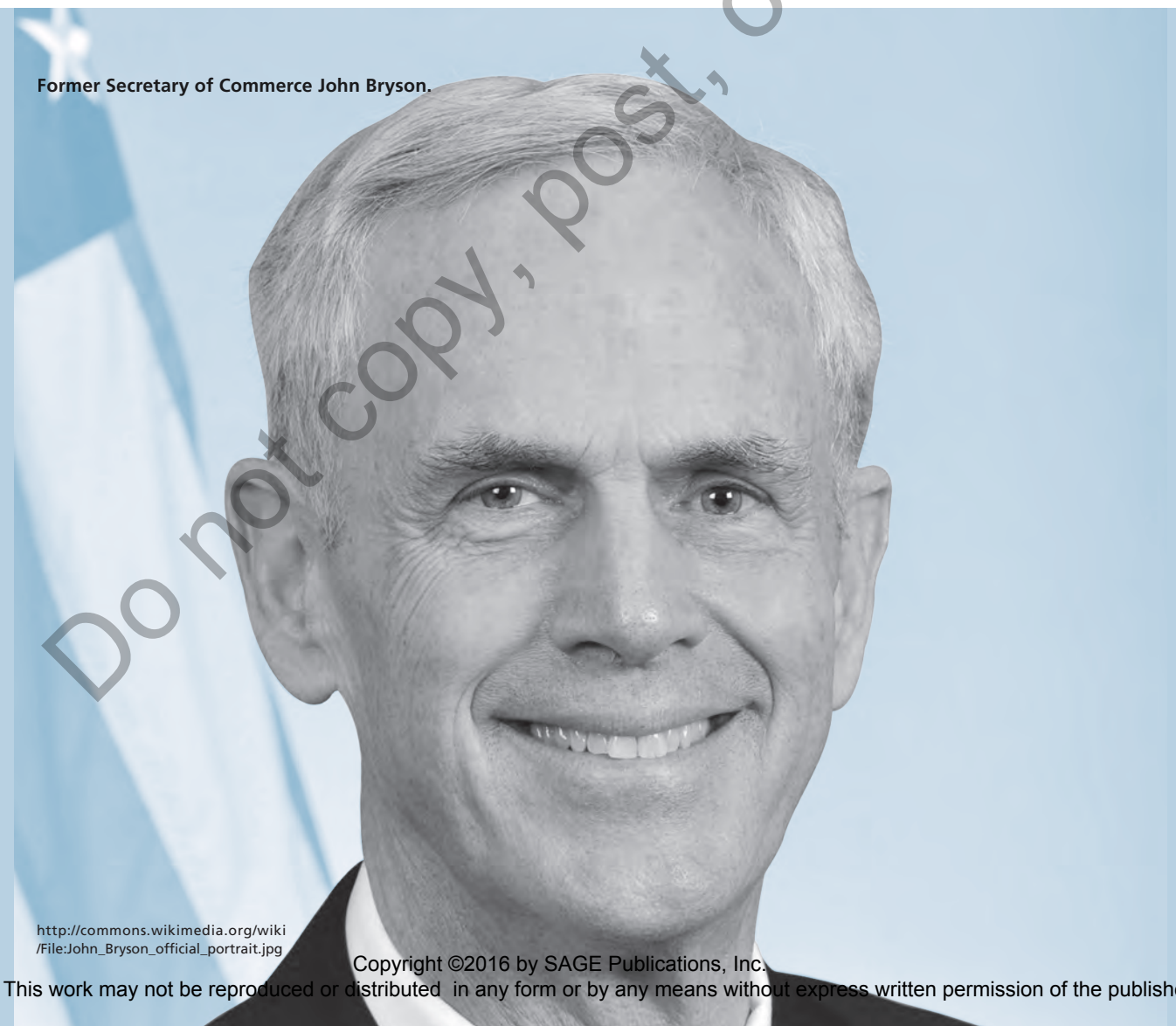
Chapter 3

Former Commerce Secretary John Bryson was driving his automobile in Los Angeles on June 9, 2012, when he crashed into a car. He got out of the car after the crash and exchanged information with the driver. As Mr. Bryson was leaving the scene, he crashed into the car again, but this time, he kept going. The driver of the other car and his two passengers decided that they should call 911 and follow him. Mr. Bryson drove less than two miles before hitting another car. When the police arrived on the scene, he was still behind the wheel, unconscious. Mr. Bryson was taken to the hospital where it was discovered that he had suffered a seizure. He was not charged with a crime even though the other cars were damaged and the passengers suffered minor injuries because he did not intentionally or even voluntarily crash into the cars.

Suppose Bryson had been aware that he had a condition that caused him to have seizures, and he had been advised not to drive because of the condition. His victims may sue him in civil court and win financial damages. But should Mr. Bryson also be charged with a crime?

This scenario raises some of the issues we will examine in this chapter.



Former Secretary of Commerce John Bryson.

http://commons.wikimedia.org/wiki/File:John_Bryson_official_portrait.jpg

The Elements of a Crime

Learning Objectives

After reading and studying this chapter, you should be able to

- Identify and define the elements of a crime
- Know the five circumstances that create a legal duty to act
- Differentiate between a voluntary and an intentional act
- Know the difference between specific and general intent
- Define *actus reus* and *mens rea*
- Understand the four levels of culpability in Section 2.02 of the Model Penal Code
- Distinguish between "but for" and proximate causation
- Explain strict liability

Introduction

All crimes consist of a number of elements that the prosecution must prove beyond a reasonable doubt before a person may be convicted of a crime. For most crimes, these elements are as follows:

1. A voluntary act (actus reus)
2. A guilty state of mind (mens rea)
3. The concurrence of the act and the guilty state of mind
4. Causation, and
5. A resulting harm

In other words, while a person is performing an act of his own free will, he must have the state of mind required by the statute. The state must prove that some harm occurred and that the defendant's actions caused that harm. There are some exceptions to this general rule. For example, you will learn that there are some instances in which a person's *failure* to act makes him criminally liable.

Some crimes also require the proof of "attendant circumstances"—additional facts that must also exist at the time of the criminal act. For example, for the crime of statutory rape, which is sexual intercourse with an individual under the age of consent, the victim's age would be the attendant circumstances.

This chapter will define and discuss the elements of a crime, the circumstances under which a person may be charged with a crime for failing to act, the different states of mind that expose a person to criminal liability, and the circumstances under which a person may be criminally liable even when he has no guilty state of mind at all.

A Voluntary Act (Actus Reus)

Thoughts and Statuses

Most people agree that a person must actually *do* something harmful before he may be convicted of a crime. However, what if we knew for certain that an individual was about to commit a crime. Would we want to give the state the power to stop him?

In the science fiction movie *Minority Report*, the crime of murder is eliminated because the Justice Department's Pre-Crime Unit uses psychic beings who are able to see into the future and predict when murders will be committed. Police officers are given the power to arrest the potential murderers before they commit the crimes.

We do not punish individuals for thinking harmful thoughts. Of course our police officers do not have magical powers like the officers in *Minority Report* that enable them to read the minds of potential criminals. But even if they did, would it be a good idea to arrest and punish people for thinking about committing crimes? Sometimes people think about doing bad things but then change their minds and decide to obey the law. With the limited resources in our criminal justice system, do we really want to punish people who do no more than think bad thoughts—especially when they cause no harm? Many of us have thought bad thoughts but never acted upon them. Shouldn't people who refrain from acting upon their bad thoughts be rewarded for exercising self-control and obeying the law?

Suppose a person has a certain condition or status as a result of the commission of certain criminal acts. Should **status crimes** be criminalized? In the following case, the U.S. Supreme Court struck down a California law that made it a crime to be a drug addict.

Robinson v. California (1962)

U.S. Supreme Court

370 U.S. 660

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

The appellant was convicted after a jury trial in the Municipal Court of Los Angeles. The evidence against him was given by two Los Angeles police officers. Officer Brown testified that he had had occasion to examine the appellant's arms one evening on a street in Los Angeles some four months before the trial. The officer testified that at that time he had observed "scar tissue and discoloration on the inside" of the appellant's right arm, and "what appeared to be numerous needle marks and a scab which was approximately three inches below the crook of the elbow" on the appellant's left arm. The officer also testified that the appellant under questioning had admitted to the occasional use of narcotics.

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

reforms. The existence of such a chronic condition may be ascertained from a single examination, if the characteristic reactions of that condition be found present."

The judge further instructed the jury that the appellant could be convicted under a general verdict if the jury agreed either that he was of the "status" or had committed the "act" denounced by the statute. All that the People must show is either that the defendant did use a narcotic in Los Angeles County, or that while in the City of Los Angeles he was addicted to the use of narcotics

Under these instructions the jury returned a verdict finding the appellant "guilty of the offense charged.." . . . The broad power of a State to regulate the narcotic drugs traffic within its borders is not here in issue. . . . Such regulation, it can be assumed, could take a variety of valid forms. A State might impose criminal sanctions, for example, against the unauthorized manufacture, prescription, sale, purchase, or possession of narcotics within its borders. In the interest of discouraging the violation of such laws, or in the interest of the general health or welfare of its inhabitants, a State might establish a program of compulsory treatment for those addicted to narcotics. Such a program of treatment might require periods of involuntary confinement. And penal sanctions might be imposed for failure to comply with established compulsory treatment procedures. . . . Or a State might choose to attack the evils of narcotics traffic on broader fronts also—through public health education, for example, or by efforts to ameliorate the economic and social conditions under which those evils might be thought to flourish. In short, the range of valid choice which a State might make in this area is undoubtedly a wide one, and the wisdom of any particular choice within the allowable spectrum is not for us to decide. Upon that premise we turn to the California law in issue here.

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

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

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

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

Questions

1. The California statute makes it a crime "to use narcotics, or to be addicted to the use of narcotics." Which part of the statute does the Court find unconstitutional?
2. What is the rationale for the Court's holding?
3. The Court compares the statute to the criminalization of leprosy, mental illness, or the common cold. Are these fair comparisons? Why or why not?

The Voluntariness Requirement

The Supreme Court in *Robinson* made it clear that a person has to *do* something in order to be charged with a crime—there must be an act. But what if a person does an act involuntarily—because she is ill or otherwise has no control over her harmful acts? Should she still be held criminally liable? Commerce Secretary Bryson was not charged with a crime when he crashed into two cars, as described at the beginning of this chapter. However, some accidents involving involuntary acts are criminalized. Courts reached different results in the following two cases.

People v. Decina (1956)

N. Y. Court of Appeals
138 N.E. 2d 799

At about 3:30 p.m. on March 14, 1955, a bright, sunny day, defendant was driving, alone in his car, in a northerly direction on Delaware Avenue in the city of Buffalo. The portion of Delaware Avenue here involved is 60 feet wide. At a point south of an overhead viaduct of the Erie Railroad, defendant's car swerved to the left, across the center line in the street, so that it was completely in the south lane, traveling 35 to 40 miles per hour.

It then veered sharply to the right, crossing Delaware Avenue and mounting the easterly curb at a point beneath the viaduct and continued thereafter at a speed estimated to have been about 50 or 60 miles per hour or more. During this latter swerve, a pedestrian testified that he saw defendant's hand above his head; another witness said he saw defendant's left arm bent over the wheel, and his right hand extended towards the right door.

A group of six schoolgirls were walking north on the easterly sidewalk of Delaware Avenue, two in front and four slightly in the rear, when defendant's car struck them from behind. One of the girls escaped injury by jumping against the wall of the viaduct. The bodies of the children struck were propelled northward onto the street and the lawn in front of a coal company, located to the north of the Erie viaduct on Delaware Avenue. Three of the children, 6 to 12 years old, were found dead on arrival by the medical examiner, and a fourth child, 7 years old, died in a hospital two days later as a result of injuries sustained in the accident.

After striking the children, defendant's car continued on the easterly sidewalk, and then swerved back onto Delaware Avenue once more. It continued in a northerly direction, passing under a second viaduct before it again veered to the right and remounted the easterly curb, striking and breaking a metal lamppost. With its horn blowing steadily apparently because defendant was "stopped over" the steering wheel the car proceeded on the sidewalk until if finally crashed through a 7 1/4-inch brick wall of a grocery store, injuring at least one customer and causing considerable property damage.

When the police arrived, defendant attempted to rise, staggered and appeared dazed and unsteady. When informed that he was under arrest, and would have to accompany the police to the station house, he resisted and, when he tried to get away, was handcuffed. The foregoing evidence was adduced by the People, and is virtually undisputed. [D]efendant did not take the stand nor did he produce any witnesses.

From the police station defendant was taken to the E. J. Meyer Memorial Hospital, a county institution, arriving at 5:30 P.M.

[A doctor] asked defendant how he felt and what had happened. Defendant, who still felt a little dizzy or blurry, said that as he was driving he noticed a jerking of his right hand, which warned him that he might develop a convulsion, and that as he tried to steer the car over to the curb he felt himself becoming unconscious, and he thought he had a convulsion. He was aware that children were in front of his car, but did not know whether he had struck them.

Defendant then proceeded to relate to Dr. Wechter his past medical history, namely, that at the age of 7 he was struck by an auto and suffered a marked loss of hearing. In 1946 he was treated in this same hospital for an illness during which he had some convulsions. Several burr holes

were made in his skull and a brain abscess was drained. Following this operation defendant had no convulsions from 1946 through 1950. In 1950 he had four convulsions, caused by scar tissue on the brain. From 1950 to 1954 he experienced about 10 or 20 seizures a year, in which his right hand would jump although he remained fully conscious. In 1954, he had 4 or 5 generalized seizures with loss of consciousness, the last being in September, 1954, a few months before the accident. Thereafter he had more hospitalization, a spinal tap, consultation with a neurologist, and took medication daily to help prevent seizures.

On the basis of this medical history, Dr. Wechter made a diagnosis of Jacksonian epilepsy, and was of the opinion that defendant had a seizure at the time of the accident.

We turn first to the subject of defendant's cross appeal, namely, that his demurrer should have been sustained, since the indictment here does not charge a crime. The indictment states essentially that defendant, knowing "that he was subject to epileptic attacks or other disorder rendering him likely to lose consciousness for a considerable period of time," was culpably negligent "in that he consciously undertook to and did operate his Buick sedan on a public highway" (emphasis supplied) and "while so doing" suffered such an attack which caused said automobile "to travel at a fast and reckless rate of speed, jumping the curb and driving over the sidewalk" causing the death of 4 persons. In our opinion, this clearly states a violation of section 1053-a of the Penal Law. The statute does not require that a defendant must deliberately intend to kill a human being, for that would be murder. Nor does the statute require that he knowingly and consciously follow the precise path that leads to death and destruction. It is sufficient, we have said, when his conduct manifests a "disregard of the consequences which may ensue from the act, and indifference to the rights of others. No clearer definition, applicable to the hundreds of varying circumstances that may arise, can be given. Under a given state of facts, whether negligence is culpable is a question of judgment."

Assuming the truth of the indictment, as we must on a demurrer, this defendant knew he was subject to epileptic attacks and seizures that might strike at any time. He also knew that a moving motor vehicle uncontrolled on public highway is a highly dangerous instrumentality capable of unrestrained destruction. With this knowledge, and without anyone accompanying him, he deliberately took a chance by making a conscious choice of a course of action, in disregard of the consequences which he knew might follow from his conscious act, and which in this case did ensue. How can we say as a matter of law that this did not amount to culpable negligence within the meaning of section 1053-a?

To hold otherwise would be to say that a man may freely indulge himself in liquor in the same hope that it will not affect his driving, and if it later develops that ensuing intoxication causes dangerous and reckless driving resulting in death, his unconsciousness or involuntariness at that time would relieve him from prosecution under the statute. His awareness of a condition which he knows may produce such consequences as here, and his disregard of the consequences, renders him liable for culpable negligence, as the courts below have properly held. . . . To have a sudden sleeping spell, an unexpected heart or other disabling attack, without any prior knowledge or warning thereof, is an altogether different situation, . . . and there is simply no basis for comparing such cases with the flagrant disregard manifested here.

Questions

1. What was Mr. Decina's voluntary act?
2. The court acknowledged that Mr. Decina did not intentionally hit the schoolgirls but holds that he was negligent in driving his car. What facts support this holding?
3. How does the court compare Mr. Decina's behavior with that of a drunk driver?

Martin v. State (1944)[1] examines the **voluntary act** requirement in an entirely different context. Martin was in his home when police officers arrived, placed him under arrest, and drove him to a public highway. While on the highway, Mr. Martin allegedly committed the act of using loud and profane language while drunk. He was charged and convicted of "being drunk on a public highway" under the following statute:

> Any person who, while intoxicated or drunk, appears in any public place where one or more persons are present, * * * and manifests a drunken condition by boisterous or indecent conduct, or loud and profane discourse, shall, on conviction, be fined, etc. Code 1940, Title 14, Section 120.[2]

Martin appealed his conviction. The Alabama Court of Appeals reversed his conviction, holding that Martin could not be convicted unless he voluntarily went to the highway in a drunken condition. Since the police officers "involuntarily and forcibly" carried him to the highway, there was no voluntary act, and his conviction could not stand.

How is this case different from *Decina?* Notice that both cases demonstrate the difference between "voluntary" and "intentional" acts. "Voluntariness" refers to a person's acts (**actus reus**) while "intent" describes his mental state (**mens rea**). Mr. Decina intended to get into his car and drive it, but he did not intend the physical movements during the seizure that caused him to hit and kill the children. Those movements were involuntary. Likewise, Mr. Martin intended to drink the alcohol that caused him to become intoxicated, but he did not intend to go onto the highway, nor did he voluntarily move his body to that location.

Consider the following hypothetical:

> Rick and Bernie were bricklayers working at a construction site on the second floor of a building. Rick walked past Bernie just as he was about to position a brick on the wall and accidentally bumped his arm. The brick flew out of Bernie's hand and hit Kecia on the head as she was walking on the sidewalk below.

Would Bernie be charged with assaulting Kecia? Bernie neither intentionally nor voluntarily hit Kecia with the brick. Rick's accidental bumping of Bernie's arm caused the brick to fall and hit Kecia. There was no criminal act.

Omissions

Under certain circumstances, an individual's *failure to act* may be a crime. Peter is walking past the lake in the park when he sees a man on a small boat fall into the water. The man does not appear to know how to swim. Peter watches the man struggle and go under water for the third time. Does he have a duty to jump in and save him? Should Peter have a duty only if he knows how to swim? Does he have a duty to call for help? If the man drowns, may Peter be charged with homicide for his failure to save or at least assist the drowning man?

Most crimes punish individuals for committing acts that cause harm. Should the law impose a responsibility on individuals to act in order to prevent harm to others and punish them when they fail to act? Should it depend on the individual's relationship to the person who is in danger? Many people are hesitant to interfere in the affairs of individuals they do not know. For example, if a parent spanks her child in a public place, most people would not intervene unless it is a life-threatening situation. Even in situations involving a physical fight between two or more people, many individuals would choose to "mind their own business" for a variety of reasons. In the case of the parent spanking the child, most people—even those who feel strongly that children should not be hit—would believe that parents have the right and freedom to decide how to discipline their own children. In the case involving individuals fighting each other, some may wonder whether the people involved are just "horsing around" rather than actually fighting. Or perhaps they fear that they may be injured if they try to stop the fight. As for the drowning man, many people would not only fear drowning themselves but may be concerned that they might make the situation worse. But are there some situations where we

should impose a duty to act? The following case is likely the most famous example of a tragic death that occurred as a result of the failure to act.

The Kitty Genovese Case

New York Daily News Archive/New York Daily News/Getty Images

Kitty Genovese

Kitty Genovese was twenty-eight years old when she was raped and murdered near her apartment in New York City. On March 13, 1964, Ms. Genovese drove home from her job as a manager at a bar. She parked her red Fiat near the Long Island Railroad and proceeded to walk toward her apartment in the Kew Gardens area of Queens. A man followed her from the parking lot and stabbed her in the back. He stabbed her repeatedly and sexually assaulted her as she screamed for help. A police investigation later revealed that numerous neighbors—as many as thirty-eight—heard her screams but did nothing. They did not intervene or even call the police.[3]

The Genovese case garnered national attention—not because of the gruesome details of the murder but because of the neighbors' failure to assist. Although some have questioned whether thirty-eight people really knew what was going on and failed to help, it is clear that many people heard a woman screaming for help and did nothing. Social scientists studied the case and labeled the phenomenon "the bystander effect." After doing a number of experiments, they concluded that the more people present, the less likely any of them will help a person in distress. According to the experiments, presumably everyone thought that someone else would come to the person's aid.[4]

It is very possible that Kitty Genovese's life would have been saved had just one person called the police and reported that someone was screaming for help. Few would expect a bystander to personally come to a stranger's rescue by confronting an assailant and attempting to fight him off. Such actions would likely cause even further harm, and no one would expect a person to endanger his own life in order to save the life of a total stranger. But what possible harm would come from the simple act of calling the police to report that someone was possibly in danger? Should society criminalize the failure to at least report dangerous situations that could result in the loss of life? It may have been difficult to determine who actually heard Kitty Genovese's cries for help, but law enforcement difficulties aside, should these omissions be criminalized?

A person may be held criminally liable for her failure to act only if she has a legal duty to do so. In *Jones v. United States* (1962), the court held that there are at least four circumstances that create a legal duty to act:

> One can be held criminally liable: first, where a statute imposes a duty to care for another; second, where one stands in a certain status relationship to another; third, where one has assumed a contractual duty to care for another; and fourth, where one has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid.[5] . . .

A fifth circumstance may also create a legal duty: when a person creates a risk of harm. For example, if a driver hits a pedestrian and injures him, he has a legal duty to call an ambulance or do whatever is necessary to make sure that the pedestrian receives medical treatment.

AP Photo/KABC TV

A Good Samaritan Law was passed in Nevada when a witness failed to report Sherrice Iverson's murder to the police. Should other states pass similar laws?

Statutes that impose a legal duty include laws that require individuals to file income tax returns or register firearms. If a person has a contractual duty to care for a disabled person, he may be held criminally liable if his failure to do so results in that person being harmed. A parent's legal duty to care for her child and a married couple's legal duty to care for each other come from those special status relationships. If a person assumes the care of a neighbor and the neighbor becomes ill and dies, that person is criminally liable for the death if he secludes the neighbor so that no one else is able to come to the neighbor's assistance. Finally, if a driver accidentally hits a pedestrian, the driver has a legal duty to get assistance for the pedestrian and may be criminally liable for any additional harm to the pedestrian as a result of the driver's failure to do so because she created the risk of harm.

The Case of David Cash

On May 25, 1997, twenty-year-old David Cash and his nineteen-year-old friend Jeremy Strohmeyer went to a casino in Las Vegas. In the early morning hours, Strohmeyer followed a seven-year-old girl named Sherrice Iverson into the women's restroom. David Cash came in later and found Strohmeyer struggling with the little girl in one of the restroom stalls. Cash walked out and went for a walk. He didn't report what he had seen to the security guards or to the police. In fact, he told no one. Less than an hour later, Strohmeyer told David Cash that he had molested the little girl and killed her. At around 5 a.m., Sherrice's body was found stuffed in the toilet in the women's restroom.

Strohmeyer eventually pled guilty to murder, kidnapping, and two counts of sexual assault. He was sentenced to four life terms without the possibility of parole. Cash, on the other hand, was not charged with anything because at that time, there was no legal duty to even report the horrible crimes Stromeyer had committed.

Cash's behavior received almost as much attention and condemnation as Strohmeyer's. In addition to his failure to report the crime, he later angered the public even more by saying that he felt sorrier for his friend Jeremy than for the little girl because he did not know her or her family.[6] Cash was a student at the University of California at Berkeley at the time, and there was a protest at the university with demands that he be expelled. The University Chancellor issued a statement informing the public that Cash had not broken any laws and would not be expelled, but added that he also was outraged by Cash's statements.[7]

Cash's failure to report the crime led to the passage of the Sherrice Iverson Bill in Nevada in 2000. The law makes it a crime to fail to notify the police upon witnessing the sexual assault of a child. Most states do not have laws that require members of the public to take action to assist others in peril. Minnesota is one state that does have such a law:

Minnesota's Good Samaritan Statute

1. **Duty to assist.** A person at the scene of an emergency who knows that another person is exposed to or has suffered grave physical harm shall, to the extent that the person can do so without danger or peril to self or others, give reasonable assistance to the exposed person. Reasonable assistance may include obtaining or attempting to obtain aid from law enforcement or medical personnel. A person who violates this subdivision is guilty of a petty misdemeanor.

The few states that have **Good Samaritan laws** make it clear that bystanders are not required to assist others if such assistance may cause harm to the "good Samaritan," to the person in need of help, or to anyone else. The Minnesota law emphasizes that the person in need of help must have been exposed to or have suffered "grave physical harm" and notes that calling the police or an ambulance will fulfill the bystander's responsibility under the law. Another section of Minnesota's law states that any person who provides such assistance will not be liable for civil damages as a result of his assistance unless he provides the assistance in a reckless manner.

Although Good Samaritan laws are rare in the United States, they are common in Europe and Canada. Like the laws in the United States, the Good Samaritan laws in Europe and Canada do not require bystanders to risk harm to themselves; they provide immunity from civil liability except in cases of gross negligence or recklessness; and they require little more than notifying law enforcement or medical personnel.

Guilty State of Mind (Mens Rea)

There is no crime if there is only an act (or a legal duty to act). The act or omission must be accompanied by a guilty state of mind. Although most people believe that an individual must have "criminal intent" to be guilty of a crime, there are a number of crimes that punish unintentional behavior. The drunk driver who accidentally hits another car, causing the death of the driver and passengers, may be charged with involuntary manslaughter or even second degree murder—even though he did not intend to kill anyone. The parents who fail to take their sick child to the doctor when the child is obviously very ill may be criminally liable for that child's death, even if they earnestly believed that the child would live, if their behavior was a gross deviation from the standard of care that a reasonable person would observe. Because the mental element of criminal behavior may involve unintentional as well as intentional behavior, it is often referred to as mens rea or "guilty mind."

Model Penal Code Section 2.02

Model Penal Code Section 2.02 sets forth four levels of mens rea, from the most serious to the least serious: **purposely**, **knowingly**, **recklessly**, and **negligently**. Most jurisdictions have adopted at least some if not all of the definitions of Section 2.02:

MPC § 2.02-General Requirements of Culpability

(1) Minimum Requirements of Culpability. Except as provided in Section 2.05, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly, or negligently, as the law may require, with respect to each material element of the offense.

(2) Kinds of Culpability Defined.

(a) Purposely.

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

(Continued)

(Continued)

(i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and

(ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

(b) Knowingly.

A person acts knowingly with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and

(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

(c) Recklessly.

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

(d) Negligently.

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

Purposely and Knowingly

A person who acts purposely or knowingly engages in intentional behavior. These two levels of mens rea are very similar, but there is a fine distinction between the two. The person who acts purposely wants or hopes for a particular harmful result. That result is the "conscious object" of his behavior. The person who acts knowingly does not necessarily want or hope for a particular result, but is "practically certain" that his actions will cause that result.

Consider the following hypothetical:

> John wants to kill Aaron. He makes a bomb to plant in Aaron's house. The bomb is powerful enough to destroy the house and all of its occupants. On the day that John plans to activate the bomb, he knows that Aaron's wife, Sarah, is in the house. Although Sarah is not the "conscious object" of his behavior and he does not want her to die, he is "practically certain" that she will die, yet he activates the bomb anyway.

What level of mens rea describes John's state of mind toward Aaron? Toward Sarah? Is there a meaningful difference between the two? These two levels of mens rea are so similar that some statutes use both "purposely" and "knowingly." For example, the Illinois battery statutes state, "A person commits battery if he *intentionally or knowingly* without legal justification and by any means, (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual" (italics added).[8]

Recklessly and Negligently

The lowest levels of mens rea—recklessly and negligently—are similar, but the distinction between the two is not as fine as the distinction between purposely and knowingly. Reckless and negligent behaviors are both unintentional, but a person who acts recklessly has some sense of awareness. The reckless person is aware of a substantial and unjustifiable risk that a particular result will occur, but she acts anyway. She consciously disregards that risk. The person who acts negligently is clueless—she has no level of awareness. She is *not* aware of the substantial and unjustifiable risk when she acts, but she *should have* been aware of that risk.

Consider the following hypotheticals:

> Sam goes drinking with his buddies at the local bar. He has six beers and two shots of tequila. Sam is so drunk by the end of the evening that he is stumbling and slurring his words. His friends urge him to leave his car at the bar and ride with one of them. They tell him that if he drives, he is likely to injure himself or someone else, but Sam does not listen. He gets in his car and speeds off, driving about 70 miles per hour in a residential area. Sam runs a red light and hits a minivan, killing all the occupants of the car.

> Sarah and Todd are Christian Scientists. Their five-year-old daughter Megan becomes very ill with a rare disease. They take the child to the doctor and are told that she will not live if she does not have a surgical procedure. Sarah and Todd refuse to allow the procedure because it is against their religious beliefs. They honestly believe that Megan will be cured if they continue to pray. Megan dies.

Was Sam's behavior reckless or negligent? There is a strong argument that Sam acted recklessly. Surely he was aware of the dangers of driving while intoxicated. Even if he was not, his friends told him that he would likely injure someone if he drove, yet he disregarded their advice.

Were Sarah and Todd reckless or negligent? Most likely they acted negligently. They were not aware of a substantial and unjustifiable risk that Megan would die. They honestly believed that prayer would cure her.

Many scholars believe that negligent behavior should not be punished in the criminal law. They believe that people who act negligently should be sued in civil court instead because it seems unfair to punish individuals who act without any awareness of the harm that they will cause. Although there are some crimes that punish negligent behavior, the mens rea for most crimes is either purposefully, knowingly, or recklessly. Often crimes that punish negligent behavior require "gross" negligence—a higher level of negligence than is required in civil cases.

General Versus Specific Intent Crimes

Some jurisdictions, generally those that do not follow the Model Penal Code, distinguish between general and specific intent crimes. General intent crimes are those which only require a mental state that pertains to the act that causes the harm of the criminal offense. For example, the crime of breaking and entering is a general intent crime because it only requires that the person intend to break and enter a particular building or structure. Specific intent crimes involve the general intent to do the act that causes the harm plus some additional special mental element. Common law burglary

(which will be discussed in detail in Chapter 5) is a specific intent crime because it involves breaking and entering of the dwelling of another *with the intent to commit a felony therein* (italics added). If the actor does not have the additional intent to commit a felony while breaking and entering, he has not committed the crime of burglary. Other specific intent crimes include possession with the intent to distribute an illegal substance and driving under the influence of alcohol. Although there are other definitions of general and specific crimes, these definitions are the most common. The distinction is only important when considering whether the defendant may present certain defenses. For example, the defense of voluntary intoxication is only permitted for specific intent crimes.

Proving Intent

The state must prove each element of an offense beyond a reasonable doubt. If there are witnesses to the crime or a videotape, proving the actus reus may not be difficult. But how does the prosecution prove what is in the defendant's mind? In the absence of a confession to the required mens rea or the testimony of a mind reader, how does the state prove this element? The following case addresses this issue.

People v. Conley (1989)

Illinois Appellate Court

543 N.E. 2d 1138

The defendant was charged with aggravated battery in connection with a fight which occurred at a party on September 28, 1985, in unincorporated Orland Township. Approximately two hundred high school students attended the party and paid admission to drink unlimited beer. One of those students, Sean O'Connell, attended the party with several friends. At some point during the party, Sean's group was approached by a group of twenty boys who apparently thought that someone in Sean's group had said something derogatory. Sean's group denied making a statement and said they did not want any trouble. Shortly thereafter, Sean and his friends decided to leave and began walking toward their car which was parked a half block south of the party.

A group of people were walking toward the party from across the street when someone from that group shouted "there's those guys from the party." Someone emerged from that group and approached Sean who had been walking with his friend Marty Carroll ten to fifteen steps behind two other friends, Glen Mazurowski and Dan Scurio. That individual demanded that Marty give him a can of beer from his six-pack. Marty refused, and the individual struck Sean in the face with a wine bottle causing Sean to fall to the ground. The offender attempted to hit Marty, but missed as Marty was able to duck. Sean had sustained broken upper and lower jaws and four broken bones in the area between the bridge of his nose and the lower left cheek. Sean lost one tooth and had root canal surgery to reposition ten teeth that had been damaged. Expert testimony revealed that Sean has a permanent condition called mucosal mouth and permanent partial numbness in one lip. The expert also testified that the life expectancy of the damaged teeth might be diminished by a third or a half.

The jury returned a guilty verdict for aggravated battery based on permanent disability . . . The defendant initially contends on appeal that the State failed to prove beyond a reasonable doubt that Sean O'Connell incurred a permanent disability. Section 12–4(a) of the Criminal Code of 1961 provides that: "[a] person who, in committing

a battery, intentionally or knowingly causes great bodily harm, or permanent disability or disfigurement commits aggravated battery." (Ill.Rev.Stat. (1983) ch. 38, par. 12–4(a).) The defendant contends there must be some disabling effect for an aggravated battery conviction based on permanent disability. The defendant does not dispute that Sean lost a tooth or that surgery was required to repair damaged teeth. The defendant also does not dispute that Sean will have permanent partial numbness in one lip or suffer from a condition called mucosal mouth. The defendant maintains, however, that there is no evidence as to how these injuries are disabling because there was no testimony of any tasks that can no longer be performed as a result of these injuries. . . . It seems apparent that for an injury to be deemed disabling, all that must be shown is that the victim is no longer whole such that the injured bodily portion or part no longer serves the body in the same manner as it did before the injury. Applying this standard to the case at hand, the injuries Sean O'Connell suffered are sufficient to constitute a permanent disability. Sean will endure permanent partial numbness in one lip and mucosal mouth. He lost one tooth and there is also a chance he may lose some teeth before attaining the age of seventy.

The defendant further argues that the State failed to prove beyond a reasonable doubt that he intended to inflict any permanent disability. The thrust of defendant's argument is that under section 12–4(a), a person must intend to bring about the particular harm defined in the statute. The defendant asserts that while it may be inferred from his conduct that he intended to cause harm, it does not follow that he intended to cause permanent disability. The State contends it is not necessary that the defendant intended to bring about the particular injuries that resulted. The State maintains it met its burden by showing that the defendant intentionally struck Sean.

For proper resolution of this issue, it is best to return to the statutory language. Section 12–4(a) employs the terms "intentionally or knowingly" to describe the required mental state. The relevant statutes state:

> "4–4. Intent. A person intends, or acts intentionally or with intent, to accomplish a result or engage in conduct described by the statute defining the offense, when his conscious objective or purpose is to accomplish that result or engage in that conduct." (Ill.Rev.Stat.1987, ch. 38, par. 4–4.)
>
> "4–5. Knowledge. A person knows or acts knowingly or with knowledge of: (b) The result of his conduct, described by the statute defining the offense, when he is consciously aware that such result is practically certain to be caused by his conduct." (Ill.Rev.Stat.1987, ch. 38, par. 4–5.)

Section 12–4(a) defines aggravated battery as the commission of a battery where the offender intentionally or knowingly causes great bodily harm, or permanent disability or disfigurement. Because the offense is defined in terms of result, the State has the burden of proving beyond a reasonable doubt that the defendant either had a "conscious objective" to achieve the harm defined, or that the defendant was "consciously aware" that the harm defined was "practically certain to be caused by his conduct." . . .

Although the State must establish the specific intent to bring about great bodily harm, or permanent disability or disfigurement under section 12–4(a), problems of proof are alleviated to the extent that the ordinary presumption that one intends the natural and probable consequences of his actions shifts the burden of production, though not persuasion, to the defendant. . . . If the defendant presents evidence contrary to the presumption, then the presumption ceases to have effect, and the trier of fact considers all the evidence and the natural inferences drawn therefrom. . . . .Intent can be inferred from the surrounding circumstances, the offender's words, the weapon used, and the force of the blow. . . . As the defendant's theory of the case was mistaken identity, there was no evidence introduced negating the presumption of intent. However, even if Conley had denied any intention to inflict permanent disability, the surrounding circumstances, 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. Therefore, we find the evidence sufficient to support a finding of intent to cause permanent disability beyond a reasonable doubt.

The judgment of the circuit court is affirmed.

Questions

1. What issues did Mr. Conley raise on appeal?
2. What was the court's rationale in rejecting the appellant's arguments?
3. After reading *Conley*, what did you learn about how the state proves mens rea in a criminal case?

Concurrence and Causation

Concurrence

A criminal act occurs when there is a voluntary act (or omission) that causes the resulting harm, a guilty state of mind, and the concurrence of the two. Mary commits a burglary when she breaks and enters John's house with the intent to steal his expensive flat screen television set. If she breaks and enters the house with the intent of taking a nap on John's sofa, she is not guilty of burglary, even if she decides to steal the television set after she wakes up from her nap. She would be guilty of theft of the television and breaking and entering, but not of burglary.

One exception to the concurrence rule is the continuing trespass doctrine. This doctrine is often applied in cases involving theft of property, when the thief forms the intent to deprive his victim of his property after he takes the property. As you will learn in Chapter 5, a person commits the crime of theft only when he takes property with the intent to permanently deprive the victim of the property. So if Tom takes Jerry's bike without Jerry's permission, it is considered a wrongful or trespassory taking. But if at the time Tom takes the bike, he only intends to borrow it for thirty minutes and then return it, he has not committed the crime of theft. Suppose that after Tom takes the bike, he decides to keep it? In that case, there is no concurrence of the act and the guilty state of mind. However, the continuing trespass doctrine establishes that Tom is guilty of theft by attributing his subsequent decision to permanently deprive Jerry of the bike back to the time when he originally took the bike without permission.

Causation

Unlike concurrence, causation can sometimes be a complicated issue in criminal cases. There is no criminal liability if the act or omission of the accused did not cause the resulting harm. In some cases, causation is clear. Jim takes out his pistol and shoots Dan in the head. Dan falls and dies instantly. Jim clearly caused Dan's death. But suppose Jim shoots Dan in the head, and Dan is rushed to the hospital. Dan is rushed to the operating room where surgery is performed. He dies during the surgery. It is later discovered that the surgery was unsuccessful because of the surgeon's negligence. Did Jim or the negligent surgeon cause Dan's death?

There are two types of causation in the criminal law: actual or **"but for" causation** and **proximate causation**. The defendant may not be found guilty of the crime unless the prosecutor proves both types of causation beyond a reasonable doubt. If the resulting harm would not have occurred but for the actions of the defendant, then actual causation is proven. The defendant's act (or omission) must not only be the actual cause of the harm, but it must be the proximate or direct cause as well. Proximate causation is at issue when other acts or omissions that occur after the defendant's act or omission contribute to the resulting harm. In the example above, Jim and the surgeon may have caused Dan's death. The question is whether the defendant should be held criminally liable if some other intervening cause appears to have contributed to the resulting harm. Was Jim's act the proximate cause of death, or should the surgeon's negligent act relieve Jim of criminal liability? The following case illustrates the complexities of proximate causation.

People v. Kibbe (1974)

N. Y. Court of Appeals

321 N.E.2d 773

During the early evening the defendants were drinking in a Rochester tavern along with the victim, George Stafford. The bartender testified that Stafford was displaying and "flashing" one hundred dollar bills, was thoroughly intoxicated and was finally "shut off" because of his inebriated condition. At some time between 8:15 and 8:30 p.m., Stafford inquired if someone would give him a ride to Canandaigua, New York, and the defendants, who, according to their statements, had already decided to steal Stafford's money, agreed to drive him there in Kibbe's automobile. The three men left the bar and proceeded to another bar where Stafford was denied service due to his condition. The defendants and Stafford then walked across the street to a third bar where they were served, and each had another drink or two.

After they left the third bar, the three men entered Kibbe's automobile and began the trip toward Canandaigua. Krall drove the car while Kibbe demanded that Stafford turn over any money he had. In the course of an exchange, Kibbe slapped Stafford several times, took his money, then compelled him to lower his trousers and to take off his shoes to be certain that Stafford had given up all his money; and when they were satisfied that Stafford had no more money on his person, the defendants forced Stafford to exit the Kibbe vehicle.

As he was thrust from the car, Stafford fell onto the shoulder of the rural two-lane highway on which they had been traveling. His trousers were still down around his ankles, his shirt was rolled up towards his chest, he was shoeless and he had also been stripped of any outer clothing. Before the defendants pulled away, Kibbe placed Stafford's shoes and jacket on the shoulder of the highway. Although Stafford's eyeglasses were in the Kibbe vehicle, the defendants, either through inadvertence or perhaps by specific design, did not give them to Stafford before they drove away. It was some time between 9:30 and 9:40 p.m. when Kibbe and Krall abandoned Stafford on the side of the road. The temperature was near zero, and, although it was not snowing at the time, visibility was occasionally obscured by heavy winds which intermittently blew previously fallen snow into the air and across the highway; and there was snow on both sides of the road as a result of previous plowing operations. The structure nearest the point where Stafford was forced from the defendants' car was a gasoline service station situated nearly one half of a mile away on the other side of the highway. There was no artificial illumination on this segment of the rural highway.

At approximately 10:00 p.m. Michael W. Blake, a college student, was operating his pickup truck in the northbound lane of the highway in question. Two cars, which were approaching from the opposite direction, flashed their headlights at Blake's vehicle. Immediately after he had passed the second car, Blake saw Stafford sitting in the road in the middle of the northbound lane with his hands up in the air. Blake stated that he was operating his truck at a speed of approximately 50 miles per hour, and that he "didn't have time to react" before his vehicle struck Stafford. After he brought his truck to a stop and returned to try to be of assistance to Stafford, Blake observed that the man's trousers were down around his ankles and his shirt was pulled up around his chest. A deputy sheriff called to the accident scene also confirmed the fact that the victim's trousers were around his ankles, and that Stafford was wearing no shoes or jacket.

At the trial, the Medical Examiner of Monroe County testified that death had occurred fairly rapidly from massive head injuries. In addition, he found proof of a high degree of intoxication with a .25%, by weight, of alcohol concentration in the blood.

For their acts, the defendants were convicted of murder, robbery in the second degree and grand larceny in the third degree. However, the defendants basically challenge only their convictions of murder, claiming that the People failed to establish beyond a reasonable doubt that their acts "caused the death of another," as required by the statute. . . . They contend that the actions of Blake, the driver of the pickup truck, constituted both an intervening and superseding cause which relieves them of criminal responsibility for Stafford's death.

We subscribe to the requirement that the defendants' actions must be a sufficiently direct cause of the ensuing death before there can be any imposition of criminal liability, and recognize, of course, that this standard is greater than that required to serve as a basis for tort liability. Applying these criteria to the defendants' actions, we conclude that their activities on the evening of December 30, 1970 were a sufficiently direct cause of the death of George Stafford so

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as to warrant the imposition of criminal sanctions. In engaging in what may properly be described as a despicable course of action, Kibbe and Krall left a helplessly intoxicated man without his eyeglasses in a position from which, because of these attending circumstances, he could not extricate himself and whose condition was such that he could not even protect himself from the elements. The defendants do not dispute the fact that their conduct evinced a depraved indifference to human life which created a grave risk of death, but rather they argue that it was just as likely that Stafford would be miraculously rescued by a good samaritan. We cannot accept such an argument. There can be little doubt but that Stafford would have frozen to death in his state of undress had he remained on the shoulder of the road. The only alternative left to him was the highway, which in his condition, for one reason or another, clearly foreboded the probability of his resulting death.

Under the conditions surrounding Blake's operation of his truck (i.e., the fact that he had his low beams on as the two cars approached; that there was no artificial lighting on the highway; and that there was insufficient time in which to react to Stafford's presence in his lane), we do not think it may be said that any supervening wrongful act occurred to relieve the defendants from the directly foreseeable consequences of their actions. In short, we will not disturb the jury's determination that the prosecution proved beyond a reasonable doubt that their actions came clearly within the statute (Penal Law, s 125.25, subd. 2) and "cause(d) the death of another person."

The orders of the Appellate Division should be affirmed.

Questions

1. What issue did Mr. Kibbe raise on appeal?
2. What was the court's rationale for rejecting Kibbe's argument?
3. Did the defendants intend to kill Stafford? Did they act purposely, knowingly, recklessly, or negligently?

Strict Liability

For some behaviors, criminal liability is imposed even if there is no guilty state of mind. Strict liability crimes only require that a person do a voluntary act. Persons guilty of these crimes do not act purposely, knowingly, recklessly, or negligently. They may have done something accidentally or made a mistake—even a reasonable one. Nonetheless, the criminal law holds them liable.

Some **strict liability** laws are called "regulatory" or "public welfare" laws because they are meant to assure public health and safety. For example, there are strict liability laws that prohibit the sale of alcohol to minors and punish manufacturers who sell adulterated or misbranded drugs. So if a bartender sells alcohol to a minor, she is guilty even if she honestly believes that the minor is an adult and even if any reasonable person would have shared that belief. Likewise, the manufacturer who sells contaminated drugs is guilty even if she had no idea that the drugs were contaminated and even if she took reasonable steps to assure the purity of drugs. The penalties for these regulatory strict liability crimes are almost always very minor—usually a fine.

There are a few strict liability crimes that carry stiff penalties, including prison time. Statutory rape, or sex with a minor child, is one such crime. Rape and other sex offenses will be discussed in detail in Chapter 7. You will learn that the crime of rape involves sexual intercourse by force or threat of force and without consent. Consent is usually a defense to rape of an adult, but it is not a defense to sex with a minor child. The fact that the child appeared to be an adult is no defense. Even if the mistake was a reasonable one under the circumstances, many jurisdictions will hold the defendant strictly liable. Some states permit a defense of reasonable mistake in these cases, particularly when there is not much of an age difference between the defendant and the alleged victim.

The purpose of strict liability crimes is the protection of the public, and in the case of statutory rape, the protection of young children. If the manufacturer knows that he will be held strictly liable for distributing adulterated drugs, he will be motivated to

take particular care to assure that his products are safe and pure. Likewise, adults will make sure that the individuals with whom they have sex are over the age of consent, and bartenders will take similar precautions when serving alcoholic drinks.

The following case illustrates some of the problems inherent in strict liability offenses.

Garnett v. State (1993)

Maryland Court of Appeals

332 Md. 571

Maryland's "statutory rape" law prohibiting sexual intercourse with an underage person is codified in Maryland Code (1957, 1992 Repl.Vol.) Art. 27, § 463, which reads in full:[9]

> "Second degree rape.
>
> (a) *What constitutes.*—A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person:
>
> (1) By force or threat of force against the will and without the consent of the other person; or
>
> (2) Who is mentally defective, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know the other person is mentally defective, mentally incapacitated, or physically helpless; or
>
> (3) Who is under 14 years of age and the person performing the act is at least four years older than the victim.
>
> (b) *Penalty.*—Any person violating the provisions of this section is guilty of a felony and upon conviction is subject to imprisonment for a period of not more than 20 years."

Subsection (a)(3) represents the current version of a statutory provision dating back to the first comprehensive codification of the criminal law by the Legislature in 1809. Now we consider whether under the present statute, the State must prove that a defendant knew the complaining witness was younger than 14 and, in a related question, whether it was error at trial to exclude evidence that he had been told, and believed, that she was 16 years old.

Raymond Lennard Garnett is a young retarded man. At the time of the incident in question he was 20 years old. He has an I.Q. of 52. His guidance counselor from the Montgomery County public school system, Cynthia Parker, described him as a mildly retarded person who read on the third-grade level, did arithmetic on the fifth-grade level, and interacted with others socially at school at the level of someone 11 or 12 years of age. Ms. Parker added that Raymond attended special education classes and for at least one period of time was educated at home when he was afraid to return to school due to his classmates' taunting. Because he could not understand the duties of the jobs given him, he failed to complete vocational assignments; he sometimes lost his way to work. As Raymond was unable to pass any of the State's functional tests required for graduation, he received only a certificate of attendance rather than a high-school diploma.

In November or December 1990, a friend introduced Raymond to Erica Frazier, then aged 13; the two subsequently talked occasionally by telephone. On February 28, 1991, Raymond, apparently wishing to call for a ride home, approached the girl's house at about nine o'clock in the evening. Erica opened her bedroom window, through which Raymond entered; he testified that "she just told me to get a ladder and climb up her window." The two talked, and later engaged in sexual intercourse. Raymond left at about 4:30 a.m. the following morning. On November 19, 1991, Erica gave birth to a baby, of which Raymond is the biological father.

Raymond was tried before the Circuit Court for Montgomery County (Miller, J.) on one count of second degree rape under § 463(a)(3) proscribing sexual intercourse between a person under 14 and another at least four years older than the complainant. At trial, the defense twice proffered evidence to the effect that Erica herself and her friends had previously told Raymond that she was 16 years old, and that he had acted with that belief. The trial court excluded such evidence as immaterial, explaining:

"Under 463, the only two requirements as relate to this case are that there was vaginal intercourse, [and]

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that . . . Ms. Frazier was under 14 years of age and that . . . Mr. Garnett was at least four years older than she.

"In the Court's opinion, consent is no defense to this charge. The victim's representation as to her age and the defendant's belief, if it existed, that she was not under age, what amounts to what otherwise might be termed a good faith defense, is in fact no defense to what amount[s] to statutory rape.

"It is in the Court's opinion a strict liability offense."

The court found Raymond guilty. It sentenced him to a term of five years in prison, suspended the sentence and imposed five years of probation, and ordered that he pay restitution to Erica and the Frazier family. Raymond noted an appeal; we granted certiorari prior to intermediate appellate review by the Court of Special Appeals to consider the important issue presented in the case. . . . .

Section 463(a)(3) does not expressly set forth a requirement that the accused have acted with a criminal state of mind, or *mens rea.* The State insists that the statute, by design, defines a strict liability offense, and that its essential elements were met in the instant case when Raymond, age 20, engaged in vaginal intercourse with Erica, a girl under 14 and more than 4 years his junior. Raymond replies that the criminal law exists to assess and punish morally culpable behavior. He says such culpability was absent here. He asks us either to engraft onto subsection (a)(3) an implicit *mens rea* requirement, or to recognize an affirmative defense of reasonable mistake as to the complainant's age. Raymond argues that it is unjust, under the circumstances of this case which led him to think his conduct lawful, to brand him a felon and rapist.

Raymond asserts that the events of this case were inconsistent with the criminal sexual exploitation of a minor by an adult. As earlier observed, Raymond entered Erica's bedroom at the girl's invitation; she directed him to use a ladder to reach her window. They engaged voluntarily in sexual intercourse. They remained together in the room for more than seven hours before Raymond departed at dawn. With an I.Q. of 52, Raymond functioned at approximately the same level as the 13-year-old Erica; he was mentally an adolescent in an adult's body. Arguably, had Raymond's chronological age, 20, matched his socio-intellectual age, about 12, he and Erica would have fallen well within the four-year age difference obviating a violation of the statute, and Raymond would not have been charged with any crime at all.

To be sure, legislative bodies since the mid-19th century have created strict liability criminal offenses requiring no *mens rea.* Almost all such statutes responded to the demands of public health and welfare arising from the complexities of society after the Industrial Revolution. Typically misdemeanors involving only fines or other light penalties, these strict liability laws regulated food, milk, liquor, medicines and drugs, securities, motor vehicles and traffic, the labeling of goods for sale, and the like. . . . Statutory rape, carrying the stigma of felony as well as a potential sentence of 20 years in prison, contrasts markedly with the other strict liability regulatory offenses and their light penalties.

We think it sufficiently clear . . . that Maryland's second degree rape statute defines a strict liability offense that does not require the State to prove *mens rea;* it makes no allowance for a mistake-of-age defense. The plain language of § 463, viewed in its entirety, and the legislative history of its creation lead to this conclusion.

Section 463(a)(3) prohibiting sexual intercourse with underage persons makes no reference to the actor's knowledge, belief, or other state of mind. As we see it, this silence as to *mens rea* results from legislative design. First, subsection (a)(3) stands in stark contrast to the provision immediately before it, subsection (a)(2) prohibiting vaginal intercourse with incapacitated or helpless persons. In subsection (a)(2), the Legislature expressly provided as an element of the offense that "the person performing the act *knows or should reasonably know* the other person is mentally defective, mentally incapacitated, or physically helpless." Code, § 463(a)(2) (emphasis added). In drafting this subsection, the Legislature showed itself perfectly capable of recognizing and allowing for a defense that obviates criminal intent; if the defendant objectively did not understand that the sex partner was impaired, there is no crime. That it chose not to include similar language in subsection (a)(3) indicates that the Legislature aimed to make statutory rape with underage persons a more severe prohibition based on strict criminal liability.

Maryland's second degree rape statute is by nature a creature of legislation. Any new provision introducing an element of *mens rea,* or permitting a defense of reasonable mistake of age, with respect to the offense of sexual intercourse with a person less than 14, should properly result from an act of the Legislature itself, rather than judicial fiat. Until then, defendants in extraordinary cases, like Raymond, will rely upon the tempering discretion of the trial court at sentencing.

Questions

1. How does the court distinguish Maryland's statutory rape law from other strict liability crimes?
2. What is the court's rationale for affirming Mr. Garnett's conviction?
3. What does the court mean when it notes, "Defendants in extraordinary cases, like Raymond, will rely upon the tempering discretion of the trial court at sentencing"?

In the following excerpt from her article "Incomprehensible Crimes: Defendants With Mental Retardation Charged With Statutory Rape," Professor Elizabeth Nevins-Saunders proposes that the strict liability standard should not apply in statutory rape cases involving defendants who are mentally retarded:

"Incomprehensible Crimes: Defendants With Mental Retardation Charged With Statutory Rape" by Elizabeth Nevin-Saunders

There are at least three different options for dealing with defendants with mental retardation charged with statutory rape, and each addresses a different point in the legal process. First, judges and prosecutors could use their discretion to pursue the prosecution only of defendants who are truly morally culpable. Second, legislators could modify sentencing schemes applied to these defendants. Finally, judges or legislators could interpret or change the governing rule of statutory rape (or the elements of the crime) to require consideration of the effect of a defendant's mental retardation.

All three of these options have limitations, not the least of which is the determination of when a defendant is or should be considered mentally retarded. Each option, however, improves the current model of holding a defendant strictly liable—and often subject to significant penalties—regardless of his mental capacity and blameworthiness. I argue that the first two of these options are variations on the status quo and, by themselves, are insufficient responses to the issues raised in this Article. The third option, however—injecting a *mens rea* element into statutory rape for defendants with mental retardation—is an effective way to address the policy and constitutional concerns underlying the prosecution and sentencing of defendants with mental retardation for statutory rape. . . . In these cases, the government should have to prove that a defendant with mental retardation actually knew the complainant was underage and that her age meant she could not legally consent to sex. In essence, this burden merely requires the government to demonstrate that the assumptions underlying the strict liability standard are well founded. Significantly, if the prosecutor cannot make this case, the defendant may not necessarily be completely free, for the government could always seek supervision of the individual through civil commitment.

Change the Gatekeeping

One potential solution to the problems explored above is to rely on prosecutors and judges to use their discretion to prosecute only those defendants revealed to be truly culpable. In some ways, designating prosecutors and judges as gatekeepers makes sense. Yet in the final analysis, this "solution" is ineffective, in large part because there are too many incentives for these institutional actors not to act on behalf of this class of defendant.

Scholars widely acknowledge that prosecutors already exercise a gatekeeping function in virtually all criminal prosecutions. In their decision to charge a crime at all, or to treat it as a misdemeanor, felony, or case for diversion, prosecutors regularly exercise vast discretion. Further, at least in theory, the prosecutor's mission "is not that [he] shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer." This mission, along with knowledge of the defendant, the factual allegations, and the victim, arguably places prosecutors in the best position to make a decision as to which defendants are most appropriate for prosecution. According to this logic, a case in which a person with mental retardation was not fully aware of the meaning and consequences of his actions would be highly unlikely to work its way through the justice system at all, as prosecutors would decline to prosecute either through dismissal of the case or diversion of the defendant. . . .

While there are no statistics concerning the number of defendants with mental retardation charged with (or convicted of) statutory rape, it is clear that such discretion is frequently not exercised.

Some skeptics, believing the population of people with mental retardation in the criminal justice system to be relatively insignificant, might argue that the numbers do not justify a full prosecutorial or judicial policy, particularly if the policy is limited to statutory rape cases. But without a formal policy change, a prosecutor has virtually no incentive to abandon a strict liability standard in these cases. As some commentators and courts have noted, the standard "affords both an efficient

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and nearly guaranteed way to convict defendants." In a statutory rape case, a strict liability standard alleviates the prosecutor's burden to prove intent—often the most difficult element of a criminal case—as well as force or lack of consent. Of course, prosecutors, many of whom are elected, face political pressure to enhance their office's record of convictions and to prosecute crime vigorously. Nowhere is this more true than with regard to defendants alleged to have raped a child, where public pressure often compels an aggressive response.

Change the Sentencing Scheme

Altering the sentencing scheme as applied to defendants with mental retardation is another possible way for the criminal justice system to account for the fact that people with mental retardation who are convicted of statutory rape are likely to be different from defendants of average intelligence in ways that affect their individual moral culpability. As with the other alternatives, however, there are both advantages and disadvantages to seeking change through sentencing. While I recommend that sentencing adjustments be made in addition to modifications to the elements constituting the crime of statutory rape, even by themselves, sentencing tools could be used to improve outcomes for this class of defendants.

As with the gatekeeping solution, the danger is that the reliance on discretion—particularly unfettered discretion—does not guarantee that justice will be done. Indeed, there may be reason to fear that jurors, or even judges, will sentence more, rather than less, harshly because of the defendant's mental retardation if they have the option to do so. The difficulty is in ensuring that judges, juries, and litigants are appropriately trained to deal with people with mental retardation and that their discretion is cabined with guidelines that encourage or mandate—rather than merely permit—mitigation due to a defendant's mental retardation. For this to occur, there may well need to be some policy or legislative change through training, statutes, or administrative rules.

There are dangers to focusing exclusively on sentencing reform as a remedy because sentencing comes at the end of the criminal justice process. First, this means that a defendant will be subjected to a traumatic criminal justice process that he may have failed to fully understand. Second, while sentencing reform may ameliorate some of the concerns regarding the imposition of a strict liability standard on defendants with mental retardation, it does not address those concerns as directly as would a rule adding a subjective *mens rea* element to the crime of statutory rape.

Change the Rule

The best remedy for the problematic strict liability standard for statutory rape is to modify the liability rule for people with mental retardation who are accused of the offense. To accomplish such a change, courts or legislatures could (1) create a blanket, per se rule absolving all people with mental retardation of criminal responsibility for statutory rape (making them subject to prosecution only under "regular" rape laws) or (2) change the elements of the offense specifically for people with mental retardation. . . . The only meaningful way to address the difference in culpability of most people with mental retardation is to require prosecutors to prove that defendants exhibited a truly "guilty" mind.[10]

Questions

1. Professor Nevins-Saunders proposes that mentally retarded defendants should not be held strictly liable in cases involving statutory rape. Do you agree or disagree with her approach?
2. What are Professor Nevins-Saunders three suggestions for dealing with mentally retarded defendants in statutory rape cases?
3. Should statutory rape be a strict liability crime? Why or why not?

Concluding Note

Think of the elements of a crime as the parts or components that must all be present before any act may be called a crime. A person who is alleged to have committed a crime may not be convicted unless and until a prosecutor proves each one of these necessary components beyond a reasonable doubt. In the upcoming chapters, you will

learn about different crimes—theft, robbery, rape, murder, and many more. You will apply what you have learned in this chapter as you learn the elements of each of these crimes. Now test yourself on the material we have covered in this chapter. Good luck with the Issue Spotter exercise.

IssueSpotter

Read the hypothetical and spot the issues discussed in this chapter.

Abandoned Baby

Donna Lewis was a single mother who lived in New Town with her daughters, sixteen-year-old Wanda and three-year-old Tina. Donna was an unemployed dancer and was on welfare. Wanda had been having problems in school and was suspended twice for fighting. Donna suspected that Wanda was using drugs and on one occasion found methamphetamine (also known as crystal meth) in Wanda's bedroom. Donna sought help for Wanda, but Wanda never attended the Narcotics Anonymous meetings at the local community center as she was instructed to do. On occasion, Donna left little Tina with Wanda for short periods of time while she went out job hunting.

One day, Donna got a call from her old friend Sharon Rogers who lived in Las Vegas. Sharon told Donna about an opening in a chorus line at the Starlight Hotel in Las Vegas. Sharon told Donna that she knew the manager and could practically guarantee that Donna would be hired. The only catch was that Donna had to come out to Las Vegas within twenty-four hours. Donna borrowed money for the plane ticket from a friend, packed her bags, and instructed Wanda to take care of Tina until she got back. Donna promised to call Wanda as soon as she got to Las Vegas and to send for Wanda and Tina as soon as she could get the money for their airfare.

Donna was hired shortly after her audition and moved in with her friend Sharon. She was so excited, she forgot to call Wanda. Donna had not left a phone number where she could be reached. Three days passed and Donna never called home. Wanda began to get angry. She was getting tired of taking care of Tina. The food in the apartment was running low, and Wanda didn't have much money.

Wanda's friend Robin came to visit four days after Donna left town and offered Wanda some crystal meth to cheer her up. The two of them smoked meth in the apartment for several hours. Totally under the influence of the drug, Wanda went to a party with Robin, leaving Tina alone in the apartment. She then went home with Robin where she stayed for the next three days, smoking meth and drinking vodka. Wanda never went back to the apartment, leaving Tina in her crib with no food or water.

On the third day after Wanda left, the landlord entered the apartment and found Tina dead in her crib. An autopsy report revealed that she died from dehydration and malnutrition. Neighbors told the police that they had heard little Tina crying for a long time several days before. They had not come to check on her because Tina always cried a lot, they assumed someone was home with her, and they couldn't have entered the apartment anyway since the door was locked.

The police located Wanda, and Donna returned home after hearing a news report about Tina's death. Both Wanda and Donna gave statements to the police consistent with the aforementioned facts. In addition, Donna told the police she did not call or send for Wanda and Tina because she had not saved enough money and believed that Wanda would take care of Tina.

In New Town, involuntary manslaughter is defined as follows:

> A person is guilty of involuntary manslaughter when, as a direct result of the doing of an act in a reckless or grossly negligent manner, he causes the death of another person.

You are the prosecutor in New Town. You are considering charging Wanda and/or Donna with involuntary manslaughter.

1. What arguments would you make in support of charging Donna?
2. What arguments would you make in support of charging Wanda?
3. Use the cases and other materials in this chapter to support your arguments.

Key Terms and Cases

Notes

1. *Martin v. State*, 31 Ala. App. 334 (Ala. Crim. App. 1944).
2. Ibid., 335.
3. Martin Gansberg, "Thirty-Eight Who Saw Murder Didn't Call the Police," *New York Times*, March 27, 1964, http://www2.southeastern.edu/Academics/Faculty/scraig/gansberg.html
4. Rachel Manning, Mark Levin, and Alan Collins, "The Kitty Genovese Murder and the Social Psychology of Helping: The Parable of the 38 Witnesses," *American Psychologist* 62, no. 6 (2007): 555–562.
5. *Jones v. United States* 308 F.2d 307, 310 (D.C. Cir. 1962).
6. Cathy Booth, "The Bad Samaritan," *Time*, September 7, 1998, http://content.time.com/time/magazine/article/0,9171,989037,00.html
7. Ibid.
8. Ill.Rev.Stat.1983, ch. 38, par. 12–3(a).
9. Maryland's rape statute has since been revised. The term *statutory rape* is no longer used. See Md. Code, Com. Law §3–305.
10. Elizabeth Nevins Saunders, "Incomprehensible Crimes: Defendants with Mental Retardation Charged with Statutory Rape," *NYU Law Review* 85, no. 4 (2010): 1067.