfield’s size and a shoe box for the brand of athletic shoes worn by Byfield, along with 60 grams of crack cocaine.

Byfield carried no luggage and yet, when questioned by the police, explained that he planned to stay in Washington, D.C., for several days. The appellate court affirmed that there was sufficient evidence establishing that Byfield had previous contact with the young woman in New York and that Byfield possessed “some stake,” “power,” and “dominion and control” over the crack cocaine either personally or through his female companion. The court noted that it was not unusual for juveniles to be employed as drug couriers.⁴⁶

The most difficult issue for courts undoubtedly is joint possession. For example, the police searched an apartment shared by Jason Stansbury, Crisee Moore, and Anthony Webb and discovered marijuana. Only Moore and his son were present at the time. Webb arrived during the course of the search. The police seized \$336 from Webb; he explained that he had been paid for babysitting Moore’s son. The officers were justifiably suspicious of Webb’s explanation, because he had earlier pled guilty to possession of drugs found in another apartment that he had shared with Moore. The Iowa Supreme Court ruled that where an accused such as Webb is not the only person occupying the apartment, but one of several individuals in joint possession, the knowledge and ability to maintain control over narcotics must be demonstrated by direct proof. The fact that Webb occupied the apartment was insufficient to establish possession absent additional evidence. There were no fingerprints linking Webb to the narcotics, drug paraphernalia, or firearms or bullets found on the premises, and none of these items were near or among Webb’s personal belongings or in a location subject to Webb’s exclusive control. A search of Webb failed to find drugs on his person, and there was no evidence that he was under the influence of narcotics.⁴⁷

Webb starkly presents the conflict between broadly interpreting possession in order to combat narcotics traffic and the due process requirement that possession should be established beyond a reasonable doubt. Courts are clearly concerned that the “war on drugs” and “war on terrorism” will result in the conviction of individuals who have not been clearly demonstrated to have exercised control over contraband. On the other hand, requiring an unrealistic standard of proof can result in the guilty escaping criminal liability.

We should note that although Washington and North Dakota do not require knowing possession, in practice these courts have imposed a knowledge requirement to ensure fair results.⁴⁸ The importance of the knowledge requirement is illustrated by the Maryland case of *Dawkins v. State*. Dawkins was arrested in a hotel room in which the police found a tote bag containing narcotics paraphernalia and a bottle cap containing heroin residue. He claimed that the bag belonged to his

girlfriend, who had asked him to carry the bag to her hotel room. Dawkins claimed to have had no idea what was in the bag and explained that he only arrived a few minutes before the police. The Maryland Supreme Court reversed the defendant's conviction and explained that in order to be guilty of possession of a controlled substance, the accused "must know of both the presence and . . . general character or illicit nature of the substance. Of course, such knowledge may be proven by circumstantial evidence, and by inferences. . . ."49

Model Penal Code

Section 2.01 Possession as an Act

- (1) . . .
- (2) Possession is an act, within the meaning of this Section, if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession.

Analysis

The Model Penal Code establishes that the voluntary procurement of contraband or knowing possession of contraband for a "sufficient period" satisfies the standard for possession. The code also clarifies that an individual is required only to be aware of the nature (e.g., drugs) of an item in his or her possession and need not be informed of the item's illegal character.

The Legal Equation

Possession	=	Knowledge of presence of object
	+	exercise of dominion and control
	+	knowledge of the character of object.

Was Maldonado in constructive possession of methamphetamine?

State v. Maldonado-Echeverria, 398 S.W.3d 61 (Mo. Ct. App. 2013).
Opinion by: Howard, J.

Issue

Roberto Maldonado-Echeverria appeals his conviction and twenty-five year sentence for second degree drug trafficking, section 195.223, RSMo Cum. Supp. 2009. He claims that his conviction was not supported by sufficient evidence. The judgment of conviction is reversed.

Facts

On July 16, 2010, the Missouri Highway Patrol conducted a ruse drug checkpoint at the Route EE and K Highway interchange along I-70 in Saline County. I-70 is a "recognized drug courier route or drug corridor."

The Highway Patrol placed signs before the interchange indicating a drug checkpoint ahead. The interchange is a no services exit, meaning there were no gas stations, restaurants, or other services for the public.

Sergeant Robert McGinnis monitored the interchange for vehicles that appeared to be avoiding the checkpoint by leaving the highway. He observed a black 2001 Nissan Frontier truck exit I-70 at the interchange. Sergeant McGinnis followed the truck as it traveled north on Route EE and then turned east on Route 20 into the city limits of Marshall. The speed limit reduced to forty-five miles per hour from sixty miles per hour. The truck, however, did not slow down, and the sergeant clocked the truck at fifty-two miles an hour.

Sergeant McGinnis activated his emergency lights and stopped the truck. Sergeant McGinnis approached the truck and advised the driver of the reason for the stop. The driver stated that he did not realize the speed limit had dropped and apologized several times for speeding. The sergeant asked the driver for his license, registration, and proof of insurance. He also asked the passenger for identification. Sergeant McGinnis noticed that both men were staring straight ahead and neither would look at him. The passenger kept yawning and appeared nervous. Sergeant McGinnis also noticed a strong odor of air freshener, which sometimes indicates a masking agent used to cover the odor of contraband. The driver provided a driver's license from Sonora, Mexico, identifying him as Luis Torres. The passenger provided a Mexico consulate card that identified him as Roberto Maldonado-Echeverria. Torres told the sergeant that he borrowed the truck from his friend, Mardonio, who stayed in Kansas City. Sergeant McGinnis then asked Torres to accompany him to his patrol car.

Torres told the sergeant that he and Maldonado were going to a nearby city to pick up a truck to take back to Kansas City to work on the engine. Sergeant McGinnis asked Torres which city he was going to and whom he was going to see. Torres began mumbling and eventually stated that he was going to Marshall but did not identify the person he was going to see. Sergeant McGinnis asked Torres how long he had known Maldonado and if Maldonado was a mechanic. Torres replied that he had known Maldonado for a year and that he was not a mechanic. Sergeant McGinnis learned from a computer check that Maldonado's driver's license was suspended. Finding it odd that the two men were going to pick up another vehicle when Maldonado could not drive it with a suspended license, Sergeant McGinnis told Torres what he had learned. Torres stated that Maldonado "was just along for the ride" and was not going to be driving a truck back. The sergeant noticed that while Torres was in the patrol car, he avoided eye contact, looked out the window, and hesitated when answering simple questions. Because of the information he had learned and Torres's answers and demeanor, Sergeant McGinnis became suspicious of both men and asked Torres if he or his passenger possessed anything illegal, including drugs. Torres replied, "No, you can check." To clarify, Sergeant McGinnis asked for permission to search the vehicle, and Torres gave him permission.

Sergeant McGinnis then walked to the truck and told Maldonado that the computer check revealed an active warrant for his arrest. Maldonado acknowledged the warrant and said that he was going to take care of it soon. The sergeant asked Maldonado where the men were going, and Maldonado replied that they were going to Sedalia to visit Torres's friends. Maldonado did not know the names of Torres's friends. Maldonado stated that Torres called him and asked him if he wanted to go to Sedalia and that he said yes. Maldonado also told the sergeant that he had known Torres for two or three months.

Sergeant McGinnis again contacted Torres and told him Maldonado had given a different story about their destination. Torres responded that he had not told Maldonado about picking up a truck in Marshall. Sergeant McGinnis then searched the truck. He found a GPS device mounted on the windshield in front of the passenger that listed several addresses including a Sedalia address. In the back of the truck, Sergeant McGinnis noticed that one section of a plastic bed liner insert on the left, rear corner behind the driver's side was outside the lip of the bed where it was supposed to be pushed back. He pulled the section back and found what was later determined to be four hundred thirty-eight grams of methamphetamine valued at approximately \$43,000. The sergeant also seized multiple receipts in the passenger door, both men's cell phones, and a laptop computer. Torres's cell phone had no contact information for Maldonado or recent calls or messages from him. Maldonado's cell phone did not have any contact information for Torres or recent calls or messages from him.

Maldonado was arrested and charged with drug trafficking in the first degree. A bench trial was conducted in October 2011. Sergeant McGinnis testified for the State. Maldonado did not testify or present any evidence. The trial court found Maldonado guilty of drug trafficking in the second degree. In announcing its verdict, the trial court stated:

[Some] of the things I looked at was the fact that there is really no direct evidence that ties [Maldonado] to the methamphetamine, i.e., there is no drugs that were found on him. He didn't confess or anything like that.

Something else I looked at was the location of the . . . GPS. . . . The GPS was not only on the passenger side, but it was completely over on the passenger side to the point where it was near the end of the window or end of the window on the passenger side.

I also considered the inconsistencies of the statements of the [men] as to the destination, the reason for the trip, and the length of their relationship with each other.

I also considered that the [men] were not on each other's cell phones as contacts. And quite honestly it seems unreasonable that you would know somebody for three months or 12 months and have such a relationship that you wouldn't have been added on a cell phone and that you would be trusted to travel for \$43,000 worth of methamphetamine.

I do find and believe beyond a reasonable doubt that [Maldonado] and [Torres] possessed more than 90 grams of methamphetamine, a controlled substance, that they knew or were aware of the presence and nature

of the controlled substance, that they were acting together with the purposes of committing the offense. And therefore I am finding [Maldonado] guilty of trafficking in the second degree, which is a lesser included offense of trafficking in the first degree.

The trial court subsequently sentenced Maldonado to twenty-five years' imprisonment. This appeal followed.

Reasoning

In his sole point on appeal, Maldonado challenges the sufficiency of the evidence to support his conviction. Specifically, he contends that there was insufficient additional incriminating evidence to show that he had knowledge and control of illegal drugs hidden in the bed of the truck in which he was a passenger. A person commits the crime of trafficking drugs in the second degree if "he possesses or has under his control, purchases or attempts to purchase, or brings into this state more than thirty grams of . . . methamphetamine, its salts, isomers and salts of its isomers." If the quantity of drugs is ninety grams or more but less than four hundred fifty grams, the crime is a class A felony. "Possessed" or "possessing a controlled substance" as used in section 195.223 is defined in section 195.010(34):

[A] person, with the knowledge of the presence and nature of a substance, has actual or constructive possession of the substance. A person has actual possession if he has the substance on his person or within easy reach and convenient control. A person who, although not in actual possession, has the power and the intention at a given time to exercise dominion or control over the substance either directly or through another person or persons is in constructive possession of it. Possession may also be sole or joint. If one person alone has possession of a substance possession is sole. If two or more persons share possession of a substance, possession is joint.

Proof of a defendant's knowledge of the presence and character of a substance is normally supplied by circumstantial evidence of the defendant's acts and conduct from which it can be fairly inferred he knew of the existence of the contraband. In cases involving joint control of an automobile, a defendant is deemed to have both knowledge and control of items discovered within the automobile and, therefore, possession in the legal sense, where there is additional evidence connecting him with the items. This additional evidence must demonstrate sufficient incriminating circumstances to permit the inference of a defendant's knowledge and control over the controlled substance.

Additional incriminating circumstances that support an inference of knowledge and control include:

- (1) finding a large quantity of drugs in the vehicle;
- (2) drugs having a large monetary value in the vehicle;
- (3) easy accessibility or routine access to the drugs;
- (4) the odor of drugs in the vehicle;
- (5) the presence of the defendant's personal belongings in close proximity to the drugs;
- (6) making false statements in an attempt to deceive the police;
- (7) the defendant's nervousness;
- (8) the defendant's flight from law enforcement;
- (9) the presence of drugs in plain view;
- (10) other conduct and statements made by the defendant; and
- (11) the fact that defendant rented the vehicle. The totality of the circumstances is considered in determining whether the evidence of additional incriminating circumstances sufficiently supports an inference of knowledge and control.

In *State v. Franco-Amador*, 83 S.W.3d 555 (Mo. App. W.D. 2002), the defendant was an illegal immigrant from Mexico who was attempting to get from Phoenix, Arizona, to Atlanta, Georgia, to find work. He agreed to pay someone he met in a convenience store \$400 for a ride but would receive a discount if he helped drive. While driving, the defendant was stopped for a minor traffic violation. The officer asked to search the vehicle because the officer smelled a strong odor of air freshener and spices and both men looked nervous. The owner consented to the search, and the officer found over 1100 grams of methamphetamine encased in plastic bags and wrapped in duct tape behind the back seat cushion. . . .

In considering the totality of the circumstances, the court also noted that the evidence showed that the defendant did not own the car, had met the owner for the first time in a convenience store when he was offered a ride, and had never been in the vehicle prior to when it was stopped.

In *State v. Buford*, 309 S.W.3d 350 (Mo. App. S.D. 2010), the defendant was the front seat passenger when the car was stopped. The owner of the car was driving, and a third person was in the back seat. The officer searched the car after arresting all three occupants on active warrants and discovered a bag with one crack cocaine rock located between the front passenger seat and the door and additional loose crack cocaine rocks in plain view on the floorboard of the front passenger seat.

The Southern District found that the State failed to present sufficient evidence to show that the defendant possessed the drugs. It explained that the defendant's mere presence in the car and proximity to the drugs would not support a conviction without additional incriminating evidence. It noted that the defendant did not own the car, did not have personal belongings intermingled with the drugs, was not seen moving around in the car in what could be inferred as an attempt to conceal the drugs, and had another plausible explanation for his nervousness—an active warrant for his arrest. It was dark outside and no evidence was presented that the inside of the car had been illuminated at some point prior to being pulled over. Additionally, it was unknown how long the cocaine had been in those locations in the car and how long or how often the defendant had

been in the car. Cf. *State v. Woods*, 284 S.W.3d 630, 639 (Mo. App. W.D. 2009) (sufficient additional incriminating evidence showing passenger defendant's knowledge of and control over drugs where defendant rented the vehicle for his personal use; over 9000 grams of cocaine salts were in plain view in the trunk; defendant and driver were nervous and attempted to flee; defendant owned the radar detector in the car; two cell phones and a large bundle of cash consisting of hundred dollar bills were found on defendant's person; and defendant made incriminating statements to a bailiff).

In this case, the State argues that Maldonado's constructive possession of the methamphetamine was shown with evidence of the large amount of drugs found, the use of a masking agent, Maldonado's navigating the trip in a recognized drug corridor and attempting to evade a drug checkpoint, his inconsistent story regarding the purpose and destination of the trip and his association with Torres, his nervousness during the stop, and his possession of a cell phone.

Sergeant McGinnis found a large quantity of methamphetamine in the truck, four hundred thirty-eight grams, that had a large monetary value, approximately \$43,000. However, while Maldonado was present in the truck, mere presence in a vehicle where contraband is found is insufficient in a joint possession case. The methamphetamine was not in plain view but concealed under the left, rear corner of the bed liner behind the driver's side of the truck. It was not in close proximity to or easily accessible by Maldonado in the passenger seat inside the truck. No evidence was presented that Maldonado's personal belonging[s] were found with the drugs. He did not own the truck, and no evidence was presented as to how long he had been in the vehicle, whether he rode in it on a frequent basis, or had ever been in it before.

Furthermore, the inconsistent stories told by Torres and Maldonado did not necessarily establish that Maldonado made false statements in an attempt to deceive the police. There is no indication that Maldonado was being untruthful about their destination or the length of their association. Moreover, after being told by the sergeant that Maldonado had given a different story about their destination, Torres stated that he had not told Maldonado about picking up the truck in Marshall.

The State argues that the GPS device located on the passenger side of the truck provided evidence supporting Maldonado's involvement in navigating the trip. No evidence was presented that Maldonado owned the GPS device. And other than its location in the truck, there is no evidence that he used the device. Even if Maldonado did use it to help the driver on the route, such use did not establish, without additional incriminating evidence, that Maldonado knew of or had control of the methamphetamine. Similarly, Maldonado's possession of a cell phone alone did not establish his constructive possession of the drugs without additional evidence connecting him with the drugs. GPS devices and cell phones have many other legitimate, legal uses.

Finally, Sergeant McGinnis testified that Maldonado avoided eye contact, yawned a lot, and appeared nervous. The sergeant also testified that he noticed a strong odor of air freshener in the truck, which sometimes indicates a masking agent used to cover the odor of contraband. Without additional incriminating circumstances to support an inference of knowledge and control, the State can not merely rely on Maldonado's nervousness or the air freshener odor as sole factors to support a conviction. While visible nervousness is probative of a defendant's awareness of the controlled substance, it is merely one incriminating fact that will support a conviction if consistent with the totality of the circumstances. When a defendant has another equally probable reason for marked nervousness, there must be additional incriminating evidence before a permissible inference can be drawn that the defendant had knowledge of and control over drugs located in a vehicle. Here, Maldonado had another plausible explanation for his nervousness—an active warrant out for his arrest. Furthermore, the strong odor coming from the truck was the odor of an air freshener, not the odor of illegal drugs.

Holding

Considering the totality of the circumstances, the evidence was insufficient to permit the inference that Maldonado had knowledge and control of the methamphetamine found hidden in the bed of the truck. The point is granted.

Questions for Discussion

1. State the facts in *Maldonado-Echeverria*.
2. Explain what the prosecution must establish to convict a defendant of the constructive possession of narcotics found in an automobile. List the factors a court considers in determining whether an individual in an automobile possesses knowledge and control over the narcotics in the vehicle.
3. How did the precedents in *Franco-Amador*, *Buford*, and *Woods* influence the decision in *Maldonado-Echeverria*?
4. Consider in reading *Maldonado-Echeverria* whether the decision is consistent with the observation of the U.S. Supreme

- Court that a large quantity of drugs and cash in an automobile indicates the "likelihood of drug dealing" and that a "dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him." See *Maryland v. Pringle*, 540 U.S. 366 (2004).
5. Do you agree with the holding of the Missouri appellate court in *Maldonado-Echeverria*?
 6. What additional facts would have been required to find that Maldonado was guilty of constructive possession of methamphetamine?

Cases and Comments

1. **Constructive Possession.** Ross Cashen was convicted of marijuana possession. He was a passenger in the back seat of an automobile that was stopped for a traffic violation. There were six people in the car, four of whom were in the back seat. Cashen was sitting next to a window with his girlfriend sitting on his lap. A lighter and cigarette rolling papers were found on Cashen, and cigarette rolling papers and a small baggie of marijuana seeds were discovered in the pants pocket of his girlfriend. The officers also found a baggie of marijuana wedged in the rear seat on the side where Cashen and his girlfriend had been seated. The baggie was stuck in the crack between the back and bottom of the rear seat. At the jail, Cashen denied knowledge of the marijuana and later told the police that the drugs belonged to his girlfriend. She subsequently confessed to owning the drugs. Cashen was prosecuted and convicted for marijuana possession.

The Iowa Supreme Court noted that the issue was whether Cashen exercised constructive possession over the marijuana. His presence alone was ruled to be insufficient to establish possession, because he was not in exclusive possession of the automobile and did not have exclusive access to the back seat. The rolling papers, at most, demonstrated that Cashen possessed marijuana “in the past and intended to do so again in the future. However, we cannot infer from this fact alone that Cashen had authority or the ability to exercise unfettered influence of these drugs.” Cashen’s question to the police whether anyone had “fessed up to ownership may indicate that he had knowledge of the presence of the drugs, but does not constitute ‘dominion and control over the marijuana.’”

The Iowa Supreme Court stressed that Cashen was not the owner of the automobile, the drugs were not in plain view, and the marijuana was not found among Cashen’s personal effects. Cashen was completely cooperative, and the police also did not offer evidence indicating that Cashen’s fingerprints were on the baggie. The other three passengers were as close to the narcotics as Cashen, and the prosecution was “required to prove facts other than mere proximity to show [Cashen’s] dominion and control of the drugs.”

Are appellate courts imposing too stringent a standard of proof and impeding the effort to combat drug possession and drug dealing? On the other hand, are prosecutors unjustifiably filing charges of drug possession? See *State v. Cashen*, 666 N.W.2d 566 (Iowa, 2003).

Compare *Cashen* with the U.S. Supreme Court case of *Maryland v. Pringle*. The Supreme Court affirmed Pringle’s conviction for possession with intent to distribute cocaine and possession of cocaine, and he was sentenced to 10 years in prison. Pringle was one of three passengers in an automobile that was stopped for speeding in the early morning hours in Baltimore. He was sitting in the front seat directly in front of the glove compartment, which contained \$763. Five plastic

glassine baggies of cocaine were behind him in the back seat armrest and were accessible to all three passengers. The Supreme Court concluded that it is entirely reasonable to conclude “that any or all . . . of the occupants [of this confined space] had knowledge of, and exercised dominion and control over the cocaine. . . . There was probable cause to believe Pringle committed the crime of possession of cocaine, either solely or jointly.” The Court stressed that the quantity of drugs and cash indicated the “likelihood of drug dealing” and that a “dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him.” See *Maryland v. Pringle*, 540 U.S. 366 (2004).

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

Virgil Gattenby, a police technician who examined the computer, testified that Worden had visited certain websites containing child pornography “more than once” and that “it would have taken Worden’s computer several minutes to load the images and the images recovered had loaded completely.” Gattenby testified that although the images of child pornography were found among the cache files on the hard drive of Worden’s computer, there was no indication that Worden “had any intent to store the images—his intent was simply to view the images on his computer screen during the time that he visited a website.” Gattenby explained that when a person uses a computer to access a site, the “computer automatically stores the images from the web page in the browser cache.” According to Gattenby, this “enables the computer to load the web page more quickly when you revisit it, because data is accessed directly from the computer’s hard drive rather than loading that data over the internet.” There was no evidence that Worden possessed the type of “specialized knowledge” required to know that images were “being stored in his computer cache or that he intended to save them on his computer.” Did Worden’s viewing of sexual images constitute “knowing possession” of “material that visually or aurally depicts conduct [constituting] child pornography?” The Alaska Supreme Court held that the state statute prohibiting the possession of child pornography does not prohibit viewing material on a computer screen and observed that “[i]f Worden had gone to a movie depicting child pornography, it could not be said that he possessed the child pornography depicted in the movie, even though it might be clear that he had intentionally set out to view those images.” See *Worden v. Alaska*, 213 P.3d 144 (Alaska Ct. App. 2009).

The Alabama Court of Criminal Appeals in *Ward v. State* adopted a different approach. Ward was arrested for possession of child pornography on a computer at Troy State University. The police located 288 images in the cache folder of the hard drive of the computer. Similar images later were found on his home computer. Ward admitted viewing the files although there was no evidence that he downloaded, copied, or printed the photographs. The question according to the Supreme Court was “[d]id the defendant specifically seek out the prohibited images and did he have the ability to exercise dominion and control over those images?”

The Alabama court held that Ward, whether or not aware that the images were automatically saved in cache, had intentionally sought out and exercised control over the files present in his Web browser cache

files. He had the ability to “view” an image and “had the potential” to “attach it to an email, post it to a newsgroup, place it on a Web site, or print a hard copy.” The evidence was sufficient “to show that Ward exercised dominion and control over child pornography and was in possession of child pornography.”

The court explained that imposing liability on individuals who intentionally viewed child pornography was the best approach to deter individuals from downloading these images and to protect children from being exploited. Judge Pamela Baschab in dissent noted that although Ward’s actions were “reprehensible,” they did not constitute possession. As a judge, would you favor the approach in *Worden* or in *Ward*? See *Ward v. State*, 994 So. 293 (Ala. Crim. App. 2007). See also *Tecklenburg v. Appellate Division*, 169 Cal. App. 4th 1402 (2009).

You can find Worden v. Alaska on the study site, <http://edge.sagepub.com/lippmancc14e>.

You Decide 4.5

Six Spirit Lake, Iowa, police officers executed a search warrant at an apartment shared by Bash, her husband Kevin, and their three sons. The warrant authorized the police to seize controlled substances and a safety deposit box. The officers arrested Kevin and removed him from the home. The defendant stated that she could “show [the police] where the stuff is.” One of the officers followed Bash into the master bedroom where she told the officer that “it’s on his nightstand in a cardboard box, that it’s Kevin’s stuff, that his bong . . . was sitting on the floor next to the bed.”

Bash’s version was somewhat different. She testified that when questioned, she stated that “[i]f there is anything here, it would be on Kevin’s side of the bed.” She pointed toward his nightstand, which was on the left side of the bed.

On Kevin’s nightstand, the officers found a cardboard box bearing the word “Friscos.” Inside the box, they found 1.37 grams of marijuana. Bash claimed that she “did not know what was in the box until after the officers opened it. However, she admitted that she knew there had been marijuana in the house, in the box, in the past.”

Bash was charged with possession of a controlled substance. She was convicted and sentenced to a thirty-day suspended sentence with credit for time served and a \$250 fine.

Was Bash guilty of possession of a controlled substance? See *State v. Bash*, 670 N.W.2d 135 (Iowa 2003).

You can find the answer at <http://edge.sagepub.com/lippmancc14e>.

CHAPTER SUMMARY

A crime involves a *concurrency* between an *actus reus* (act) and *mens rea* (intent). The act generally must have *caused* the social harm punishable under the relevant statute.

A crime is limited to acts and omissions; an individual may not be punished for “mere thoughts.” This would involve an unacceptable degree of governmental intrusion into individual privacy and would result in the disproportionate punishment of individuals for ideas that ultimately may not be translated into criminal conduct. An act must be voluntary. It is fundamentally unfair to punish individuals for involuntary acts that are the product of a disease or the unconscious and are not the product of a conscious and deliberate choice. The punishment of an individual based on status is also considered “particularly obnoxious” and “cruel and unusual,” because it involves punishment for a personal condition or characteristic that may not be translated into socially harmful acts.

Criminal law, with some limited exceptions, typically does not punish individuals for a failure to act. There are limited circumstances in which individuals are required to assist those in peril. These involve a status, statute, contract, assumption of duty, creation of peril, and control and ownership of property.

The possession of contraband is also subject to punishment based on a knowing and voluntary acquisition or failure to dispose of the material. Possession requires “dominion and control.” This may be actual or constructive as well as either individual or joint.

CHAPTER REVIEW QUESTIONS

1. Why are individuals not punished for their thoughts?
2. What is the reason for requiring a voluntary act? Provide some examples of acts that are considered involuntary. May a defendant be criminally condemned for reckless driving despite the fact that an accident results from a stroke?
3. Why do status offenses constitute cruel and unusual punishment?
4. Is there a difference between the American and European rules on omissions? What are the reasons behind the American rule? When does a duty arise to intervene to assist an individual in peril?
5. Discuss the difference between actual and constructive possession and between sole and joint possession. What facts are important in establishing possession?

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