CHAPTER 3

BASIC REQUIREMENTS OF A CRIMINAL ACT

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After reading this chapter, you should be able to
- Identify the two requisites of each crime.
- Explain the meaning of *actus reus* and *mens rea*.
- Understand what constitutes an act for purposes of criminal behavior.
- Explain the concept of a legal duty to act.
- Know the requirements of a voluntary act.
- Understand the distinction between intention and intent.
- Explain how motive differs from intent.
- Know the different types of intent involved in criminal behavior.
- Understand the terms “willful” and “knowingly.”
- Explain what constitutes recklessness and criminal negligence.
- Describe the rationale for strict liability crimes.

KEY TERMS

After reading this chapter, you should understand the following key terms:

* **actus reus**: An illegal act; the act or failure to act that constitutes the crime.

* **constructive intent**: A principle of law that refers to those situations where the actor does not intend any harm but should have known that his or her behavior created a high risk of harm to others.

* **criminal sanction**: The punishment that is associated with being convicted of a crime.

* **culpability**: Blameworthiness for criminal conduct based on *mens rea*.

* **elements of a crime**: The parts of a crime that the prosecution must establish to obtain a conviction. If any one element of a crime cannot be established by the prosecution, then a finding of not guilty must be entered as to that crime.

* **general intent**: A concept employed by the courts to explain the required criminal intent for a defendant to be convicted of a certain crime, by which the government is not required to prove that the defendant intended to bring about a particular intent.

* **legal causation**: A cause recognized by law as necessary to impose criminal liability.

* **mala in se**: Crimes that are inherently bad: for example, murder, rape, and theft.

* **mala prohibita**: Acts that are crimes only because the government has declared them criminal. Acts that are not inherently bad: for example, hunting without a license.
**mens rea**: The required mental state necessary to constitute a crime.

**negligence**: The unconscious creation of risk, or the mental state in which the actor unknowingly creates a substantial and unjustifiable risk of harm to others.

**recklessness**: The conscious creation of substantial and unjustifiable risk.

**specific intent**: The intent to accomplish a specific purpose as an element of a crime.

**strict liability crimes**: Those crimes that require no proof of culpability or state of mind and are justified on the basis of the need to encourage extremely high standards of care for the protection of the public.

**transferred intent**: A principle of law that transfers the intent to harm to the person actually harmed. Involves a situation where a person intends to injure one person and mistakenly injures a third person.

A man may have as bad a heart as he chooses, if his conduct is within rules.

*Oliver Wendell Holmes, “Natural Laws,” in Collected Legal Papers, 1921*

There are two requisites of each crime: the required act or failure to act (actus reus) and the required mental state (mens rea). To state this another way, a defendant is not guilty of an offense unless he or she committed the wrongful act with the required mental state or culpability. Accordingly, before a defendant may be found guilty in a criminal trial, the prosecution must establish beyond a reasonable doubt the required actus reus and the required mens rea. In this chapter, we will examine those two requisites along with the associated rules of criminal responsibility.

**ACT—ACTUS REUS**

If the law was so restricted (to punish bad thoughts), it would be utterly intolerable: all mankind would be criminals, and most of their lives would be passed in trying and punishing each other. . . .

*James Fitzjames Stephen, History of Criminal Law in England, 1883*

The Latin term actus reus was not actively used by scholars prior to the twentieth century. It is currently used in most works on criminal law in the United States. Unfortunately, it has no single accepted meaning. Since it has no universally accepted meaning, many courts and commentators use the term more narrowly to simply describe the defendant’s conduct or the results of that conduct rather than the combination of both. The term actus reus literally means “guilty act.” It is more than voluntary muscular contractions (voluntary movement). The actus reus includes three ingredients of a crime:

1. a voluntary act or a failure to perform a voluntary act that one has a legal duty to perform
2. that causes
3. social harm

*Actus reus* can be conceptualized as including both muscular contractions and the circumstances and consequences associated with the contractions.

The justification for requiring *actus reus* is to prevent punishing a person merely for his or her thoughts. An old legal maxim says that you cannot be punished for your evil thoughts, but you may be punished for any actions associated with your evil thoughts. An additional justification is based on the concept that criminal law should not be so broad as to reach those people who entertain criminal schemes in the mind only but never allow the thoughts to govern their conduct. The practical reason for the *actus reus* requirement is that, until a person does something, we have no objective proof of the seriousness of his or her thoughts. Haven’t we all at one time or another thought about “choking someone”?

**Voluntary Acts**

The act necessary to constitute a crime varies with each crime and is generally specified in the statute that establishes it. For example, as this text will discuss, burglary is the entering of a building with the intent to commit certain offenses. In this crime, the *actus reus* is the entering of the building with the required criminal intent.

Involuntary movement normally is not sufficient to cause criminal liability. For example, C shoves A into B. A has not committed the act necessary to establish an assault on B, since A’s act was involuntary. A classic example of an involuntary movement is a muscle spasm that causes a pistol to discharge, thereby killing someone; this is not an act sufficient to establish murder. Most authorities acknowledge that mere reflex is not a voluntary act.

In some crimes, the act of speaking can be the act underlying the crime. In others, possession of something that is illegal may be an act sufficient to constitute a crime.

**Acts of Omission**

Criminal liability can be based on a failure to act (act of omission) when the individual has a legal duty to do so. Note that there must first be a legal duty to act. A moral duty is insufficient to establish criminal liability. For example, if a medical doctor is a bystander who witnesses an automobile accident, he has no legal duty to render medical assistance to the injured persons. If, however, the doctor causes the accident by his negligence, then he has a duty to render aid. In the first situation, the duty to render aid is a moral duty only. In the second situation, since the doctor caused the accident, he is under a statutory duty in most states to render aid.

Legal duty to act arises in most cases from statutory sources. For example, most state vehicle codes require persons involved in an automobile accident to render aid or assistance to persons injured in the accident. Under the Internal Revenue
Defendant was drunk in his home. He was arrested by the police and taken out onto a public highway.

**ISSUE:** On these facts, can he be convicted of public drunkenness?

The court held that his appearance in public was involuntary, and therefore he had not committed the crime of public drunkenness.\(^3\)

Code, most of us are required to file tax returns. The failure to file when required is a crime. In some cases, the duty may result from the relationship of the parties. For example, parents have a duty to protect and safeguard their children. Thus, a parent generally has a duty to rescue his or her endangered child. The legal duty may also result from a contractual relationship between the parties. If a childcare worker accepts the care of a child, the worker has a reasonable duty to rescue if the child is in danger.

If one has no duty to act, but does act, then there is a legal duty to act in a reasonable manner.

**Model Penal Code (MPC 2.01)**

**Requirements of Voluntary Act**

1. A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable.

A husband was convicted of first-degree rape upon his daughter, based on a sexual relationship that had been going on for some time.

**ISSUE:** Can a wife who knows of the illegal sexual relationship be convicted as an accomplice for her failure to take any action to stop the relationship?

The court held that the wife had a duty to protect her daughter and that her failure to intervene on behalf of the child made her an accomplice.\(^4\)
BASIC REQUIREMENTS OF A CRIMINAL ACT

CASE ON POINT

THE MURDER OF KITTY GENOVESE

Kitty Genovese was murdered in New York City. She was killed on the sidewalk in front of her apartment in Queens. The attack started at 3:20 AM and continued until she died some 35 minutes later. During this period, at least thirty-seven law-abiding citizens watched the killer stalk and stab her three times. Twice during the series of assaults on her, lights turned on in nearby bedrooms interrupted the killer and frightened him off. Each time he returned to continue the assaults. Despite her cries for help, not one of the thirty-seven citizens attempted to help—not one even called the police during the attacks, although one called after her death. When asked why he did not call the police, one man stated, “I was tired.” Since none of the thirty-seven citizens had a legal duty to help, their inaction, while morally wrong, was not criminal behavior.

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

3. Liability for the commission of an offense may not be based on an omission unaccompanied by action unless:
   a. the omission is expressly made sufficient by the law defining the offense; or
   b. a duty to perform the omitted act is otherwise imposed by law.

CASE ON POINT

JONES V. UNITED STATES

Circuit Judge Wright:

. . . . There are at least four situations in which the failure to act may constitute breach of a legal duty. One can be held criminally liable: first, where a statute imposes a duty to care for another; second, where one stands in 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.

308 F.2d 307 (D.C. Cir. 1962).
4. Possession is an act, within the meaning of this Section, if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession.

**INTENT—MENS REA**

*Actus non facit reum nisi mens sit rea.*

“An act does not make (an individual) guilty, unless the mind be guilty.”

The general concept of *mens rea* is that criminal sanctions should not be imposed on those who innocently cause harm. As Justice Oliver Wendell Holmes, Jr., stated in *The Common Law*: “even a dog distinguishes between being stumbled over and being kicked.” Accordingly, for an act to be criminal, it must be accompanied by the required *mens rea*, also referred to as *culpability*. Although this concept appears clear and is generally accepted, there are many problems in applying it to particular cases. One legal scholar says that the term *mens rea* is fraught with greater ambiguity than any other legal term.

As we will show, different crimes require different degrees of intent. In addition, substantial problems are caused by the traditional use of imprecise terminology.

If a person has sufficient *mens rea* to commit a crime, but commits a lesser one, he or she will be held accountable only for the actual crime committed. A classic example in this area is the following:

If one from a housetop recklessly throws down a billet of wood upon the sidewalk where persons are constantly passing, and it falls on a person passing by and kills him, this would be murder. If instead of killing him, it inflicts only a slight injury, the party would not be convicted of murder since murder was not committed.

The term *mens rea* has been difficult for the courts and the legislatures to define: The U.S. Code takes seventy-nine words to define it. A restatement of the U.S. Code’s definition only serves to confuse readers. Many scholars consider intent and *mens rea* to be the same. Others argue that intent is only a part of *mens rea*, since it does not cover those situations where recklessness or negligence is sufficient to establish the mental requirement.

The easiest way to understand *mens rea* is to understand the four mental states that qualify as *mens rea*: general intent, specific intent, transferred intent, and constructive intent. As we note later in this chapter, constructive intent includes those situations in which recklessness or negligence is sufficient to establish *mens rea*.

In criminal law, there is a significant distinction between the words *intention* and *intent*. Intention is often equated with the mental state of specific intent, which is discussed below. Intent is also different from motive.

Motive is the desire that compels or drives a person to intend to do something. Unlike intent, motive is not an element of the crime and therefore does not
need to be proven in order to find a defendant guilty. Evidence of a motive, however, is often used to establish the existence or absence of intent.

**General Intent**

Arnold Loewy, in attempting to describe *general intent*, states: “General intent is an extraordinarily esoteric concept. It is usually employed by courts to explain criminal liability when a defendant did not intend to bring about a particular result.”

General intent, for the most part, refers to the intent to commit the act (*actus reus*) required for the crime. General intent is sufficient *mens rea* for most criminal offenses. To establish general intent, it must be shown that the defendant acted with a malevolent purpose; that is, the accused committed the required act while knowing that it was wrong. Once it is proven that the accused committed the required act, it is presumed that he or she had the necessary general intent.

It is often stated that a person is presumed to intend the natural and probable consequences of his or her knowing and deliberate acts. There is no presumption, however, that a person intended results that are not natural, reasonable, or probable consequences of voluntary acts.

**Specific Intent**

*Specific intent* refers to doing the *actus reus* with the intent to cause a particular result. The term *specific intent* is often used by the courts for crimes that require proof of a particular mental state of intent or knowledge. Unlike general intent, specific intent is not presumed but must be proven. Associated with specific intent is the requirement of scienter. *Scienter* is a legal term meaning the degree of knowledge that makes a person criminally liable for his or her physical acts. When a certain state of knowledge (scienter) is required, the prosecution must allege the existence of the scienter in the indictment (charges) against the accused. For example, in most states, the offense of battery or assault upon a police officer requires showing that the defendant knew that the victim was a police officer. This is the scienter, and it must be alleged in the pleadings. Other examples of scienter include:

- Aiding a felon (must allege and prove that the defendant knew that the person he or she was aiding was a felon).
- Refusing to assist a law enforcement officer (must allege and prove that the defendant knew that the person requesting assistance was a law enforcement officer).

Also associated with specific intent is the term *willful*. This is another one of those terms that is very perplexing. At times, it means nothing more than “intentional.” At other times, it means more, namely that the defendant intentionally caused the social harm with a bad motive. This latter meaning was applied by the U.S. Supreme Court in *United States v. Murdock*. In this case, the defendant refused
Defendants were prosecuted in the County of Maui, Hawaii, for indecent exposure. They admitted that they were sunbathing in the nude on a beach, but contended that there was no intent to expose themselves indecently. In addition, defendants contended that there was no evidence to show an intent to expose themselves indecently. The statute in question required a general intent for the essential elements of the offense. Evidence was presented in court to establish that the beach was isolated and away from the view of the adjoining road and beaches. It was accessible by a well-worn path and known to be a favorite fishing location.

**ISSUE:** Are the facts sufficient to justify an inference of intent on the part of the defendants to be seen by others?

The court held that the defendants’ actions in exposing themselves on a public beach under circumstances where they might be seen by others was sufficient to infer a general intent to offend the community’s common sense of decency.

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**Constructive Intent**

Constructive intent refers to those situations in which the actor does not intend any harm but should have known that his or her behavior created a high risk of harm. The Model Penal Code (MPC) substitutes “recklessness” for constructive intent. Under the MPC, a reckless state of mind implies that one acts without intending harm but with complete disregard for the rights and safety of others, causing harm to result.

**Criminal Negligence**

Usually, a person is not criminally liable for negligent acts. To establish criminal liability, the negligence must amount to criminal negligence. Criminal negligence, however, has no single meaning at common law. In most cases, it constitutes a gross deviation from the standard of care required of an individual. Frequently, courts describe criminal negligence as gross negligence or culpable negligence.
One court described a criminally negligent person as one who creates a substantial unjustified risk of harm to others. To be liable in civil cases for negligence, one should be but is not necessarily aware that his or her conduct constitutes an unjustified foreseeable risk. Generally, the criminal defendant is aware of the unjustified risk but proceeds anyway.

In many states, “recklessly” is a synonym for “criminally negligent.” In other states, recklessly differs from criminally negligent in that it involves greater risk taking. In those states where there is a difference between criminal negligence and recklessness, recklessness additionally requires that the defendant’s fault be subjective, in that he or she is aware that there is unjustifiable risk of danger in his or her conduct.

Transferred Intent

Transferred intent refers to the situation in which one intends to harm one person and instead harms another. In these cases, the law transfers the intent to harm to the person actually harmed. Transferred intent cases are often called “bad aim” cases because a large number involve an offender firing at one person and accidentally hitting someone else.

The doctrine of transferred intent has long been recognized in common law. For example, Sir William Blackstone stated in his commentaries on the law of England:

Thus if one shoots at A; and misses him, but kills B; this is murder; because of the previous felonious intent, which the law transfers from one to the other. The same is the case where one lays poison for A; and B, against whom the prisoner had no malicious intent, takes it, and it kills him; this is likewise murder.

Strict Liability Crimes

As Chapter 1 discussed, common law crimes are considered moral wrongs in themselves (mala in se). Traditionally, these crimes require proof of either general or specific intent. Some of the mala prohibita crimes, however, require no proof of culpability. These offenses are called “strict liability” offenses because mere proof that the act was committed is sufficient to convict an individual. No culpability or state of mind need be proven. Some criminal law writers contend that these crimes are not really crimes but only regulatory offenses.

Strict liability crimes often involve one of the following types of conduct: selling impure or adulterated food, selling prohibited beverages to minors, selling articles that are misbranded, and driving without a license.

Similar to the strict liability offenses are the vicarious liability crimes. In these crimes, the defendant is held accountable for the conduct of another, usually an
CASE ON POINT

ESTABLISHING DEFENDANT’S MENTAL STATE: STATE V. WILLIAMS

Excerpt from the trial judge’s instructions to the jury:

Often a defendant’s mental state is not conducive to demonstration through direct evidence. In criminal prosecutions, proof of a defendant’s mental state often must be inferred from the circumstances, and the jury must make its determination by both the act and by the surrounding circumstances. The key to circumstantial evidence generally, and as applied to state-of-mind questions specifically, is whether it bears a logical connection to the disputed fact. When an individual’s state of mind is at issue, a greater breadth of evidence is allowed. A court will admit circumstantial evidence that has a tendency to shed light on a defendant’s mental state or which tends fairly to explain the defendant’s actions, notwithstanding that the evidence relates to conduct that occurred before the offense. Similarly, conduct that occurs after the charged offense circumstantially may support inferences about a defendant’s state of mind.

The relevance of post-crime conduct to a defendant’s mental state is recognized when the conduct demonstrates consciousness of guilt. Flight is recognized as being a type of post-crime conduct that can demonstrate consciousness of guilt. Evidence of flight occurring after the commission of an offense has been held probative of guilt and admissible. A defendant’s post-crime conduct evidencing a guilty conscience provided a sound basis from which a jury logically could infer that a defendant was acting consistent with an admission of guilt or that the conduct was illuminating on a defendant’s earlier state of mind.

When the State alleges criminal recklessness, it must demonstrate through legally competent proofs that defendant had knowledge or awareness of, and then consciously disregarded, a substantial and unjustifiable risk.

The element of criminal recklessness differs from knowing culpability in that the latter requires a greater degree of certainty that a particular result will occur. Recklessness can generally be distinguished from purposely and knowingly based on the degree of certainty involved. Purposely and knowingly states of mind involve near certainty, while recklessness involves an awareness of a risk that is of a probability rather than certainty. Even when recklessness is the mens rea element of the crime charged, a defendant’s knowledge or awareness is material to the determination of culpability. Recklessness resembles knowledge in that both involve a state of awareness.


employee. For example, if a waiter serves adulterated food in a restaurant, the owner of the restaurant may be vicariously liable for the actions of the waiter, even though the owner did not know of the conduct. In some cases, vicarious liability is extended to the employer even in situations in which the employee deliberately disobeys the orders or instructions of the employer—for example, when a bartender disobeys the owner and sells beer to minors.
PRACTICUM 3.4

In a dispute over the quality of heroin, the defendant fired at the drug dealer. He missed the dealer but hit and killed a 12-year-old bystander.

ISSUE: Is the defendant guilty of murder with intent to kill?

Despite the argument by his counsel that the defendant had no malice toward the victim and did not intend to kill him, the defendant was convicted of murder with intent to kill. The Maryland appellate court stated that the doctrine of transferred intent has been a part of American common law since before the Revolution and continues today as part of our law.¹⁶

The justifications for strict and vicarious liability crimes are the need to encourage extremely high standards of care required for the protection of society and the difficulty of proving culpability in those cases.

Model Penal Code (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.

   a. Purposely. A person acts purposely with respect to a material element of an offense when:
      i. if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
      ii. if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.
   b. Knowingly. A person acts knowingly with respect to a material element of an offense when:
      i. if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
      ii. if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.
c. **Recklessly.** A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.

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

3. **Culpability Required Unless Otherwise Provided.** When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly, or recklessly with respect thereto.

4. **Prescribed Culpability Requirement Applies to All Material Elements.** When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all material elements of the offense, unless a contrary purpose plainly appears.

5. **Substitutes for Negligence, Recklessness, and Knowledge.** When the law provides that negligence suffices to establish an element of an offense, such element also is established if a person acts purposely, knowingly, or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts purposely or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts purposely.

6. **Requirement of Purpose Satisfied If Purpose Is Conditional.** When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense.

7. **Requirement of Knowledge Satisfied by Knowledge of High Probability.** 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, unless he actually believes that it does not exist.

8. **Requirement of Willfulness Satisfied by Acting Knowingly.** A requirement that an offense be committed willfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears.

9. **Culpability as to Illegality of Conduct.** Neither knowledge nor recklessness or negligence as to whether conduct constitutes an offense or as to the existence, meaning, or application of the law determining the elements of an offense is
an element of such offense, unless the definition of the offense or the Code so provides.

10. **Culpability as Determinant of Grade of Offense.** When the grade or degree of an offense depends on whether the offense is committed purposely, knowingly, recklessly, or negligently, its grade or degree shall be the lowest for which the determinative kind of culpability is established with respect to any material element of the offense.

**Comments on Model Penal Code Sections**

Section 2.02 has been called the most important section of the Model Penal Code, since it contains a number of rules for resolving conceptual difficulties with regard to culpability. Under the section, strict liability is provided only for violations, which are punished only by financial penalties. The code stresses that the required degree of culpability must exist with respect to each essential element of the offense.

The traditional terms “willfully” and “maliciously” have been replaced by four types of culpability: purposely, knowingly, recklessly, and negligently. **Knowingly** means voluntarily and intentionally, not by accident or mistake. Phillip E. Johnson illustrates the differences between the types by the use of an old English case:

An anarchist throws a bomb into the royal carriage, killing the king, the king’s valet, the royal coachman, and a bystander on the street. The assassin’s purpose was to kill the king (purposely). He knew that the bomb would also kill the king’s valet who was riding in the coach (knowingly). He told a friend that his actions might kill the coachman, but he hoped the coachman would survive (recklessly—aware of the risk). He was unaware, however, that the bomb would also kill a bystander (negligently).¹⁷

The code also makes a significant distinction between reckless and negligent. Under this section, **recklessness** involves the conscious creation of a risk, whereas negligence involves the failure to recognize a risk that one should be aware of. Recklessness under the MPC is equivalent to the traditional culpability state of general intent. Negligence is the only one of the four types of culpability that involves no conscious wrongdoing.

With respect to ignorance of the existence of a statute prohibiting the conduct in question, the section provides that the knowledge of the existence of a criminal prohibition is not an element of the offense.

**JOINDER OF INTENT AND ACT**

The **actus reus** and the **mens rea** must be joined in time. For example, if X decided to murder someone one week, then changed her mind but accidentally killed the person the next week, this would not be murder, since the intent to kill and the act did
not exist together at any one time. There is no specific length of time, however, that the mens rea must exist before the act as long as they exist concurrently at some time. In fact, the necessary mental element may be formed at the exact time that the requisite act is committed.

CAUSATION

Causation is an implicit element of a crime’s actus reus. This is based on the fact that the actus reus is considered a voluntary act resulting in the harm to society prohibited by the offense. For example, before X can be convicted of murder, his act must have been the cause of the victim’s death. Most causation issues arise in criminal homicide cases. The presence of causation is usually an issue only when the harm caused was an unwanted result—for example, the unintended death of a victim.

Actual cause exists if the result would not have occurred when it did in the absence of that factor. This can be stated another way: But for the defendant’s act, would the social harm have occurred when it did?

The determination that the defendant’s conduct was an actual cause of the result, however, does not necessarily mean that the defendant is criminally liable for the harm. For the defendant to be guilty, not only must she have acted with the required mens rea, but she must also be the proximate cause of the harm. Proximate cause is also defined as the legal causation of the harm. That cause is legally considered the act that was directly responsible for the harm.

In most crimes, it is easy to assign the direct cause of the social harm. There may, however, be intervening causes that are also linked to the event. Intervening causes are classified as either dependent or independent. A dependent intervening cause is a force that occurs in response to an earlier causal force. Dependent causes do not relieve the defendant of causal responsibility for the resulting harm. An independent intervening cause is a force that does not occur in response to the wrongdoer’s initial conduct. An independent cause may relieve the defendant of the causal responsibility for the resulting harm.

Consider the following examples:

1. X shoots V. V is being transported to the hospital when the ambulance is involved in a wreck that kills V. Is X guilty of murder?

2. X shoots V. V is taken to the hospital, where he receives negligent treatment. V dies. Had V received adequate treatment, he would have survived the shooting. Is X guilty of murder?

In the first situation, X probably would not be guilty of murder, since the wreck was an independent intervening cause. The wreck was not in response to the defendant’s conduct. In the second situation, X probably would be guilty of murder, since poor medical treatment is considered a dependent intervening cause. In the latter example, medical treatment is in response to the defendant’s conduct.
BASIC REQUIREMENTS OF A CRIMINAL ACT

CASE ON POINT

PEOPLE V. RIDEOUT

Excerpts from the trial judge’s instructions to the jury on causation:

In criminal jurisprudence, the causation element of an offense is generally comprised of two components: factual cause and proximate cause. The concept of factual causation is relatively straightforward. In determining whether a defendant’s conduct is a factual cause of the result, one must ask, “but for” the defendant’s conduct, would the result have occurred? If the result would not have occurred absent the defendant’s conduct, then factual causation exists. The existence of factual causation alone, however, will not support the imposition of criminal liability. Proximate causation must also be established. Proximate causation is a “legal colloquialism.” It is a legal construct designed to prevent criminal liability from attaching when the result of the defendant’s conduct is viewed as too remote or unnatural. Thus, a proximate cause is simply a factual cause of which the law will take cognizance.

For a criminal defendant’s conduct to be regarded as a proximate cause, the victim’s injury must be a “direct and natural result” of the defendant’s actions. In making this determination, it is necessary to examine whether there was an intervening cause that superseded the defendant’s conduct such that the causal link between the defendant’s conduct and the victim’s injury was broken. If an intervening cause did indeed supersede the defendant’s act as a legally significant causal factor, then the defendant’s conduct will not be deemed a proximate cause of the victim’s injury. The standard by which to gauge whether an intervening cause supersedes, and thus severs the causal link, is generally one of reasonable foreseeability. The linchpin in the superseding cause analysis is whether the intervening cause was foreseeable based on an objective standard of reasonableness. If it was reasonably foreseeable, then the defendant’s conduct will be considered a proximate cause. If, however, the intervening act by the victim or a third party was not reasonably foreseeable—e.g., gross negligence or intentional misconduct—then generally the causal link is severed and the defendant’s conduct is not regarded as a proximate cause of the victim’s injury or death.

In criminal law, a superseding intervening cause does not need to be the only cause. Indeed, while a defendant’s conduct might have been a factual cause of an accident, the victim’s conduct might also have been a cause and, more to the point, potentially a superseding cause.


PRESUMPTIONS

Often, it is difficult to prove the requisite intent required to convict the defendant of a certain crime. For example, in one state, first-degree murder may be defined as the unlawful and intentional killing of a human being with malice. How do you establish that the defendant actually intended to kill the victim, especially when the defendant claims that the killing was accidental? To overcome this difficulty,
legislatures and courts establish rules of presumption. A presumption operates in
the following manner: Upon proof of fact A, the court may or must presume fact
B. One of the most commonly accepted presumptions is that a person is presumed
to have intended the natural and probable consequences of his or her act. Many
states have enacted “bad check” statutes that create the presumption that, if an
individual has not made “good” the bad check within a certain number of days after
notification, that the individual is presumed to have intentionally defrauded the
individual who accepted the bad check. In this situation, to prove the intent to de-

fraud (fact B), you would need to establish notification of the check’s dishonor (fact
A). There are two types of presumptions: permissible or rebuttable ones and
mandatory or conclusive presumptions. With a permissible or rebuttable pre-
sumption, the fact-finder (judge or jury) may find fact B after fact A is established.
With mandatory or conclusive presumptions, if fact A is established, the fact-
finder must accept the existence of fact B.
UNITED STATES V. BAILEY

Chief Justice Rehnquist:

In the early morning hours of August 26, 1976, respondents Clifford Bailey, James T. Cogdell, Ronald C. Cooley, and Ralph Walker, federal prisoners at the District of Columbia jail, crawled through a window from which a bar had been removed, slid down a knotted bedsheet, and escaped from custody. Federal authorities recaptured them after they had remained at large for a period of time ranging from one month to three and one-half months. Upon their apprehension, they were charged with violating 18 U.S.C. § 751 (a), which governs escape from federal custody. At their trials, each of the respondents adduced or offered to adduce evidence as to various conditions and events at the District of Columbia jail, but each was convicted by the jury. The Court of Appeals for the District of Columbia Circuit reversed the convictions by a divided vote, holding that the District Court had improperly precluded consideration by the respective juries of respondents’ tendered evidence.

Respondents’ defense of duress or necessity centered on the conditions in the jail during the months of June, July, and August 1976, and on various threats and beatings directed at them during that period.

Criminal liability is normally based upon the concurrence of two factors, “an evil-meaning mind and an evil-doing hand...” Morissette v. United States, 342 U.S., at 251. In the present case, we must examine both the mental element, or mens rea, required for conviction under § 751 (a) and the circumstances under which the “evil-doing hand” can avoid liability under that section because coercive conditions or necessity negates a conclusion of guilt even though the necessary mens rea was present.

Few areas of criminal law pose more difficulty than the proper definition of the mens rea required for any particular crime.

At common law, crimes generally were classified as requiring either “general intent” or “specific intent.” This venerable distinction, however, has been the source of a good deal of confusion. “Sometimes ‘general intent’ is used in the same way as ‘criminal intent’ to mean the general notion of mens rea, while ‘specific intent’ is taken to mean the mental state required for a particular crime. Or, ‘general intent’ may be used to encompass all forms of the mental state requirement, while ‘specific intent’ is limited to the one mental state of intent. Another possibility is that ‘general intent’ will be used to characterize an intent to do something on an undetermined occasion, and ‘specific intent’ to denote an intent to do that thing at a particular time and place.” (Chief Justice Rehnquist quoting from the Morissette opinion; case also discussed on p. 47)

A person who causes a particular result is said to act purposefully if he consciously desires that result, whatever the likelihood of that result happening from his conduct, while he is said to act knowingly if he is aware that that result is practically certain to follow from his conduct, whatever his desire may be as to that result... In the case of most crimes, the limited distinction between knowledge and purpose has not been considered important since there is good reason for imposing liability whether the defendant desired or merely knew of the practical certainty of the results... In certain narrow classes of crimes, however, heightened culpability has been thought to merit special attention. Thus, the statutory and common law of homicide often distinguishes, either in setting the “degree” of the crime or in imposing punishment, between a person who knows that another person will be killed as the result of his conduct and a person who acts with the specific purpose of taking another’s life.

VERTICAL GROWTH OF CRIMINAL CODES

Robert Johnson, County Attorney for Anoka County, Minnesota, and a member of Minnesota’s Crime Volunteer Advisory Committee, points out that the vertical growth of criminal codes occurs in three ways. The most direct way is simply declaring a crime, such as interference with privacy, to be a felony rather than a gross misdemeanor. Another way is to declare that a misdemeanor crime, such as domestic assault or driving while impaired, becomes a felony upon a second or third violation. The third method by which vertical growth has been achieved is increasing the penalty when the victim is a member of a particular interest group, such as police, probation officers, or jailers.

According to Johnson, the broad criminalization of conduct since the 1970s means many more lives are impacted by the criminal justice system and the collateral consequences of conviction. Some individuals are swept unexpectedly into the criminal justice system unaware that their conduct is now considered worthy of a criminal charge. Johnson notes that, when we use the criminal justice system to regulate offensive behavior, we employ a system that is enormously expensive and slow. Police, prosecutors, jailers, defenders, judges, and corrections officials all must deal with an offense. Cases often take months or years to work through the system. By the time a criminal charge is resolved, the penalty is often no longer as meaningful to the people involved.

Johnson opines that overcriminalization may also undermine deterrence—a primary purpose of the criminal justice system. When a code cannot possibly be evenly enforced as written, it is likely to be enforced differently from jurisdiction to jurisdiction, and even within a locality. He contends that deterrence becomes much less effective when the public receives a mixed message as to the seriousness of a crime, or the gravity of its consequences.18

SUMMARY

Every crime has two requisites: the required act or failure to act (actus reus) and the required mental state (mens rea). Actus reus literally means “guilty act.” It is more than voluntary movement. It includes both muscular contractions and the circumstances and consequences associated with the contractions. The requirement of actus reus prevents punishing one merely for his or her thoughts.

The act necessary to constitute the crime is generally specified by statute. Involuntary movement normally does not constitute sufficient actus reus to cause criminal liability. The act of speaking or the possession of something illegal may be a sufficient act to constitute a crime.

Criminal liability can be based on a failure to act, but only when the individual has a legal duty to act. A moral duty is insufficient to establish criminal liability.

Mens rea involves the concept that criminal sanctions should not be imposed on those who innocently cause harm. For an act to be criminal, it must be accom-
panied by the required *mens rea*, also referred to as culpability. This principle can be hard to apply in some cases.

Four mental states qualify as *mens rea*: general intent, specific intent, transferred intent, and constructive intent. Criminal law distinguishes between intention and intent. Intention is often equated with specific intent. Intent also differs from motive. Motive is the desire that drives a person to intend to do something. Unlike intent, motive is not an element of a crime and therefore need not be proven in order to find a defendant guilty.

General intent is the intent to commit the act (*actus reus*) required for the crime. General intent is sufficient *mens rea* for most criminal offenses. To establish general intent, the prosecution must show that the accused committed the required act and knew that it was wrong. If the accused committed the required act, the law presumes that he or she had the necessary general intent.

Specific intent refers to the intent to cause a particular result. It often applies to crimes that require proof of a particular mental state or knowledge.

Associated with specific intent is the requirement of *scienter*, the knowledge that makes a person criminally liable for his or her physical acts. Also associated with specific intent is willfulness, which means intentional behavior, or else causing social harm with a bad motive. Generally, one is not criminally liable for negligence. To establish criminal liability, the negligence must amount to criminal negligence, which has no single meaning at common law. In most cases, it is a gross deviation from the standard of care required of an individual.

Transferred intent applies when one intends to harm one person and instead harms another. The law assumes intent to harm the actual victim.

In the Model Penal Code, the traditional terms *willfully* and *maliciously* have been replaced by four types of culpability: purposely, knowingly, recklessly, and negligently. *Knowingly* means voluntarily and intentionally, not by accident or mistake.

*Actus reus* and *mens rea* must exist together at the time a crime is committed. Causation is also an element of a crime’s *actus reus*. The defendant’s act must have been the cause of the harm to society. Most causation issues arise in criminal homicide cases when the act causes an unintended death.

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**ADDITIONAL ASSIGNMENTS**

1. Read the selected cases and associated material for Chapter 3 posted at www.mycrimekit.com.

2. Complete the online study guide material for Chapter 3 posted at www.mycrimekit.com.

3. Discussion and thought questions:
   a. What are the basic requirements for criminal liability?
   b. Under what circumstances may an individual be guilty of a crime by failing to act?
c. What is meant by voluntary actions?

d. Distinguish between intent and causation.

e. How does the Model Penal Code differ from common law regarding the *mens rea* requirement?

PRACTICUM

Write your own definition for the following phrases:

1. general intent ____________________________

2. specific intent ____________________________

3. *actus reus* ________________________________

4. *mens rea* ________________________________

NOTES


BASIC REQUIREMENTS OF A CRIMINAL ACT

15. William Blackstone, IV Commentaries at 200.