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MENS REA, CONCURRENCE, CAUSATION

Did the defendant know that his pet tigers endangered his daughter?

By June 6, 1999, the tigers were two years old. Lauren was ten. She stood fifty-seven inches tall and weighed eighty pounds. At dusk that evening, Lauren joined Hranicky in the tiger cage. Suddenly, the male tiger attacked her. It mauled the child's throat, breaking her neck and severing her spinal cord. She died instantly. . . . Hranicky testified . . . [that] he did not view the risk to be substantial because he thought the tigers were domesticated and had bonded with the family. . . . Thus, he argues, he had no knowledge of any risk.

Learning Objectives

1. Know the role of criminal intent in criminal law and punishment.
2. State the categories of criminal intent in the Model Penal Code.
3. Explain the difference between the criminal intents of purposely and knowingly and between the criminal intents of recklessly and negligently.
4. Know the characteristics of strict liability offenses.
5. Know the importance of concurrence in defining crimes.
6. Appreciate the role of causality in the determination of criminal guilt.
7. Explain the concepts of cause-in-fact, proximate cause, coincidental intervening cause, and responsive intervening cause.

INTRODUCTION

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

One of the common law's great contributions to contemporary justice is to limit criminal punishment to "morally blameworthy" individuals who consciously choose to cause or to create a risk of harm or injury. Individuals are punished based on

the harm caused by their decision to commit a criminal act rather than because they are "bad" or "evil" people. Former Supreme Court justice Robert Jackson observed that a system of punishment based on intent is a celebration of the "freedom of the human will" and the "ability and duty of the normal individual to choose between good and evil." Jackson noted that this emphasis on individual choice and free will assumes that criminal law and punishment can deter people from choosing to commit crimes, and those who do engage in crime can be encouraged to develop a greater sense of moral responsibility and avoid crime in the future.¹

MENS REA

You read in the newspaper that your favorite rock star shot and killed one of her friends. There is no more serious crime than murder; yet before condemning the killer, you want to know, “What was on her mind?” The rock star may have intentionally aimed and fired the rifle. On the other hand, she may have aimed and fired the gun believing that it was unloaded. We have the same act, but a different reaction based on whether the rock star intended to kill her friend or acted in a reckless manner. As Oliver Wendell Holmes Jr. famously remarked, “Even a dog distinguishes between being stumbled over and being kicked.”²

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

The common law originally punished criminal acts and paid no attention to the mental element of an individual’s conduct. The killing of an individual was murder, whether committed intentionally or recklessly. Canon, or religious law, with its stress on sinfulness and moral guilt, helped to introduce the idea that punishment should depend on an individual’s “moral blameworthiness.” This came to be fully accepted in the American colonies; and, as observed by the U.S. Supreme Court, *mens rea* is now the “rule of, rather than the exception to, the principles . . . of American criminal jurisprudence.” There are some good reasons for requiring moral blameworthiness.

- *Responsibility*. It is just and fair to hold a person accountable who intentionally chooses to commit a crime.
- *Deterrence*. Individuals who act with a criminal intent pose a threat to society and should be punished in order to discourage them from violating the law in the future and in order to deter others from choosing to violate the law.
- *Punishment*. The punishment should fit the crime. The severity of criminal punishment should depend on whether an individual’s act was intentional, reckless, or accidental.

The concept of *mens rea* has traditionally been a source of confusion, and the first reaction of students and teachers has been to flee from the topic. This is understandable when it is realized that in 1972, U.S. statutes employed 76 different terms to describe the required mental element of federal crimes. This laundry list included terms such as *intentionally*, *knowingly*, *fraudulently*, *designedly*, *recklessly*, *wantonly*, *unlawfully*, *feloniously*, *willfully*, *purposely*, *negligently*, *wickedly*, and *wrongfully*. These are what Justice Jackson termed “the variety, disparity and confusion” of the judicial definition of the “elusive mental element” of crime.⁴

The Evidentiary Burden

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

In most cases, we must look at the surrounding circumstances and apply our understanding of human behavior. In *People v. Conley*, a high school student at a party hit another student with a wine bottle, breaking the victim’s upper and lower jaws, nose, and cheek and permanently numbing his mouth. The victim and his friend were alleged to have made insulting remarks at the party and were leaving when one of them was assaulted with a wine bottle. The attacker was convicted of committing an aggravated battery that “intentionally” or “knowingly” caused “great bodily harm or permanent disability or disfigurement.” The defendant denied possessing this intent. An Illinois appellate court held that the “words, the weapon used, and the force of the blow . . . the use of a

bottle, the absence of warning and the force of the blow are facts from which the jury could reasonably infer the intent to cause permanent disability.” In other words, the Illinois court held that the defendant’s actions spoke louder than his words in revealing his thoughts. Evidence that helps us indirectly establish a criminal intent or criminal act is termed **circumstantial evidence**.⁶

The Model Penal Code Standard

The common law provided for two confusing categories of *mens rea*, a general intent and a specific intent. These continue to appear in various state statutes and decisions.

A **general intent** is simply an intent to commit the *actus reus* or criminal act. There is no requirement that prosecutors demonstrate that an offender possessed an intent to violate the law, an awareness that the act is a crime, or an awareness that the act will result in a particular type of harm. Proof of the defendant’s general intent is typically inferred from the nature of the act and the surrounding circumstances. The crime of battery or a nonconsensual, harmful touching provides a good illustration of a general intent crime. The prosecutor is only required to demonstrate that the accused intended to commit an act that was likely to substantially harm another. In the case of a battery, this may be inferred from factors such as the dangerous nature of the weapon, the number of blows, and the statements uttered by the accused. A statute that provides for a general intent typically employs terms such as *intentionally* or *willfully* to indicate that the crime requires a general intent.

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

Courts often struggle with whether statutes require a general or specific intent. The consequences can be seen from the Texas case of *Alvarado v. State*. The defendant was convicted of “intentionally and knowingly” causing serious bodily injury to her child by placing him in a tub of hot water. The trial judge instructed the jury that they were merely required to find that the accused deliberately placed the child in the water. The appellate court overturned the conviction and ruled that the statute required the jury to find that the defendant possessed the intent to place the child in hot water, as well as the specific intent to inflict serious bodily harm.⁷

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

Constructive intent is a fourth type of common law intent. This was applied in the early 20th century to protect the public against reckless drivers and provides that individuals who are grossly and wantonly reckless are considered to intend the natural consequences of their actions. A reckless driver who caused an accident that resulted in death is, under the doctrine of constructive intent, guilty of a willful and intentional battery or homicide.

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

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

Model Penal Code

Section 2.02. General Requirements of Culpability

- (1) Minimum Requirements of Culpability. . . . [A] person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently . . . with respect to each material element of the offense.
- (2) Kinds of Culpability Defined.
 - (a) Purposely.

A person acts purposely with respect to material elements of an offense when:

 - (i) . . . it is his conscious object to engage in conduct of that nature or to cause such a result. . . .
 - (b) Knowingly.

A person acts knowingly . . . when:

 - (i) If the element involves the nature of his conduct, . . . he is aware of the existence of such circumstances or he believes or hopes that they exist; and
 - (ii) If the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.
 - (c) Recklessly.

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.
 - (d) Negligently.

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

Analysis

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

At the end of the chapter we take a look at strict liability, which is a crime that does not require a criminal intent.

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

PURPOSELY

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

pulls the trigger with the purpose of killing the victim, the burglar breaks and enters with the purpose of committing a felony inside the dwelling, and a thief possesses the purpose of permanently depriving an individual of the possession of his or her property.

Was the defendant guilty of a hate crime?

People v. Flores, No. B220564 (Cal. Ct. App. 2011). Opinion by: Armstrong, J.

Issue

Defendant and appellant Cesareo Flores was convicted by a jury of premeditated attempted murder. Additionally, the jury found that appellant committed the crime for the benefit of a criminal street gang . . . ; that he committed a hate crime in concert with another person; and that he personally used a firearm, personally and intentionally discharged it, and thereby caused great bodily injury. Appellant was sentenced to prison for a term of 37 years to life. He timely appealed his conviction [in part based on the claim that the facts did not support his conviction of a hate crime].

Facts

On May 13, 2008, the victim, Saquan Mensah, left his high school campus accompanied by his friends Marquise Murphy and Ronnie Burnett; the three, all African-Americans, walked to the bus stop near the corner of Santa Fe Avenue and Pacific Coast Highway in Long Beach, next to a gas station. A group of people of different races but predominately African-American was congregated at the site, waiting for buses. As Mensah and his friends arrived at the bus stop, a group of three Hispanic males approached them, addressing them with gang taunts: “F--- Crabs” (a derogatory reference to the Crips gang) and “f--- Slobs” (a derogatory term for the Bloods gang). Neither taunt produced a reaction. One of the Hispanics then said “f--- n-----.” Mensah asked one of the Hispanic males if he wanted to fight, and that person agreed. The Hispanics started walking to the back of the gas station, and Mensah, Murphy, Burnett and as many as a dozen other youths followed them. Mensah expected to engage in a one-on-one fist fight with the person who taunted him. Instead, appellant pulled a gun out of his waistband and fired three to six shots. Before running off, appellant yelled “Eastside Longo,” the name of his gang. Two bullets hit Mensah, one in the chest, and the other in the hip as he was retreating. Mensah spent over three weeks in the hospital recuperating from his wounds.

Both the prosecution and defense presented expert testimony relevant to the gang enhancement allegation.

Although appellant did not testify at trial, his statements to police were admitted into evidence. According to the detective who interviewed him, appellant gave “three

different versions of what happened.” . . . Appellant also told the detective that he is a member of the Playboys clique of the Eastside Longo Gang.

At trial, five witnesses, including the victim Mensah, identified appellant as the shooter. Although there were minor discrepancies in the testimony of the various witnesses, such as their descriptions of the shooter’s clothing and the number of shots fired, each of the witnesses gave a substantially similar account of what transpired.

The gas station’s video footage of the crime was admitted into evidence. The quality of the video was not such that the individuals could be identified. The video did, however, indicate that shortly before the first shot was fired, one of the African-American onlookers lifted his arm and pointed at something. The victim’s friend, Burnett, identified himself as “the pointer” in the video, and testified that he was pointing at appellant in response to seeing appellant’s gun. The defense sought to establish that the shooter fired the gun in response to being threatened; that is to say, appellant wished to argue (without admitting that he was present at the crime scene) that he and his two companions were greatly outnumbered by the dozen or so youths who were following the group to the back of the gas station; that he assumed that his adversaries were gang members, and that gang members typically carry weapons; so that when he saw one of his adversaries lift his arm and point at him, he believed that his life was in danger. . . .

Reasoning

The jury found true the allegation that the attempted murder was a hate crime and that appellant committed the offense voluntarily and in concert with another, in violation of section 422.75, subdivision (b). Appellant claims there was insufficient evidence to support this finding.

Penal Code section 422.55 defines “hate crime” as “a criminal act committed, in whole or in part, because of one or more of the . . . actual or perceived characteristics of the victim,” including race. As our Supreme Court explained in *In re M.S.* (1995), 10 Cal. 4th 698, 719, “the bias motivation must be a cause in fact of the offense, whether or not other causes exist. When

multiple concurrent motives exist, the prohibited bias must be a substantial factor in bringing about the crime. Importantly, “[t]he Legislature has not sought to punish offenses committed by a person who entertains in some degree racial, religious or other bias, but whose bias is not what motivated the offense.”

We have found only two California cases which discuss the sufficiency of the evidence proffered in support of the jury’s finding that the principal offense constituted a hate crime: *People v. Lindberg* (2008), 45 Cal. 4th 1, and *In re M.S.* In the latter case, two minor girls and their two adult male companions shouted antigay epithets in a “‘hateful’ sounding tone” at five homosexual men who were strangers to them as they were walking in the early-morning hours in San Francisco’s Castro District. The aggressors threatened to “beat up” the gay men, screaming, “We are going to kill you, you are all going to die of AIDS,” and “We are going to get you faggots.” One of the victims slipped and fell to the ground, where he was kicked repeatedly by the minors and their companions. Another of the victims was kicked in the head, causing him to lose consciousness. . . . [T]he juvenile court found that the offense had been committed because of the victims’ sexual orientation.

The Supreme Court affirmed that finding on appeal. In interpreting the statutory language, the court stated that the “statutes require proof, inter alia, that the offense was committed because of the perpetrator’s racial, religious or other specified bias. . . . [B]ecause of’ means the conduct must have been caused by the prohibited bias. A cause is a condition that logically must exist for a given result or consequence to occur.” While recognizing that “A number of causes may operate concurrently to produce a given result, . . . [b]y employing the phrase ‘because of’ in sections 422.6 and 422.7, the Legislature has simply dictated that the bias motivation must be a cause in fact of the offense, whether or not other causes also exist.” One may logically infer from this that, in the context of this case, if the minors would not have attacked the victims had they not perceived the victims to be gay, then the bias motivation caused the offense.

In *People v. Lindberg*, the defendant confessed to stabbing Thien Minh Ly to death. The defendant, who was involved in the White power movement, told his cousin he had “killed a jap” “for [the] racial movement” and repeated that the murder was racially motivated. A search of the defendant’s residence uncovered many written and graphic materials supporting the conclusion that the defendant was a White supremacist, including a poster celebrating the death of Martin Luther King, swastika-adorned paraphernalia, and an application for the N.A.A.W.P. (National Association for the Advancement of White People).

When interviewed upon his arrest, the defendant admitted that he had sent a newspaper clipping about the murder to his cousin but denied any involvement

in the crime. He indicated that he was interested in the murder “[c]ause it was an ethnic,” and “[i]t wasn’t a White person.” The defendant’s cellmate in jail came to believe that the defendant hated Asian people based on comments he had heard defendant make. The defendant had told his teenage friend that he disliked Asians because he “got kicked off Okinawa.” He referred to Asians as “gooks” and Hispanics as “spick[s]” and “wetback[s]” A former coworker of the defendant testified to his racist remarks. For instance, on one occasion an African-American employee came into the employee lunchroom, said hello and then left. The defendant said, “I hate that n---- bitch. She got on my nerves.” The coworker also testified that the defendant referred to Asians as “gooks,” and reported an incident when the defendant, with others, was harassing an Asian man by pushing and screaming at him. Letters written by the defendant also reflect defendant’s disregard for ethnic minorities. . . . [T]he Supreme Court found this evidence sufficient to support the jury’s hate-murder special circumstance finding.

The records in *In re M.S.* and *People v. Lindberg* contained extensive evidence that the defendants in those cases were motivated by anti-gay and racial bias, such that the crimes would not have occurred in the absence of that motivation. In this case, the jury was asked to find true the hate crime allegation based on appellant’s utterance of a single racial epithet, and expert gang testimony to the effect that members of the Eastside Longo gang do not “like Black people. They consider them enemies because they may be gangsters.” However, the foregoing evidence is, at best, suggestive of appellant’s racial bias.

As our Supreme Court made clear in *In re M.S.*, the prosecution must do more than provide evidence of racial bias; it must prove that such bias caused the offense. Here, there is no direct evidence that appellant’s racial bias caused him to shoot Mensah. Thus, the prosecution had to rely on an inference that appellant’s racial bias caused him to attack Mensah.

Although there were a dozen or more African-Americans whom appellant could have chosen to assault had he been motivated by racial hatred, appellant focused on one particular person—Mensah—to whom he addressed his gang insults, and at whom he aimed and fired his weapon. This is in stark contrast to the situation in *In re M.S.*, where the defendants directed their insults and criminal behavior at the entire group of people sharing the perceived characteristic of homosexuality. In addition, David Peraleta provided evidence that appellant attacked Mensah in retaliation for Mensah’s engagement in an “unfair fight” with Peraleta the day before the shooting. This evidence negates any suggestion that appellant was motivated by antipathy to African-Americans; rather, the evidence presented at trial supports the conclusion that what motivated appellant to attack Mensah was personal and gang animosity.

Holding

[T]here is no evidence that appellant would have shot Mensah had he not acted on his “nonbias motives,” that is, his gang-related motivations. We therefore reverse the hate crime enhancement finding and strike the additional two-year sentence imposed as a result of that finding.

Dissent, *Kriegler, J.*, Concurring and Dissenting

As our Supreme Court has explained, a hate crime is committed “because of the victim’s race under Penal Code section 422.75 if the bias motivation was a cause in fact of the offense, and when multiple concurrent causes exist, the bias motivation must have been a substantial factor in bringing about the offense.” . . . The issue is whether the record contains substantial evidence from which a rational trier of fact could find the essential elements of the hate crime enhancement beyond a reasonable doubt. The evidence, viewed in the light most favorable to the judgment, demonstrates that defendant’s racial bias motivation was one of the substantial factors in the shooting. A group of Hispanic

gang members, including defendant, confronted a group of Black young men, including victim Saquan Mensah, at a bus stop. Words were exchanged, starting with the Hispanics’ gang taunts of Black gangs. After the initial volley of slurs, the groups moved to the rear of a gas station to fight. A witness testified that defendant said, “f--- n-----s,” pulled out a gun, and shot Mensah.

This evidence alone was sufficient to support a finding that racial bias was at least one substantial factor in the shooting. The testimony of police officers familiar with defendant’s gang provided additional evidence to support the hate crime enhancement. According to the officers’ testimony, defendant was an admitted gang member who had numerous gang-related tattoos, including one—“crab killer”—that indicated defendant did not like Black gangsters or Black people. Defendant’s gang held racial animus towards Blacks. One officer expressed the opinion that a gang member yelling “f--- n-----s” indicated disrespect for Black gang members.

Given the record in this case, a rational trier of fact could easily conclude that a substantial factor in the shooting of Mensah was defendant’s racial hatred of Blacks. The record supports the reasonable inference the incident would not have taken place except for the race of the victim. I would affirm the hate crime enhancement.

Questions for Discussion

1. Summarize the evidence supporting the conclusion that Flores committed a hate crime. What is the evidence supporting the argument that Flores did not commit a hate crime?
2. What is the legal test for a hate crime in California according to the appellate court?
3. Why were the defendants in *People v. Lindberg* and *In re M.S.* convicted of hate crimes? How did the court majority distinguish these two cases from *Flores*?
4. Do you agree with the majority opinion or with the dissent? Explain your answer. Should the criminal law punish a gang shooting which is found to be a hate crime more seriously than a gang shooting which is not found to be a hate crime?

Cases and Comments

Transferred Intent. The doctrine of transferred intent first developed in England in 1575 in the case of *Regina v. Saunders & Archer*. Saunders gave his wife a poison apple. She took a bite out of the apple and gave the apple to her daughter who died after finishing the apple. Saunders’s intent to kill his wife was transferred to his daughter, and the judge convicted him of killing his daughter although his intent was to poison his wife. *Regina v. Saunders & Archer*, 75 Eng. Rep. 706 (1575).

The doctrine of transferred intent subsequently was adopted by courts in the United States. Transferred intent primarily is applied to cases of homicide and battery although it applies to other cases as well. Most courts limit the doctrine to crimes requiring an intent of purposely or knowingly.

The California case of *People v. Scott* is one of the most important American cases on transferred intent. Calvin Hughes and Elaine Scott went through a bitter breakup of their relationship. Scott’s two sons Damien Scott and Derrick Brown retaliated by attempting to shoot and kill Hughes. They hit Hughes in the heel of his shoe and inadvertently killed an innocent teenager, Jack Gibson, who was sitting in a nearby car. *People v. Scott*, 927 P.2d 288 (Cal. 1996).

The California Supreme Court relied on the transferred intent theory of liability to hold Scott and Brown liable for the death of Gibson. The court explained that a “defendant who shoots with an intent to kill but misses and hits a bystander instead should be punished for a crime of the same seriousness as the

one he tried to commit against his intended victim.” A shorthand way to understand transferred intent is to remember that the defendant’s intent follows the bullet. Why does the law recognize transferred intent in these “wrong aim” cases?

Individual accountability. Defendants should be held responsible for the result (murder) that they

intended to achieve (murder) and did achieve (murder).

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

You can find more cases on the study site: Commonwealth v. Barnette and Commonwealth v. Ferino, <http://edge.sagepub.com/lippmancl4e>.

You Decide 5.1

Five African American juveniles between the ages of 11 and 14 were walking in the street when they heard a vehicle approaching and moved onto the sidewalk. Hennings, a Caucasian, drove past the young men and shouted at them to “get the f--- off the road.” One of the young men, K.W., yelled back at Hennings, “[W]e don’t have to get the f--- off the street.”

Hennings exited the truck and threatened the young men with a pocketknife with a serrated blade between 3 and 4 inches long. Four of the juveniles fled, although K.W. stood his ground. K.W. challenged Hennings that “if you drop the knife,” “we’ll beat [your] ass.” The other four boys started back toward K.W., and Hennings walked back to his truck. Hennings called the boys “f--- n---s” as he got back into his truck.

Hennings sped off and circled back around the block. As the boys were crossing a street, they saw Hennings heading toward them in his truck. He aimed

the truck at A.M., and the truck’s tires drove over him. Hennings left the scene.

A.M. was able to recover from potentially severe injuries, although he suffered permanent scarring and discoloration across his body, including on his face.

Hennings, when questioned by the police, referred to the young men as “monkeys” and stated if they “don’t have enough sense to stay out the f--- road, . . . they deserve to get hit.” Hennings’s mother, who was present during the police interrogation, asked, “Why didn’t you wait for ’em to move?” Hennings responded, “When they’re standing in f--- road like stupid monkeys.” Hennings’s parents suggested the complaint was brought against Hennings because the family was not well liked because of their opinions on race relations. Was Hennings guilty of ethnic intimidation? See *State v. Hennings*, 791 N.W.2d 828 (Iowa 2010).

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

KNOWINGLY

An individual satisfies the knowledge standard when he or she is “aware” that circumstances exist or that a result is practically certain to follow from his or her conduct. Examples of knowledge of circumstances are to knowingly “possess narcotics” or to knowingly “receive stolen property.” It is sufficient that a person is aware that there is a high probability that property is stolen; he or she need not be certain. An illustration of a result that is practically certain to occur is a terrorist who bombs a public building knowing the people inside are likely to be maimed or injured or to die.

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

permit his son to fight for the United States” as indicating that Haupt’s “son had the misfortune of being a chip off the old block.”⁹

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

Did the defendant know the dancer’s age?

***State v. Nations*, 676 S.W.2d 282 (Mo. Ct. App. 1984). Opinion by: Satz, J.**

Issue

Defendant, Sandra Nations, owns and operates the Main Street Disco, in which police officers found a scantily clad sixteen-year-old girl dancing for tips. Consequently, defendant was charged with endangering the welfare of a child “less than seventeen years old.” Defendant was convicted and fined \$1,000. Defendant appeals. We reverse.

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

Reasoning

The pertinent part of section 568.050 provides as follows:

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

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

“Knowingly” is a term of art, whose meaning is limited to the definition given to it by our present criminal code. Literally read, the code defines “knowingly” as actual knowledge—“A person ‘acts knowingly,’ or with knowledge, (1) with respect . . . to attendant circumstances when he is aware . . . that those circumstances exist. . . .” So read, this definition

of “knowingly” or “knowledge” excludes those cases in which “the fact [in issue] would have been known had not the person willfully ‘shut his eyes’ in order to avoid knowing.” The Model Penal Code, the source of our criminal code, does not exclude these cases from its definition of “knowingly.” Instead, the Model Penal Code proposes that “[when] knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence.” . . .

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

Our legislature, however, did not enact this proposed definition of “knowingly.” . . . The sensible, if not compelling, inference is that our legislature rejected the expansion of the definition of “knowingly” to include willful blindness of a fact, and chose to limit the definition of “knowingly” to actual knowledge of the fact. Thus, in the instant case, the State’s burden was to show defendant actually was aware the child was under seventeen, a heavier burden than showing there was a “high probability” that the defendant was aware that the child was under seventeen. . . .

Facts

The record shows that, at the time of the incident, the child was sixteen years old. When the police arrived, the child was dancing on stage for tips with another female. The police watched her dance for some five to seven minutes before approaching defendant in the service area of the bar. Believing that one of the girls appeared to be “young,” the police questioned defendant about the child’s age. Defendant told them that both girls were of legal age and that she had checked

the girls' identification when she hired them. When the police questioned the child, she initially stated that she was eighteen but later admitted that she was only sixteen. She had no identification.

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

Holding

These facts simply show defendant was untruthful. Defendant could not have checked the child's

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

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

Questions for Discussion

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

You Decide 5.2

California police intercepted two boxes containing roughly eighty-two pounds of marijuana. The boxes were addressed to Bob Cliff at 692 Sheffield Road in Norcross, Georgia. In September 1997, the police in Georgia made a "controlled delivery" of the packages to the address on the packages. Defendant Castillo answered the door, signed two aliases, and accepted the two packages. Castillo was arrested while driving away from the home. The police searched the home and seized marijuana from the living room and the bathroom. Castillo admitted he accepted the boxes for Wilfrido Escutia, who later pled guilty to drug trafficking. Escutia instructed Castillo to use an American name when he accepted the boxes. Castillo later delivered the tracked boxes to Escutia in a public restroom. He stated that he was instructed to go to

another location where he was paid \$200 per box. Castillo was convicted of knowing possession of a large quantity of marijuana and appealed his conviction on the grounds that he did not actually know the contents of the boxes. He argued that the judge improperly had given the jury a "willful blindness" instruction, which relieved the prosecution of the burden of proving that he knowingly possessed the marijuana. Should the judge have issued a "willful blindness" instruction? See *Perez-Castillo v. State*, 572 S.E.2d 657 (Ga. Ct. App. 2002).

You can find the answer at
<http://edge.sagepub.com/lippmancl4e>.
For an international perspective on this topic, visit the study site.

RECKLESSLY

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

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

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

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

The Model Penal Code provides a twofold test for reckless conduct:

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

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

Was the defendant aware of the risk posed by the tigers to his daughter?

***Hranicky v. State*, 13-00-431-Cr (Tex. Crim. App. 2005). Opinion by: Castillo, J.**

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

Facts

A newspaper advertisement offering tiger cubs for sale caught the eye of eight-year-old Lauren Villafana. She decided she wanted one. She expressed her wish to her

mother, Kelly Dean Hranicky, and to Hranicky, her stepfather. Over the next year, the Hranickys investigated the idea by researching written materials on the subject and consulting with owners of exotic animals. They visited tiger owner and handler Mickey Sapp several times. They decided to buy two rare tiger cubs from him, a male and a female whose breed is endangered in the wild. . . .

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

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

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

The record reflects four different versions of the events that led to Lauren's death. Hranicky told the grand jury that he and Lauren were sitting side-by-side in the cage about 8:00 P.M., petting the female tiger. A neighbor's billy goat cried out. The noise attracted the male tiger's attention. He turned toward the sound.

The cry also caught Lauren's attention. She stood and looked at the male tiger. When Lauren turned her head toward the male tiger, "That was too much," Hranicky told the grand jury. The tiger attacked. Hranicky yelled. The tiger grabbed Lauren by the throat and dragged her across the cage into a water trough. Hranicky ran after them. He struck the tiger on the head and held him under the water. The tiger released the child.

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

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

Justice of the Peace James Dawson performed an inquest at the scene of the incident. Judge Dawson testified Hranicky gave him an oral statement also. Hranicky told him Lauren went to the cage on a regular basis and groomed only the female tiger. He then corrected himself to say she actually petted the animal. Hranicky was "very clear about the difference

between grooming and petting." Hranicky maintained that Lauren never petted or groomed the male tiger. Hranicky told Dawson that Lauren asked permission to enter the cage that evening, saying "Daddy, can I come in?"

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

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

Several witnesses at trial contradicted Hranicky's assessment of the level of risk the tigers presented, particularly to children. Sapp said he told the Hranickys it was safe for children to play with tiger cubs. However, once the animals reached forty to fifty pounds, they should be confined in a cage and segregated from any children. "That's enough with Lauren, any child, because they play rough, they just play rough."

Sapp further testified he told the Hranickys to keep Lauren away from the tigers at that point, because the animals would view the child as prey. He also said he told Lauren directly not to get in the cage with the tigers. Sapp did not distinguish between children who were strangers to the tigers and those who had helped raise the animals. He described any such distinction as "ludicrous." In fact, Sapp testified, his own two children had been around large cats all of their lives. Nonetheless, he did not allow them within six feet of the cages. The risk is too great, he told the jury. The Hranickys did not tell him that purchasing the tigers was Lauren's idea. Had he known, he testified, "that would have been the end of the conversation. This was not for children." He denied telling Hranicky that it was safe for Lauren to be in the cage with the tigers.

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

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

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

James Boller, the chief cruelty investigator for the Houston Society for the Prevention of Cruelty to Animals, testified that tigers, even those raised in captivity, are wild animals that act from instinct. Anyone who enters a cage with a conscious adult tiger should bring a prop to use as a deterrent. Never take one's eyes off the tiger, Evans told the jury. Never make oneself appear weak and vulnerable by diminishing one's size by crouching or sitting. Never bring a child into a tiger cage. The danger increases when the tigers are in adolescence, which begins as early as two years of age for captive tigers. Entering a cage with more than one tiger increases the risk. Entering with more than one person increases the risk further. Entering with a child increases the risk even more. Tigers' activity level depends on the time of day. . . . Boller identified eight o'clock on a summer evening as a high activity time. A child should never enter a tiger cage in the first place, Boller testified. Taking a child into a tiger cage "during a high activity time for the animal is going to increase your risk dramatically."

Dr. Richard Villafana, Lauren's biological father, told the jury he first learned of the tigers when his daughter told him over the phone she had a surprise to show him at their next visit. When he came to pick her up the following weekend, he testified, she took him into the house and showed him the female cub. Villafana described his reaction as "horror and generalized upset and dismay, any negative term you care to choose." He immediately decided to speak to Kelly Hranicky about the situation. He did not do so in front of Lauren, however, in an effort to avoid a "big argument." Villafana testified he later discussed the tigers with Kelly Hranicky, who assured him Lauren was safe. . . . As the tigers matured, no one told Villafana

the Hranickys allowed Lauren in the cage with them. Had he known, he "would have talked to Kelly again" and "would have told her that [he] was greatly opposed to it and would have begged and pleaded with her not to allow her in there." He spoke to his daughter about his concerns about the tigers "almost every time" he saw her.

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

Issue

. . . Did Hranicky act in a reckless fashion?

Reasoning

The record reflects that each of the witnesses who came into contact with Hranicky in connection with the tigers testified they told him that (1) large cats, even those raised in captivity, are dangerous, unpredictable wild animals; and (2) children were particularly at risk from adolescent and adult tigers, especially males. Expert animal handlers whom Hranicky consulted and written materials he claimed to have read warned Hranicky that the risks increased with adolescent male tigers, with more than one person in the cage, with more than one tiger in the cage, at dusk during the animals' heightened activity period, and when diminishing one's size by sitting or crouching on the ground. They each cautioned that tigers attack swiftly, without warning, and are powerful predators.

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

On the other hand, the record shows that before buying the tigers, Hranicky researched the subject and conferred with professionals. He received training in handling the animals. Further, Kelly Hranicky testified she also understood the warnings about not allowing children in the tiger cage to apply to strangers, not to Lauren. Hranicky told the grand jury he did not think the warnings applied to children, like Lauren, who had helped raise the animal. He said he had seen other handlers, including Sapp and McAda, permit Lauren and other children to go into tiger cages. He testified Currer told him it was safe to permit children in tiger cages. Further, while the State's witness described zoo policies for handling tigers, those policies were not known to the general public. Finally, none of the significant figures in Lauren's life fully appreciated the danger the

tigers posed for Lauren. Hranicky was not alone in not perceiving the risk. . . .

Holding

Hranicky testified to the grand jury he did not view the risk to be substantial, because he thought the tigers were domesticated and had bonded with the family. He claimed not to have any awareness of any risk. The tigers were acting normally. Lauren had

entered the cage numerous times to pet the tigers with no incident. Further, he asserted, other than a minor scratch by the male as a cub, the tigers had never harmed anyone. Thus, he argues, he had no knowledge of any risk.

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

Questions for Discussion

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

NEGLIGENTLY

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

In considering negligence, keep the following in mind:

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

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

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

Was the babysitter guilty of negligent or reckless homicide?

People v. Baker, 771 N.Y.S.2d 607 (N.Y. App. Div. 2004). Opinion by: Rose, J.

Facts

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

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

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

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

Issue

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

Reasoning

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

Is the defendant guilty of reckless or negligent homicide? There is no evidence that defendant knew the actual temperature in any portion of the apartment or subjectively perceived a degree of heat that would have made her aware that serious injury or death from hyperthermia would almost certainly result. Put another way, the risk of serious physical injury or death was not so obvious under the circumstances that it demonstrated defendant's actual awareness. There was only circumstantial evidence on this point, consisting of the subjective perceptions of other persons who later came into the apartment from cooler outside temperatures. Defendant, who had been in the apartment as the heat gradually intensified over many hours, and who was described by others as appearing flushed and acting dazed, could not reasonably be presumed to have had the same perception of oppressive and dangerous heat. Rather, defendant testified that she knew only that the heat made her feel dizzy and uncomfortable, and she denied any awareness of a risk of death. Most significantly, there is no dispute that defendant remained in a room that was nearly as hot as the victim's bedroom for approximately nine hours and checked on the victim several times before the foster parents returned. This evidence of defendant's failure to perceive the risk of serious injury stands unrefuted by the prosecution.

Defendant's ability to appreciate such a risk was further brought into doubt by the prosecution's own expert witness, who described her as having borderline intellectual function, learning disabilities, and a full-scale IQ of only 73. We also note that here, unlike where an unclothed child is shut outside in freezing temperatures, the circumstances are not of a type from which it can be inferred without a doubt that a person of even ordinary intelligence and experience would have perceived a severe risk of serious injury or death. . . .

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

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

she subjected herself to the excessive heat is plainly inconsistent with a finding that she perceived a risk of death.

Holding

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

Accordingly, we reduce the conviction from depraved indifference murder to criminally negligent homicide and remit the matter to county court for sentencing on the reduced charge.

You can find more cases on the study site: Koppersmith v. State, <http://edge.sagepub.com/lippmancl4e>.

Questions for Discussion

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

You Decide 5.3

Ginger McLaughlin was charged with child neglect. Both McLaughlin and her husband were 22 years of age. Ginger had two daughters aged 4 and 6; and two years into her marriage, she and her husband had a child. One year after they were married, Ginger's husband while babysitting spanked one of her daughters with a toy broom handle causing severe bruising on the 6-year-old, and he was charged with assault. He had gone to the bedroom of one of Ginger's daughters on two previous occasions and had spanked her without provocation; and he had hit Ginger on two separate occasions, in one instance causing a black eye. Between October 1977 and March 1978, Ginger's husband left the house; and when he returned, Ginger stated that he seemed to have greater control over his emotions. Between March and June 1978, her husband babysat for the girls without incident and seemed genuinely happy over the birth of their new baby in April 1978. A Children's Services

Division caseworker warned Ginger that allowing her husband to be alone with the children created a "high risk" and urged her to enter into counseling with her husband. As a precaution following the birth of the new baby, Ginger's husband periodically stayed with a friend.

On the day of the relevant incident, Ginger and her husband had gotten into an argument, and she left for 45 minutes to exchange some bottles for money at the store. "When she returned she found that the baby had been injured by her husband. They immediately took the child to a hospital, but he died a few days later of head injuries received from at least two blows." Ginger's husband was convicted of manslaughter, and Ginger was indicted for child neglect. Is Ginger guilty of negligence? See *State v. McLaughlin*, 600 P.2d 474 (Ore. Ct. App. 1979).

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

STRICT LIABILITY

We all have had the experience of telling another person that “I don’t care why you acted in that way; you hurt me and that was wrong.” This is similar to a strict liability offense. A **strict liability** offense is a crime that does not require a *mens rea*, and an individual may be convicted based solely on the commission of a criminal act.

Strict liability offenses have their origin in the industrial development of the United States in the middle of the 19th century. The U.S. Congress and various state legislatures enacted a number of **public welfare offenses** that were intended to protect society against impure food, defective drugs, pollution, and unsafe working conditions, trucks, and railroads. These *mala prohibita* offenses (an act is wrong because it is prohibited) are distinguished from those crimes that are *mala in se* (inherently wrongful, such as rape, robbery, and murder).

The common law was based on the belief that criminal offenses required a criminal intent; this ensured that offenders were morally blameworthy. The U.S. Supreme Court has pronounced that the requirement of a criminal intent, although not required under the Constitution, is “universal and persistent in mature systems of law.”¹² Courts, however, have disregarded the strong policy in favor of requiring a criminal intent in upholding the constitutionality of *mala prohibita* laws. Congress and state legislatures typically indicate that these are strict liability laws by omitting language such as “knowingly” or “purposely” from the text of the law. Courts look to several factors in addition to the textual language in determining whether a statute should be interpreted as providing for strict liability:

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

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

There is a trend toward expanding strict liability into the non-public welfare crimes that carry relatively severe punishment. Many of these statutes are criticized for imposing prison terms without providing for the fundamental requirement of a criminal intent. For instance, in *State v. York*, the defendant was sentenced to one year in prison in Ohio after he was convicted of having touched the buttocks of an 11-year-old girl.

The appellate court affirmed his conviction for “gross sexual imposition” and ruled that this was a strict liability offense and that the prosecutor was required to demonstrate only a prohibited contact with an individual under 13 that could be perceived by the jury as sexually arousing or gratifying to the defendant.¹³

The U.S. Supreme Court indicated in *Staples v. United States* that it may not be willing to continue to accept the growing number of strict liability public welfare offenses. The National Firearms Act was intended to restrict the possession of dangerous weapons and declared it a crime punishable by up to 10 years in prison to possess a “machine gun” without legal registration. The defendant was convicted for possession of an AR-15 rifle, which is a semiautomatic weapon that can be modified to fire more than one shot with a single pull of the trigger. The Supreme Court interpreted the statute to require a *mens rea*, explaining that the imposition of a lengthy prison

sentence has traditionally required that a defendant possess a criminal intent. The Court noted that gun ownership is widespread in the United States and that a strict liability requirement would result in the imprisonment of individuals who lacked the sophistication to determine whether they purchased or possessed a lawful or unlawful weapon.¹⁴

The Model Penal Code, in section 1.04(5), accepts the need for strict liability crimes while limiting these crimes to what the code terms “violations.” Violations are not subject to imprisonment and are punishable only by a fine, forfeiture, or other civil penalty, and they may not result in the type of legal disability (e.g., result in loss of the right to vote) that flows from a criminal conviction.

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

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

Steelman v. State, 602 N.E.2d 152 (Ind. Ct. App. 1992). Opinion by: Baker, J.

Issue

Defendant-appellant Monte Steelman was convicted of dealing in marijuana within 1,000 feet of school property, a Class C felony, and was adjudicated an habitual offender. The court sentenced him to the presumptive term of four years' imprisonment for the dealing in marijuana conviction, and enhanced the sentence by the minimum term of 20 years' imprisonment for the habitual offender adjudication. Steelman now appeals his conviction and sentence. He raises two issues for our review, which we restate as:

- I. Whether the state had to prove Steelman both delivered and knew he delivered marijuana within 1,000 feet of school property.
- II. Whether the sentence was manifestly unreasonable and disproportionate to the crime.

Facts

On November 26, 1990, Steelman offered to sell six marijuana joints for \$4 a piece to a confidential informant, Joseph Moore. Officer Branum of the Richmond Police Department gave Moore \$24 to make the buy and agreed to pay him \$25. The officers fitted Moore with a listening device, a tape recorder, and a microphone. They followed Moore in a separate car as Moore drove to Steelman's residence, a second story

apartment on 11th Street in Richmond, Indiana, to make the buy.

Upon arriving at Steelman's apartment, Moore followed Steelman and Steelman's wife into the kitchen. Moore paid Steelman \$24 and Steelman's wife handed Moore a plastic sandwich bag with six marijuana joints inside. Moore and Steelman discussed the possibility of purchasing an ounce of marijuana for \$200, but Steelman said he would have to go somewhere to get the ounce. After staying 20 to 30 minutes, Moore left. He took the plastic bag with six joints to the police department, and a chemical analysis revealed the joints contained marijuana and weighed 2.4 grams. The Wayne County Surveyor measured the distance from the front of Steelman's residence to the nearby Vaile Elementary School property. The surveyor concluded the distance was 959 feet, accurate to within three one-hundredths of a foot.

Following a jury trial, Steelman was convicted of dealing in marijuana within 1,000 feet of school property, a Class C felony, and he was adjudicated an habitual offender.

Reasoning

Steelman first challenges the State's failure to prove he knew he was within 1,000 feet of school property when he sold marijuana to Moore. The statute under which he was convicted, IND. CODE 35-48-4-10, provides, in relevant part:

- (a) A person who:
 - (1) knowingly or intentionally:
 - (A) manufactures;
 - (B) finances the manufacture of;
 - (C) delivers; or
 - (D) finances the delivery of; marijuana, hash oil, or hashish, pure or adulterated; or
 - (2) possesses, with intent to:
 - (A) manufacture;
 - (B) finance the manufacture of;
 - (C) deliver; or
 - (D) finance the delivery of; marijuana, hash oil, or hashish, pure or adulterated;

commits dealing in marijuana, hash oil, or hashish, a Class A misdemeanor, except as provided in subsection (b).

- (b) The offense is:
 - ...
 - (2) a Class C felony if:
 - ...
 - (B) the person;
 - (i) delivered; or
 - (ii) financed the delivery of; marijuana, hash oil or hashish in or on school property or within one thousand (1,000) feet of school property or on a school bus.

Steelman acknowledges this court has ruled that the State does not have to prove as an element of the crime that the defendant knew he was within 1,000 feet of school property. Nonetheless, he argues the facts in this case are distinguishable from our previous cases because here, the drug transaction did not take place with the school in plain view. *See, e.g., Reynolds-Herr v. State* (1991), 582 N.E.2d 833 (transaction took place across the street from elementary school); *Berry v. State* (1990), 561 N.E.2d 832 (defendant was inside the school attempting to deal marijuana); *Crocker v. State* (1990), 563 N.E.2d 617 (defendant admitted his house, where the deal took place, was across the street from a school).

In this case, Steelman argues it is not obvious to a lay person that his apartment is within 1,000 feet of school property. The Vaile Elementary School is two streets away from his apartment, and the school

property can not be seen from the street on which his apartment building is located. He relies further on the fact that it took an expert surveyor to determine his apartment building is within 959 feet of the southern and westernmost corner of the school property. Steelman further urges this court to reconsider our opinion in *Williford v. State* (1991), Ind. App., 571 N.E.2d 310. In that case, Williford sold a quarter ounce of marijuana to an undercover police officer in the Four Crowns Tavern in Auburn, Indiana. Following a jury trial, he was convicted of selling marijuana within 1,000 feet of school property.

Although there was no evidence Williford knew the McIntosh Elementary School was within 1,000 feet of the tavern, we affirmed his conviction. We held that the statute does not require the State to prove the defendant knew he was within the legislatively mandated “drug-free zone” which surrounds our schools. “A dealer’s lack of knowledge of his proximity to the schools does not make the illegal drug any less harmful to the youth in whose hands it may eventually come to rest.” As we said in *Williford*, we say again today: “Those who choose to deal drugs in the vicinity of our schools do so at their own peril.” The State did not have to prove Steelman knew he was within 1,000 feet of the Vaile Elementary School when he delivered marijuana to Moore.

Steelman also argues that the Indiana Code is impermissibly ambiguous because the statutory definition of school property is so broad that it could encompass any building rented by a school or the farthest reaches of the grounds adjacent to such a building.

In this case, Steelman does not question that the Vaile Elementary School is school property under the Indiana Code, [but] he challenges the statute simply by questioning whether a building rented by a school would be considered school property. As applied to him the statute is not vague. Steelman’s vagueness challenge is therefore without merit.

Steelman complains next that the statute is impermissibly silent on how the 1,000-foot distance is to be calculated, and he challenges the technique the State used to measure the distance from his apartment to the school property. He recognizes that surveyors measure distances based on “line of sight” calculations. Because one would not walk in a straight line from the elementary school to his apartment, however, Steelman argues the “line of sight” measurement is irrational. He tells us that neither defendants nor schoolchildren walk through obstacles such as buildings, homes, fences, concrete barriers, creeks, or the like. Steelman complains further that he was on the second floor of his apartment building, so, at the very least, the surveyor should have measured the distance to the second floor, not the ground level.

When the legislature created the 1,000-foot drug-free zone surrounding our schools, it made no allowance for barriers such as buildings or homes or fences or concrete barriers or creeks. Rather, the legislative intent is plain: to punish those who deal drugs within 1,000 feet of school property. The surveyor's line-of-sight technique to determine the 1,000-foot perimeter around the school property conforms to the legislative intent. There was no error.

Next, the State had to prove Steelman delivered marijuana within 1,000 feet of school property. In this case, the delivery took place inside of Steelman's second floor apartment. We agree with Steelman, therefore, that the State had to prove the delivery in Steelman's second floor apartment was within 1,000 feet of the elementary school. Contrary to Steelman's assertions, however, the State met its burden of proof.

The surveyor's "line of sight" measurement ran between a point on the far side of Steelman's apartment building to a point on the southwest corner of the school lot. That distance was 959 feet. The surveyor did not need to do a line-of-sight measurement from the school property to where Steelman delivered the marijuana in his second floor apartment because, mathematically, no matter where in his apartment the delivery took place, Steelman had to be within the 1,000-foot zone. Because the surveyor's measurement was sufficient to prove the delivery in Steelman's second floor apartment took place within 1,000 feet of school property, there was no error.

Stelman also argues the statutory provision increasing the penalty for delivering marijuana within 1,000 feet of school property violates the Equal Protection Clause because it discriminates against minority defendants. He reasons that "given the demographics of the typical modern urban setting, and the movement toward community schools, inner city black defendants are far more likely to reside in close proximity to a school than is true of their white suburban counterparts." In this case, Steelman completely fails to set forth proof of a racially discriminatory intent or purpose, let alone proof that the statute does, in fact, affect a greater proportion of minority defendants than their "white suburban counterparts."

Without proving a racially discriminatory impact, coupled with an intent or purpose to discriminate, Steelman's argument must fail.

Finally, Steelman argues his sentence is manifestly unreasonable and disproportionate to the nature of his offenses. The court sentenced him to the presumptive term of four years' imprisonment for his conviction for dealing in marijuana within 1,000 feet of school property, a Class C felony. The court then enhanced the sentence by the minimum term of 20 years' imprisonment for the habitual offender adjudication. Steelman complains first that his dealing in marijuana offense was relatively minor. In support of his argument, he cites the fact that he delivered the marijuana to his adult cousin, and that he sold only six marijuana cigarettes weighing a total of 2.4 grams, a quantity within the misdemeanor range. Steelman fails to realize, however, that the seriousness of the offense escalated when he delivered the marijuana within 1,000 feet of school property. The offense Steelman committed was a Class C felony, [so] it was not a misdemeanor. He is very much mistaken, therefore, when he calls the offense relatively minor. The four year sentence for dealing marijuana within 1,000 feet of school property was more than reasonable. Likewise, the seriousness of the felony supports enhancing his sentence by 20-years for being an habitual offender.

We must also consider Steelman's two prior felonies upon which his habitual offender adjudication is based. Both offenses were Class D felony thefts, committed in 1983 and 1985. Our supreme court has long recognized that the purpose of habitual offender statutes is to punish more severely those defendants who have not been deterred by prior sanctions. When short term incarcerations have failed to deter, our legislature has mandated longer sentences for third felony convictions. We find Steelman's enhanced sentence is neither unreasonable nor disproportionate to his offenses.

Holding

The judgment is in all things affirmed.

Questions for Discussion

1. Why does Indiana make selling marijuana within 1,000 feet of school property a strict liability offense?
2. What does the prosecutor have to prove to convict Steelman under IND. CODE 35-48-4-10?
3. How does Steelman distinguish his case from other cases prosecuted under the same statute?
4. Do you believe Steelman's sentence was unreasonable and disproportionate to his crime?

You can find State v. Walker on the study site: <http://edge.sagepub.com/lippmancl4e>.

You Decide 5.4

In July 1995, Ronnie Polk was the passenger in an automobile that was stopped for a moving violation in close proximity to Highland Christian School in Lafayette, Indiana. A police officer's search led to the seizure of crack cocaine and several tablets of diazepam. In Indiana, possession of more than 3 grams of cocaine within 1,000 feet of a school is enhanced from a Class D felony to a Class A felony punishable by 30 years in prison, and possession of a "Schedule IV" drug without a doctor's prescription within 1,000 feet of a school is enhanced from a Class D to a Class C felony, punishable by four years in prison.

Polk was convicted and sentenced for both offenses, and his two sentences were to run concurrently. Polk also was convicted of being a habitual offender, and his combined sentence for the three convictions totaled

50 years. Polk maintains that the legislature did not intend for the possession of cocaine within 1,000 feet of a school to be a strict liability offense that applied to passengers possessing narcotics in automobiles, because this did not advance Indiana's interest in protecting schoolchildren. Applying the statute to individuals in automobiles would allow the police to wait to stop automobiles suspected of containing narcotics as they approached within 1,000 feet of a school.

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

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

CONCURRENCE

We now have covered both *actus reus* and *mens rea*. The next step is to understand that there must be a **concurrency** between a criminal act and a criminal intent. *Chronological concurrence* means that a criminal intent must exist at the same time as a criminal act. An example of chronological concurrence is the requirement that a burglary involves breaking and entering with an intent to commit a felony therein. The classic example is an individual who enters a cabin to escape the cold and after entering decides to steal food and clothing. In this instance, the intent did not coincide with the criminal act, and the defendant will not be held liable for burglary.

The principle of concurrence is reflected in section 20 of the California Penal Code, which provides that in "every crime . . . there must exist a union or joint operation of act and intent or criminal negligence." The next case is *State v. Rose*. Can you explain why the defendant's guilt for manslaughter depends on the prosecution's ability to establish a concurrence between the defendant's act and intent?

The Legal Equation

Concurrence = $\text{Mens rea (in unison with)}$
 + actus reus.

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

***State v. Rose*, 311 A.2d 281 (R.I. 1973). Opinion by: Roberts, J.**

These are two indictments, one charging the defendant, Henry Rose, with leaving the scene of an accident, death resulting, . . . and the other charging the defendant with manslaughter. The defendant was tried

on both indictments to a jury in the superior court, and a verdict of guilty was returned in each case. Thereafter the defendant's motions for a new trial were denied. . . .

Facts

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

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

Issue

The defendant is contending that if the evidence is susceptible of a finding that McEnery was killed upon impact, he was not alive at the time he was being

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

Reasoning

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

Holding

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

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

Questions for Discussion

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

You Decide 5.5

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

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

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

CAUSATION

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

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

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

Establishing that a defendant's criminal act caused harm to the victim can be more complicated than you might imagine. Should an individual who commits a rape be held responsible for the victim's subsequent suicide? What if the victim attempted suicide a week before the rape and then killed herself following the rape? Would your answer be the same if the stress induced by the rape appears to have contributed to the victim contracting cancer and dying a year later? What if doctors determine that a murder victim who was hospitalized would have died an hour later of natural causes in any event? We can begin to answer these hypothetical situations by reviewing the two types of causes that a prosecutor must establish beyond a reasonable doubt at trial in order to convict a defendant: **cause in fact** and legal or **proximate cause**.

As noted, causality arises in prosecutions for crimes that require a particular result, such as murder, maiming, arson, and damage to property. The prosecution must prove beyond a reasonable doubt that the harm to the victim resulted from the defendant's unlawful act. You will find that most causality cases involve defendants charged with murder who claim that they should not be held responsible for the victim's death.

Cause in Fact

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

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

Legal or Proximate Cause

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

In most cases, a defendant is clearly both the cause in fact and legal cause of the victim's injury or death. However, consider the following scenarios: You pull the trigger, and the victim dies. You point out that it was not your fault, since the victim died from the wound you inflicted in combination with a minor gun wound that she suffered earlier in the day. Should you be held liable? In another scenario an ambulance driver rescues the victim, the ambulance's brakes fail,

and the vehicle crashes into a wall, killing the driver and victim. Are you or the driver responsible for the victim's death? You later learn that the victim died after the staff of the hospital emergency room waited five hours to treat the victim and that she would have lived had she received timely assistance. Who is responsible for the death? Would your answer be different in the event that the doctors protested that they could not operate on the victim because of a power outage caused by a hurricane? What if the victim was wounded from the gunshot and, although barely conscious, stumbled into the street and was hit by an automobile or by lightning? In each case, "but for" your act, the victim would not have been placed in the situation that led to his or her death. On the other hand, you might argue that in each of these examples you were not legally liable, because the death resulted from an **intervening cause** or outside factor rather than from the shooting. As you can see from the previous examples, an intervening cause may arise from

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

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

Intervening Cause

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

Coincidental Intervening Acts

A defendant is not considered legally responsible for a victim's injury or death that results from a coincidental intervening act (some texts refer to this as an *independent intervening cause*). The classic case is an individual who runs from a mugger and dies from injuries sustained when a tree that has been struck by lightning falls on him. It is true that "but for" the robbery, the victim would not have fled.

The defendant nevertheless did not order or compel the victim to run and certainly had nothing to do with the lightning strike that felled the tree. As a result, the perpetrator generally is not held legally liable for a death that results from this unpredictable combination of an attempted robbery, bad weather, and a tree.

Coincidental intervening acts arise when a defendant's act places a victim in a particular place where the victim is harmed by an unforeseeable event.

The Ninth Circuit Court of Appeals offered an example of an unforeseeable event as a hypothetical in the case of *United States v. Main*. The defendant in this example drives in a reckless fashion and crashes his car, pinning the passenger in the automobile. The defendant leaves the scene of the accident to seek assistance, and the semiconscious passenger is eaten by a bear. The Ninth Circuit Court of Appeals observed that reckless driving does not create a foreseeable risk of being eaten by a bear and that this intervening cause is so out of the ordinary that it would be unfair to hold the driver responsible for the victim's death.¹⁶ Another example of an unforeseeable coincidental intervening event involves a victim who is wounded, taken to the hospital for medical treatment, and then killed in the hospital by a knife-wielding mass murderer. Professor Dressler notes that in this case the unfortunate victim has found himself or herself in the "wrong place at the wrong time."¹⁷

Defendants will be held responsible for the harm resulting from coincidental causes in those *rare* instances in which the event is "normal and foreseeable" or could have been reasonably predicted. In *Kibbe v. Henderson*, two defendants were held liable for the death of George Stafford, whom they robbed and abandoned on the shoulder of a dark, rural two-lane highway on a cold, windy, and snowy evening. Stafford's trousers were down around his ankles, his shirt was rolled up toward his chest, and the two robbers placed his shoes and jacket on the shoulder of the highway and did not return Stafford's glasses. The near-sighted and drunk Stafford was sitting in the middle

of a lane on a dimly lit highway with his hands raised when he was hit and killed by a pickup truck traveling 10 miles per hour over the speed limit that coincidentally happened to be passing by at the precise moment that Stafford wandered into the highway.¹⁸

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

Responsive Intervening Acts

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

In *People v. Armitage*, David Armitage was convicted of "drunk boating causing [the] death" of Peter Maskovich. Armitage was operating his small aluminum speedboat at a high rate of speed while zigzagging across the river when it flipped over. There were no flotation devices on board, and the intoxicated Armitage and Maskovich clung to the capsized vessel. Maskovich disregarded Armitage's warning and decided to try to swim to shore and drowned. A California appellate court ruled that Maskovich's decision did not break the chain of causation. The "fact that the panic stricken victim recklessly abandoned the boat and tried to swim ashore was not a wholly abnormal reaction to the peril of drowning," and Armitage could not exonerate himself by claiming that the "victim should have reacted differently or more prudently."¹⁹

Defendants have also been held liable for the response of individuals other than the victim. For instance, in the California case of *People v. Schmies*, defendant Schmies fled on his motorcycle from a traffic stop at speeds of up to 90 miles an hour and disregarded all traffic regulations. During the chase, one of the pursuing patrol cars struck another vehicle, killing the driver and injuring the officer. Schmies was convicted of grossly negligent vehicular manslaughter and of reckless driving. A California court affirmed the defendant's conviction based on the fact that the officer's response and the resulting injury were reasonably foreseeable. The officer's reaction, in other words, was not so extraordinary that it was unforeseeable, unpredictable, and statistically extremely improbable.²⁰

Medical negligence has also consistently been viewed as foreseeable and does not break the chain of causation. In *People v. Saavedra-Rodriguez*, the defendant claimed that the negligence of the doctors at the hospital rather than the knife wound he inflicted was the proximate cause of the death and that he should not be held liable for homicide. The Colorado Supreme Court ruled that medical negligence is "too frequent to be considered abnormal" and that the defendant's stabbing of the victim started a chain of events, the natural and probable result of which was the defendant's death. The court added that only the most gross and irresponsible medical negligence is so removed from normal expectations as to be considered unforeseeable.²¹

In *United States v. Hamilton*, the defendant knocked the victim down and jumped on and kicked his face. The victim was rushed to the hospital, where nasal tubes were inserted to enable him to breathe, and his arms were restrained. During the night the nurses changed his bedclothes and negligently failed to reattach the restraints on the victim's arms. Early in the morning the victim went into convulsions, pulled out the nasal tubes, and suffocated to death. The court held that regardless of whether the victim accidentally or intentionally pulled out the tubes, the victim's death was the ordinary and foreseeable consequence of the attack and affirmed the defendant's conviction for manslaughter.²²

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

The Model Penal Code

The Model Penal Code eliminates legal or proximate causation and requires only "but-for causation." The code merely asks whether the result was consistent with the defendant's intent

or knowledge or was within the scope of risk created by the defendant's reckless or negligent act. In other words, under the Model Penal Code, you merely look at the defendant's intent and act and ask whether the result could have been anticipated. In cases of a resulting harm or injury that is "remote" or "accidental" (e.g., a lightning bolt or a doctor who is a serial killer), the Model Penal Code requires that we look to see whether it would be unjust to hold the defendant responsible.²³

The next case, *People v. Cervantes*, asks whether it is just and fair to hold a defendant liable as the legal or proximate cause of the victim's death.

The Legal Equation

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

Should Cervantes be held criminally liable for causing the killing of a rival gang member?

***People v. Cervantes*, 29 P.3d 225 (Cal. 2001). Opinion by: Baxter, J.**

Issue

This case presents a question concerning proof of proximate causation in a provocative act murder case. We granted review to decide whether defendant, a member of a street gang, who perpetrated a nonfatal shooting that quickly precipitated a revenge killing by members of an opposing street gang, is guilty of murder on the facts before us.

Facts

Shortly after midnight on October 30, 1994, defendant and fellow Highland Street gang members went to a birthday party in Santa Ana thrown by the Alley Boys gang for one of their members. Joseph Perez, the prosecution's gang expert, testified the Highland Street and Alley Boys gangs were not enemies at the time. Over 100 people were in attendance at the party, many of them gang members.

Outside of the house, defendant approached a woman he knew named Grace. She was heavily intoxicated and declined defendant's invitation to go to another party with him, which prompted him to call her a "ho," leading, in turn, to an exchange of crude insults. Juan Cisneros, a member of the Alley Boys,

approached and told defendant not to "disrespect" his "homegirl." Richard Linares, also an Alley Boy, tried to defuse the situation, but Cisneros drew a gun and threatened to "cap [defendant's] ass." Defendant responded by brandishing a handgun of his own, which prompted Linares to intervene once again, pushing or touching defendant on the shoulder in an effort to separate him from Cisneros. In response, defendant stated "nobody touches me" and shot Linares through the arm and chest.

A crowd of some 50 people was watching these events unfold. Someone yelled, "Why did you shoot my home boy?" or "your home boy shot your own homeboy," to which someone responded "Highland [Street] is the one that shot." A melee erupted, and gang challenges were exchanged.

A short time later a group of Alley Boys spotted Hector Cabrera entering his car and driving away. Recognizing him as a member of the Highland Street gang, they fired a volley of shots, killing him. A variety of shell casings recovered from the street evidenced that at least five different shooters had participated in the murder of Cabrera.

Perez testified that although the Highland Street and Alley Boys gangs were not enemies at the time of the shootings, both gangs would be expected to be

armed. He opined that the Alley Boys would consider defendant's conduct in shooting Linares to be an act of "major disrespect" to their gang. To avenge the shooting, they would be expected to respond quickly with equal or greater force against defendant or another member of his gang. Therefore, Perez opined, Cabrera's death was a reasonably foreseeable consequence of defendant's actions.

Defendant testified he did not intend to shoot Linares, but was simply trying to protect himself from Cisneros, who drew his weapon first. He was surprised when his gun went off, because he did not feel it fire or see any flash. He testified, "I don't know if I shot [Linares] or somebody else shot [him], but what I do know is that if I [had] attempted to murder anybody, I would have shot [him] while he was on the floor." In the confusion following the shooting of Linares, defendant heard someone say, "[Y]our home boy shot your own home boy," and then he heard someone say "Highland's the one that shot." Realizing he was in danger, defendant ran from the party and sped off with several others. He heard shots being fired as they drove away. He was stopped by police and arrested a short distance away.

Defendant was charged with murdering Cabrera The jury was . . . instructed that liability for homicide requires a causal connection between an unlawful act and death, namely, that the act's direct, natural and probable consequences must be death. . . . [T]he jury was instructed that a direct, natural and probable consequence must be reasonably foreseeable, measured objectively under a reasonable person test. . . . The jury convicted defendant of the murder of Cabrera, fixed at second degree.

Reasoning

The question before us is, therefore, whether sufficient evidence supports defendant's conviction of murder based on the provocative act murder theory. . . . In particular, the essential element with which we are here concerned is proximate causation in the context of a provocative act murder prosecution.

In homicide cases, a "cause of the death of [the decedent] is an act or omission that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act or mission the death of [the decedent] and without which the death would not occur." In general, "[p]roximate cause is clearly established where the act is directly connected with the resulting injury, with no intervening force operating." In this case there was an intervening force in operation—at least five persons in attendance at the party, presumably all members of the Alley Boys, shot and killed Highland Street gang member Hector Cabrera in a hail of bullets shortly after the melee erupted. . . .

The provocative act murder doctrine has traditionally been invoked in cases in which the perpetrator

of the underlying crime instigates a gun battle, either by firing first or by otherwise engaging in severe, life-threatening, and usually gun-wielding conduct, and the police, or a victim of the underlying crime, responds with privileged lethal force by shooting back and killing the perpetrator's accomplice or an innocent bystander. In *People v. Gilbert*, 408 P.2d 365 (Cal. 1965), we stated that

When the defendant or his accomplice, with a conscious disregard for life, intentionally commits an act that is likely to cause death, and his victim or a police officer kills in reasonable response to such act, the defendant is guilty of murder. In such a case, the killing is attributable, not merely to the commission of a felony, but to the intentional act of the defendant or his accomplice committed with conscious disregard for life.

We then discussed causation:

[T]he victim's self-defensive killing or the police officer's killing in the performance of his duty cannot be considered an independent intervening cause for which the defendant is not liable, for it is a reasonable response to the dilemma thrust upon the victim or the policeman by the intentional act of the defendant or his accomplice.

In short, *Gilbert* described provocative act murder liability in traditional terms of proximate causation and . . . reaffirmed the general rule that no criminal liability attaches . . . for an unlawful killing that results from an independent intervening cause (i.e., a superseding cause). In contrast, when the death results from a dependent intervening cause, the chain of causation ordinarily remains unbroken and the initial actor is liable for the unlawful homicide. . . .

In an early Illinois case, *Belk v. The People* (1888) 125 Ill. 584, the defendants were alleged to have negligently allowed their team of horses to break loose on a narrow country lane. The team collided with a wagon in plain sight just ahead, causing that wagon's team of horses to panic and run away and thereby throwing the victim, a passenger, to her death. The Illinois court reversed the resulting manslaughter convictions on other grounds, but reasoned that "[b]etween the acts of omission or commission of the defendants, by which it is alleged the collision occurred, and the injury of the deceased, there was not an interposition of a human will acting independently . . . or any extraordinary natural phenomena, to break the causal connection." We also cited *Madison v. State* (1955) 234 Ind. 517, in which "the court . . . affirmed a conviction of second degree murder when the defendant threw a hand grenade at one Couch who, presumably impulsively [i.e.,

instinctively and not as an act of will], kicked it to another who was killed. The fact that Couch kicked the grenade did not break the line of causation. . . .” And we recalled *Wright v. State* (Fla. Dist. Ct. App. 1978) 363 So.2d 617, wherein the defendant was convicted of manslaughter for firing from his car into his intended victim’s car. The intended victim had “rapidly accelerated his car while ‘ducking bullets’” and fatally ran over a pedestrian. We found the significance of the facts and holding in *Wright* to be as follows: “Shots that cause a driver to accelerate impulsively and run over a nearby pedestrian suffice to confer liability; but if the driver, still upset, had proceeded for several miles before killing a pedestrian, at some point the required causal nexus would have become too remote for the [shooter] to be liable for homicide.”

The principles derived from these and related authorities have been summarized as follows.

In general, an “independent” intervening cause will absolve a defendant of criminal liability. However, in order to be “independent” the intervening cause must be “unforeseeable . . . an extraordinary and abnormal occurrence, which rises to the level of an exonerating, superseding cause.” On the other hand, a “dependent” intervening cause will not relieve the defendant of criminal liability. . . . If an intervening cause is a normal and reasonably foreseeable result of defendant’s original act the intervening act is “dependent” and not a superseding cause, and will not relieve defendant of liability.

. . . The precise consequence need not have been foreseen; it is enough that the defendant should have foreseen the possibility of some harm of the kind which might result from his act.

Turning to the facts at hand, we agree with defendant that the evidence introduced below is insufficient as a matter of law to support his conviction of provocative act murder, for it fails to establish the essential element of proximate causation. The facts of this case are distinguishable from the classic provocative act murder case in a number of respects. Defendant was not the initial aggressor in the incident that gave rise to the provocative act. There was no direct evidence that Cabrera’s unidentified murderers were even present at the scene of the provocative act, i.e., in a position to actually witness defendant shoot Linares. Defendant

himself was not present at the scene where Cabrera was fatally gunned down; the only evidence introduced on the point suggests he was already running away from the party or speeding off in his car when the victim was murdered.

But the critical fact that distinguishes this case from other provocative act murder cases is that here the actual murderers were not responding to defendant’s provocative act by shooting back at him or an accomplice, in the course of which someone was killed. They were not in the shoes of police officers . . . who shot back and killed an accomplice as an objectively “reasonable response to the dilemma thrust upon [them]” by the defendant’s malicious and life-endangering provocative acts . . . and were not like the intermediary in *Madison v. State* who instinctively kicked away a live hand grenade thrown at him by defendant Madison, resulting in the death of another.

On the contrary . . . nobody forced the Alley Boys’ murderous response in this case, if indeed it was a direct response to defendant’s act of shooting Linares. The willful and malicious murder of Cabrera at the hands of others was an independent intervening act on which defendant’s liability for the murder could not be based.

The circumstance that the murder occurred a very short time after defendant shot Linares, and the opinion of prosecution gang expert Perez that Cabrera’s murder was a foreseeable consequence of defendant’s shooting of Linares in the context of a street gang’s code of honor mentality, was essentially the only evidence on which the jury was asked to find that Cabrera’s murder was “a direct, natural, and probable consequence” of defendant’s act of shooting Linares. Given that the murder of Cabrera by other parties was itself felonious, intentional, perpetrated with malice aforethought, and directed at a victim who was not involved in the original altercation between defendant and Linares, the evidence is insufficient . . . to establish the requisite proximate causation to hold defendant liable for murder.

Holding

The judgment of the Court Appeal is reversed to the extent it affirms defendant’s conviction of murder. . . .

Questions for Discussion

1. Summarize the facts in *Cervantes*.
2. Explain the court’s distinction between dependent intervening acts and independent intervening acts.
3. Why did the court find that the killing of Cabrera was an independent intervening act and that Cervantes was not liable for murder?
4. Do you agree with the prosecution’s gang expert that Cabrera’s murder was a foreseeable consequence of the shooting of Linares?
5. As a juror, would you hold Cervantes liable for murder?

Cases and Comments

1. **Drag Racing.** In *Velazquez v. State*, the defendant Velazquez and the deceased Alvarez agreed to drag race their automobiles over a quarter-mile course on a public highway. Upon completing the race, Alvarez suddenly turned his automobile around and proceeded east toward the starting line. Velazquez also reversed direction. Alvarez was in the lead and attained an estimated speed of 123 mph. He was not wearing a seat belt and had a blood alcohol content of between .11 and .12. Velazquez had not been drinking and was traveling at roughly 90 mph. As both approached the end of the road, they applied their brakes, but Alvarez was unable to stop. He crashed through the guardrail and was propelled over a canal and landed on the far bank. Alvarez was thrown from his car, pinned under the vehicle when it landed, and died. The defendant crashed through the guardrail, landed in the canal, and managed to escape.

A Florida district court of appeal determined that the defendant's reckless operation of his vehicle in the drag race was technically the cause in fact of Alvarez's death under the "but for" test. There was no doubt that "but for" the defendant's participation, the deceased would not have recklessly raced his vehicle and would not have been killed. The court, however, ruled that the defendant's participation was not the proximate cause of the deceased's death because the "deceased, in effect, killed himself by his own volitional reckless driving," and that it "would be unjust to hold the defendant criminally responsible for this death." The race was completed when Alvarez turned his car around and engaged in a "near-suicide mission."

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

2. **Children and Handguns.** Bauer left a .45 caliber registered handgun on the dresser in a downstairs bedroom where he slept with his girlfriend. His girlfriend's 9-year-old son TC was spending the night and removed the handgun from the dresser. TC, who had never before held a loaded firearm and had not been instructed on how to use a gun, took the firearm with him to school and accidentally shot a classmate, AK-B. TC told the police that TC and his siblings often slept in the bedroom and had complete access to the downstairs portion of the house. The children told the police that there were several guns in the house, including a shotgun in the downstairs bedroom, a handgun on the downstairs dresser, a handgun on a computer desk, a handgun under the couch, and a handgun in the glove compartment of the car. TC had been warned by Bauer and by his mother never to

touch the guns because they were loaded. Bauer told the police that he did not know that TC took the gun although he was aware that TC had taken money from the glove compartment of Bauer's car. Washington law at the time did not impose any requirements for the storage of firearms. Bauer was charged with the assault of AK-B. Would you hold Bauer criminally liable for the assault committed by TC? See *State v. Bauer*, 295 P.2d 1227 (Wash. Ct. App. 2013).

3. **The Year-and-a-Day Rule.** Defendant Wilbert Rogers stabbed James Bowdery in the heart with a butcher knife on May 6, 1994. During an operation to repair Bowdery's heart, he suffered a cardiac arrest. This led to severe brain damage as a result of a loss of oxygen. Bowdery remained in a coma and died on August 7, 1995, from kidney complications resulting from remaining in a vegetative condition for such a lengthy period of time. Rogers was convicted of second-degree murder and appealed on the grounds that the prosecution was barred by the **year-and-a-day rule**, which prohibits a murder conviction when more than a year has transpired between the defendant's criminal act and the victim's death. The Tennessee Supreme Court observed that the rule was based on the fact that 13th-century medical science was incapable of establishing causation beyond a reasonable doubt when a significant amount of time elapsed between the injury to the victim and the victim's death. The rule has also been explained as an effort to moderate the common law's automatic imposition of the death penalty for felonies.

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

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

You can find more cases on the study site: Banks v. Commonwealth and People v. Kern, <http://edge.sagepub.com/lippmancl4e>.

CRIME IN THE NEWS

In 2014, Vonte Skinner was convicted of attempted murder and aggravated assault for allegedly attempting to carry out a contract killing of a narcotics dealer who had withheld the proceeds from narcotics sales from a drug gang. A search of the defendant's car led to the seizure of three notebooks filled with rap lyrics authored by Skinner. A number of the lyrics are described as "violent" and were written under the moniker "Real Threat." Skinner has the word "Threat" tattooed on his arm.

The jury was unable to reach a verdict at Skinner's first trial. He was convicted at a second trial in which a detective testifying for the State of New Jersey read excerpts from the defendant's lyrics, testimony that ran for 13 pages in the trial transcript. The prosecution successfully argued that although none of the lyrics mentioned the victim by name and that all of the lyrics had been composed prior to the shooting, the lyrics provided evidence of the defendant's criminal motive and intent and capacity for violence. Several of the lyrics are reprinted below.

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

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

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

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

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

The New Jersey Supreme Court found that there
was no connection between the various crimes and bad
acts recounted in the lyrics and the crime with which the
defendant had been convicted. "We reject the proposi-
tion that probative evidence about a charged offense

can be found in an individual's artistic endeavors absent
a strong nexus between specific details of the artistic
composition and the circumstances of the offense for
which the evidence is being adduced." The Supreme
Court also noted the risk that the introduction of the ly-
rics had prejudiced the jury against the defendant.

In other cases courts have found a strong connec-
tion between rap lyrics and a defendant's mental deter-
mination to kill. In *Bryant v. State*, 802 N.E.2d 486 (Ind.
Ct. App.), the defendant was convicted of the murder of
his stepmother. His lyrics were admitted to establish his
motive to kill because the lyrics closely resembled the
crime with which the defendant was charged. "'Cuz the
5-0 won't even know who you are when they pull yo ugly
ass out of the trunk of my car." In the South Carolina
trial of Gonzales Wardlaw (Snoop), the defendant's ly-
rics were introduced as an admission of guilt to a mur-
der, and in a Pittsburgh case, two men were sentenced
to prison after posting a rap video that threatened to
harm two police officers who had arrested them.

Law enforcement officials now are trained to use
rap lyrics to assist them in investigating crimes. The
New York Times identified 36 cases between 2012 and
2014 in which prosecutors attempted to introduce
rap music at a defendant's trial. The American Civil
Liberties Union of New Jersey found that courts admit-
ted lyrics roughly 80 percent of the time. Studies find
that juries are more likely to believe that defendants
who have written violent rap lyrics are more capable
of committing a murder than defendants who have not
written violent lyrics.

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

CHAPTER SUMMARY

It is a fundamental principle of criminal law that a criminal offense requires a criminal intent that occurs concurrently with a criminal act. The requirement of a *mens rea*, or the mental element of a criminal act, is based on the concept of "moral blameworthiness." The notion of blameworthiness, in turn, reflects the notion that

individuals should be subject to criminal punishment and held accountable only when they consciously choose to commit a crime or to create a high risk of harm or injury.

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

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

- *Purposely*. You aimed and shot the arrow at William Tell with the purpose of killing him rather than with the intent of hitting the apple on his head. (Tell is the national hero of Switzerland who was required to shoot an apple off his son's head.)
- *Knowingly*. You know that you are a poor shot, and when shooting at the apple on William Tell's head, you knew that you were practically certain to kill him.
- *Recklessly*. You clearly appreciated and knew the risk of shooting the arrow at William Tell with your eyes closed. Nevertheless, you proceeded to shoot the arrow despite the fact that this was a gross deviation from the standard of care that a law-abiding person would exhibit.
- *Negligently*. You claim that you honestly believed that you were such an experienced hunter that there was no danger in shooting the apple from William Tell's head. This was a gross deviation from the standard of care that a reasonable person would practice under the circumstances.

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

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

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

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

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

CHAPTER REVIEW QUESTIONS

1. What is the reason that the law requires a *mens rea*?
2. Why is it difficult to prove *mens rea* beyond a reasonable doubt? Discuss some different ways of proving *mens rea*.
3. Explain the difference between purpose and knowledge. Which is punished more severely? Why?
4. Distinguish recklessness from negligence. Which is punished more severely? Why?
5. What is the difference between a crime requiring a criminal intent and strict liability?
6. Explain the "willful blindness" rule.
7. What is the importance of the principle of concurrence? Provide an example of a lack of concurrence.
8. Disputes over causation typically arise in prosecutions for what types of crimes?
9. Explain the statement that an individual's criminal act must be shown to be both the cause in fact and the legal or proximate cause.
10. What is meant by the statement that legal or proximate cause is based on a judgment of what is just or fair under the circumstances? How does this differ from the determination of a cause in fact or a "but for" analysis?

11. What is the difference between a coincidental intervening act and a responsive intervening act? Provide examples.
12. Discuss the test for determining whether coincidental intervening acts and responsive intervening acts break the chain of causation.
13. Provide concrete examples illustrating a coincidental intervening act and a responsive intervening act that do not break the chain of causation. Now provide examples of coincidental and intervening acts that do break the chain of causation.
14. What is the year-and-a-day rule? Why are states now abandoning this principle?
15. What are the arguments for and against strict liability offenses?
16. What is the approach of the Model Penal Code toward causality? Use some of the cases in the text to illustrate your answer.
17. Are we too concerned with criminal intent? Why not impose the same punishment on criminal acts regardless of an individual's intent? Is the father or mother of a child hit by a car concerned whether the driver was acting intentionally, knowingly, recklessly, or negligently?

LEGAL TERMINOLOGY

causation 122	intervening cause 123	responsive intervening act 123
cause in fact 122	knowingly 103	scienter 101
circumstantial evidence 102	<i>mens rea</i> 101	specific intent 102
coincidental intervening act 123	negligently 103	strict liability 116
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