CRIMINAL LAW: AN INTEGRATED APPROACH



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Criminal Law: An Integrated Approach

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1.1: Introduction to American Criminal Law

What is criminal law?

Of the various subjects a student encounters in an American law school, *criminal law* may appear the most familiar. From an early age, every American is exposed to depictions of various aspects of the criminal legal system. Police (and "robbers" and "burglars") appear in children's books and toys. Criminal investigations and prosecutions are dramatized in television and movies. In the news media, there is ample, perhaps exaggerated, coverage of crimes, arrests, trials, and punishments. Criminal law appears everywhere, in part because in the United States it *is* nearly everywhere: this country uses criminal legal interventions with a frequency and severity unmatched in most other nations. For this reason, many of the ideas and terms you encounter in this book will be ones you're likely to have heard before: *charges*, *conviction*, *presumption of innocence*, *proof beyond a reasonable doubt*, to give a few examples—along with terms of critique such as *mass incarceration* and *racial bias* and *overcriminalization*.

Criminal law seems familiar, but the apparent familiarity can be misleading. Media or cultural depictions of criminal law are often inaccurate, and these depictions won't teach you to practice law or to pass a bar exam. This book does pursue those goals, and others. It seeks to give you an understanding of American criminal law that will be useful whether you practice in this field or a different area of law, and indeed, an understanding that will be useful even if you do not practice law at all. With so much criminal law everywhere in the United States, understanding how this area of law operates is crucial for any lawyer.

Notwithstanding the seeming familiarity of criminal law, many students eventually find the subject to be very different from what they expected "law" to be. To minimize confusion, it is useful to begin with some basic descriptions. What makes criminal law the same as other areas of law? That is, what makes it *law*? And what makes criminal law different from other areas of law? What makes *criminal* law a distinctive field?

Philosophers have no single answer to the question, *what is law*, and dictionaries identify the word as one with multiple meanings. We speak of the laws of physics, for example, but those statements about the observed properties of physical objects are very different from the kinds of laws that one studies in law school. For the purposes of this book, law can be understood as a human practice that involves both authoritative written texts and decisions by public officials. Text and decision: it will be important to keep both in mind as you study criminal law. For example, a statute that defines "burglary" is a written text, and it is designed to guide official decisions by police officers, prosecutors, and judges. Official decisions are often but not always guided by a prior written text; sometimes public officials make decisions without statutory or other written guidance. And official decisions are sometimes, but only sometimes, recorded in a new written text. Decisions by police officers are often unrecorded, or recorded in a document such as an arrest report that's soon lost to history, whereas courts frequently announce and explain their decisions in written opinions that are preserved for much longer periods. This latter kind of text, the judicial opinion or "case," makes up much of law school reading assignments. But cases are not the only written texts that are important to the practice of law, and judicial decisions are not the only decisions that are important to law. In criminal law (and many other fields), statutes are especially important legal texts. And in criminal law (and many other fields), decisions by executive branch officials are often determinative of legal outcomes. In this book, statutes and cases are the type of legal text that you'll encounter most often, but you will also see examples of other legal texts such as indictments (a special document stating criminal charges) and arrest reports. We will consider how these various texts reflect and shape official decisions and actions.

Here, then, is one way in which criminal law is like other areas of law that you will encounter in law school: it is a distinctive human practice that involves the use of written texts to guide, constrain, or express official decisions and actions. It bears emphasis that the decisions reached in law are decisions made by human beings. Humans are rational creatures who can deliberate about moral values, or take into account empirical evidence, or be influenced by public opinion, or rely on "common sense" as they make legal decisions. But human rationality is bounded, or limited by various factors such as imperfect information and cognitive biases. Human law, unlike the laws of physics, thus reflects various characteristics of human decisionmaking that are also observable in other contexts, such as the influence of emotion and cognitive biases. Racial bias is a particularly acute concern in criminal law, and it will be addressed later in this chapter and at various other points throughout this book. Perhaps criminal law is even more shaped by emotion and cognitive bias than other fields of human law; we will explore that possibility. For now, the key point is that legal texts are designed to guide human decisionmaking, but the relevant text may not be the only factor that shapes an official decision.

What (beyond the possibility of unusual effects of bias and emotion) distinguishes *criminal* law from other fields of human law? Criminal law was once more commonly called "the law of crimes," and the concept of a crime may help us identify what is distinctive about criminal law. In popular culture and lay parlance, the term crime is likely to bring to mind images of wrongful or harmful acts. It is tempting to think of criminal law as the law that regulates (by prohibiting) acts of violence or other inflictions of serious harm. Certainly many cultural depictions of crime encourage that view, equating crime with murder, rape, or other grave physical harms. But in legal terms, a crime is any act that has been designated as a crime by the appropriate legal actors. Many acts designated as crimes do not involve any physical harm, or even conduct that is widely viewed as harmful. Public intoxication, or "loitering," or a failure to file required paperwork, are all acts designated as criminal, as you will see in the coming chapters. We will consider a wide array of acts designated as criminal and investigate whether we can identify one or more shared characteristics of those acts. Is there an extra-legal definition of "wrong" or "harm" that predicts which acts will be labeled as crimes?

Whether or not the acts designated as criminal are in fact wrongful or harmful in all cases, the designation of a person as "a criminal" brings significant negative consequences to that person in all or nearly all cases. Criminal law is often said to be distinctive in imposing unique burdens, such as loss of liberty through a jail or prison sentence. Even when a person convicted of a criminal offense avoids incarceration, a criminal conviction carries considerable stigma and often renders a person ineligible for various social benefits.

Indeed, the burdens of a criminal conviction are a key part of the distinction between criminal law and tort law. Tort law, which you are likely to study in your first year of law school, is similar to criminal law in that it imposes legal liability for conduct designated as wrongful. In fact, the modern English word "tort" comes from the Latin term *torquere* (to twist, or distort) and its past participle *tortum* (wrong or injustice). Many acts could be classified as both crimes and torts, such as intentional inflictions of physical injury. But tort law is different from criminal law in at least two key respects. First, the sanctions are different. Tort liability usually means having to pay monetary damages to the injured party, but it does not involve custodial detention or the stigma of a criminal conviction. To be sure, criminal punishment can take the form of a fine, or monetary restitution to a victim, so the fact that a person has to pay money for some wrongdoing does not itself distinguish crimes from torts. But criminal sanctions often involve not monetary payments (or, not only monetary payments) but physical detention, in a jail or prison. Additionally, there is a stigma associated with a criminal conviction that is not typically associated with being found liable for a tort. Thus, the severity and stigma of criminal sanctions may be one point of distinction from tort law. A second way in which tort law is different from criminal law is that the decision to pursue a tort claim is usually the choice of a private party, not a public official. Police and prosecutors decide whether a given individual will be investigated and charged with a crime, but the individual or private party who is harmed by tortious conduct decides whether to file a tort suit.

Because the burdens of a criminal conviction are seen as more severe than the burdens typically imposed by non-criminal laws, criminal law contains various structures designed to limit the imposition of criminal penalties. For example, criminal punishment is said to require a higher standard of proof than is required in many other areas of law – that's the *beyond a reasonable doubt* standard that you're likely to have heard invoked before. This is another way in which criminal law differs from tort law, and it may explain why some defendants are acquitted of criminal charges but found civilly liable for the same conduct in a tort suit. (O.J. Simpson is a famous example: he was acquitted of the murders of his ex-wife and her friend Ron Goldman, but Simpson was found liable for the deaths in a subsequent civil tort suit with a lower standard of proof.) In Chapter Two, Three, and Four, we will encounter several cases that address constitutional principles arguably designed to limit the imposition of criminal law's distinctively severe penalties. As you read those cases, you will gain a better understanding of how the United States has developed its extensive system of criminal legal interventions, notwithstanding ostensible limits on the use of criminal sanctions.

Throughout this book, we will consider the ways that criminal law is, and is not, like other areas of law. We'll ask this question with specific focus on the conduct that the law regulates, the burdens or penalties that the law imposes, and the ways that official legal decisions are made. The aim is to help you understand criminal law in context, but if these comparisons also help you understand other fields of law, so much the better!

In the remainder of this introductory chapter, and indeed in much of the rest of this book, we will consider three types of official decisions that are especially important to criminal law. For any individual person to be convicted of a crime, each of these three decisions is necessary. First, the *criminalization* decision is the choice to define some category of conduct as criminal. Today, this decision usually must be made by a legislature and expressed in a criminal statute, but we will see in this chapter that criminalization decisions have not always required legislative action or a written statute.

Criminal statutes (or other texts that define activity as criminal) are not self-enforcing. For example, the existence of a statute that criminalizes the possession of cocaine is not by itself enough to ensure that all persons who possess cocaine will be convicted of violating that statute. Accordingly, a second type of decision key to criminal law is the *enforcement* decision, or the decision by enforcement agents such as police and prosecutors to arrest or charge a given person. In practice, the enforcement decision is usually not just one decision but two decisions or more: the decision by a police officer to investigate and perhaps arrest a person; the decision by a prosecutor to charge a particular offense; and in many instances, later decisions by a prosecutor to add or drop charges as part of a plea bargaining process.

Plea bargaining is often (but not always) a precursor to the third key decision, the *adjudication* decision, in which a formal, and often final, decision is made to classify the defendant as guilty or not guilty. If a criminal case involves a jury trial, then it is the jury who makes the adjudication decision. Some criminal cases involve bench trials, in which a judge serves as the factfinder and decides whether to convict the defendant or not. But the vast majority of criminal convictions are based on guilty pleas rather than jury or bench trials. When a defendant pleads guilty, it is more difficult to identify the actor who makes the adjudication decision. It could be said that the defendant himself (or herself) makes the adjudication decision, since the defendant admits his own guilt instead of asking a jury or judge to determine guilt. But what would lead a defendant to do that? In a system that promises that every defendant will be presumed innocent until proven guilty, why do so many defendants plead guilty, disclaim their own innocence, and relieve prosecutors of their burden to prove guilt? We will explore these questions more in Chapter Four and throughout the book. It will turn out that *criminalization decisions* and *enforcement decisions* can create situations in which *adjudication decisions* all but disappear – choices about what to criminalize, and how to enforce those laws, can make a guilty plea rather than a trial the least terrible option for many a defendant. For now, it is important simply to note that the distinctive standard of proof mentioned above – proof beyond a reasonable doubt – does not actually get tested in most criminal cases. Prosecutors don't have to "prove" anything if a defendant pleads guilty.

In a nutshell, then, criminal law is a human practice which involves three important types of decisions: *criminalization*, *enforcement*, and *adjudication*. Any of these decisions may be guided by, or recorded in, an official text, but texts will not always determine how the decisions are made. This book seeks to help you understand the practice of criminal law by helping you understand each of these three types of decision, and its relation to applicable texts. We will consider similar questions about each type of decision: Who makes it? Does the decision have to take a certain form (a statute, an indictment, a verdict) in order to be recognized as legally valid? What constraints or criteria apply to the decision, and how does each decision establish constraints or criteria for other decisionmakers? For example, consider the modern view that the decision to criminalize conduct must be expressed in a written statute. What constraints, if any, apply to a legislature's decision to enact a new statute? Once a statute is enacted, how does it then guide or constrain the decisions of police, prosecutors, judges, or juries?

Our first case focuses most directly on the criminalization decision and which institution – court or legislature – should make that decision. But as you read, look also for references to the other two decisions, the enforcement decision and the conviction decision.

Is this act a crime?

COMMONWEALTH of Pennsylvania

v.

Michael MOCHAN, Appellant

Superior Court of Pennsylvania
110 A. 2d 788

Jan. 14, 1955

HIRT, Judge.

One indictment (Bill 230), before us in the present appeals, charged that the defendant on May 4, 1953 'devising, contriving and intending the morals and manners of the good citizens of this Commonwealth then and there being, to debauch and corrupt, and further devising and intending to harass, embarrass and villify divers citizens of this Commonwealth and particularly one Louise Zivkovich and the members of the family of her the said Louise Zivkovich * * * unlawfully, wickedly and maliciously did then and there on the said days and dates aforesaid, make numerous telephone calls to the dwelling house of the said Louise Zivkovich at all

times of the day and night, in which said telephone calls and conversations resulting therefrom the said Michael Mochan did wickedly and maliciously refer to the said Louise Zivkovich as a lewd, immoral and lascivious woman of an indecent and lewd character, and other scurrilous, opprobrious, filthy, disgusting and indecent language and talk and did then and there use in said telephone calls and conversations resulting therefrom, not only with the said Louise Zivkovich as aforesaid but with other members of the family of the said Louise Zivkovich then and there residing and then and there answering said telephone calls aforesaid intending as aforesaid to blacken the character and reputation of the said Louise Zivkovich and to infer that the said Louise Zivkovich was a woman of ill repute and ill fame, and intending as aforesaid to harass, embarrass and villify the said Louise Zivkovich and other members of her household as aforesaid, to the great damage, injury and oppression of the said Louise Zivkovich and other good citizens of this Commonwealth to the evil example of all other in like case offending, and against the peace and dignity of the Commonwealth of Pennsylvania.'

A second indictment (Bill 231), in the same language, charged a like offense committed by defendant on another date. Defendant was tried before a judge without a jury and was convicted on both charges and was sentenced. He has appealed … on the ground advanced by him that the conduct charged in the indictments, concededly not a criminal offense in this State by any statute, does not constitute a misdemeanor at common law. In a number of States and especially in the common law State of Pennsylvania the common law of England, as to crimes, is in force except in so far as it has been abrogated by statute. The indictments in these cases by their language, clearly purported to charge a common law crime not included in our Penal Code or elsewhere in our statutory law.

It is established by the testimony that the defendant over a period of more than one month early in 1953, on numerous occasions and on the specific dates laid in the indictments, telephoned one Louise Zivkovich, a stranger to him and a married woman of the highest character and repute…. His language on these calls was obscene, lewd and filthy. He not only suggested intercourse with her but talked of sodomy as well, in the loathsome language of that criminal act, on a number of occasions. The calls were coming in from a four-party line. Through cooperation with the telephone company, the defendant was finally located and was arrested by the police at the telephone after the completion of his last call. After his arrest bearing upon the question of his identification as the one who made the calls, Mrs. Zivkovich recognized his voice, in a telephone conversation with him which was set up by the police.

It is of little importance that there is no precedent in our reports which decides the precise question here involved. The test is not whether precedents can be found in the books but whether the alleged crimes could have been prosecuted and the offenders punished under the common law. In *Commonwealth v. Miller*, 94 Pa.Super. 499, 507 (1928), the controlling principles are thus stated: 'The common law is sufficiently broad to punish as a misdemeanor, although there may be no exact precedent, any act which directly injures or tends to injure the public to such an extent as to require the state to interfere and punish the wrongdoer, as in the case of acts which injuriously affect public morality, or obstruct, or pervert public justice, or the administration of government.' Any act is indictable at common law which from its nature scandalously affects the morals or health of the community. 1 Wharton, Criminal Law, 12 Ed., § 23 (1932). … [I]n *Commonwealth v. Glenny*, 54 Pa. Dist. & C. R. 633 (1945), in a well considered opinion it was held that an indictment charging that the defendant took indecent liberties tending to debauch the morals of a male victim adequately set forth a common law offense. And as early as *Updegraph v. Commonwealth*, 11 Serg. & R. 394 (1824), it was held that Christianity is a part of the common law and maliciously to villify the Christian religion is an indictable offense.

To endeavor merely to persuade a married woman to commit adultery is not indictable. *Smith v. Commonwealth*, 54 Pa. 209 (1867). The present defendant's criminal intent was evidenced by a number of overt acts beyond the mere oral solicitation of adultery. The vile and disgusting suggestions of sodomy alone and the otherwise persistent lewd, immoral and filthy language used by the defendant, take these cases out of the principle of the *Smith* case. Moreover potentially at least, defendant's acts injuriously affected public morality. The operator or any one on defendant's four-party telephone line could have listened in on the conversations, and at least two other persons in Mrs. Zivkovich's household heard some of defendant's immoral and obscene language over the telephone.

The name 'Immoral Practices and Conduct' was ascribed to the offense and was endorsed on the indictments by the District Attorney. Whether the endorsement appropriately or adequately names the offense is unimportant; the factual charges in the body of the indictments identify the offense as a common law misdemeanor and the testimony established the guilt of the defendant.

Judgments and sentences affirmed.

WOODSIDE, J., filed a dissenting opinion in which GUNTHER, J., joins.

Not unmindful of the reprehensible conduct of the appellant, I nevertheless cannot agree with the majority that what he did was a crime punishable under the laws of this Commonwealth.

The majority is declaring something to be a crime which was never before known to be a crime in this Commonwealth. They have done this by the application of such general principles as 'it is a crime to do anything which injures or tends to injure the public to such an extent as to require the state to interfere and punish the wrongdoer;' and 'whatever openly outrages decency and is injurious to public morals is a misdemeanor.'

Not only have they declared it to be a crime to do an act 'injuriously affecting public morality,' but they have declared it to be a crime to do any act which has a 'potentially' injurious effect on public morality.

Under the division of powers in our constitution it is for the legislature to determine what 'injures or tends to injure the public.'

One of the most important functions of a legislature is to determine what acts 'require the state to interfere and punish the wrongdoer.' There is no reason for the legislature to enact any criminal laws if the courts delegate to themselves the power to apply such general principles as are here applied to whatever conduct may seem to the courts to be injurious to the public.

There is no doubt that the common law is a part of the law of this Commonwealth, and we punish many acts under the common law. But after nearly two hundred years of constitutional government in which the legislature and not the courts have been charged by the people with the responsibility of deciding which acts do and which do not injure the public to the extent which requires punishment, it seems to me we are making an unwarranted invasion of the legislative field when we arrogate that responsibility to ourselves by declaring now, for the first time, that certain acts are a crime.

When the legislature invades either the judicial or the executive fields, or the executive invades either the judicial or legislative fields, the courts stand ready to stop then. But in matters of this type there is nothing to prevent our invasion of the legislative field except our own self restraint. There are many examples of how carefully the courts, with admirable self restraint, have fenced themselves in so they would not romp through the fields of the other branches of government. This case is not such an example.

Until the legislature says that what the defendant did is a crime, I think the courts should not declare it to be such.

I would therefore reverse the lower court and discharge the appellant.

Notes and questions about *Mochan*

1. Notice the key decisions that were necessary in order for Michael Mochan to be convicted of a crime: first, the decision that "acts which injuriously affect public morality" are crimes; second, the decision that these particular phone calls constituted such injurious acts and warranted prosecution; and third, the decision that sufficient evidence exists to establish that Mochan was the person who made the calls. Which public officials made each of these decisions?
2. With *Commonwealth v. Mochan*, you have just read your first judicial opinion about criminal law. But do all the ideas and arguments here come from judges? Look closely at the first paragraph of the opinion, which is mostly a quotation. Whose language is the court quoting?
3. In light of the previous question, some tips for reading cases as you go forward: keep in mind that court opinions often quote other sources, or even without quoting, summarize arguments of the parties or other courts. Read carefully and consider each passage in context. This will help you determine when a judge is reporting arguments or decisions made by others, and when he or she is announcing or justifying the court's own arguments and decision. And of course, be sure to take note of where a majority opinion ends and where a concurring or dissenting opinion begins.
4. An indictment (the type of document quoted in the first paragraph of this case) is a written document describing the defendant's conduct and charging a specific offense. How does the prosecutor determine that Mochan's actions are properly classified as criminal? Is there a name for the crime that Michael Mochan allegedly committed?
5. Identify Mochan's "grounds for appeal," or his specific argument that he should not have been convicted.
6. What is the difference between a "common law crime" and a statutory crime?
7. The majority opinion emphasizes that "to endeavor merely to persuade a married woman to commit adultery" is not a crime in Pennsylvania. What additional factors made Mochan's conduct properly classified as criminal, in the majority's view?

8. Once Louise Zivkovich reported obscene telephone calls to the police, were police obligated to investigate and respond? Once police investigated and identified Mochan as the person who made the calls, was a prosecutor obligated to bring charges? The court identifies as a misdemeanor "any act which directly injures or tends to injure the public *to such an extent as to require the state to interfere and punish the wrongdoer*" (emphasis added). The court later states that "potentially at least, defendant's acts injuriously affected public morality." Why is a potential effect on public morality sufficient for conviction? Does the court address the question whether the injury to public morality required the state to interfere here? Who determines whether state intervention is required?
9. Throughout this book, you can be confident that if a concurring or dissenting opinion is included in your assignment, there's something important to be learned from that opinion. In this case, Judge Woodside's dissenting opinion is important because his position is the majority view today: criminalization decisions (the classifications of acts as crimes) should be made by the legislative branch rather than the judicial branch. Why does Judge Woodside think that criminalization decisions should be made by a legislature rather than a court? (In Chapter Two, we will consider in more detail why Judge Woodside's view became the prevalent view in the United States.)
10. The opinions in *Mochan* present two options: criminalization decisions can be made by the legislature, or criminalization decisions can be made by the judiciary. Are these the only two options? In the United States, government is usually organized into three branches, not just two – legislative, judicial, and executive. Police and prosecutors are part of the executive branch. Did executive branch officials play any role in the criminalization decision here? (In Chapter Three, we will consider in more detail the relationship between *criminalization* decisions, or the classification of a category of acts as criminal, and *enforcement* decisions, or the choice to treat a specific individual's actions as falling within a larger category of acts defined as criminal.)
11. In your own view, which branch of government is best suited to decide that a category of actions should be classified as criminal and subject to punishment?

Check Your Understanding (1-1)

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"Substance," "Procedure," Text, and Decision

Many American criminal law casebooks, and indeed many criminal law scholars, divide criminal law into "substantive law" and "procedure." On a standard account, "substantive criminal law" refers to the definitions of crimes or defenses, or general principles of criminal liability, stated in criminal statutes and interpreted or elaborated by judicial decisions. For example, the definition of murder, and the criteria for a valid insanity defense, are "substantive law." The general definition of a misdemeanor in *Mochan*, "any act which directly injures or tends to injure the public to such an extent as to require the state to interfere and punish the wrongdoer," would similarly be classified as "substantive law." Substantive criminal law, on this view, is determined by the legislatures who enact statutes and the judges who interpret and apply these statutes, and one can find substantive law in certain key texts: statutes and judicial opinions.

The decisions of police and prosecutors are often classified as something different – *procedure* – and these decisions are often given little or no attention in a course on substantive law. This conceptual division between substance and procedure has led many a student to be surprised and puzzled in the criminal law classroom, because in most cultural depictions of criminal law, prosecutors and police are portrayed as central actors – as they should be. Beyond criminal law textbooks, enforcement decisions tend to gather a fair amount of interest and attention. One reason for the attention to enforcement is that a decision to enforce a criminal statute is often a decision to exercise the government's power to use superior physical force: to arrest someone and take them into custody, to subject someone to a prison sentence. This dimension of criminal law, its connection to state violence, can be obscured from view if we think of criminal law only in terms of crime definitions and not in terms of the decisions that are made in light of those definitions. Very roughly, one could say that the traditional curricular approach identifies "criminal law" as residing in certain texts (again, statutes and written judicial opinions about statutes or general principles of liability). The decisions that individual officials make about those texts are not themselves part of "criminal law," at least as the subject is traditionally taught.

This book proceeds from a more practical – and more complete – conception of law. Criminal law, like other types of human law, involves the interaction of texts and decisions. Though designed for the typical first-year criminal law course, this book does not limit itself to "substantive" law, at least in the usage described above. Statutory definitions of crimes, and general principles of

criminal liability, are indeed discussed at length in this book. But these "substantive" laws are important insofar as they are invoked and applied by enforcement officials – police and prosecutors. Imagine a statute that criminalizes swimming in public while wearing improper attire, or one that criminalizes the sale of a videotape without an official rating displayed on the cover. If such statutes exist on paper but are never used to arrest or prosecute anyone, they don't really represent the "criminal law" that students need to learn, and that this book seeks to explain. Moreover, if such statutes *are* used to arrest and prosecute people, but it is police and prosecutors who decide what counts as "improper attire" or an "official rating," then the study of these laws should take these decisions by enforcement officials into account. This book is about criminal law as a human practice, which means that the decisions of enforcement officials are an important part of its focus. The approach taken here might be called an integrated approach, because it integrates written texts with the decisions that the texts are supposed to guide, and it integrates decisions by legislative, judicial, and executive actors.

One advantage of this integrated approach is that it better equips us to examine distinctive features of criminal law in the United States, including the exceptionally broad scale of criminal legal interventions and stark racial disparities among those targeted for policing and punishment. More empirical information about American criminal legal practices will be presented throughout the book, but here are three key features to keep in mind from the outset:

1. **Imprisonment**. For many years, the United States has had the highest incarceration rate in the world by a large margin, meaning it imprisons a greater share of its population than any other country. Again, a decision to use criminal law (rather than some other form of legal intervention) is often a decision to use superior physical force, and the physical constraints of prison are one very common form of force used by the state. The U.S. incarceration rate peaked at about 1000 people imprisoned per 100,000 residents, or about 1% of the population, around 2006-2008. Since then the incarceration rate has declined to about 700 people imprisoned per 100,000. (These numbers include persons detained in both prisons and jails. The Covid-19 pandemic has caused some fluctuation in these numbers, as many U.S. prisons released persons to reduce overcrowding, but jail populations have since expanded.) For comparison, the worldwide average incarceration rate is about 155 people imprisoned per 100,000. For more data on global incarceration rates, check out https://www.prisonpolicy.org/global/2018.html. The Vera Institute of Justice is another good source of data; for a report on pandemic-related fluctuations in prison and jail populations, see https://www.vera.org/publications/people-in-jail-and-prison-in-spring-2021.
2. **Criminal interventions other than imprisonment**. To count only the persons incarcerated in jail or prison may be to examine only the tip of a very big iceberg. The vast majority of people who are convicted of criminal offenses receive a non-custodial sentence, such as probation. And a still larger group of Americans are subjected to forcible police interventions such as stops, frisks, or even arrests but then not convicted, often because the police activity does not uncover evidence of any crime. It is much more difficult to gather data on these interventions than on prison sentences, but it does seem clear that the United States is an outlier not only in the number of people it imprisons but also in the number of people it convicts, arrests, or simply investigates through criminal law enforcement.
3. **Racial disparities in both imprisonment and other criminal interventions**. For prison sentences but also nearly every other type of criminal intervention, persons of color, especially Black people, are overrepresented in relation to their population. For example, Black people are more likely than white people to be stopped by the police, to be arrested, to be the target of police violence, to be detained pre-trial, to be sentenced to prison, to be sentenced to a life term, and so on. These patterns of disparity are discussed throughout the book, but you can see an overview and visual depictions of some of the data at https://www.prisonpolicy.org/blog/2020/07/27/disparities/.

One can't really understand these phenomena simply by reading statutory definitions of crimes, or judicial opinions parsing statutory language. Indeed, a narrow focus on statutory definitions or judicial opinions is likely to be misleading. If one thinks of criminal law only in terms of crime definitions, then it may be tempting to conclude that racial disparities in punishment must be the product of racial disparities in criminalized behavior. In other words, one might assert that persons of color are convicted and punished at higher rates just because persons of color commit crimes more often. Though a handful of commentators do make this claim, this book aims to give you a more complete and accurate understanding of racial disparities in American criminal law. Substantial evidence (some of it linked above, more of it cited later in this book) indicates that a person of color is likely to be subject to more frequent and more severe criminal interventions than a similarly situated white person. Racial disparities in American criminal law are largely a product of public officials' choices. And while statutory definitions enable enforcement choices, the statutes themselves often don't explain those choices. The study of statutory definitions in isolation from enforcement

practices is likely to produce an idealized and inaccurate picture of criminal law as a race-neutral, carefully constrained field. This book aims to help you understand the whole picture of criminal law, as sprawling and inegalitarian as that picture may be.

Finally, this book is also "integrated" in that it attempts to give you an overview of criminal law across the entire United States, even as it emphasizes that the definitions of crimes vary by specific jurisdiction. Each state enacts its own statutes or code (a criminal code is a collection of many different statutes). You could not hope to memorize the criminal code of even one state, much less many states. But your goal should not be the memorization of crime definitions. Criminalization, enforcement, and conviction decisions often follow similar patterns from one state to another, and this book will help you become familiar with those patterns. When you know the typical patterns and basic structures of criminal law, it becomes much easier to identify and apply the relevant law of a specific jurisdiction. For example, in Chapter Five we will study property offenses, including the offense of "burglary." You will see that various states define burglary differently, but at the same time, there are commonalities across jurisdictions. You don't need to memorize the definition of burglary from any specific state, but you do need to learn how to read and apply any burglary statute you encounter.

On the topic of jurisdictional variations, a quick note about the Multistate Bar Exam (MBE): this licensing exam for American lawyers is not based on any single state's law, but it includes multiple choice questions about crime definitions – including burglary! The people who write the MBE have in mind a generic definition of burglary (and generic definitions of many other crimes), and for better or worse, becoming licensed as a lawyer usually requires learning the MBE's generic definitions. But have no fear. You can think of the MBE as itself a fictitious jurisdiction, and this book aims to leave you as well prepared to operate in that imaginary jurisdiction as any actual U.S. state.

Check Your Understanding (1-2)

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The Power to Enforce Criminal Law

Like *Commonwealth v. Mochan*, the first case in this chapter, the next case comes from Pennsylvania. In that state, county sheriffs (and deputy sheriffs) are empowered to arrest drivers for traffic violations that amount to "a breach of the peace." But Pennsylvania *sheriffs* do not have powers as extensive as *police officers*, who can in Pennsylvania and most states make an arrest for any criminal offense whether or not the offense involves "a breach of the peace" or even carries potential jail or prison time as a punishment. The legal classification of conduct as criminal gives most police officers – again, but not necessarily a Pennsylvania sheriff – power to stop, investigate, and possibly an arrest a person who is suspected of engaging in that conduct.

The federal constitution, especially its Fourth Amendment, has been interpreted and applied by courts to regulate many police decisions related to search and seizure. This book does not delve deeply into Fourth Amendment law, which you can study in an upper-level course. But it will be useful to know now that police authority to search or seize very often depends on whether the officer has adequate suspicion of criminal activity. When police search or seize without adequate suspicion of conduct that is actually criminal, any evidence they discover could be "suppressed," or kept out of court.

In short, the classification of conduct as criminal is important not only because it subjects persons to punishment, but also because it subjects persons to policing. Very often, policing leads to the discovery of new evidence and a prosecution for conduct other than that which initially led the police to intervene, as you see below. Another way to put this point: the choice to criminalize conduct is also a choice to empower enforcement actions, such as investigations or arrests by police.

COMMONWEALTH of Pennsylvania

v.

Victor Lee COPENHAVER, Appellant

Supreme Court of Pennsylvania
229 A.3d 242

April 22, 2020

CHIEF JUSTICE SAYLOR.

In this appeal by allowance, we address whether a deputy sheriff may conduct a traffic stop on the basis of an expired registration sticker, on the theory that such a violation amounts to a breach of the peace.

In August 2015, a deputy sheriff conducted a vehicle stop of Appellant's pickup truck. Upon approaching the truck, the deputy noticed an odor of alcohol and marijuana emanating from the passenger compartment. After administering field sobriety tests, he arrested Appellant for suspected driving under the influence of alcohol and controlled substances ("DUI"). Appellant was ultimately [convicted of DUI, possession of marijuana, and three Vehicle Code offenses].

Appellant challenged the deputy's authority to conduct a traffic stop and sought suppression of all evidence obtained during the encounter…. The parties … agreed that:

The vehicle stop occurred as a result of the deputy … observing the tailgate to the pickup truck operated by … [Appellant] being in a down position. This caught [the deputy's] attention. He further observed that the registration on the pickup truck was expired, and additionally, the registration number was identified as belonging to a vehicle other than the one on which it was attached[.]

Order of Stipulated Facts. In connection with the motion to suppress, Appellant argued that an expired registration tag does not give rise to a breach of the peace for purposes of a deputy's residual common law authority to make arrests. [The fact that the truck's tailgate was down … did not give rise to a Vehicle Code violation.]

[The trial court denied the suppression motion.]

After a bench trial, Appellant was convicted of DUI and other offenses, and he was sentenced to a term of partial confinement. Appellant lodged an appeal, arguing that his suppression motion should have been granted because operating a vehicle with an expired registration sticker does not by itself constitute a breach of the peace.

The Superior Court affirmed… [T]he Superior Court concluded that Appellant's action in driving the pickup truck with an expired registration tag involved a breach of the peace, thus authorizing the deputy to conduct the traffic stop. Appellant sought further review in this Court….

The Commonwealth concedes that operating a vehicle with an expired registration sticker, in and of itself, may not comprise a breach of the peace. Because the expired registration belonged to a different vehicle, however, the Commonwealth argues (as it did before the Superior Court) that a reasonable possibility existed that the truck may have been stolen. Thus, the Commonwealth submits that Appellant's Vehicle Code violations, when considered together, gave rise to a breach of the peace.

The question before this Court, however, is limited to whether operating a vehicle with an expired registration sticker, standing alone, amounts to a breach of the peace, and hence, that is the only question we will resolve. As "breach of the peace" was a criminal offense prior to the enactment of the Crimes Code, and as this Court has not yet had occasion to describe the contours of that concept, we begin by turning to the historical definition of the phrase to determine its present application.

As Appellant highlights, before the Crimes Code was enacted, Pennsylvania courts recognized that a breach of the peace "generally manifests [itself] by some outward, visible, audible or violent demonstration; not from quiet, orderly and peaceable acts secretly done."

Consistent with this understanding, other jurisdictions have equated a breach of the peace with violent or dangerous activities or behavior. To take one example, Wisconsin's Court of Appeals has held that driving under the influence of alcohol comprises a breach of the peace, as the dangerous nature of the offense threatens public safety. We find the thrust of these judicial and scholarly expressions persuasive. Accordingly, we now hold that – for purposes of a deputy sheriff's common law authority to enforce the Vehicle Code – a breach of the peace arises from an act or circumstance that causes harm to persons or property, or has a reasonable potential to cause such harm, or otherwise to provoke violence, danger, or disruption to public order.

In our view, operating a vehicle with an expired registration sticker does not fit within that description, as it is not a violent or dangerous action, nor is it likely to lead to public disorder. Indeed, to the contrary, a vehicle's registration tag expires with the passage of time and, as such, the expiration is passive in nature (although there may be intentionality or knowledge with regard to the decision to drive with an expired registration). Driving a vehicle with such a sticker, moreover, does not tend to incite violence, disorder, public or private insecurity, or the like. That being the case, we conclude that driving a vehicle with an expired registration does not entail a breach of the peace.

… Accordingly, the order of the Superior Court is vacated, and the matter is remanded to that court for further proceedings consistent with this opinion.

Justices Baer, Todd, Donohue, Dougherty and Mundy join the opinion.

Justice Wecht files a concurring and dissenting opinion.

JUSTICE WECHT:

I join the Majority's straightforward and important holding "that driving a vehicle with an expired registration does not entail a breach of the peace."

…

III

Since our Nation's founding, this Commonwealth's Constitutions have recognized the office of county sheriff. Curiously, however, while our [state] Constitution mentions the existence of the county sheriff, its text does not assign or specify any duties of that office. Twenty-six years ago, this Court confronted the question of whether a sheriff could, even in the absence of statutory authority, arrest an individual who has committed a breach of the peace. *See Commonwealth v. Leet*, 641 A.2d 299 (1994). … [T]he Court, after reviewing the history of the sheriff at common law, simply declared that "[u]nless the sheriff's common law power to make warrantless arrests for breaches of the peace committed in his presence has been abrogated, it is clear that a sheriff (and his deputies) may make arrests for motor vehicle violations which amount to breaches of the peace committed in their presence," as long as the sheriff (or her deputies) "complete[d] the same type of training that is required of police officers throughout the Commonwealth." And that was that.

Leet was flawed at the time it was decided, and the past twenty-six years have underscored these flaws…. It is time to overrule that precedent, and it is time for our General Assembly to define the duties of our Commonwealth's sheriffs….

B

The Framers of our Commonwealth's and our Nation's Constitutions had a conception of law somewhat different from our own. For them, the common law simply existed, waiting to be revealed by the "brooding omnipresence in the sky." *S. Pac. Co. v. Jensen*, 244 U.S. 205 (1917) (Holmes, J., dissenting). But our Framers' beliefs about "the source of natural justice" made way over time for the view that "law in the sense in which courts speak of it today does not exist without some definite authority behind it," *Erie R.R. CO. v. Tompkins*, 304 U.S. 64 (1938). Today's conception of common law "is rooted in a positivist mindset utterly foreign to the American common-law tradition of the late 18th century."

The brooding-omnipresence-versus-positivist-authority debate played out most prominently on the civil side of our common law jurisprudence, especially in the area of general common law and federal diversity jurisdiction. However, when our Commonwealth adopted English common law in 1777, we not only adopted the common law of torts and contracts and property, but the common law of crime as well. Into the twentieth century, we continued to adjudicate criminal common law. *See Commonwealth v. Mochan*, 110 A.2d 788 (1955). However, in 1972, in line with the modern positivist trend, our General Assembly codified the criminal laws of this Commonwealth. In doing so, the General Assembly decreed: "Common law crimes abolished.–No conduct constitutes a crime unless it is a crime under [Title 18 of Pennsylvania's Consolidated Statutes] or another statute of this Commonwealth." Act of 1972 (codified as 18 Pa.C.S. § 107(b)). Thus, the Commonwealth can no longer bring common law charges against defendants. Rather, Pennsylvania prosecutors must look to the "definite authority" of a statute duly enacted by our General Assembly.

C

In enacting the criminal code, the General Assembly elected not to codify the common law crime of "breach of the peace." Additionally, neither the criminal code nor the Motor Vehicle Code ("MVC") empowers sheriffs to enforce their provisions. This is not because the General Assembly is incapable of identifying in legislation which of our law enforcement personnel can enforce our statutes. Police officers have the [statutory] authority to make warrantless arrests for violations of the criminal code, and municipal police officers are specifically empowered to enforce that same code. State police officers and "[o]ther police officers" are empowered to make arrests for violations of the MVC.

Nor is the General Assembly incapable of defining the sheriff's duties. On the contrary. By my count, the word "sheriff" appears in over 400 statutory provisions. Most importantly, "sheriffs … shall perform all those duties authorized or imposed on them by

statute." In line with this generic grant of authority, the General Assembly has empowered our Commonwealth's sheriffs to perform all sorts of specific tasks. A sheriff can make an arrest for the violation of a protection from abuse order committed in the sheriff's presence…. A sheriff can investigate disputes about the custody of animals, search for gunpowder in homes within the City of Philadelphia, serve process on islands between Pennsylvania and New Jersey, remove stocks of illegal fireworks, and issue licenses for dealers of precious metals [statutory citations omitted]. Even within the confines of the MVC, a sheriff can direct that a vehicle be impounded for nonpayment of fines, and conduct public sales for impounded vehicles [statutory citations omitted]. Also within the MVC, drivers are ordered to obey a sheriff who is directing traffic, and a sheriff's vehicle is permitted to have flashing lights, And yet, with all of these specific provisions giving various duties to sheriffs, including within the MVC itself, never did the General Assembly decree that sheriffs should have the general authority to enforce the laws of our Commonwealth, criminal or motor vehicle in nature.[1]

As a matter of law, this lack of statutory authorization should have been the end of this debate. Then-Chief Justice Nix, the sole dissenter in *Leet*, thought it was. … Notwithstanding its unquestionable power to do so, the General Assembly has chosen not to alter our statutory framework with regard to sheriffs since Chief Justice Nix dissented in 1994. The dissent was convincing then, and it is convincing now. It should be the law.

D

… The Majority strives mightily to create a more precise meaning of breach of the peace, possibly in the forlorn hope that our lower courts will be able to adjudicate future cases without our recurrent intervention. Past experience of this Court suggests that this exercise will prove fruitless. The six cases preceding Copenhaver's appeal have failed to provide authoritative guidance. *Cf. Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (avoiding having to define breach of the peace, but writing that "[t]he term apparently meant very different things in different common-law contexts" and "[e]ven when used to describe common-law arrest authority, the term's precise import is not altogether clear"). That we continually have felt bound to grant *allocatur* on this issue over the past quarter century is a testament to the impossibility of defining the term with precision. The General Assembly clearly is better-suited to such a task.

Our continued failure to squarely define breach of the peace does no favor to either sheriffs or average residents of (and visitors to) Pennsylvania. When a sheriff is traveling in an official vehicle and witnesses an individual disobeying some provision of the MVC, that sheriff will have to decide, on a moment's notice, whether the observed action is a breach of the peace. While we rely upon our law enforcement officers to know the law and their duties in enforcing the law, requiring a sheriff to interpret when a particular action is a breach of a peace … seems beyond the pale, considering that even the judges and justices of this Commonwealth cannot come to an agreement.

Perhaps even more troubling is the lack of notice given to those Pennsylvanians who may violate the MVC. The average resident, who likely has less legal training than a law enforcement officer, will have no idea whether driving over an "unprotected hose of a fire department," parking forty-nine feet from a railroad crossing, or crossing a highway in a golf cart at a forty-five degree angle [statutory citations omitted], constitutes a breach of the peace, for which a sheriff passing by could make an arrest….

A sheriff using these common law powers of arrest granted by this Court has enormous discretion. Because law enforcement resources are not unlimited, discretion is a necessary element in our criminal justice system. But as the law stands, sheriffs have discretion not only in determining who may be arrested and for what crimes they may be arrested, but also in determining (at least until court review following a suppression motion) whether sheriffs themselves have the authority to make the arrest in the first place. …

E

Leet was incorrect when it was decided, and it should be overruled. …

[W]hile I agree that an expired registration tag does not amount to a breach of the peace, I would find that sheriffs do not possess the authority to stop drivers who violate the Motor Vehicle Code, absent a directive from the General Assembly.

Check Your Understanding (1-3)

The original version of this chapter contained H5P content. You may want to remove or replace this element.

Notes and questions on *Copenhaver*

1. Defining an act as criminal creates the legal authority *to punish*, in that legal definitions of crime specify some penalty that can be imposed on the person who engages in the given act. Defining an act as criminal can also create the legal authority *to police*, in that law enforcement officers will have powers to investigate and arrest persons suspected of the act defined as criminal. In the first case you read, *Commonwealth v. Mochan*, the dispute between the majority and dissent focused on which branch of government should have the power to decide which acts will be subject to punishment. (Again, the dissenting opinion in *Mochan* represents the view that eventually came to prevail in the United States, including Pennsylvania. See Part III-B of Justice Wecht's opinion in this case.) *Commonwealth v. Copenhaver* presents a parallel dispute about the power to police rather than the power to punish. Which branch of government should have the power to decide when an act, such as driving with an expired vehicle registration, subjects a person to arrest by a county sheriff?
2. Where do police officers or other law enforcement agents get their powers? Is the power to arrest just out there, like a "brooding omnipresence in the sky"? Judge Wecht contrasts the brooding omnipresence view of law with a more modern "positivist" view, one that holds "law in the sense in which courts speak of it today does not exist without some definite authority behind it." Judge Wecht would argue that a sheriff's power to arrest must have "some definite authority behind it," and more specifically, some definite authority granted *by the legislature*.
3. But consider again: is it really significant for the legislature to grant police arrest authority, or, thinking back to *Mochan*, for the legislature to designate which acts are subject to criminal punishment? As Judge Wecht notes, it's fairly easy for the legislature to grant police broad powers to enforce any offense. It's also fairly easy for legislatures to enact new criminal statutes. And many state legislatures have indeed created very broad powers to police and punish. American criminal law is not characterized by a lack of legislative involvement; it is instead characterized by very broad criminalization choices by legislatures.
4. The *Copenhaver* case is included here to encourage you to consider the ways in which criminalization decisions empower, and otherwise interact with, enforcement decisions. As you begin to think about enforcement decisions, keep in mind that a criminal conviction usually involves multiple different enforcement decisions – by police officers, by prosecutors, and perhaps by judges or other judicial employees. Enforcement decisions include decisions to investigate and arrest, typically made by police officers, but also a multitude of decisions about whether and how to charge the defendant, and which paths toward (or away from) conviction to pursue. The federal Bureau of Justice Statistics publishes a classic graphic that captures many key enforcement decisions, along with adjudication decisions, which you can view at https://bjs.ojp.gov/media/image/45506. This image is misleading in some respects, most prominently in its implication that a "crime" necessarily precedes any initiation of investigation and prosecution. In fact, many investigations begin with suspicion that criminal activity may have occurred, and then never produce any proof that a crime did in fact take place. Notwithstanding the limitations of the BJS flowchart, the sections labeled "Entry into the System" (on policing) and "Prosecution and Pretrial Services" (on prosecutorial choices) give you a reasonable overview of the many enforcement choices that can shape a defendant's fate.
5. Victor Copenhaver, the defendant in *Copenhaver*, was ultimately convicted of what crime or crimes? Who made the *adjudication* decision in this case? That is, who found Copenhaver guilty? What evidence supported the finding of guilt?
6. As you probably already know, the prosecution is required to "prove" the defendant's guilt (unless the defendant pleads guilty, as discussed above and in more detail in Chapter Four). In principle, the prosecution should meet its burden of proof by relying only on evidence that it has obtained legally. But there are many exceptions to that principle, and many debates about whether and when evidence that government actors have obtained illegally should be "suppressed," or excluded from court at a trial. Whatever one's judgment about the desirability of suppressing illegally seized evidence, it is clear that as the investigative powers of the police expand, the government's ability to obtain evidence *legally* also expands. Thus expansions of the power to police are also expansions of the power to convict and punish—not because new police powers necessarily define more conduct as criminal, but because new police powers will help the state obtain what it needs to prove various types of conduct already defined as criminal.
7. Notice that the term "breach of the peace" is used in a couple of different ways. As Judge Wecht notes (Part III-C), there was once a common law crime called "breach of the peace," which was not codified when Pennsylvania abolished common law crimes and enacted a criminal code. But even if there is no specific crime called "breach of the peace" in Pennsylvania today, the term remains important because of an earlier state case, the *Leet* decision from 1994. In *Leet*, the state supreme court decided that sheriffs had the authority to make warrantless arrests for offenses that constituted breaches of the peace. In this second usage, "breach of the peace" is not one specific crime but rather a broad category of offenses that could include drunk or reckless driving (to use the majority's example) and maybe also driving over a fire hose or crossing a highway in a golf cart at a forty-five degree angle (to use Judge Wecht's examples).

8. As noted by the majority, the prosecution (here, "the Commonwealth") argued that the vehicle stop was justified not merely because the deputy sheriff suspected an expired registration, but also because the deputy suspected that the truck Copenhaver was driving could be stolen. The registration sticker was not simply expired; it had been issued to a different vehicle. The problem with this argument, as discussed by Justice Wecht in a portion of his opinion not included here, was that the deputy had testified that he did not learn that the registration was issued to a different vehicle until after he had stopped the truck. This seemingly small dispute raises broad questions about the scope of law enforcement authority, most of which we will not be able to tackle in this book. In general, police and other law enforcement officials are able to stop, arrest, or search persons when they have legally adequate suspicion. This means that long after a stop, arrest, or search has taken place, prosecutors and defense attorneys will often be arguing about what the police officer knew or suspected when he decided to exercise his investigative authority. Again, in this particular case, the deputy had testified that he did not know the registration sticker didn't match the truck until after he made the stop. But the prosecution focused on the stipulated facts, rather than the deputy's testimony, and argued that the stipulated facts allowed a conclusion that the deputy had in fact been aware of the mismatched sticker and thus could have suspected vehicle theft. All of this is important to this case, because the state courts would almost certainly find vehicle theft to be a "breach of the peace," even if a mere expired registration is not a breach of the peace.
9. Also on the term "breach of the peace," notice this possible contradiction between the majority and Judge Wecht: The majority claims that the court "has not yet had occasion to describe the contours" of the concept of a breach of the peace. But Judge Wecht points out that between *Leet* in 1994 and *Copenhaver* in 2020, the state supreme court decided six cases concerning the scope of sheriffs' authority to arrest for "breaches of the peace." Let this small, seemingly inconsequential divergence alert you to an important feature of all judicial opinions: they are expressions of human decisions, and they are usually carefully crafted to defend a specific outcome. Judges often have some leeway to choose which legal questions to address, which facts to include in their opinions, and which authorities or precedents to invoke (or ignore). One advantage of a case with multiple opinions is that you may get a slightly fuller picture of the background facts or applicable precedents.
10. It is important to understand the role that judicial opinions play in the field of criminal law, and the role they play in a criminal law course and in this book. As you know now after reading *Commonwealth v. Mochan* and the accompanying notes, today criminal law is a statutory field. For a type of conduct to be classified as criminal, a legislature needs to enact a statute defining the conduct as a crime. Judicial opinions are not the primary source of crime definitions. But as we will see in the next few chapters, statutes often leave many questions open for interpretation, and judges often help determine the scope of criminal law by adopting one interpretation or another. Still, the fact that crimes are typically defined by statute means that judicial opinions play a somewhat different role in this field, and in this book, than they do in some other areas of law. We do not read cases simply to identify their holdings. We do not attempt to synthesize an overarching rule from an array of cases on a related topic. Instead, we read cases primarily as case studies: each case in this book is selected to illustrate several important aspects of criminal law in practice. The notes that follow each case will help you identify various ways in which a particular case demonstrates something important about criminal law.
11. For example, one could say that the holding of *Commonwealth v. Copenhaver* is that in Pennsylvania, the offense of driving with an expired vehicle registration sticker is not a "breach of the peace" that gives a county sheriff authority to stop the vehicle. But that is hardly the most important lesson that you should learn from this case. Instead, the case is included here for reasons detailed in the notes above. Most importantly, you should understand that enforcement action is the critical link between a criminalization decision and an ultimate finding of guilt. A criminalization decision—the choice to classify a type of conduct as criminal—will produce enforcement powers, and those enforcement powers must be exercised to then bring a particular defendant to court for an adjudication decision. Justice Wecht's separate opinion also makes *Copenhaver* a good case to prompt reflection about different types of law and different theories of law. Is law, including the law that empowers police, a "brooding omnipresence in the sky" that exists independently of legislative action? Should we think of law as only the formal pronouncements of legislatures? Should we view judicial decisions as something other than law-making? The brooding omnipresence view is one that may overly obscure the role of human beings and their specific decisions, treating law as an abstraction that exists independently of human decisionmakers. *Copenhaver* is here to raise these important questions as you begin your study of criminal law. Beyond *Copenhaver* and throughout this book, think of each case as a case study, and use the notes after each case to help you identify the various lessons to be drawn from each case.

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1. In contrast to Pennsylvania, where sheriffs rely for their general arrest power only upon common law authority developed and pronounced by this Court, other states specifically empower their sheriffs through statute to make arrests, including for breaches

of the peace… I can imagine nothing disabling our own General Assembly from passing similar laws if it chooses to do so. [Footnote by Justice Wecht.] ↵

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1.2: Criminalization Decisions

Introduction

In this chapter, *criminalization* refers to the classification of a type of conduct as criminal. To criminalize conduct means that persons who engage in that conduct may become liable for criminal sanctions. But criminalization itself does not guarantee that all persons who engage in the conduct will actually be punished, as will become more clear in the next two chapters on enforcement and adjudication. This chapter raises four questions about criminalization.

- Who? Which public officials or government institutions have the power and authority to classify conduct as criminal?
- Why? When public officials designate a type of conduct as criminal, why do they make that choice?
- How, or, in what form? When a public authority designates conduct as criminal, what form does that designation take? Are there necessary components that must be included in the definition of a crime?
- With what limits? Are there constraints on the power to declare conduct to be criminal?

For any of these questions, there may be a divergence between a purely descriptive answer and a normative answer. For example, one might think that, as a normative matter, all criminalization decisions should be made by the legislature and expressed in a clearly worded statute. And yet one might discover that in practice, vaguely worded statutes give courts or law enforcement officials the power to decide what kinds of conduct will be treated as criminal. This chapter seeks both to provide accurate descriptions of how criminalization decisions are made and to prompt reflection on normative questions about how criminalization decisions should be made.

One important question may seem to be missing from the above list: what types of conduct are, or have been, criminalized? Put simply, which acts are crimes? A catalogue of all crimes would be far too long for one book, let alone one chapter. But this book does aim to give you an overview of the types of conduct that have been defined as criminal. You will get some of this overview in Part B of this chapter, which addresses the reasons that public officials choose to criminalize. The range of different types of acts that have been designated as criminal may provide some clues to the reasons underlying criminalization choices. In addition, the final section of this chapter identifies some narrow areas in which the U.S. Constitution might prohibit criminalization of certain types of conduct. Most broadly, the book as a whole, including Unit Two with its focus on specific offenses, attempts to give you a sense of criminalization patterns in American jurisdictions.

An example may be useful to clarify the distinction between *criminalization*, discussed in this chapter, and *enforcement* and *adjudication*, discussed in the following two chapters. As you are no doubt aware, American states and the federal government have long criminalized the possession and distribution of many substances deemed dangerous. Some jurisdictions have recently decriminalized marijuana, which means that persons who possess or sell marijuana according to state guidelines are no longer subject to criminal punishment for that conduct. But even in a jurisdiction that continues to criminalize marijuana possession, the mere fact that a person possesses marijuana is not, by itself, sufficient to ensure that the person will be convicted and punished. For those things to happen, the person needs to be subject to enforcement – such as a police officer's discovery of the marijuana, and a prosecutor's choice to press charges – and adjudication – a formal determination of guilt. Criminalization is the first key decision that leads to punishment, but it is only the first.

Who defines crimes? Common law to codification

In early English common law, courts were primarily responsible for criminalization. Criminalization decisions were expressed in judicial opinions which identified certain kinds of acts as eligible for criminal liability. But from a fairly early date, courts shared the authority to criminalize with legislatures, who could enact statutes defining types of conduct as criminal. By 1765, the English Parliament had created at least 160 statutory felonies (each punishable by death). William Blackstone, 4 *Commentaries on the Laws of England* 18 (1765). After the American colonies declared their independence and began to establish their own criminal legal systems, they imported many English common law definitions of crimes, but they also began enacting new criminal statutes. And even as American state courts applied and interpreted English common law precedent, they also altered those precedents or designated new categories of activity as criminal, thus developing an American common law of crime. Thus, for much of American history, an act could be classified as criminal in any of three circumstances: 1) because English courts had criminalized it; 2) because American courts had criminalized it; or 3) because American legislatures had criminalized it.

But the notion that *courts* could declare conduct to be criminal was controversial in the young United States, and throughout the nineteenth century there were calls to eliminate this judicial power and codify all of criminal law – that is, to permit legislatures and only legislatures to define conduct as criminal. In 1812, the U.S. Supreme Court decided that federal courts lacked the power to define common law crimes; only Congress, the federal legislature, could designate conduct as a federal crime. *United States v. Hudson& Goodwin* (1812). *Hudson& Goodwin* does not directly affect the power of state courts to designate conduct as criminal under state law, but most U.S. states did in fact eventually limit or abolish the power of state courts to declare conduct to be criminal. Recall *Commonwealth v. Mochan* from the previous chapter, in which the majority continued to endorse common law crimes and the dissent urges exclusive legislative authority to criminalize. Even when decided in 1955, *Mochan* was an outlier. As you read in *Commonwealth v. Copenhaver* at the end of Chapter One, Pennsylvania eventually joined most other American states in abolishing common law crimes.

As a general matter, criminalization is now a legislative decision in the United States. That is, to prosecute a person in the U.S. today, officials almost always do need a statute, which is an official legislative statement defining conduct as criminal. Criminal law is a statutory field in this sense: it would be very unusual to see today a prosecution like the one in *Mochan*, where prosecutors did not cite any specific statute at all. Statutes, collected in criminal codes, are a central part of criminal law, and this chapter will explore several issues related to codes and statutes. But the prominence of statutes does not mean that "common law" principles or terms are now unimportant, or that judges have no power to shape the definition of crimes. As you will see, many criminal statutes use common law terms or definitions, and judges often invoke the common law in interpreting statutes. Moreover, when we turn our attention from the definitions of offenses to the scope of affirmative defenses, such as self-defense or necessity, we will see that common law terms and reasoning continues to play a more prominent role in that arena.

Between the legislature and the judiciary, who should have the power to define conduct as criminal? You may wish to glance back at Judge Woodside's dissent in *Mochan* for some arguments for legislative primacy. Two standard arguments focus on democracy and notice. The democracy argument holds that a legislature is the best representative of the people, and criminalization choices should reflect the will of the people. The notice argument focuses on the form of criminalization, holding that a statute gives individuals advance notification that certain acts will be liable for punishment, whereas judicial decisions typically involve an actual defendant who has already been charged, and thus may not provide adequate notice to that particular defendant. Can you think of other reasons why either the judiciary or the legislature may be better suited to make criminalization decisions?

Are legislatures and courts likely to make different kinds of criminalization choices? In particular, is one institution more likely to classify conduct as criminal than the other? Some scholars have suggested that the threshold for criminalization may be lower when legislatures, rather than judges, define what is criminal. It does appear to be the case that legislatures enact new crimes more readily than do the handful of courts that retain the authority to declare common law crimes. And the greater legislative readiness to criminalize appears to have operated even before judicial crime definition fell into disfavor. As noted above, William Blackstone observed – and lamented – the proliferation of statutory felonies in England back in 1765! For further comparison of judicial crime-creation to legislative crime-creation in the United States, see Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 Va. L. Rev. 965 (2019); Dru Stevenson, *Costs of Codification*, 2014 U. Ill. L. Rev. 1129.

Whatever one's normative views as to who should make criminalization decisions, it is important to understand the existing state of American law: legislatures decide what conduct is criminal, at least as an initial matter. (In the next chapter we will note some ways that the executive branch can participate in or influence criminalization decisions, and in Chapter Four, we consider ways in which courts make criminalization decisions through their interpretation and application of statutes.) Although criminalization remains a choice to be made most often by the legislature, there is no single legislature that makes all of American criminal law. Congress is our national legislature and its criminal statutes – federal criminal laws – do apply across the nation. The first case in this chapter, *Morissettev. United States*, involves a federal criminal statute that was used to prosecute a man accused of taking federal property in Michigan. But as you will learn when you study constitutional law, Congressional power is limited in various respects. Most criminal law comes from state legislatures, not Congress, which means that the definitions of crimes vary from state to state. Most states have a crime called "murder," but the precise definition of murder can vary from state to state. Thus, whether a particular killing constitutes a murder can depend on where the killing takes place. This point bears emphasis, and repetition: jurisdiction matters! Always pay attention to where potentially criminal activity takes place, and consider the relevant laws of that jurisdiction. (Luckily, as noted in the first chapter, you do not need to memorize the various laws of every jurisdiction to do well in a criminal

law course, or to do well as a practicing lawyer. But you do need to know that jurisdiction matters, and you need to be able to understand and apply the relevant statutes of a given jurisdiction.)

One particular collection of criminal statutes has traditionally loomed large in law school teaching. In the 1950s, a group of scholars and jurists developed a set of criminal statutes called the Model Penal Code (MPC). The American Law Institute, the group that drafted the MPC, is not a government entity and has no official authority to make binding law. Instead, the Institute sought to create a model or blueprint that would inspire actual legislatures to revise their own criminal codes. The drafters of the MPC sought greater consistency and rationality in criminal law. They saw some common law principles as outdated or misguided, and thus certain aspects of the MPC deliberately depart from common law traditions. After the MPC was published in 1962, some state legislatures did enact statutes that follow specific parts of the MPC, though no state adopted the entire model code. Certain provisions of the MPC have been very influential and widely copied in actual legislation. But as a code, or a complete set of statutes, the MPC is probably more widely embraced by law professors, who often give it extensive attention in a criminal law course, than by legislatures. The MPC is also influential among judges, who sometimes refer to the MPC when addressing questions not directly resolved by an existing statute. In short, some parts of the MPC have influenced actual codes and practices more than others. And even among states that have adopted parts of the MPC, significant local variation has developed as different state courts interpret MPC-inspired statutes differently. See Anders Walker, *TheNew Common Law: Courts, Culture, and the Localization of the Model Penal Code*, 62 Hastings L.J. 1633 (2011). Throughout this book, we will look at portions of the MPC when they are relevant, but it is important to keep in mind that the MPC is a blueprint or model rather than a binding legal document.

Among state criminal codes that borrow heavily from the MPC and those that do not, one common feature deserves emphasis: all criminal codes tend to be sprawling and ever-growing legal texts, with many statutes that seem to overlap – that is, multiple statutes that could plausibly be used to punish the same conduct. Even in states that have enacted many MPC-inspired statutes, the impact of those statutes may become less important as other statutes proliferate. Legislatures add new criminal statutes fairly often, and remove statutes somewhat more rarely. Somewhat counterintuitively, perhaps, some scholars have described the steady expansion of criminal codes as "degradation": "[t]he main form of degradation is the proliferation of numerous new offenses that duplicate, but may be inconsistent with, prior existing offenses." Paul H. Robinson & Michael T. Cahill, *TheAccelerating Degradation of American Criminal Codes*, 56 Hastings L.J. 633, 635 (2005). "American criminal codes have, since their initial codification, shown a tendency to become bigger and bigger. Bigger, however, is not always better. Indeed, it is sometimes worse…." Id. In later chapters, we will consider ways in which enforcement and adjudication decisions are affected by the proliferation of criminal statutes, especially the phenomenon of overlapping statutes. Most importantly, overlapping statutes increase enforcement discretion and make guilty pleas more likely, as we shall see.

Why enact criminal laws? Principles of criminalization

To classify conduct as criminal is to say that persons who engage in that conduct may be subject to criminal liability, which usually involves the imposition of some kind of burden, such as loss of physical liberty, monetary penalties, or other unpleasant consequences. Why do public officials choose to subject certain kinds of conduct to criminal sanctions? One simple answer focuses on criminal sanctions as deterrents: the government wants to discourage some type of conduct, and so it threatens unpleasant consequences for those who engage in that conduct. That answer isn't complete, though. First, we may still wonder how a government chooses what conduct to discourage, and how it decides when to use criminal sanctions as opposed to other incentives or disincentives, such as civil penalties. And second, the deterrent effects of criminal sanctions are mixed. Sometimes the threat or imposition of criminal penalties does seem to discourage persons from engaging in the specified conduct, and sometimes it doesn't. The continued (and ever-growing) enactment of criminal statutes in the face of mixed deterrent effects raises the possibility that reasons other than a desire to deter may sometimes motivate criminalization choices.

If public officials criminalize conduct in order to be able to punish it, the rationales for criminalization are likely to coincide with rationales for punishment. In addition to deterrence, retribution (or "just deserts"), incapacitation, and rehabilitation are frequently identified as goals of punishment. These considerations do often enter discussions of criminalization, but again, notice that these goals do not themselves tell us which acts need to be deterred, retributed, incapacitated, or rehabilitated. And if it sounds strange to speak of incapacitating or rehabilitating acts rather than people, that should highlight an important difference between criminalization and punishment. Criminalization can target acts or conduct; the state can designate an act as a crime even before the act takes place, and even if the act never actually does take place. But punishment, the actual imposition of criminal sanctions, is

something that is done to a person. Punishment may be imposed in response to an act, but it is imposed on the person who has been found to engage in that act. Toward the end of this chapter, we will examine further the ways in which criminal law targets acts, persons, or both.

Many philosophers have developed principles of criminalization to explain when it is appropriate to designate conduct as criminal. The philosophers' principles aren't binding law, of course, but they could provide insight into actual government decisions or serve as a normative guide for government actors. One possible principle of criminalization is a harm principle, which could hold that conduct should be criminalized if and only if the conduct causes harm to other people. (Of course, what constitutes harm, and how much harm must occur to warrant government intervention, are further issues to be decided. Recall again *Mochan*, in which "any act which directly injures or tends to injure the public to such an extent as to require the state to interfere" was said to be criminal, and a vulgar phone call was found to be sufficiently injurious, or harmful, to constitute a crime.) Some theorists would distinguish between harm and wrong, and would argue that criminal sanctions should be imposed on wrongful conduct even if wrongs do not always cause harm. (Again, what constitutes wrongful conduct, and when a wrong warrants criminal intervention, must also be determined. As noted in Chapter One, tort law is also purportedly concerned with wrongful conduct. When should a state choose criminal sanctions rather than, or in addition to, tort sanctions?)

The concepts of harm and wrong may be too abstract to give concrete guidance to criminalization choices. If we look at the actual types of conduct that have been designated as criminal in many jurisdictions, we see that inflictions of physical injury to other persons (killing, in the most extreme, but also nondeadly assaults), taking property in violation of existing ownership rules, activities considered immoral, and activities viewed as unnecessarily dangerous are common categories of criminal offenses. But this list is only a brief beginning. Legislatures often attach criminal sanctions to violations of seemingly mundane public regulations. One much-cited example is the federal statute that criminalizes the misuse of Smokey the Bear's image. More obscurely, an early Hawaii statute designated the practice of photography without a license as a misdemeanor offense. See *Territory v. Kraft*, 33 Haw. 397 (1935). (Fritz Kraft photographed President Franklin Roosevelt during the president's visit to Hawaii, and then sold prints of the image, thus triggering a misdemeanor prosecution. The Supreme Court for the territory of Hawaii, which was not yet a state, eventually decided that the statute exceeded the government's power.) *Morissettev. United States*, discussed below, discusses a category of regulatory offenses known as "public welfare" offenses. In recent years some legal theorists have urged the preservation of "public order" or "civil order" as a principle to guide criminalization choices, but it is not clear whether civil order is any more precise a guide than the concept of harm or wrong.

It is important to consider the reasons that public authorities choose to criminalize conduct, but do not be frustrated if you can't identify one principle or even one set of principles that seems to explain all criminalization choices. The enactment of a new criminal statute is an action by elected politicians; you can decide for yourself whether politicians act always on principle. The criminal law scholar William Stuntz famously said that "American criminal law's historical development has borne no relation to any plausible normative theory – unless 'more' counts as a normative theory." Stuntz, *ThePathological Politics of Criminal Law*, 100 Mich. L. Rev. 505 (2001). Whether you agree with Stuntz or not, thinking about the rationales for various criminal laws can help you understand how this area of law works. With that in mind, take a moment to think about criminalization choices in relation to enforcement choices.

The principles of criminalization identified above treat the question "why criminalize" as essentially equivalent to the question, "why punish?" But designating conduct as criminal does not mean that all who engage in that conduct will automatically be punished. When an act is designated as criminal, persons who engage in that act may become liable to punishment. But such a person is not actually punished until enforcers detect the violation, gather sufficient evidence of it, and prosecute and convict the person. Criminalization empowers enforcement actions, as discussed in relation to *Copenhaver* in Chapter One. Designating conduct as criminal empowers police and prosecutors to investigate, intervene, and initiate charges. Sometimes, there may be reasons to pursue these enforcement actions even if the government is not concerned about punishing the specific conduct that authorizes the investigation. For example, many investigations of traffic offenses are likely designed to gather information about other, unrelated offenses, such as drug crimes. The government may not see much value in imposing criminal punishment for traffic violations, but it may see great value in policing traffic violations. Thus, empowering law enforcement to intervene might itself be the aim of some criminalization decisions. We will return to this topic in the next chapter, which considers enforcement choices in more detail.

And finally, consider the possibility that some criminalization choices are primarily expressive. The government sometimes may wish to declare conduct criminal in order to communicate its disapproval of that conduct, even if it does not expect to impose punishment often. (Consider the criminalization of suicide, for example.)

Check Your Understanding (2-1)

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Who, why, and how to define a crime

So far, we have discussed who makes criminalization decisions and why government may wish to criminalize. Both of these questions, along with a third – must the definition of a crime include certain ingredients, such as a requirement of wrongful intent? – arise in *Morissettev. United States*, presented below. Before you read the Supreme Court's opinion, look at the text of the statute, excerpted below. Because criminalization is usually a legislative choice in contemporary law, most cases included this book involve the application of a specific criminal statute. Thus, most cases will be preceded by the relevant statutory text. Reading the statutory text will help you in a few ways. First, reading statutes and regulations is important to modern legal practice in any area of law, not just criminal law. Law does not reside wholly in judicial opinions, and you should become comfortable reading legal texts that were not written by courts. Second, you should become familiar with the standard form of a criminal statute. The statute below, like most criminal statutes, is not formulated as a command to individuals in the form, "don't do X." Instead, this statute, like most criminal statutes, describes a type of activity or conduct and specifies a punishment to be imposed on those who engage in that activity. The statute tells government officials – police, prosecutors, judges – what to do when someone engages in the criminalized conduct. In the next chapter, we will consider in more detail the way in which a statute operates to expand the power of enforcement officials. A third reason to look closely at the statute will become more clear by the end of this chapter: many criminal statutes can be divided into "elements," or separate components that must be established in order to convict a defendant. You can use the statutes that precede cases in this book to practice identifying the separate elements of a given crime. (The next section of this chapter will give you more guidance about how to identify "elements.") Finally, you may find it helpful to glance back at the statutory text as you read the judicial opinion. As you will see, arguments about the best way to interpret the statutory language are often the focus of appellate opinions.

With all that said, consider the following federal statute, first enacted by Congress in 1948:

18 U.S.C. § 641 . Public money, property, or records

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States … shall be fined under this title or imprisoned not more than ten years, or both….

Joseph Edward MORISSETTE

v.

UNITED STATES

Supreme Court of the United States
342 U.S. 246

Jan. 7, 1952

Justice JACKSON delivered the opinion of the Court.

This would have remained a profoundly insignificant case to all except its immediate parties had it not been so tried and submitted to the jury as to raise questions both fundamental and far-reaching in federal criminal law….

On a large tract of uninhabited and untilled land in a wooded and sparsely populated area of Michigan, the Government established a practice bombing range over which the Air Force dropped simulated bombs at ground targets. At various places about the range signs read 'Danger—Keep Out—Bombing Range.' Nevertheless, the range was known as good deer country and was extensively

hunted. Spent bomb casings were cleared from the targets and thrown into piles 'so that they will be out of the way.' They were … dumped in heaps, some of which had been accumulating for four years or upwards, were exposed to the weather and rusting away.

Morissette, in December of 1948, went hunting in this area but did not get a deer. He thought to meet expenses of the trip by salvaging some of these casings. He loaded three tons of them on his truck and took them to a nearby farm, where they were flattened by driving a tractor over them. After expending this labor and trucking them to market in Flint, he realized $84.

Morissette … is a fruit stand operator in summer and a trucker and scrap iron collector in winter. An honorably discharged veteran of World War II, he enjoys a good name among his neighbors and has had no blemish on his record more disreputable than a conviction for reckless driving.

The loading, crushing and transporting of these casings were all in broad daylight, in full view of passers-by, without the slightest effort at concealment. When an investigation was started, Morissette voluntarily, promptly and candidly told the whole story to the authorities, saying that he had no intention of stealing but thought the property was abandoned, unwanted and considered of no value to the Government. He was indicted, however, on the charge that he 'did unlawfully, wilfully and knowingly steal and convert' property of the United States of the value of $84….

On his trial, Morissette, as he had at all times told investigating officers, testified that from appearances he believed the casings were cast-off and abandoned, that he did not intend to steal the property, and took it with no wrongful or criminal intent. The trial court, however, was unimpressed, and ruled: '(H)e took it because he thought it was abandoned and he knew he was on government property. * * * That is no defense. * * * I don't think anybody can have the defense they thought the property was abandoned on another man's piece of property.'

The Court of Appeals … affirmed the conviction…. Its construction of the statute is that it creates several separate and distinct offenses, one being knowing conversion of government property. The court ruled that this particular offense requires no element of criminal intent. This conclusion was thought to be required by the failure of Congress to express such a requisite and this Court's decisions in *United States v. Behrman* (1922) and *United States v. Balint* (1922).

In those cases this Court did construe mere omission from a criminal enactment of any mention of criminal intent as dispensing with it. If they be deemed precedents for principles of construction generally applicable to federal penal statutes, they authorize this conviction. Indeed, such adoption of the literal reasoning announced in those cases would do this and more—it would sweep out of all federal crimes, except when expressly preserved, the ancient requirement of a culpable state of mind. We think … an effect has been ascribed to them more comprehensive than was contemplated and one inconsistent with our philosophy of criminal law.

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution….

Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil. [1]As the state codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation. Courts, with little hesitation or division, found an implication of the requirement as to offenses that were taken over from the common law. The unanimity with which they have adhered to the central thought that wrongdoing must be conscious to be criminal is emphasized by the variety, disparity and confusion of their definitions of the requisite but elusive mental element. However, courts of various jurisdictions, and for the purposes of different offenses, have devised working formulae, if not scientific ones, for the instruction of juries around such terms as 'felonious intent,' 'criminal intent,' 'malice aforethought,' 'guilty knowledge,' 'fraudulent intent,' 'wilfulness,' 'scienter,' to denote guilty knowledge, or 'mens rea,' to signify an evil purpose or mental culpability. By use or combination of these various tokens, they have sought to protect those who were not blameworthy in mind from conviction of infamous common-law crimes.

However, the *Balint* and *Behrman* offenses belong to a category of another character, with very different antecedents and origins. The crimes there involved depend on no mental element but consist only of forbidden acts or omissions. [They represent] a century-old but accelerating tendency, discernible both here and in England, to call into existence new duties and crimes which disregard any ingredient of intent. The industrial revolution multiplied the number of workmen exposed to injury from increasingly powerful and complex mechanisms, driven by freshly discovered sources of energy, requiring higher precautions by employers. Traffic of velocities, volumes and varieties unheard of came to subject the wayfarer to intolerable casualty risks if owners and drivers were not to observe new cares and uniformities of conduct. Congestion of cities and crowding of quarters called for health and welfare regulations undreamed of in simpler times. Wide distribution of goods became an instrument of wide distribution of harm when those who dispersed food, drink, drugs, and even securities, did not comply with reasonable standards of quality, integrity, disclosure and care. Such dangers have engendered increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare.

While many of these duties are sanctioned by a more strict civil liability, lawmakers, whether wisely or not, have sought to make such regulations more effective by invoking criminal sanctions to be applied by the familiar technique of criminal prosecutions and convictions. This has confronted the courts with a multitude of prosecutions, based on statutes or administrative regulations, for what have been aptly called 'public welfare offenses.' These cases do not fit neatly into any of such accepted classifications of common-law offenses, such as those against the state, the person, property, or public morals. Many of these offenses are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty. Many violations of such regulations result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize. While such offenses do not threaten the security of the state in the manner of treason, they may be regarded as offenses against its authority, for their occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted. In this respect, whatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity. Hence, legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element. The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities. Also, penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation. Under such considerations, courts have turned to construing statutes and regulations which make no mention of intent as dispensing with it and holding that the guilty act alone makes out the crime….

After the turn of the Century, a new use for crimes without intent appeared when New York enacted numerous and novel regulations of tenement houses, sanctioned by money penalties. Landlords contended that a guilty intent was essential to establish a violation [but New York courts disagreed].… [F]or diverse but reconcilable reasons, [other] state courts converged on the same result, discontinuing inquiry into intent in a limited class of offenses against such statutory regulations.

Before long, similar questions growing out of federal legislation reached this Court. Its judgments were in harmony with this consensus of state judicial opinion…. In overruling a contention that there can be no conviction on an indictment which makes no charge of criminal intent but alleges only making of a sale of a narcotic forbidden by law, Chief Justice Taft, wrote: "While the general rule at common law was that the scienter was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes even where the statutory definition did not in terms include it * * *, there has been a modification of this view in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement. It is a question of legislative intent to be construed by the court." *Balint*.

On the same day, the Court determined that an offense under the Narcotic Drug Act does not require intent, saying, "If the offense be a statutory one, and intent or knowledge is not made an element of it, the indictment need not charge such knowledge or intent." *Behrman*.

[But] since no federal crime can exist except by force of statute, the reasoning of the *Behrman* opinion, if read literally, would work far-reaching changes in the composition of all federal crimes. Had such a result been contemplated, it could hardly have escaped mention….

…[R]ecently … the Court took occasion more explicitly to relate abandonment of the ingredient of intent, not merely with considerations of expediency in obtaining convictions, nor with the malum prohibitum classification of the crime, but with the peculiar nature and quality of the offense. We referred to 'a now familiar type of legislation whereby penalties serve as effective means of regulation', and continued, 'such legislation dispenses with the conventional requirement for criminal conduct—

awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.' *United States v. Dotterweich* (1943).

Neither this Court nor, so far as we are aware, any other has undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not. We attempt no closed definition, for the law on the subject is neither settled nor static. The conclusion reached in the *Balint* and *Behrman* cases has our approval and adherence for the circumstances to which it was there applied. A quite different question here is whether we will expand the doctrine of crimes without intent to include those charged here.

Stealing, larceny, and its variants and equivalents, were among the earliest offenses known to the law that existed before legislation; they are invasions of rights of property which stir a sense of insecurity in the whole community and arouse public demand for retribution, the penalty is high and, when a sufficient amount is involved, the infamy is that of a felony, which, says Maitland, is '* * * as bad a word as you can give to man or thing.' State courts of last resort, on whom fall the heaviest burden of interpreting criminal law in this country, have consistently retained the requirement of intent in larceny-type offenses. If any state has deviated, the exception has neither been called to our attention nor disclosed by our research.

Congress, therefore, omitted any express prescription of criminal intent from the enactment before us in the light of an unbroken course of judicial decision in all constituent states of the Union holding intent inherent in this class of offense, even when not expressed in a statute. Congressional silence as to mental elements in an Act merely adopting into federal statutory law a concept of crime already so well defined in common law and statutory interpretation by the states may warrant quite contrary inferences than the same silence in creating an offense new to general law, for whose definition the courts have no guidance except the Act. Because the offenses before this Court in the Balint and Behrman cases were of this latter class, we cannot accept them as authority for eliminating intent from offenses incorporated from the common law…

The Government asks us by a feat of construction radically to change the weights and balances in the scales of justice. The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries. Such a manifest impairment of the immunities of the individual should not be extended to common-law crimes on judicial initiative.

The spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute. And where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

We hold that mere omission from § 641 of any mention of intent will not be construed as eliminating that element from the crimes denounced.

II.

[Even if] criminal intent is retained in the offenses of embezzlement, stealing and purloining, as incorporated into this section, it is urged that Congress joined with those, as a new, separate and distinct offense, knowingly to convert government property, under circumstances which imply that it is an offense in which the mental element of intent is not necessary.

… Congress, by the language of this section, has been at pains to incriminate only 'knowing' conversions. But, at common law, there are unwitting acts which constitute conversions. In the civil tort, except for recovery of exemplary damages, the defendant's knowledge, intent, motive, mistake, and good faith are generally irrelevant. If one takes property which turns out to belong to another, his innocent intent will not shield him from making restitution or indemnity, for his well-meaning may not be allowed to deprive another of his own.

Had the statute applied to conversions without qualification, it would have made crimes of all unwitting, inadvertent and unintended conversions. Knowledge, of course, is not identical with intent and may not have been the most apt words of limitation. But knowing conversion requires more than knowledge that defendant was taking the property into his possession. He must have had knowledge of the facts, though not necessarily the law, that made the taking a conversion. In the case before us, whether the

mental element that Congress required be spoken of as knowledge or as intent, would not seem to alter its bearing on guilt. for it is not apparent how Morissette could have knowingly or intentionally converted property that he did not know could be converted, as would be the case if it was in fact abandoned or if he truly believed it to be abandoned and unwanted property.

… We find no grounds for inferring any affirmative instruction from Congress to eliminate intent from any offense with which this defendant was charged.

III.

As we read the record, this case was tried on the theory that even if criminal intent were essential its presence (a) should be decided by the court (b) as a presumption of law, apparently conclusive, (c) predicated upon the isolated act of taking rather than upon all of the circumstances. In each of these respects we believe the trial court was in error.

Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury…. It follows that the trial court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act…

We think presumptive intent has no place in this case. A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense. A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition…

Of course, the jury, considering Morissette's awareness that these casings were on government property, his failure to seek any permission for their removal and his self-interest as a witness, might have disbelieved his profession of innocent intent and concluded that his assertion of a belief that the casings were abandoned was an afterthought. Had the jury convicted on proper instructions it would be the end of the matter. But juries are not bound by what seems inescapable logic to judges. They might have concluded that the heaps of spent casings left in the hinterland to rust away presented an appearance of unwanted and abandoned junk, and that lack of any conscious deprivation of property or intentional injury was indicated by Morissette's good character, the openness of the taking, crushing and transporting of the casings, and the candor with which it was all admitted. They might have refused to brand Morissette as a thief. Had they done so, that too would have been the end of the matter.

Reversed.

Notes and questions about *Morissette*

1. For Joseph Morissette to be convicted, a criminalization decision is necessary. Here, the relevant criminalization decision is the decision that whoever "knowingly converts" federal property is guilty of an offense, as stated in the applicable statute, 18 U.S.C. § 641. Who made this decision? In one respect, the obvious answer is Congress. But once Congress has decided that it is a crime to "knowingly convert" federal property, who then decides what it means to "knowingly convert" federal property? More specifically, who decides whether the offense of knowing conversion requires an intention to act wrongfully? Is it the prosecutor's decision? The trial judge's? Someone else?
2. Notice that the Court links the purposes of criminalization to the analysis of the definition of a particular crime. Because "public welfare" offenses were enacted for different purposes than traditional common law crimes, public welfare offenses need not always require proof of wrongful intent. What makes an offense into a public welfare offense? Why isn't knowing conversion of government property a public welfare offense, in the Court's view?
3. As with all appellate opinions, read carefully and remember that you are reading an opinion – a document designed to advocate one view of the law. The Court makes some broad claims about criminal law in general, such as, "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion." Later, the Court acknowledges that these generalizations are not true of all crimes, and the Court focuses its attention on the particular statute at hand. Does *Morissette* establish that all crimes require wrongful intent? If not, what rules or principles does the case establish? (Try to answer these questions on your own, then read the notes below to see if you're on the right track.)
4. *Morissettev. United States* is the first case in this book that focuses on the interpretation of a criminal statute, but it is hardly the last. (In Chapter One, *Mochan* involved a common law prosecution without an applicable criminal statute, and *Copenhaver* focused on the scope of the common law power of county sheriffs to make arrests.) The statute used to prosecute Joseph Morissette, 18 U.S.C. § 641, is included in your text just before the court's opinion. This format will be used throughout the

book. For each case, the relevant statutory text will be reproduced immediately before the judicial opinion. As explained above, reading and interpreting statutes is an important skill that you should practice often.

5. The Supreme Court's statement of its own holding can be found at the end of Part I of the opinion: "We hold that mere omission from § 641 of any mention of intent will not be construed as eliminating that element from the crimes denounced." It's important to be able to identify the holdings of cases, as you've probably already learned. But this narrow holding, focused on this particular statute, is not the only lesson to be drawn from *Morissette*. Several broader aspects of this case merit emphasis. First, you should notice that the mere existence of a statute, like § 641, does not necessarily resolve all questions that arise about crime definitions. Very often, statutes require interpretation; someone has to decide what the words of the statute mean. Second, notice that the interpretive question here concerns mental states, or mens rea: what must the defendant be thinking in order to be guilty of this statutory offense? Mens rea is a concept very important to criminal law, as discussed further in the next note. Third, the Court suggests that while "strict liability," or liability without proof of any specific mental state, is possible in criminal law, courts should not presume strict liability simply because a statute fails to state explicitly a mens rea requirement. Here, although the language of the statute does not mention intent, the Supreme Court concludes that conviction of the statutory offense does require proof of wrongful intent. And finally, notice that to answer the interpretive question about the mens rea requirement of § 641, the Court discusses the mens rea requirements of common law larceny and related offenses. This is one of the ways in which common law crime definitions or other common law doctrines remain important even in today's world of statutes: when statutory text is susceptible to multiple interpretations or otherwise leaves important questions unresolved, courts often turn to common law to attempt to resolve the ambiguity.
6. "Mens rea" is typically translated as "guilty mind." This term is often used to refer to the mental state that a defendant must have in order to be guilty of a crime. The *Morissette* Court identifies several other terms that have also been used to refer to required mental states: scienter, willfulness, malice aforethought, and others. Courts have defined these terms slightly differently in different jurisdictions and contexts, so we will study the meanings of these terms as they arise in particular cases and with regard to particular offenses. Perhaps of interest to linguistics or history buffs: "mens rea," like its companion term "actus reus" (translated as "guilty act" and discussed below), is legal Latin, a term that gained its current meaning after Latin was no longer widely used as a spoken language. The principle that crime definitions "always" required wrongful intent may have first circulated in the eighteenth or nineteenth century. At that time (and before and after), there were many counterexamples of crimes without a wrongful intent requirement. See Guyora Binder, *The Rhetoric of Motive and Intent*, 6 Buff. Crim. L. Rev. 1, 16 (2002); Francis Bowes Sayre, *MensRea*, 45 Harv. L. Rev. 974 (1932). Today, however, mens rea requirements are very common in criminal law. As you will see, appellate courts frequently uphold a conviction, or reverse one, based on an assessment of the defendant's mental state. Being able to analyze and make arguments about mens rea requirements is critical to success in a criminal law course or in the practice of criminal law. We'll return to the subject of mens rea many times over the course of this book.
7. Recall again that each criminal conviction requires not only a criminalization decision, but also a decision to enforce the law against a particular defendant and a decision that the defendant is in fact guilty. From the lower court opinion in this case, we know this much about the enforcement decisions: Joseph Morissette left the federal land with a large pile of "bomb-shaped" pieces of metal in his truck, easily visible to any passerby. At some point after leaving the government land, Morissette was questioned by a police officer, and Morissette told the officer how and where he obtained the metal. The police officer alerted an FBI agent, who later contacted Morissette. Morissette responded promptly to the FBI's inquiry and explained to them how he had obtained the metal. Which of these facts, or other facts in the Supreme Court's opinion, seem most relevant to a prosecutor's decision to pursue charges in this case? Would you have chosen to prosecute Morissette, given what you know about the case? Why or why not? In Chapter Three, we will consider in more detail how police and prosecutors decide to pursue specific prosecutions.
8. Part III of the Supreme Court's opinion is most focused on the adjudication decision, and more specifically, on the question who should decide whether Morissette had the requisite wrongful intent when he took the bomb casings. You should notice the ways that criminalization, enforcement, and adjudication decisions interact with one another. In order to know whether the jury has to find wrongful intent, the Court must determine whether the criminalization of "knowing conversion" included a wrongful intent requirement. We'll consider the statutory analysis of § 641 in more detail in the next section.

Intention, action, and beyond: the basic form of a crime definition

As you now know, modern criminalization decisions are legislative decisions in the first instance – Congress or a state legislature must enact a statute to define conduct as criminal. In this section, we'll look at several examples of criminal statutes to become familiar with the usual form and components of a criminal statute. We can start with the same federal statute that was used to prosecute Morissette, 18 U.S.C. § 641. Here is the statutory text again:

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States … shall be fined under this title or imprisoned not more than ten years, or both….

Notice that this statute describes conduct and sets a penalty for persons who engage in that conduct. Notice also that the statute uses some terms that may themselves seem to name criminal activity – embezzle, steal, purloin – but it does not define those terms, or specify the differences among them. And notice that § 641 is susceptible to multiple interpretations, especially with regard to the question of what mental state the defendant must hold in order to complete the crime. Each of these aspects of § 641 is fairly typical of criminal statutes, as you will see as you read more statutes.

The standard path to a criminal conviction is a guilty plea, and most guilty pleas do not lead to an appeal. In most of those cases, there may be no dispute about the meaning of a statute. But within the small fraction of cases in which a defendant contests guilt and later pursues an appeal, it is fairly common to see questions of statutory interpretation arise. Again, for each judicial opinion in this book, the relevant statutory text is reprinted at the beginning of the case (and/or included in the court's opinion). You should look at these statutes closely, both to help you understand the specific issues addressed in each judicial opinion and to become generally familiar with the format, structure, and terminology of criminal statutes.

Some basic terminology will be helpful as you read and analyze criminal statutes, and as you read courts' analysis of these statutes. To become familiar with the terms, consider a simple theft statute:

Theft of property, Tennessee (T.C.A. § 39-14-103):

A person commits theft of property if, with intent to deprive the owner of property, the person knowingly obtains or exercises control over the property without the owner's effective consent.

This statute, like most, can be divided into component parts, or "elements." The elements of an offense are the separate facts that must be established – "proven" to a jury or more frequently, admitted by the defendant – in order to convict the defendant. Theft in Tennessee has three elements, according to the state courts:

1. The defendant obtained or exercised control over property;
2. The defendant did not have the owner's effective consent; and
3. The defendant intended to deprive the owner of the property.

As it is phrased here, the first element focuses on the defendant's actions or conduct – obtaining or exercising control over property. Courts and practitioners often use the terms "conduct element" or "actus reus" to describe the element(s) of a crime definition that refers to the defendant's actions. Actus reus is usually translated as "guilty act." Just as courts have considered whether crime definitions must always include mens rea or mental state elements, courts have considered whether actus reus is a required element of any crime definition. That question is examined further in the next section of this chapter.

For a moment, skip the second element of theft in Tennessee (lack of effective consent), and look at the third listed element: intent to deprive the owner of property. This is a mens rea element expressly stated in the statutory text. As you now know from *Morissette*, courts might find a required mens rea element even if one is not stated clearly in the statutory text. But the first place to look for mens rea, or any aspect of a crime definition, is the text of the statute itself.

But notice that there is a mens rea term in the statutory text that did not appear in the numbered list of elements: the defendant must "knowingly" obtain or exercise control over the property. A more precise list of the required elements of this theft statute would specify that obtaining or exercising control must be done knowingly. With precision, though, comes complexity. If the first fact that the prosecution must prove is that "the defendant knowingly obtained or exercised control over property," this fact will combine a conduct element (obtaining or exercising control) with a mental state element (knowledge that one is obtaining or exercising control). (And with complexity come more questions: does the word "knowingly" modify only the verbs "obtains or exercises

control"? Or does "knowingly" also modify "without the owner's effective consent," meaning that the defendant must be aware that the property owner has not consented in order to violate this statute? These are the kind of interpretive questions that often arise with regard to criminal statutes.)

Now go back to the middle element of the Tennessee statute, the requirement that the defendant did not have the owner's effective consent. This element doesn't refer directly to the defendant's own mental state or the defendant's conduct; it doesn't tell us something about what the defendant must be thinking or doing in order for the crime to occur. Instead, this element describes another fact or circumstance that must exist in order for the crime to occur: the owner of the property must not have given consent for the defendant to take or control the property. This kind of element is sometimes called an "attendant circumstance" element.

In addition to mental state / mens rea, conduct / actus reus, and attendant circumstances, crime definitions also may refer to results or causation requirements. Imagine the same Tennessee theft statute, but with one more element:

1. The defendant obtained or exercised control over property;
2. The defendant did not have the owner's effective consent;
3. The defendant intended to deprive the owner of the property; and
4. The owner suffered substantial financial loss.

This fourth element is a result element: it requires a showing that a certain result has taken place. As suggested by the term "result," courts would generally interpret such an element to require not only proof that the specified event occurred – proof that the owner did suffer substantial financial loss – but also proof of causation – proof that the defendant's conduct caused the owner's loss. We will look more closely at result elements and causation requirements in Chapter Five.

Sometimes, identifying the elements of a crime will be as easy as reading the statute and separating the text into different clauses. But often, identifying the elements of a crime requires more work, and argument, than simply reading the statute. In some instances, the statute will use a label without defining it, and you'll have to look beyond the statute to learn the elements of the offense. (What does it mean to embezzle, or purloin, under the statute used to prosecute Joseph Morissette?) In some instances, even simple and seemingly clear words will be susceptible to more than one interpretation. (In the Tennessee theft statute just discussed, which terms are modified by the word "knowingly"?) And sometimes courts will identify elements that are not clearly stated in the text of the statute, as the Supreme Court did in requiring proof of wrongful intent in *Morissette*. When statutory language is unclear or subject to multiple interpretations, part of a lawyer's task is to argue for one interpretation or another.

Consider the federal theft statute applied in *Morissette* one more time to see how separating a statute into elements can help you ask more precise questions about what must be established to show that the crime has occurred. Again, we can think of elements of an offense as the separate facts that must be established – "proven" to a jury or more frequently, admitted by the defendant – in order to convict the defendant. At Joseph Morissette's trial, the prosecution needed to prove the following elements:

1. Morissette did embezzle, steal, purloin, or knowingly convert
2. to his use or the use of another
3. a thing of value
4. belonging to the federal government.

The prosecution did not argue that Morissette had embezzled or purloined the metal casings, but did allege both stealing and conversion. The indictment – the formal document that charged Morissette with the offense – alleged:

That on or about the 2nd day of December, A.D. 1948, at Oscoda, Michigan, in the Eastern District of Michigan … Joseph Edward Morissette, did unlawfully, willfully and knowingly steal and convert to his own use about three tons of used bomb casings having a value of approximately $84.00, and being the property of the United States of America, located at the bombing range of the Oscoda Army Air Base, in violation of Section 641, United States Code, Title 18.

Notice that, besides alleging stealing and conversion, the indictment did claim that Morissette acted with wrongful intent —"unlawfully, willfully and knowingly." But an allegation in an indictment is not proof at trial. Did the prosecution "prove" the right mental state? Did the jury determine that Morissette had acted with wrongful intent? Statutory analysis often requires a precise determination of the mental state the defendant must have with respect to each separate element of the offense. In Parts II and III of its opinion, the Supreme Court tackled this more precise analysis. What, exactly, did Morissette need to be thinking in order to commit this crime? Did he need to intend to steal, meaning that he had to think that what he was doing was reasonably

called “stealing” and therefore illegal? Or was it enough for Morissette to know that he was taking property, even if he did not know that he was doing anything illegal? Look closely at Part II.

Check Your Understanding (2-2)

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Ultimately, the Supreme Court determined that because the jury had not been properly instructed on the need to find wrongful intent (in the sense of awareness that one is taking the property of another), the courts could not be confident that the jury did in fact find the necessary mental state, and so Morissette’s conviction was reversed.

Breaking a statute into elements helps analyze these questions, and others that may arise. For example, suppose that Morissette did intend to steal the bomb casings, in the sense that he assumed they belonged to someone but nevertheless decided to take them from their rightful owner and sell them for profit. But suppose also that Morissette did not know that he was on government property, and instead he thought he was stealing from a private landowner. Would he be guilty of a violation of 18 U.S.C. § 641? Does the requirement of wrongful intent apply only to the act of taking the property, or also to the attendant circumstance that the property belongs to the federal government?

Don’t be frustrated if you don’t know the answer to the previous question even after reading the statute, or even after reading the Court’s opinion in *Morissette*. Neither did prosecutors and defense attorneys, until a number of federal courts issued opinions on this particular question of statutory interpretation. The courts did not all agree initially; one federal circuit initially interpreted 18 U.S.C. § 641 to require proof that the defendant knew that the property in question belonged to the federal government. But this circuit later overruled its own earlier decisions and joined other federal courts in holding that the fact that the government owned the property was a “jurisdictional element” that did not have an associated mens rea requirement. See *United States v. Speir*, 564 F.2d 934, 937-938 (10th Cir. 1977), overruling *Findley v. United States*, 362 F.2d 921 (10th Cir. 1966) and *United States v. Baltrunas*, 416 F.2d 401 (10th Cir. 1969). Now, courts are “unanimous that a person may violate 18 U.S.C. § 641 … even though that person is ignorant of the government’s ownership of the converted property.” *United States v. Sivils*, 960 F.2d 587, 595 (6th Cir. 1992). The defendant does still need to know that the property belongs to someone other than the defendant, as the Court established in *Morissette*, but the defendant need not know that the owner is the federal government.

As this history of caselaw on § 641 illustrates, statutory language is often subject to different possible interpretations. Once courts have interpreted the language in a particular way, that interpretation is binding (unless later overruled). But before courts have weighed in on a particular question of statutory interpretation, the law may simply be ambiguous or uncertain. That’s not a reason to panic as a lawyer. Indeed, areas of legal ambiguity are the places where lawyers’ skills are especially important and valuable. When you read legal texts, try not to assume that the first meaning that comes to your mind is the only possible interpretation. Instead, get in the habit of asking yourself, is there another way to read this? A lawyer’s work often involves arguing in favor of one interpretation over another, and to do that well, you need to anticipate other interpretations and be prepared to critique them.

The Voluntary Act “Requirement”

Morissette states that mens rea, or some culpable mental state, is generally required as a component of a crime definition (though again, the Court acknowledges the existence of many exceptions). Is there a similar general requirement for an actus reus, or some culpable action, for criminal liability? Courts sometimes speak of a voluntary act requirement, as discussed below.

STATE

v.

IVAN ALVARADO

Court of Appeals of Arizona, Div. 1, Dept. C
200 P.3d 1037

December 26, 2008

HALL, Judge.

The offense of promoting prison contraband occurs when a person "knowingly takes contraband into a correctional facility or the grounds of such facility." Ariz. Rev. Stat. (A.R.S.) § 13–2505 (2001). The trial court granted defendant's post-verdict motion for a judgment of acquittal on the charge of promoting prison contraband, reasoning that defendant did not "voluntarily" take marijuana into the jail following his arrest because it was concealed on his person when he was arrested. The State appeals the trial court's ruling….

We view the evidence at trial in the light most favorable to upholding the jury's verdict. The evidence showed that a police officer, responding to a call reporting a possible family fight, felt what he believed to be a pipe in defendant's coat pocket when he was patting him down for weapons. Defendant told the officer that it was his marijuana pipe and gave the officer permission to remove it…. As the officer was securing defendant in handcuffs, defendant volunteered that he had marijuana in another coat pocket. The officer retrieved a baggie of marijuana weighing 71 milligrams … and completed his pat down before placing defendant in the police car for transportation to the Yavapai County Jail.

Before entering the jail, the police officer asked defendant if he had any drugs or weapons on him, and warned him that he faced additional charges if he took drugs or weapons into the jail. Defendant responded, "No." The police officer repeated the question and warning … and defendant again responded, "No." After defendant was brought into the facility to commence the booking process, a detention officer also asked defendant if he had any weapons or drugs on him, and defendant "sort of murmured no." The detention officer, however, searched defendant's person and removed a container from one of defendant's pockets, which, when opened, held 790 milligrams of marijuana. Defendant volunteered, "Oh, man, I worked hard for that chronic," a slang term for marijuana.

The judge denied defendant's request for a preliminary instruction that the crime of promoting prison contraband requires proof that "the defendant knowingly and voluntarily took contraband into a correctional facility," but agreed to add a definition of "voluntary act" to the preliminary instructions. At the close of the State's case, defendant moved for judgment of acquittal on the charge on the ground that the State had not met its burden "to prove [he] voluntarily brought contraband into the jail." The judge denied the motion, finding the evidence sufficient to go to the jury "based on the evidence that it was on his person at the time he was booked into jail." The judge allowed defendant to argue to the jury that no evidence was offered to show defendant engaged in a voluntary act, and instructed the jury that the State must prove that defendant had committed a voluntary act, again defining the term as "a bodily movement performed consciously and as a result of effort and determination." The jury convicted defendant of promoting prison contraband, possession of marijuana, and possession of drug paraphernalia.

Defendant renewed his motion for judgment of acquittal after trial, relying in his reply on *State v. Tippetts*, 43 P.3d 455 (Or. Ct. App. 2002)…. The State timely appealed.… We review a trial court's grant of a post-conviction judgment of acquittal for an abuse of discretion. …In conducting our review, we view the facts in the light most favorable to upholding the jury's verdict….

…. At issue in this appeal is A.R.S. § 13-201 (2001), which provides that "[t]he minimum requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform a duty imposed by law which the person is physically capable of performing." The legislature has defined "voluntary act" as "a bodily movement performed consciously and as a result of effort and determination."

In *Tippetts*, [an] Oregon appellate court considered the appeal of a defendant who was convicted of introducing marijuana into the jail under similar circumstances. The marijuana was in defendant's pants pocket when he was arrested. A jail officer asked the defendant if he had drugs or weapons on him before searching him and discovering the marijuana, to which the defendant apparently made no response… The *Tippetts* court [found that] "the contraband was introduced into the jail only because the police took defendant (and the contraband) there against his will." … The court further explained that the requirement of a voluntary act dictated "that the mere fact that defendant voluntarily possessed the drugs before he was arrested is insufficient to hold him criminally liable for the later act of introducing the drugs into the jail." The court also reasoned that the constitutional privilege against self-incrimination prevented "the state from forcing defendant to choose between admitting to possession of a controlled substance and being charged with introducing that substance into a correctional facility."

In order for the "involuntary act" of entering the jail with drugs to supply the basis for a conviction of conveying drugs into the jail, the [*Tippetts*] court held, "the involuntary act must, at a minimum, be a reasonably foreseeable or likely consequence of the voluntary act on which the state seeks to base criminal liability" [and] "no reasonable juror could have found that the introduction of contraband into the jail was a reasonably foreseeable consequence of possessing it." Rather, the court reasoned, under those

facts, the police officer's "act of arresting defendant and transporting him to the jail was an intervening cause that resulted in the marijuana's being introduced into the jail."

Courts outside this jurisdiction have split on whether entering a jail involuntarily with drugs in one's possession can form the basis of a conviction for introducing contraband into the jail. Three jurisdictions have followed the reasoning outlined in *Tippetts*…. Courts in five jurisdictions, however, have diverged from or rejected the analysis of *Tippetts*, holding that no more than entry into jail knowing that one is carrying contraband is required by the plain terms of the governing statutes….

We decline to follow *Tippetts* and its progeny….

In *State v. Lara* (1995) our supreme court explained that the requirement that an act be "voluntary" is simply a codification of the common law requirement of *actus reus*, a requirement grounded in the principle that a person cannot be prosecuted for his thoughts alone, and that the voluntary act requirement does not modify the *mensrea* required for the offense. The court therefore concluded that expert testimony that the defendant suffered from a brain disorder that caused him to fly into a rage "as if by reflex" was insufficient to support a voluntary act instruction. The court stated that the statutory requirement that the conduct include "a bodily movement performed consciously and as a result of effort and determination" simply means that the defendant engage in "a determined conscious bodily movement, in contrast to a knee-jerk reflex driven by the autonomic nervous system." [In interpreting the "voluntary act" requirement, the court characterized the evidence as showing that Lara was both conscious and "relentless in his effort and determination."]

Defendant, however, would have us interpret the governing statutes to require that the State not only prove that defendant knew that he was taking marijuana into the jail but that he was entering the jail "voluntarily." In making this request, defendant confuses the concept of a "voluntary act" with the requisite culpable mental state for the offense. Again, as explained in *Lara*: " '[V]oluntary act' means *actus reus.* On the other hand, 'voluntary' has also been used to describe behavior that might justify inferring a particular culpable mental state." The evidence in this case is more than sufficient to demonstrate that defendant had the necessary *mensrea* of "knowingly" taking the marijuana into the jail, as evidenced by his statement, "Oh man, I worked hard for that chronic." If we were to adopt defendant's interpretation, the statute would only apply to non-inmates, such as employees or visitors, who "voluntarily" enter the jail while carrying drugs. The statute is not so limited and we decline, under the guise of interpretation, to modify the statute in a manner contrary to its plain wording.

Finally, the circumstance here that both the arresting officer and the detention officer informed defendant of the consequences of bringing contraband into the jail and gave him an opportunity to surrender any contraband beforehand highlight that defendant was performing a bodily movement "consciously and as a result of effort and determination" when he carried the contraband into the jail. That defendant chose not to disclose that he possessed an additional amount of marijuana on his person does not somehow absolve him of responsibility for his actions on the theory that providing him an opportunity to choose between admitting to possession of the marijuana and being charged with introducing that substance into the jail violates the self-incrimination clause of the Fifth Amendment. In this regard, we agree with the Court of Criminal Appeals of Tennessee: "…[A]fter being advised of the consequences of bringing drugs into the jail, the Appellant consciously chose to ignore the officers' warnings…. Under these circumstances, the Appellant was the author of his own fate." *State v. Carr*, 2008 WL 4368240 at 5.

Because the evidence in this case sufficiently demonstrated that defendant consciously, with effort and determination, engaged in the prohibited conduct of carrying marijuana into the Yavapai County Jail, the trial court erred in entering a judgment of acquittal. We therefore reverse the judgment of acquittal, direct the court to reinstate the jury's verdict, and remand for further proceedings consistent with this Opinion.

Check Your Understanding (2-3)

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Notes and questions about *Alvarado*

1. Two different Arizona statutes are important to this opinion. The first, § 13–2505, simply defines the offense of "promoting prison contraband," one of the three offenses with which Alvarado was charged, and the only charge that he was challenging in this appeal. To challenge his conviction for promoting prison contraband, Alvarado relied on another Arizona statute, § 13-201, which offers a fairly standard statement of a voluntary act requirement. Arizona's § 13-201 is similar in some respects to the Model Penal Code's § 2.01, reprinted below.

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

(2) The following are not voluntary acts within the meaning of this Section:

(a) a reflex or convulsion;
(b) a bodily movement during unconsciousness or sleep;
(c) conduct during hypnosis or resulting from hypnotic suggestion;
(d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual.

(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.

(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.

Recall that the Model Penal Code is a collection of statutes drafted and published by the American Law Institute. The MPC is not itself binding law, but many parts of it, including § 2.01, have inspired or influenced American legislators.

2. The term "voluntary" seems to refer to choices and mental states, which can produce confusion between a voluntary act requirement and mens rea analysis, as the Arizona court points out. But courts do distinguish between a "voluntary act requirement," which purportedly applies to all criminal statutes regardless of whether they require the prosecution to prove specific details of the defendant's mental state, and mens rea requirements, which vary by statute and may not appear in every single criminal statute. How does the *Alvarado* court attempt to distinguish between a voluntary act requirement and mens rea requirements?
3. In criminal law (and in other areas of law), it is often the case that a principle is widely endorsed if stated in general terms, and yet there exists substantial disagreement about how the principle applies to concrete cases. "Criminal liability requires a voluntary act" is one such principle. At least four U.S. jurisdictions have found a separate offense of contraband possession in jail is a violation of a voluntary act requirement if imposed on defendants like Alvarado, who are brought into jail against their will. But at least six other jurisdictions, including Arizona in the opinion you've just read, have found conviction of a contraband offense in these circumstances to be permissible even given a voluntary act requirement. In the discussion above of the federal "knowing conversion" statute, we saw that statutory language is often subject to different plausible interpretations. So too with a term such as "voluntary act" – different jurisdictions may interpret it differently. In the face of these different approaches, which "law" should you learn? Just what you see here: you should be aware of the widespread endorsement of the general principle that criminal liability requires a voluntary act, and you should also know that there exist varying interpretations of what that principle means in specific circumstances. Again, a lawyer's role is often to argue for one interpretation over another. To begin to develop that skill, try to articulate the strongest argument you can for the position that Alvarado's conviction violates the voluntary act requirement. Then, make the strongest argument you can for the position that his conviction does not violate the voluntary act requirement.
4. Does a voluntary act requirement mean that the defendant must consciously choose the specific actions described in the statutory language? Or could the requisite "voluntary act" have occurred prior to the conduct specified in the statute? Try to identify the specific voluntary act that makes Alvarado properly convicted, in the court's view. If Alvarado "worked hard for that chronic" and then chose to put the drugs in his pocket at some point, could that choice serve as the necessary voluntary act? Or was it the failure to tell jail officials about the (additional) drugs that constituted the necessary voluntary act? Notice that MPC § 2.01 identifies conditions under which omissions, or failures to do something, can serve as the basis of criminal liability. We consider omission liability in more detail with *Lambert v. California*, the next case in this chapter, and then again in Chapter Six.
5. Is possession even an act? MPC § 2.01 addresses that question as well, and we will consider it in much more detail in Chapter Seven.
6. In light of the complexities and jurisdictional variations discussed above, is it an accurate description of existing law to say that criminal liability requires an act? One commentator has suggested that criminal law contains at best an "action presumption" rather than an "action requirement." Antony Duff, *Answering for Crime* (2007). Another has argued that a better description would identify "a control requirement" rather than "an act requirement" for criminal liability. "Control … is more plausibly

regarded as a condition of both moral and criminal responsibility. … The core idea behind the control requirement is that a person lacks responsibility for those states of affairs he is unable to prevent from taking place or obtaining." Douglas Husak, *Does Criminal Liability Require an Act?*, in The Philosophy of Criminal Law: Selected Essays (2010).

7. The enforcement decision: when he was brought to jail, Ivan Alvarado was already facing marijuana and drug paraphernalia possession charges based on the pipe and baggie discovered at the location of his arrest. When officers discovered additional marijuana after Alvarado entered the jail, why did they bring a new and separate charge of "promoting prison contraband" instead of adding another count of marijuana possession? Chapter Three discusses the considerations, including applicable penalties, that can influence these types of charging decisions.
8. The Fifth Amendment of the U.S. Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." This provision, often called the privilege against self-incrimination, has been interpreted to restrict the ability of police or other state officials to interrogate suspects or otherwise demand answers to questions about criminal conduct. Alvarado argued that to punish him for failing to disclose the marijuana in his pocket would violate his Fifth Amendment rights. The Arizona state court rejected that argument without saying much about it, and the U.S. Supreme Court has not ruled directly on this issue. We won't dive deeply into Fifth Amendment doctrine in this course, but keep in mind that just as there are numerous interpretations of which acts are "voluntary," there are differing interpretations of what constitutes "compulsion."
9. A Pennsylvania man returned home from one job around midnight and left for a second job around 6:30 am, staying awake through the intervening hours. On his way home from the second job, at about 7:00 pm, he fell asleep while driving, crossed into the wrong lane, and struck another vehicle. He was found guilty of the offense of careless driving. Was this conviction based on a voluntary act? What was the act? See *Commonwealth v. Cathey*, 435 Pa. Super. 162 (1994).

Criminalization and the U.S. Constitution

The discussion of *State v. Alvarado* above simply took for granted that Arizona could criminalize the possession of marijuana, and more specifically, the possession of marijuana in a jail or prison. But in recent years, many jurisdictions have reconsidered their earlier choices to criminalize marijuana possession. Is this choice, or any other choice to criminalize or decriminalize specific conduct, simply a matter of legislative prerogative? As a legislature makes criminal laws, is the legislature itself bound by any higher law – such as the U.S. Constitution? Various provisions of the Constitution identify individual rights or set limits to government power. Do any of these provisions constrain criminalization choices?

There are at least three ways in which the federal constitution might limit criminalization. One concerns not the what question (what conduct can be criminalized) but rather the how question: how must a criminalization decision be expressed? Must a criminal statute fit a specified form? The Supreme Court has interpreted the Fourteenth Amendment's due process clause to require that criminal statutes are written in sufficiently clear language to give adequate notice of the prohibited conduct. This doctrine, often called the void-for-vagueness doctrine, is discussed in Chapter Three on enforcement decisions, since one of the doctrine's rationales is that clear statutes are needed to guide enforcement choices.

A second type of constitutional limitation on criminalization does address the what question. Guarantees of specific individual rights have been interpreted to prevent certain protected acts from being designated as crimes. For example, the First Amendment's protection of free speech prevents states from criminalizing some types of expressive conduct, like burning a flag. And under the Second Amendment as most recently interpreted, individuals possess a right to bear arms that prevents at least some acts of gun possession from being designated as criminal. This Second Amendment constraint on criminalization is discussed more in Chapter Seven. Finally, the path from *Roe v. Wade* (1973) to *Dobbs v. Jackson Women's Health Organization* (2022) further illustrates the way that an individual right can limit criminalization — and the broad power to criminalize that legislatures enjoy in the absence of a recognized constitutional right. When the Supreme Court recognized a constitutional right to terminate a pregnancy in *Roe*, many state laws that criminalized abortion became unconstitutional. Those who wanted to re-criminalize abortion began a long and ultimately successful campaign to overrule *Roe*. Once the Court did overrule *Roe* with *Dobbs* in 2022, many states promptly enacted criminal prohibitions of abortion.

The remainder of this chapter addresses a third type of constitutional limitation on criminalization choices. In a few cases decided around the middle of the 20th century, the Supreme Court seemed to find a principle somewhat similar to a voluntary act requirement, or perhaps a control requirement, implicit in the federal constitution. *Lambert v. California* (1957), reprinted below, reversed a conviction for failing to register as a felon, noting that the state law imposed criminal liability without "any activity whatever" and even when the defendant did not know of an obligation to register. A few years later, *Robinson v. California* (1962)

found that a state statute that made it a crime to "be addicted to narcotics" was a criminalization of disease that violated the Eighth Amendment. In the immediate aftermath of these decisions, some commentators thought the Supreme Court had established "a broad, constitutionally required voluntary-act norm." William Stuntz, *TheUneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 Yale L.J. 1, 68 (1997).

But *Robinson* was limited, though not explicitly overruled, by a divided Court in *Powell v. Texas* (1968), which allowed Texas to convict a chronic alcoholic of the crime of public intoxication. The *Powell* plurality emphasized that the crime required the voluntary "conduct" of a public appearance, and a fifth Justice suggested that the government would not be able to apply the statute to a homeless alcoholic who had no opportunity to avoid public intoxication. *Powell* did not explicitly reject the idea that a voluntary act, or voluntary conduct, was a constitutionally necessary component of criminal liability. But it treated "appearance in public" as an "act," or conduct, that may be punished without violating the constitution.

Supreme Court decisions, like criminal statutes, constitutional provisions, and other legal texts, are susceptible to varying interpretations. (Or, to put it in the terms used in Chapter One, a legal text does not always influence subsequent legal decisions in precisely the ways that the text's authors might hope.) To determine whether, or how much, the Constitution constrains criminalization choices, it is important to be aware of the Court's opinions and also the ways these opinions have been interpreted. The remainder of this chapter is designed to help you see the interaction between Supreme Court opinions and decisions by lower courts, including state courts. Below, you will find the text of *Lambert v. California* followed by some excerpts of recent cases that interpret and apply *Lambert*. After that, instead of presenting *Robinson* and *Powell* independently, this section presents a state court opinion that summarizes and applies those two Supreme Court cases.

[The relevant statutory text for *Lambert* is omitted here, since it is reprinted in the first few paragraphs of the Supreme Court's opinion below.]

Virginia LAMBERT, Appellant

v.

CALIFORNIA

Supreme Court of the United States
355 U.S. 225

Decided Dec. 16, 1957

Mr. Justice DOUGLAS delivered the opinion of the Court.

Section 52.38(a) of the Los Angeles Municipal Code defines 'convicted person' as follows:

'Any person who, subsequent to January 1, 1921, has been or hereafter is convicted of an offense punishable as a felony in the State of California, or who has been or who is hereafter convicted of any offense in any place other than the State of California, which offense, if committed in the State of California, would have been punishable as a felony.'

Section 52.39 provides that it shall be unlawful for 'any convicted person' to be or remain in Los Angeles for a period of more than five days without registering; it requires any person having a place of abode outside the city to register if he comes into the city on five occasions or more during a 30-day period; and it prescribes the information to be furnished the Chief of Police on registering.

Section 52.43(b) makes the failure to register a continuing offense, each day's failure constituting a separate offense.

Appellant, arrested on suspicion of another offense, was charged with a violation of this registration law. The evidence showed that she had been at the time of her arrest a resident of Los Angeles for over seven years. Within that period she had been convicted in Los Angeles of the crime of forgery, an offense which California punishes as a felony. Though convicted of a crime punishable as a felony, she had not at the time of her arrest registered under the Municipal Code. At the trial, appellant asserted that s 52.39 of the Code denies her due process of law and other rights under the Federal Constitution, unnecessary to enumerate. The trial court denied this objection. The case was tried to a jury which found appellant guilty. The court fined her $250 and placed her on probation for three years. … The Appellate Department of the Superior Court affirmed the judgment, holding there was no merit to the claim that the ordinance was unconstitutional. … The case having been argued and reargued, we now hold that the registration provisions of the Code as sought to be applied here violate the Due Process requirement of the Fourteenth Amendment.

The registration provision, carrying criminal penalties, applies if a person has been convicted 'of an offense punishable as a felony in the State of California' or, in case he has been convicted in another State, if the offense 'would have been punishable as a felony' had it been committed in California. No element of willfulness is by terms included in the ordinance nor read into it by the California court as a condition necessary for a conviction.

We must assume that appellant had no actual knowledge of the requirement that she register under this ordinance, as she offered proof of this defense which was refused. The question is whether a registration act of this character violates due process where it is applied to a person who has no actual knowledge of his duty to register, and where no showing is made of the probability of such knowledge.

We do not go with Blackstone in saying that 'a vicious will' is necessary to constitute a crime, for conduct alone without regard to the intent of the doer is often sufficient. There is wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition. But we deal here with conduct that is wholly passive—mere failure to register. It is unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed. Cf. *United States v. Balint*; *United States v. Dotterweich*. The rule that 'ignorance of the law will not excuse' is deep in our law, as is the principle that of all the powers of local government, the police power is 'one of the least limitable.' On the other hand, due process places some limits on its exercise. Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act. [The Court cited various civil cases.] [T]he principle is equally appropriate where a person, wholly passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case.

Registration laws are common and their range is wide. Many such laws are akin to licensing statutes in that they pertain to the regulation of business activities. But the present ordinance is entirely different. Violation of its provisions is unaccompanied by any activity whatever, mere presence in the city being the test. Moreover, circumstances which might move one to inquire as to the necessity of registration are completely lacking. At most the ordinance is but a law enforcement technique designed for the convenience of law enforcement agencies through which a list of the names and addresses of felons then residing in a given community is compiled. The disclosure is merely a compilation of former convictions already publicly recorded in the jurisdiction where obtained. Nevertheless, this appellant on first becoming aware of her duty to register was given no opportunity to comply with the law and avoid its penalty, even though her default was entirely innocent. She could but suffer the consequences of the ordinance, namely, conviction with the imposition of heavy criminal penalties thereunder. We believe that actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand. As Holmes wrote in *The Common Law*, "A law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear." Its severity lies in the absence of an opportunity either to avoid the consequences of the law or to defend any prosecution brought under it. Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community.

Reversed.

Mr. Justice BURTON, dissents because he believes that, as applied to this appellant, the ordinance does not violate her constitutional rights.

Mr. Justice FRANKFURTER, whom Mr. Justice HARLAN and Mr. Justice WHITTAKER join, dissenting.

The present laws of the United States and of the forty-eight States are thick with provisions that command that some things not be done and others be done, although persons convicted under such provisions may have had no awareness of what the law required or that what they did was wrongdoing. The body of decisions sustaining such legislation, including innumerable registration laws, is almost as voluminous as the legislation itself. The matter is summarized in *United States v. Balint*: 'Many instances of this are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of mala in se.'

Surely there can hardly be a difference as a matter of fairness, of hardship, or of justice, if one may invoke it, between the case of a person wholly innocent of wrongdoing, in the sense that he was not remotely conscious of violating any law, who is imprisoned for five years for conduct relating to narcotics, and the case of another person who is placed on probation for three years on condition that she pay $250, for failure, as a local resident, convicted under local law of a felony, to register under a law passed as an exercise of the State's 'police power.' Considerations of hardship often lead courts, naturally enough, to attribute to a statute the requirement of a certain mental element—some consciousness of wrongdoing and knowledge of the law's command—as a matter of statutory construction. Then, too, a cruelly disproportionate relation between what the law requires and the sanction for its disobedience may constitute a violation of the Eighth Amendment as a cruel and unusual punishment, and, in respect to the States, even offend the Due Process Clause of the Fourteenth Amendment.

But what the Court here does is to draw a constitutional line between a State's requirement of doing and not doing. What is this but a return to *Year Book* distinctions between feasance and nonfeasance—a distinction that may have significance in the evolution of common-law notions of liability, but is inadmissible as a line between constitutionality and unconstitutionality….

If the generalization that underlies, and alone can justify, this decision were to be given its relevant scope, a whole volume of the United States Reports would be required to document in detail the legislation in this country that would fall or be impaired. I abstain from entering upon a consideration of such legislation, and adjudications upon it, because I feel confident that the present decision will turn out to be an isolated deviation from the strong current of precedents—a derelict on the waters of the law. Accordingly, I content myself with dissenting.

Notes and questions on *Lambert* (and its progeny)

1. The California registration requirement applied to "convicted persons," a term defined to describe any person convicted of an offense punishable as a felony. But what is a felony? In the United States, this term is used to designate any crime with a potential punishment of more than one year imprisonment. Felonies are often distinguished from misdemeanors, which typically have a maximum sentence of one year. The felony designation turns on the maximum authorized punishment, not the punishment actually imposed.
2. The Supreme Court emphasizes three features of this case: a) the defendant apparently did not know of her duty to register, and the statute did not require proof of knowledge; b) the statute criminalized "wholly passive" conduct, "unlike the commission of acts"; and c) the statute did not address obviously blameworthy conduct (or an obviously blameworthy omission), but rather it was a measure established "for the convenience of law enforcement agencies." Are all three considerations necessary to the outcome? Is any single one of these considerations sufficient to the outcome?
3. The *Lambert* Court held that the Los Angeles registration requirement was a violation of the Due Process Clause of the Fourteenth Amendment. That clause provides that no state shall "deprive any person of life, liberty, or property without due process of law." This language, too, is subject to many different interpretations, as you will see in a Constitutional Law course! For purposes of learning criminal law, you should know that another constitutional provision imposes a somewhat different requirement related to notice. Article I, section 9 of the Constitution provides that "No Bill of Attainder or ex post facto Law shall be passed." The Supreme Court has interpreted this language to prohibit retrospective criminal laws, or laws used to punish activity that took place before the law was enacted. The need for fair notice is often cited as a rationale for the prohibition of ex post facto legislation. However, neither *Lambert* nor ex post facto doctrine requires that a defendant have actual notice of the relevant criminal law in order to be subject to criminal liability.
4. Another notice question concerns criminalization in relation to enforcement: If this particular defendant's ignorance of the registration requirement was indeed essential to the outcome in *Lambert*, then perhaps the case is not really a limitation on the power to criminalize. Could the Court be objecting instead to the enforcement decision that was made here – the decision to prosecute a particular defendant who did not know of the registration requirement? But if the California law did not explicitly require knowledge of a duty to register, then is there a problem with the criminalization decision after all? The usual rule is that "ignorance of the law is no excuse" – that is, a defendant's ignorance of a particular criminal prohibition is usually irrelevant to his or her liability for violating that prohibition. Here, it seems to be ignorance of the rule in combination with the other factors mentioned above (the criminalization of passive conduct, and the regulatory nature of the offense) that seems to generate the due process violation.
5. Omission liability will be examined in more detail in Chapter Six, but it is important to understand now that *Lambert* does not categorically prohibit the imposition of criminal punishment for failures to act. The guiding principle is that a person may be

punished for a failure to act in situations in which the law imposes a duty to act. The Los Angeles ordinance imposed a duty to register, and by itself, that duty was not a due process violation. Again, it appears to be the combination of various factors that leads the Court to find a due process violation here.

6. Notice that in *Lambert* the Court disclaims William Blackstone's claim that "a vicious will" is essential to a crime, though the Court had quoted Blackstone for just that proposition in its *Morissette* opinion in 1952. Shortly after *Lambert*, one commentator wrote that "Mens rea is an important requirement, but it is not a constitutional requirement, except sometimes." Herbert Packer, *MensRea and the Supreme Court*, 1962 Sup. Ct. Rev. 107.
7. Justice Frankfurter's dissent quotes *Balint* (also discussed in *Morissette*) to distinguish between "regulatory measures" and "mala in se" crimes. *Mala in se*, typically translated as "wrong in itself," is a label often applied to murder, rape, theft, and other crimes widely viewed as inherently wrongful. *Mala in se* crimes are often distinguished from *mala prohibita* (or *malumprohibitum*) offenses, crimes that address conduct that is "wrong (only) because it is prohibited," or because a ruling authority has seen fit to regulate it. We might not think it is inherently wrongful to fail to file a registration with the state about one's past criminal convictions (especially if the state imposed those convictions and is presumably already aware of them). But if the state has chosen to require registration by those with felony convictions, then to fail to register is *malumprohibitum*. Few legal outcomes depend on the classification of a crime as *malumin se* or *malumprohibitum*, but it is useful to know these terms and understand that in some circumstances, courts might evaluate an offense differently if they think it falls in one category rather than the other.
8. Justice Frankfurter's dissent predicted that *Lambert* would be "an isolated deviation … a derelict upon the waters of the law." About six decades later, it appears that Frankfurter was right. One 2020 study found that *Lambert* had been cited in 825 federal and state cases, but in almost all of these cases, courts distinguished *Lambert* or interpreted it narrowly, ultimately upholding registration requirements and other criminal laws arguably similar to the one applied to Virginia Lambert. See Cynthia Aikon, *The Lost Promise of* Lambert v. California, 49 Stetson L. Rev. 267, 278-280 (2020). A sampling of *Lambert* discussions from state and lower federal courts is below:

   "We find the registration ordinance in *Lambert* to be readily distinguishable from the sex offender registration statute at issue in the case at hand. In *Lambert*, the registration requirement was a general municipal ordinance, whereas our Sex Offender Registry Act is a statewide registration program. Unlike the registration requirement in *Lambert*, the sex offender registration requirement is directed at a narrow class of defendants, convicted sex offenders, rather than all felons. … And, perhaps most importantly, instead of serving as a general law enforcement device, as the United States Supreme Court found the City of Los Angeles' felon registration ordinance, our statute was specifically enacted as a public safety measure based on the Legislature's determination that convicted sex offenders pose an unacceptable risk to the general public once released from incarceration." *State v. Latimore*, 700 S.E. 2d 456, 461 (Ct. App. S.C. 2010) (upholding conviction for failure to register as sex offender).

   "[W]hile Beckley's failure to register is passive conduct, we find that passive conduct in and of itself is not controlling. *Lambert* stressed the innocent nature of the defendant's conduct, which is not present in the instant case. A convicted sex offender's failure to inquire into the state's laws on registration is not wholly innocent conduct." *State v. Beckley*, 2004 WL 1277358 (Ct. App. Ohio 2004) (upholding conviction for failure to register as a sex offender).

   "That Hester had no actual notice of SORNA [a federal sex offender registration statute] is not sufficient to render his prosecution pursuant to that statute a violation of his due process rights. … Like our sister circuits, we find [*Lambert*'s reference to] 'circumstances which might move one to inquire as to the necessity of registration' to be critical. … Hester knew he had to update his registration [under New York state law]. Accordingly, Hester's reliance on *Lambert* is misplaced. The fact that Hester did not receive notice of SORNA is not sufficient to render his prosecution for failure to register as a sex offender under [SORNA] a violation of his due process rights." *United States v. Hester*, 589 F.3d 86, 92-93 (2nd Cir. 2009) (following other federal courts in rejecting Lambert challenge to the federal Sex Offender Registration and Notification Act, on the grounds that persons convicted of sex offenses should know of or ask about duties to register).

   "[I]n the event that a defendant's conduct is not "wholly passive," because it arises from either the commission of an act or a failure to act under circumstances that reasonably should alert the defendant to the likelihood that inaction would subject him or her to criminal liability, *Lambert* simply does not apply." *State v. Miller*, 800 S.E.2d 400, 407 (N.C. 2017) (rejecting challenge to a new state law creating strict liability felony offense for a person previously convicted of possessing methamphetamine to possess any product containing pseudoephedrine).

Different parts of the federal constitution could impose different kinds of constraints on criminalization. *Lambert* involved a due process challenge: a claim that California's felon registration statute violated the constitutional requirement that no state shall deprive a person of life, liberty or property without "due process of law." The Ex Post Facto Clause imposes a different constraint, though one that is concerned mainly with the timing of criminalization and less with questions about what conduct (or non-conduct) is criminalized. Still another potential limit on a state's power to criminalize conduct comes from the Eighth Amendment, which prohibits the infliction of "cruel and unusual punishments." As noted above, the Supreme Court found the Eighth Amendment to prohibit the criminalization of narcotics addiction in *Robinson v. California* (1962), but then the Court limited the apparent scope of *Robinson* a few years later in *Powell v. Texas* (1968), which permitted the state of Texas to convict a person suffering from alcoholism of the crime of "public intoxication." Consider the application of *Robinson* and *Powell* in *People v. Kellogg*, below.

The PEOPLE

v.

Thomas KELLOGG

Court of Appeal, Fourth District, Division 1, California
119 Cal.App.4th 593

June 17, 2004

HALLER, J.

Thomas Kellogg contends his public intoxication conviction constitutes constitutionally proscribed cruel and/or unusual punishment because his status as an involuntarily homeless, chronic alcoholic makes it impossible for him to avoid being intoxicated in public. We reject this contention. The public intoxication statute … is carefully crafted to impose criminal culpability only if the publicly intoxicated person is unable to exercise care for his or her own safety or the safety of others, or is obstructing a public way. The statute does not punish the mere *condition* of being a homeless, chronic alcoholic but rather punishes *conduct* posing a public safety risk. Although criminal prosecution may not be the preferred way to address the daunting challenges faced by a person in Kellogg's position, the Legislature's policy choice to retain the misdemeanor offense of public intoxication to provide for the public welfare does not rise to the level of cruel and/or unusual punishment even as applied to a homeless, chronic alcoholic.

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

After his arrest on January 10, 2002, Kellogg posted $104 cash bail and was released. Because he was homeless, he was not notified of his court date and he did not appear for his January 31 arraignment. A warrant for his arrest was issued on February 11, 2002; he was arrested again for public intoxication on February 19 and 27…. After a pretrial discussion in chambers about Kellogg's physical and psychological problems, the trial court conditionally released Kellogg on his own recognizance and ordered that he be escorted to the Department of Veterans Affairs Hospital by Officer Hawley. He was not accepted for admission at the hospital and accordingly was returned to county jail.

Kellogg pleaded not guilty and filed a motion to dismiss the charges based on his constitutional right to be free of cruel and unusual punishment.

[At a pretrial hearing on the motion to dismiss,] Psychologist Gregg Michel and Psychiatrist Terry Schwartz testified on behalf of Kellogg. These experts explained that … [i]n addition to his severe alcohol dependence, which causes him to suffer withdrawal symptoms if he stops drinking, [Kellogg] suffers from dementia, long-term cognitive impairment, schizoid personality disorder, and symptoms of posttraumatic stress disorder. He has a history of seizure disorder and a closed head injury, and reported anxiety, depressive symptoms and chronic pain. He is estranged from his family. Physically, he has peripheral edema, gastritis, acute liver

damage, and ulcerative colitis requiring him to wear a colostomy bag. To treat his various conditions and symptoms he has been prescribed Klonopin and Vicodin and may suffer from addiction to medication.

Dr. Michel opined that Kellogg was gravely disabled and incapable of providing for his basic needs, and that his degree of dysfunction was life-threatening. … Drs. Michel and Schwartz opined that Kellogg's homelessness was not a matter of choice but a result of his gravely disabled mental condition….

Dr. Schwartz questioned whether a long-term, locked residential treatment setting was a viable option as density conditions (often four patients in a room) and group participation requirements were incompatible with Kellogg's schizoid personality condition. Dr. Schwartz stated that Kellogg had been offered various forms of treatment and housing but had not made use of those resources; she posited that unless resources were offered in a different way, there would be no change in outcome….

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

Testifying for the prosecution, Physician James Dunford stated that at the jail facility, medical staff assess the arrestee's condition and provide treatment as needed…. Dr. Dunford opined that between March 2 and 7, Kellogg's condition had improved because his seizure medicine was restarted, his alcohol withdrawal was treated, his vital signs were stable, his colostomy bag was clean and intact, his overall cleanliness was restored, and he was interacting with people in a normal way.

… Finding that before his arrest Kellogg was offered assistance on at least three occasions and that his medical condition improved while in custody, the court denied the motion to dismiss the charges.

On April 2, 2002, the court found Kellogg guilty of one charge of violating section 647 arising from his conduct on January 10, 2002. At sentencing on April 30, the probation officer requested that the hearing be continued for another month so Kellogg could be evaluated for a possible conservatorship. Kellogg objected to further incarceration as violating the Eighth Amendment and opposed a conservatorship. Pointing to Dr. Michel's assessment that Kellogg was not a suitable candidate for conservatorship, defense counsel argued that the conservatorship program did not have the resources to handle a person with the combination of Kellogg's problems. Further, because of his medical complications, no recovery or board and care home felt comfortable accepting him. Kellogg requested probation to allow him to participate in the VA's rehabilitative program…. The prosecution agreed with the defense suggestion that a concerted effort be made to place Kellogg in the VA program.

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

After his release from jail, defense counsel made extensive, but unsuccessful, efforts to place Kellogg in an appropriate program and to find a permanent residence for him. On May 25 and 28, 2002, he was again arrested for public intoxication. After he failed to appear at his June 4 review hearing, his probation was summarily revoked. Kellogg was rearrested on June 12. After a probation revocation hearing, Kellogg's probation was formally revoked and he was ordered to serve the 180–day jail sentence. The court authorized that his sentence be served in a residential rehabilitation program. However, no such program was found….

On July 11, 2003, the appellate division of the superior court affirmed the trial court's denial of Kellogg's motion to dismiss on Eighth Amendment grounds. We granted Kellogg's request to have the matter transferred to this court for review.

Section 647(f) defines the misdemeanor offense of disorderly conduct by public intoxication as occurring when a person "is found in any public place under the influence of intoxicating liquor … in such a condition that he or she is unable to exercise care for his or her own safety or the safety of others, or by reason of his or her being under the influence of intoxicating liquor … interferes with or obstructs or prevents the free use of any street, sidewalk, or other public way." Kellogg argues that this statute, as applied to him, constitutes cruel and/or unusual punishment prohibited by the Eighth Amendment to the federal Constitution [and the California state constitution]. He asserts that his chronic alcoholism and mental condition have rendered him involuntarily homeless and that it is impossible for him to avoid being in public while intoxicated. He argues because his public intoxication is a

result of his illness and beyond his control, it is inhumane for the state to respond to his condition by subjecting him to penal sanctions.

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

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

The fifth justice in the *Powell* plurality, Justice White, concurred in the result only, concluding that the issue of involuntary or compulsive behavior could be pivotal to the determination of cruel and unusual punishment, but the record did not show the defendant (who had a home) suffered from any inability to refrain from drinking in public. Justice White opined that punishing a homeless alcoholic for public drunkenness could constitute unconstitutional punishment if it was impossible for the person to resist drunkenness in a public place. … Kellogg argues Justice White, who was the deciding vote in *Powell*, would have sided with the dissenting justices had the circumstances of his case (i.e., an involuntarily homeless chronic alcoholic) been presented, thus resulting in a finding of cruel and unusual punishment by a plurality of the Supreme Court.

We are not persuaded. Although in *Robinson* the United States Supreme Court held it was constitutionally impermissible to punish for the mere *condition* of addiction, the court was careful to limit the scope of its decision by pointing out that a state may permissibly punish disorderly conduct resulting from the use of narcotics. This limitation was recognized and refined by the plurality opinion in *Powell*, where the court held it was permissible for a state to impose criminal punishment when the addict engages in *conduct* which spills into public areas. As stated in *Powell* and expressly reflected in the terms of section 647(f), public intoxication is a criminal offense because it can endanger the welfare of the intoxicated individual and the public….

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

… [W]e conclude that the California Legislature's decision to allow misdemeanor culpability for public intoxication, even as applied to a homeless chronic alcoholic such as Kellogg, is neither disproportionate to the offense nor inhumane. In deciding whether punishment is unconstitutionally excessive, we consider the degree of the individual's personal culpability as compared to the amount of punishment imposed. To the extent Kellogg has no choice but to be drunk in public given the nature of his impairments, his culpability is low; however, the penal sanctions imposed on him under section 647(f) are correspondingly low. Given the state's interest in providing for the safety of its citizens, including Kellogg, imposition of low-level criminal sanctions for Kellogg's conduct does not tread on the federal or state constitutional proscriptions against cruel and/or unusual punishment.

… In presenting his argument, Kellogg points to the various impediments to his ability to obtain shelter and effective treatment, apparently caused by a myriad of factors including the nature of his condition and governmental policies and resources, and asserts that these impediments do not justify criminally prosecuting him. He posits that the Eighth Amendment "mandates that society do more for [him] than prosecute him criminally and repeatedly incarcerate him for circumstances which are beyond his control."

We are sympathetic to Kellogg's plight; however, we are not in a position to serve as policy maker to evaluate societal deficiencies and amelioration strategies. It may be true that the safety concerns arising from public intoxication can be addressed by means of civil custody rather than penal sanctions. Indeed, the Legislature has provided alternatives to penal sanctions against persons who are drunk in public, including civil protective custody and release without criminal processing. However, the Legislature has not seen fit to remove the option of criminal prosecution and conviction. Absent a constitutional violation, it is not our role to second-guess this policy determination.

Kellogg does not contend he was been arbitrarily deprived of alternatives to criminal prosecution in this case… rather, he broadly challenges his misdemeanor conviction as, in and of itself, being cruel and unusual punishment. Thus, our sole task in this appeal is to determine whether Kellogg's conviction constituted cruel and/or unusual punishment. As set forth above, we find no such constitutional infirmity.

The judgment is affirmed.

McDONALD, J., dissenting.

…. The majority opinion appears to be based on the premise that Kellogg's conduct posed a safety hazard and showed a clear potential for harm and therefore his conviction was not merely for being intoxicated in public. Section 647(f) punishes a person for being intoxicated in public "in such a condition that he or she is unable to exercise care for his or her own safety or the safety of others, or … interferes with or obstructs … the free use of any street, sidewalk, or other public way." However, the trial court did not find and the record is devoid of evidence showing that Kellogg was unable to care for his own safety or the safety of others or interfered with or obstructed any street, sidewalk or other public way. The record shows only that Kellogg was sitting under a bush on a highway embankment. That evidence is insufficient to support a finding he was actually interfering with or obstructing that highway or was unable to care for his or others' safety. The majority opinion permits the mere potential or possibility that Kellogg would interfere with or obstruct that highway or become unable to care for his or others' safety to be sufficient for a 647(f) conviction, which is therefore a conviction for simply being homeless and intoxicated in public.

… [Additionally, the] record does not support the People's assertion that Kellogg's homelessness was by choice. In support of their assertion, the People cite the testimony of Officer Hawley that she had offered Kellogg assistance on three occasions and each time he declined help. Considering the extensive expert testimony in the record regarding Kellogg's chronic alcoholism, dementia, severe cognitive impairment, and schizoid personality disorder, his rejection of generalized offers of assistance cannot be viewed as a "choice" or voluntary decision by Kellogg to remain homeless.

Although the People assert that incarceration of Kellogg provides him with treatment similar to or better than he would receive were he civilly committed, the quality of his treatment in jail does not prevent his criminal conviction from constituting cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. As Justice Fortas stated in his dissenting opinion in *Powell*:

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

In any event, the evidence in the record does not support the People's assertion.

… I would reverse the judgment.

Notes and questions on *Kellogg*

1. Distinguishing precedent: how does the *Kellogg* court distinguish between the criminalization of status or condition, which it says is unconstitutional under *Robinson*, and the criminalization of conduct? More specifically, why is addiction properly classified as a condition, while public intoxication is properly classified as conduct? How do threats to public safety play into

the analysis? Is there any circumstance in which public intoxication would not pose a threat to public safety? Is there any circumstance in which narcotics addiction would not pose a threat to public safety?

2. The court classifies Kellogg's public intoxication as conduct, but does the court view his conduct as voluntary? Does the majority opinion dispute the claim that Kellogg is unable to avoid violating this statute?
3. As you think about voluntariness and choice, consider the choices available to the police, prosecutors, and trial court. The trial court said it faced a "Hobson's choice," a phrase often used to describe a situation with no attractive alternative. But more precisely, a Hobson's choice is a take-it-or-leave-it situation. Hobson was an English stable owner who rented horses. Rather than let his customers choose their favorite horse, he required them to take the horse nearest the stable door or none at all. In this case, the medical testimony seems to indicate that the available non-punitive treatment options are unlikely to help Kellogg recover. Nevertheless, is "leave it" still an option? Could prosecutors or courts simply decline to impose criminal sanctions, even in the absence of a non-criminal intervention strategy?
4. Recall four standard rationales for punishment discussed earlier in this chapter: deterrence, retribution or desert, incapacitation, and rehabilitation. Are any of these rationales applicable here? The designation of public intoxication as criminal seems unlikely to deter someone in Kellogg's position. Does a criminal sanction give Kellogg his just deserts? What does Kellogg deserve, in your view? Incarceration does incapacitate him, in that it renders him unable to access alcohol or appear in public while intoxicated (or indeed, to appear in public at all). And state officials argued that incarceration also provided Kellogg with rehabilitative treatment that was as good or better than the treatment he would receive outside the criminal legal system, though this claim was contested. As you think about this case, consider both the criminalization decision—the choice to make public intoxication into a criminal offense—and the enforcement and conviction decisions—the choice to apply the public intoxication statute to Kellogg in particular. A legislature could choose to criminalize a broad category of conduct, public intoxication, without seeking to impose criminal sanctions on everyone who is intoxicated in public. Instead, the rationale for criminalization could be a desire to empower enforcement officials to exercise discretion and pursue convictions and punishment for some subset of people who are publicly intoxicated – people who, in the enforcement official's judgment, are in particular need of deterrence, incapacitation, or rehabilitation, or people who are especially deserving of punishment.
5. Criminalization of acts, or of persons? Throughout most of this chapter, we have spoken of criminalization as the classification of an act as criminal. When, if ever, should the designation "criminal" be applied to a person rather than an act? The U.S. Supreme Court's opinion in *Robinson v. California*, discussed by the *Kellogg* court, is sometimes interpreted to prohibit "the criminalization of status." In *Robinson*, the Court struck down a statute that made it a crime to "be addicted to the use of narcotics." The Court explained,

   > 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.

   Robinson, 370 U.S. 660, 666 (1962). The *Robinson* Court was focused on the question whether an act, as opposed to a condition or a status, can be designated as a criminal offense. The Court does not address the separate issue of criminalization as itself a status: once acts are properly criminalized, persons convicted of those acts are often designated as "criminals" (or "felons," or "offenders"), and as such, these persons hold a different social and legal status from "law-abiding citizens."
6. Criminal law and disability: In this case, all parties seemed to agree that Kellogg had significant disabilities and his public intoxication was a product of those disabilities. Although Kellogg may have had health issues more extreme than the average defendant, rates of mental illness and other health problems are much higher among convicted and imprisoned persons than

among the general population. When, if ever, should disability make a difference to criminal liability? When, if ever, should criminal law be used as a response to disability? We return to some of these issues later in this book when we consider the insanity defense and claims of diminished capacity.

7. Democracy, the Constitution, and criminal law decisions: Officer Hawley approached Kellogg on January 10 in response to a citizen's complaint about homeless persons. Suppose that most citizens of San Diego want public intoxication to be criminal, and they want police officers to use the public intoxication statute to remove Kellogg and others like him from public spaces. Is there any reason courts and other public institutions should not defer to the will of the majority? Constitutional challenges to legislation often involve a counter-majoritarian claim, or an argument that the Constitution prevents the majority from making certain choices.
8. Criminalization decisions and other public decisions: The government makes many, many policy choices beyond the choice to criminalize. It enacts and enforces civil laws, it decides whether to provide welfare benefits or other goods (including housing and health care) to citizens, it makes funding decisions, and much more. These decisions will affect citizens' well-being and behavior; the decisions may make harmful conduct more or less likely. Whether criminalization seems appropriate may depend upon one's frame of reference – whether we consider the potentially criminal conduct in isolation, or the broader social and political context in which the conduct takes place. The *Kellogg* court focuses on the question whether public intoxication can be conceived as "conduct." The court declines to consider whether imposing criminal sanctions for public intoxication is the best policy choice: "we are not in a position to serve as policy maker to evaluate societal deficiencies and amelioration strategies." This argument about the appropriate role of the judiciary is fairly common. It rests on a dichotomy between "legal" questions that a court is empowered to answer, such as whether public intoxication is conduct, and "policy" questions that lie beyond the court's power, such as whether criminal sanctions are a sensible response to problems of homelessness and alcoholism. The very characterization of an issue as a "legal" question or a "policy" question is often contested, and one crucial skill for a lawyer is the ability to frame issues in a way that will convince a court that it has the power to resolve those issues.

End of Chapter Review

Check Your Understanding (2-4)

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1. Holmes, The Common Law, considers intent in the chapter on The Criminal Law, and earlier makes the pithy observation: "Even a dog distinguishes between being stumbled over and being kicked." [Fn. by the Court) ↵

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1.3: Enforcement Decisions

Introduction

Suppose a criminalization decision has been made; a legislature has enacted a new criminal statute. Now what? The enactment of a statute does not, all by itself, generate any prosecutions or convictions. In this sense, a criminal statute is not self-enforcing. Legislatures do not monitor for violations, make arrests, or file charges. These enforcement tasks are instead allocated to executive branch officials—most importantly, police and prosecutors. This chapter offers an overview of police and prosecutorial authority, with a particular focus on the interaction between enforcement authority and criminal statutes.

A few key points are worth noting at the outset, and each should become more clear as you read the chapter. First, police and prosecutors typically have the authority to enforce any criminal statute in the jurisdiction. (We encountered this principle in Chapter One in our study of *Commonwealth v. Copenhaver*, where we were able to contrast the general enforcement authority of most police officers to the narrower enforcement powers of Pennsylvania county sheriffs.) Broad authority to enforce is the first key idea to keep in mind; the second is broad discretion. By discretion, we mean that enforcement officials typically have a choice about whether to enforce a given statute. For most offenses in most jurisdictions, enforcement is not mandatory. A police officer who observes or suspects an offense has the power to investigate and perhaps make an arrest, but the officer is not obligated to do so. And a prosecutor who receives a report or evidence of an offense has the power to bring charges, but is not obligated to do so.

In addition to authority and discretion, a third important theme of this chapter is suspicion, a topic not traditionally covered in first-year criminal law courses. You have probably often heard it said that a criminal conviction requires proof beyond a reasonable doubt. We will consider standards of proof, and the guilty pleas that are much more common than proof through presentation of evidence, in more detail in the next chapter. Here in this chapter, we focus on enforcement powers rather than convictions, and enforcement powers do not require proof. The power to search or to make an arrest arises as soon as a police officer has a legally adequate level of suspicion, and the same is true for a prosecutor's power to file charges. This book does not seek to teach you suspicion doctrines in detail; you will look much more closely at the meaning of "reasonable suspicion" or "probable cause" if you take a course on investigative criminal procedure. But this chapter does introduce the basic concept of legally adequate suspicion, since it is the key threshold condition for many criminal law enforcement powers.

The combination of authority, discretion, and suspicion is a potent mix. Long before there is any proof of wrongdoing, and even in cases where no proof is ever established, police and prosecutors gain powers to intrude into individuals' lives and curtail important liberties. The ability to act on suspicion rather than proof, and the fact of broad enforcement discretion, create opportunities for racial bias to shape criminal law outcomes. That is the final and most important theme to emphasize throughout this chapter: enforcement decisions as a source of significant racial disparities. Criminalization decisions and adjudication decisions can also contribute to racial inequality in criminal law, but enforcement may be the place where racial disparities are most easily identified and documented.

Police Decisions

In the early 1990s, many Chicago citizens were concerned about high levels of violence and drug crime. Many community members expressed particular concern about gang intimidation, reporting that members of criminal gangs would establish control over particular streets or areas and intimidate the residents of that area. In 1992, the city adopted the following ordinance, which was soon challenged in court.

Chicago Municipal Code, § 8–4–015

(a) Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.

(b) It shall be an affirmative defense to an alleged violation of this section that no person who was observed loitering was in fact a member of a criminal street gang.

(c) As used in this Section:

(1) 'Loiter' means to remain in any one place with no apparent purpose.

(2) ‘Criminal street gang’ means any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more of the criminal acts enumerated in paragraph (3), and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

…..

(5) ‘Public place’ means the public way and any other location open to the public, whether publicly or privately owned.

(e) Any person who violates this Section is subject to a fine of not less than $100 and not more than $500 for each offense, or imprisonment for not more than six months, or both.

In addition to or instead of the above penalties, any person who violates this section may be required to perform up to 120 hours of community service….

CITY OF CHICAGO, Petitioner

v.

Jesus MORALES et al.

Supreme Court of the United States
527 U.S. 41

Decided June 10, 1999

Justice STEVENS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and V, and an opinion with respect to Parts III, IV, and VI, in which Justice SOUTER and Justice GINSBURG join.

In 1992, the Chicago City Council enacted the Gang Congregation Ordinance, which prohibits “criminal street gang members” from “loitering” with one another or with other persons in any public place. The question presented is whether the Supreme Court of Illinois correctly held that the ordinance violates the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.

I

… Commission of the offense involves four predicates. First, the police officer must reasonably believe that at least one of the two or more persons present in a “public place” is a “criminal street gang membe[r].” Second, the persons must be “loitering,” which the ordinance defines as “remain[ing] in any one place with no apparent purpose.” Third, the officer must then order “all” of the persons to disperse and remove themselves “from the area.” Fourth, a person must disobey the officer’s order. If any person, whether a gang member or not, disobeys the officer’s order, that person is guilty of violating the ordinance.

Two months after the ordinance was adopted, the Chicago Police Department promulgated … guidelines … to establish limitations on the enforcement discretion of police officers “to ensure that the anti-gang loitering ordinance is not enforced in an arbitrary or discriminatory way.” Chicago Police Department, General Order 92–4. [Only] sworn “members of the Gang Crime Section” and certain other designated officers [are authorized to make arrests under the ordinance, pursuant to] detailed criteria for defining street gangs and membership in such gangs. In addition, the order … provides that the ordinance “will be enforced only within … designated areas.” The city, however, does not release the locations of these “designated areas” to the public.

II

During the three years of its enforcement [before the ordinance was first held invalid in 1995], the police issued over 89,000 dispersal orders and arrested over 42,000 people for violating the ordinance. In the ensuing enforcement proceedings, 2 trial judges upheld the constitutionality of the ordinance, but 11 others ruled that it was invalid, with one court finding that the “ordinance fails to notify individuals what conduct is prohibited, and it encourages arbitrary and capricious enforcement by police.”… We granted certiorari, and now affirm. Like the Illinois Supreme Court, we conclude that the ordinance enacted by the city of Chicago is unconstitutionally vague.

III

The basic factual predicate for the city’s ordinance is not in dispute. As the city argues in its brief, “the very presence of a large collection of obviously brazen, insistent, and lawless gang members and hangers-on on the public ways intimidates residents, who

become afraid even to leave their homes and go about their business. That, in turn, imperils community residents' sense of safety and security, detracts from property values, and can ultimately destabilize entire neighborhoods." The findings in the ordinance explain that it was motivated by these concerns. We have no doubt that a law that directly prohibited such intimidating conduct would be constitutional[1]but this ordinance broadly covers a significant amount of additional activity. Uncertainty about the scope of that additional coverage provides the basis for respondents' claim that the ordinance is too vague.

… [An] imprecise laws[] may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests. .. [A]s the United States recognizes, the freedom to loiter for innocent purposes is part of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment. We have expressly identified this "right to remove from one place to another according to inclination" as "an attribute of personal liberty" protected by the Constitution. *Williams v. Fears*, 179 U.S. 270 (1900); see also *Papachristou v. Jacksonville*, 405 U.S. 156 (1972).[2]

… [I]t is clear that the vagueness of this enactment makes a facial challenge appropriate. This is not an ordinance that "simply regulates business behavior and contains a scienter requirement." It is a criminal law that contains no *mens rea* requirement, and infringes on constitutionally protected rights.

Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement….

IV

"It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits…." *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966). [T]he definition of ["loiter"] in this ordinance—"to remain in any one place with no apparent purpose"—does not [have a clear meaning]. It is difficult to imagine how any citizen of the city of Chicago standing in a public place with a group of people would know if he or she had an "apparent purpose." If she were talking to another person, would she have an apparent purpose? If she were frequently checking her watch and looking expectantly down the street, would she have an apparent purpose?

Since the city cannot conceivably have meant to criminalize each instance a citizen stands in public with a gang member, the vagueness that dooms this ordinance is not the product of uncertainty about the normal meaning of "loitering," but rather about what loitering is covered by the ordinance and what is not. The Illinois Supreme Court emphasized the law's failure to distinguish between innocent conduct and conduct threatening harm. [Although] a number of state courts that have upheld ordinances that criminalize loitering combined with some other overt act or evidence of criminal intent[,] state courts have uniformly invalidated laws that do not join the term "loitering" with a second specific element of the crime.

The city's principal response to this concern about adequate notice is that loiterers are not subject to sanction until after they have failed to comply with an officer's order to disperse. "[W]hatever problem is created by a law that criminalizes conduct people normally believe to be innocent is solved when persons receive actual notice from a police order of what they are expected to do." We find this response unpersuasive for at least two reasons.

… If the loitering is in fact harmless and innocent, the dispersal order itself is an unjustified impairment of liberty. Because an officer may issue an order only after prohibited conduct has already occurred, [the officer's order] cannot provide the kind of advance notice that will protect the putative loiterer from being ordered to disperse. Such an order cannot retroactively give adequate warning of the boundary between the permissible and the impermissible applications of the law.

Second, the terms of the dispersal order compound the inadequacy of the notice…. It provides that the officer "shall order all such persons to disperse and remove themselves from the area." This vague phrasing raises a host of questions. After such an order issues, how long must the loiterers remain apart? How far must they move? If each loiterer walks around the block and they meet again at the same location, are they subject to arrest or merely to being ordered to disperse again? …

The Constitution does not permit a legislature to "set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *United States v. Reese*, 92 U.S. 214 (1876). This ordinance is … vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all."

V

The broad sweep of the ordinance also violates "the requirement that a legislature establish minimal guidelines to govern law enforcement." *Kolender v. Lawson*, 461 U.S. 352 (1983). There are no such guidelines in the ordinance. In any public place in the city of Chicago, persons who stand or sit in the company of a gang member may be ordered to disperse unless their purpose is apparent. The mandatory language in the enactment directs the police to issue an order without first making any inquiry about their possible purposes. It matters not whether the reason that a gang member and his father, for example, might loiter near Wrigley Field is to rob an unsuspecting fan or just to get a glimpse of Sammy Sosa leaving the ballpark; in either event, if their purpose is not apparent to a nearby police officer, she may—indeed, she "shall"—order them to disperse.

Recognizing that the ordinance does reach a substantial amount of innocent conduct, we turn, then, to its language to determine if it "necessarily entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat." *Kolender.* As we discussed in the context of fair notice, the principal source of the vast discretion conferred on the police in this case is the definition of loitering as "to remain in any one place with no apparent purpose." As the Illinois Supreme Court interprets that definition, it "provides absolute discretion to police officers to decide what activities constitute loitering." We have no authority to construe the language of a state statute more narrowly than the construction given by that State's highest court….

It is true, as the city argues, that the requirement that the officer reasonably believe that a group of loiterers contains a gang member does place a limit on the authority to order dispersal. That limitation would no doubt be sufficient if the ordinance only applied to loitering that had an apparently harmful purpose or effect, or possibly if it only applied to loitering by persons reasonably believed to be criminal gang members. But this ordinance, for reasons that are not explained in the findings of the city council, requires no harmful purpose and applies to nongang members as well as suspected gang members. It applies to everyone in the city who may remain in one place with one suspected gang member as long as their purpose is not apparent to an officer observing them. Friends, relatives, teachers, counselors, or even total strangers might unwittingly engage in forbidden loitering if they happen to engage in idle conversation with a gang member….

VI

In our judgment, the Illinois Supreme Court correctly concluded that the ordinance does not provide sufficiently specific limits on the enforcement discretion of the police "to meet constitutional standards for definiteness and clarity." We recognize the serious and difficult problems testified to by the citizens of Chicago that led to the enactment of this ordinance…. However, in this instance the city has enacted an ordinance that affords too much discretion to the police and too little notice to citizens who wish to use the public streets.

Accordingly, the judgment of the Supreme Court of Illinois is

Affirmed.

Justice O'CONNOR, with whom Justice BREYER joins, concurring in part and concurring in the judgment.

… As it has been construed by the Illinois court, Chicago's gang loitering ordinance is unconstitutionally vague because it lacks sufficient minimal standards to guide law enforcement officers. In particular, it fails to provide police with any standard by which they can judge whether an individual has an "*apparent* purpose." Indeed, because any person standing on the street has a general "purpose"—even if it is simply to stand—the ordinance permits police officers to choose which purposes are *permissible*….

It is important to courts and legislatures alike that we characterize more clearly the narrow scope of today's holding. As the ordinance comes to this Court, it is unconstitutionally vague. Nevertheless, there remain open to Chicago reasonable alternatives to combat the very real threat posed by gang intimidation and violence. For example, the Court properly and expressly distinguishes the ordinance from laws that require loiterers to have a "harmful purpose," from laws that target only gang members, and from laws that incorporate limits on the area and manner in which the laws may be enforced. … Indeed, as the plurality notes, the city of Chicago has several laws that do [have these additional requirements]. Chicago has even enacted a provision that "enables police officers to fulfill … their traditional functions," including "preserving the public peace." Specifically, Chicago's general disorderly conduct provision allows the police to arrest those who knowingly "provoke, make or aid in making a breach of peace." See Chicago Municipal Code § 8–4–010 (1992).

In my view, the gang loitering ordinance could have been construed more narrowly. The term "loiter" might possibly be construed in a more limited fashion to mean "to remain in any one place with no apparent purpose other than to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal activities." Such a definition would be

consistent with the Chicago City Council's findings and would avoid the vagueness problems of the ordinance as construed by the Illinois Supreme Court….

The Illinois Supreme Court did not choose to give a limiting construction to Chicago's ordinance. …[W]e cannot impose a limiting construction that a state supreme court has declined to adopt. Accordingly, I join Parts I, II, and V of the Court's opinion and concur in the judgment.

[Partial concurrences by Justices KENNEDY and BREYER, each concurring in the judgment, omitted.]

Justice SCALIA, dissenting.

The citizens of Chicago were once free to drive about the city at whatever speed they wished. At some point Chicagoans (or perhaps Illinoisans) decided this would not do, and imposed prophylactic speed limits designed to assure safe operation by the average (or perhaps even subaverage) driver with the average (or perhaps even subaverage) vehicle. This infringed upon the "freedom" of all citizens, but was not unconstitutional.

… Until the ordinance that is before us today was adopted, the citizens of Chicago were free to stand about in public places with no apparent purpose—to engage, that is, in conduct that appeared to be loitering. In recent years, however, the city has been afflicted with criminal street gangs. As reflected in the record before us, these gangs congregated in public places to deal in drugs, and to terrorize the neighborhoods by demonstrating control over their "turf." Many residents of the inner city felt that they were prisoners in their own homes. Once again, Chicagoans decided that to eliminate the problem it was worth restricting some of the freedom that they once enjoyed. The means they took was similar to the second, and more mild, example given above rather than the first: Loitering was not made unlawful, but when a group of people occupied a public place without an apparent purpose and in the company of a known gang member, police officers were authorized to order them to disperse, and the failure to obey such an order was made unlawful. The minor limitation upon the free state of nature that this prophylactic arrangement imposed upon all Chicagoans seemed to them (and it seems to me) a small price to pay for liberation of their streets.

I

… Both the plurality opinion and the concurrences display a lively imagination, creating hypothetical situations in which the law's application would (in their view) be ambiguous. But that creative role has been usurped from petitioner, who can defeat respondents' facial challenge by conjuring up *a single valid application* of the law. My contribution would go something like this [with apologies to the creators of *West Side Story*]: Tony, a member of the Jets criminal street gang, is standing alongside and chatting with fellow gang members while staking out their turf at Promontory Point on the South Side of Chicago; the group is flashing gang signs and displaying their distinctive tattoos to passersby. Officer Krupke, applying the ordinance at issue here, orders the group to disperse. After some speculative discussion (probably irrelevant here) over whether the Jets are depraved because they are deprived, Tony and the other gang members break off further conversation with the statement—not entirely coherent, but evidently intended to be rude—"Gee, Officer Krupke, krup you." A tense standoff ensues until Officer Krupke arrests the group for failing to obey his dispersal order. Even assuming (as the Justices in the majority do, but I do not) that a law requiring obedience to a dispersal order is impermissibly vague unless it is clear to the objects of the order, before its issuance, that their conduct justifies it, I find it hard to believe that the Jets would not have known they had it coming. That should settle the matter of respondents' facial challenge to the ordinance's vagueness.

II

…[T]here is not the slightest evidence for the existence of a genuine constitutional right to loiter. Justice THOMAS recounts the vast historical tradition of criminalizing the activity….

III

[The plurality claims that] this criminal ordinance contains no *mens rea* requirement. The first step in analyzing this proposition is to determine what the *actus reus*, to which that *mens rea* is supposed to be attached, consists of. The majority believes that loitering forms part of (indeed, the essence of) the offense, and must be proved if conviction is to be obtained. That is not what the ordinance provides. The only part of the ordinance that refers to loitering is the portion that addresses, not the punishable conduct of the defendant, but what the police officer must observe before he can issue an order to disperse; and what he must observe is carefully defined in terms of what the defendant *appears* to be doing, not in terms of what the defendant is *actually* doing. The ordinance does not require that the defendant have been loitering (*i.e.*, have been remaining in one place with no purpose), but rather that the

police officer have observed him remaining in one place without any *apparent* purpose. Someone who in fact *has* a genuine purpose for remaining where he is (waiting for a friend, for example, or waiting to hold up a bank) *can* be ordered to move on (assuming the other conditions of the ordinance are met), so long as his remaining has no *apparent* purpose. It is likely, to be sure, that the ordinance will come down most heavily upon those who are *actually* loitering (those who *really* have no purpose in remaining where they are); but that activity is not a condition for issuance of the dispersal order.

The *only* act of a defendant that is made punishable by the ordinance—or, indeed, that is even mentioned by the ordinance—is his failure to "promptly obey" an order to disperse. The question, then, is whether that *actus reus* must be accompanied by any wrongful intent—and of course it must. As the Court itself describes the requirement, "a person must *disobey* the officer's order." No one thinks a defendant could be successfully prosecuted under the ordinance if he did not hear the order to disperse, or if he suffered a paralysis that rendered his compliance impossible. The willful failure to obey a police order is wrongful intent enough.

* * *

The fact is that the present ordinance is entirely clear in its application, cannot be violated except with full knowledge and intent, and vests no more discretion in the police than innumerable other measures authorizing police orders to preserve the public peace and safety. As suggested by their tortured analyses, and by their suggested solutions that bear no relation to the identified constitutional problem, the majority's real quarrel with the Chicago ordinance is simply that it permits (or indeed requires) too much harmless conduct by innocent citizens to be proscribed. As Justice O'CONNOR's concurrence says with disapprobation, "the ordinance applies to hundreds of thousands of persons who are *not* gang members, standing on any sidewalk … or other location open to the public."

But in our democratic system, how much harmless conduct to proscribe is not a judgment to be made by the courts. So long as constitutionally guaranteed rights are not affected, and so long as the proscription has a rational basis, *all sorts* of perfectly harmless activity by millions of perfectly innocent people can be forbidden—riding a motorcycle without a safety helmet, for example, starting a campfire in a national forest, or selling a safe and effective drug not yet approved by the Food and Drug Administration. All of these acts are entirely innocent and harmless in themselves, but because of the *risk* of harm that they entail, the freedom to engage in them has been abridged. The citizens of Chicago have decided that depriving themselves of the freedom to "hang out" with a gang member is necessary to eliminate pervasive gang crime and intimidation…. This Court has no business second-guessing either the degree of necessity or the fairness of the trade.

I dissent from the judgment of the Court.

Justice THOMAS, with whom THE CHIEF JUSTICE and Justice SCALIA join, dissenting.

…. By invalidating Chicago's ordinance, I fear that the Court has unnecessarily sentenced law-abiding citizens to lives of terror and misery. The ordinance is not vague. "[A]ny fool would know that a particular category of conduct would be within [its] reach." *Kolender v. Lawson* (1983) (White, J. dissenting)….

I

The human costs exacted by criminal street gangs are inestimable…. Gangs fill the daily lives of many of our poorest and most vulnerable citizens with a terror that the Court does not give sufficient consideration, often relegating them to the status of prisoners in their own homes…. The city of Chicago has suffered the devastation wrought by this national tragedy….

Before enacting its ordinance, the Chicago City Council held extensive hearings.… Following these hearings, the council found that "criminal street gangs establish control over identifiable areas … by loitering in those areas and intimidating others from entering those areas." It further found that the mere presence of gang members "intimidate[s] many law abiding citizens" and "creates a justifiable fear for the safety of persons and property in the area." It is the product of this democratic process—the council's attempt to address these social ills—that we are asked to pass judgment upon today.

II

As part of its ongoing effort to curb the deleterious effects of criminal street gangs, the citizens of Chicago sensibly decided to return to basics. The ordinance does nothing more than confirm the well-established principle that the police have the duty and the power to maintain the public peace, and, when necessary, to disperse groups of individuals who threaten it….

The plurality's sweeping conclusion that this ordinance infringes upon a liberty interest protected by the Fourteenth Amendment's Due Process Clause withers when exposed to the relevant history: Laws prohibiting loitering and vagrancy have been a fixture of Anglo–American law at least since the time of the Norman Conquest…. The American colonists enacted laws modeled upon the English vagrancy laws, and at the time of the founding, state and local governments customarily criminalized loitering and other forms of vagrancy. Vagrancy laws were common in the decades preceding the ratification of the Fourteenth Amendment, and remained on the books long after….

The Court concludes that the ordinance is also unconstitutionally vague because it fails to provide adequate standards to guide police discretion and because, in the plurality's view, it does not give residents adequate notice of how to conform their conduct to the confines of the law. I disagree on both counts.

At the outset, it is important to note that the ordinance does not criminalize loitering *per se*. Rather, it penalizes loiterers' failure to obey a police officer's order to move along. A majority of the Court believes that this scheme vests too much discretion in police officers. Nothing could be further from the truth. Far from according officers too much discretion, the ordinance merely enables police officers to fulfill one of their traditional functions. Police officers are not, and have never been, simply enforcers of the criminal law. They wear other hats—importantly, they have long been vested with the responsibility for preserving the public peace….

In order to perform their peacekeeping responsibilities satisfactorily, the police inevitably must exercise discretion. Indeed, by empowering them to act as peace officers, the law assumes that the police will exercise that discretion responsibly and with sound judgment. That is not to say that the law should not provide objective guidelines for the police, but simply that it cannot rigidly constrain their every action. By directing a police officer not to issue a dispersal order unless he "observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place," Chicago's ordinance strikes an appropriate balance between those two extremes. Just as we trust officers to rely on their experience and expertise in order to make spur-of-the-moment determinations about amorphous legal standards such as "probable cause" and "reasonable suspicion," so we must trust them to determine whether a group of loiterers contains individuals (in this case members of criminal street gangs) whom the city has determined threaten the public peace. See *Ornelas v. United States*, 517 U.S. 690 (1996) ("Articulating precisely what 'reasonable suspicion' and 'probable cause' mean is not possible. They are commonsense, nontechnical conceptions that deal with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act…."). In sum, the Court's conclusion that the ordinance is impermissibly vague because it "necessarily entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat" cannot be reconciled with common sense, longstanding police practice, or this Court's Fourth Amendment jurisprudence.

… In concluding that the ordinance adequately channels police discretion, I do not suggest that a police officer enforcing the Gang Congregation Ordinance will never make a mistake. Nor do I overlook the *possibility* that a police officer, acting in bad faith, might enforce the ordinance in an arbitrary or discriminatory way. But … [i]nstances of arbitrary or discriminatory enforcement of the ordinance, like any other law, are best addressed when (and if) they arise, rather than prophylactically through the disfavored mechanism of a facial challenge on vagueness grounds.

Check Your Understanding (3-1)

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Notes and questions about *City of Chicago v. Morales*

1. When police stop an individual, question that person, or make an arrest, what is the source of their power? We first considered this question in Chapter One with *Commonwealth v. Copenhaver*. Recall that the majority of the Pennsylvania Supreme Court viewed the sheriff's authority to stop or arrest as a matter of common law, while a partial dissenting opinion argued that the Pennsylvania legislature should define the scope of sheriffs' authority by statute. In most jurisdictions, police are empowered – either by common law tradition or a statute – to enforce any criminal statute. (They are often empowered to enforce non-criminal statutes, such as civil traffic offenses, as well.) The Chicago ordinance under consideration in *Morales* seems to give the police a new power: the power to order persons to leave a given area when one or more of the persons gathered is suspected to belong to a criminal gang. If a person ordered to disperse does not do so, then the officer may make an arrest. Statutes that make it a crime to disobey a police officer's order to disperse are fairly common, but to survive constitutional review, they

usually must condition the officer's power to order persons to disperse on specific circumstances such as an immediate threat to public safety. In *Morales*, the plurality concluded that given the ambiguity of the term "loitering," the ordinance was too vague (even with its additional element of suspected gang membership) to meet constitutional requirements of due process.

2. Why didn't the police just arrest suspected gang members, instead of ordering them to disperse? "Being a gang member" is not itself a crime, and an attempt to criminalize gang membership itself could be subject to its own constitutional challenges, including the claim that it is a criminalization of status. (Recall the discussion of *Robinson v. California* and *Powell v. Texas* in the previous chapter.) But notice that the ordinance defined "criminal street gang" as a group that commits certain criminal acts, and notice also that a police superintendent reported that "90 percent" of the objectionable instances of "gang loitering" involved conduct that was separately criminalized. Why didn't the police make arrests for "intimidation," "gang conspiracy," "disorderly conduct," or other offenses, rather than rely upon the gang loitering statute? What benefits, to law enforcement officials or to the community more generally, are achieved by the gang loitering statute?
3. The Chicago ordinance provided that "whenever" an officer observes gang loitering, he "shall" order the persons loitering to disperse. In a footnote not included above, the plurality observed that one could argue that the ordinance "affords the police no discretion, since it speaks with the mandatory 'shall.' However, not even the city makes this argument, which flies in the face of common sense that all police officers must use some discretion in deciding when and where to enforce city ordinances." *Morales*, 527 U.S. at 63, n. 32. This is an important reminder that in almost all cases, the power of police to enforce statutes is discretionary – police have the option but not the obligation to enforce a given statute. There are specific exceptions to this rule. For example, some jurisdictions have enacted domestic violence statutes with mandatory arrest provisions in an attempt to counter patterns of nonenforcement. But mandatory arrest is a rare exception and not the general rule. And even a mandatory arrest provision may prove difficult to enforce if police simply decline to make the arrest. See *Castle Rock v. Gonzales*, 545 U.S. 748 (2005).
4. Analysis of the elements of the Chicago ordinance is not the main focus of any of the opinions in *Morales*, but each opinion rests on a particular interpretation of the law. As a reminder, it's useful to practice statutory interpretation with each statute you encounter. The plurality characterized the Chicago ordinance as "a criminal law that contains no mens rea requirement." Justice Scalia disagreed. What are the elements of the offense, including actus reus and mens rea, according to Scalia? According to the plurality? (Hint: look at the first paragraph of Part I of the plurality opinion, and Part III of Justice Scalia's opinion.) Compare the plurality's analysis, and Justice Scalia's, to the text of the ordinance. Which interpretation seems most accurate to you?
5. How did Chicago's anti-loitering efforts play out on the street? In other words, what were the situations and circumstances that led to actual arrests under this ordinance? The U.S. Supreme Court did not go into factual details of specific arrests in its *Morales* opinion. However, in the defendants' brief to the state supreme court, there are some descriptions of encounters that led to the arrests of Jesus Morales and other individuals charged with violating the Chicago anti-loitering law. As you read these descriptions, think about suspicion. How do police officers form the suspicion that someone is a gang member?

   [Officer's version:] Officer Matthew Craig testified at a bench trial that he observed Gregorio Gutierrez standing at the corner of Broadway and Winona Streets with two other men "doing absolutely nothing." Officer Craig and his partner immediately told them to break up and leave the area. Officer Craig and his partner drove off around the block. When they returned, they saw Gutierrez standing at the same corner and arrested him for gang loitering. According to Officer Craig, Gutierrez had told him on previous occasions that he belonged to the Latin Kings.

   [Defendant's version:] Gregorio Gutierrez testified that he had left his home with his brother and was walking towards a nearby El stop to go to their mother's place of employment. Along the way, they stopped to purchase a sandwich and soda from a store. Officer Craig and his partner drove up to them at the corner and arrested them without ever telling them to leave. When Gutierrez asked why he was being arrested, "they told us they don't like us." Gutierrez never told Officer Craig that he was a member of the Latin Kings. Gutierrez was no longer a member of the Latin Kings and was not a member on June 3, 1993. No one else with him at the corner was a member of the Latin Kings.

   [Officer's version:] At a bench trial, Officer Ray Frano testified that he saw approximately six young male Hispanics standing at the street corner by 1100 West Belmont "(t)alking to citizens on the street." The neighborhood was predominately Caucasian. Officer Frano approached the Hispanic teenagers on the corner with the stated reason: "(b)ecause we wanted to know if they lived in the neighborhood or from the neighborhood." He told the group of Hispanic teenagers that he would arrest them if they did not leave. Officer Frano left the scene. When he returned later, he arrested Jesus Morales and another person at the corner

for gang loitering. According to Officer Frano, he believed Morales was a gang member because Morales wore blue and black clothing.

[Defendant's version:] Jesus Morales testified that he was pausing at the intersection while walking on crutches home from a nearby hospital. After Morales told Officer Frano that he had no outstanding warrants, Officer Frano arrested him for gang loitering. Morales himself was not a gang member although he knew that the other person present on the corner was a Gangster Disciple.

Brief of Defendants-Appellees to Illinois Supreme Court, *City of Chicago v. Morales*, 1996 WL 33437124 (internal citations omitted).

6. Consider the accounts above in relation to the statistics reported at the beginning of Part II of the Court's opinion. The Court states that during the first three years that the ordinance was in effect, "the police issued over 89,000 dispersal orders and arrested over 42,000 people for violating the ordinance." Assuming these figures are roughly accurate, nearly half of the people who received a dispersal order were ultimately arrested for violating the ordinance. Did half the people who were ordered to disperse simply refuse to do so? Or did police make arrests even without first giving an order to disperse, as suggested by some of the defendants?
7. While the ordinance was in effect, the Chicago police department issued an order to guide officers in enforcement. This order stated that gang "membership may not be established solely because an individual is wearing clothing available for sale to the general public." Chicago Police Department, General Order 92-4, quoted in *City of Chicago v. Morales*, 687 N.E.2d 53, 64 n. 1 (1997). Consider again Officer Frano's explanations of why he approached Jesus Morales and then ordered him to disperse, quoted above in the excerpt from the defendants' brief to the state court. Frano mentioned Morales's clothing, but also the area: he noticed a group of "young male Hispanics" in a predominantly Caucasian neighborhood and wanted to know if they were "from the neighborhood." Is it fair to say that the ingredients of suspicion here are clothing, race, and place?
8. In fact, most persons prosecuted under the Chicago ordinance were Black or Latino. See Dorothy Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order Maintenance Policing*, 89 J. Crim. L. & Criminology 775, 776 n. 2 (1999). At the same time, defenders of the ordinance, including the *Morales* dissenters, argued that minority communities supported the ordinance as a way to make their neighborhoods safer. Professor Roberts reports that Blacks and other minority residents actually held conflicting opinions about the ordinance. Should the possibility of racialized patterns of enforcement affect the criminalization decision – that is, the legislative decision to enact a new law? How, if at all, should racialized patterns of enforcement affect the constitutional review of a criminal statute? We return to this question with *United States v. Armstrong* later in this chapter.
9. Across jurisdictions, the racialized conception of a "gang" has drawn scholarly attention. Some scholars argue that gangs do tend to be composed of members of the same minority racial group. Others have argued that systemic racial biases shape the labeling of groups as "gangs," with law enforcement less likely to classify a group of white persons as a criminal gang. For citations to the literature and a close analysis of the "gang" designation in federal prosecutions, see Jordan Blair Woods, *Systemic Racial Bias and RICO's Application to Criminal Street and Prison Gangs*, 17 Mich. J. Race & L. 303 (2012).
10. Void-for-vagueness doctrine is often said to address two separate concerns: first, the worry that a vague law will fail to give individuals fair warning, or notice, that specific conduct will be subject to criminal liability; and second, the worry that a vague law will enable arbitrary or discriminatory enforcement. Notice the connection between discretion and the possibility of discrimination: if police have wide discretion to select persons for loitering arrests, there arises the possibility that they will select persons for arrest on the basis of race (or some other factor not identified in the statute). A third concern, related to the first two, is that vague statutes can blur or collapse the distinction between criminalization decisions and enforcement decisions, so that in effect police decide what conduct is criminal. To express this worry, the *Morales* plurality quoted *Kolender v. Lawson* (1983), an earlier decision striking down a loitering statute on vagueness grounds, in part because the statute "necessarily entrust[ed] lawmaking to the moment-to-moment judgment of the policeman on his beat."
11. In their dissents, Justice Scalia and Thomas pointed out that American criminal laws have long criminalized "loitering and other forms of vagrancy." To Scalia and Thomas, this historical tradition was relevant because it suggested that Chicago acted well within its constitutional powers in criminalizing gang loitering. The *Morales* plurality responded by alluding to the racialized history of vagrancy law, especially the use of vagrancy prosecutions after the Civil War to push Black Americans into forced labor. See footnote 2 above, which was footnote 20 of the unedited opinion. The history of vagrancy offers an important illustration of the interaction between broad criminalization and broad enforcement discretion, as explored later in this chapter.

12. In 2000, Chicago adopted a revised gang loitering ordinance, taking guidance from Justice O'Connor's concurring opinion in *Morales*, and perhaps also from vagrancy statutes that survived constitutional challenges. The new ordinance defines gang loitering as "remaining in any one place under circumstances that would warrant a reasonable person to believe that the purpose or effect of that behavior is to enable a criminal street gang to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal activities." Chi. Ill. Mun. Code § 8-5-015 (2000). Do you think the new law avoids the problems of notice or enforcement discretion that the Court found in the first version of the law?

Vagrancy Then and Now

"Laws prohibiting loitering and vagrancy have been a fixture of Anglo-American law at least since the time of the Norman Conquest," wrote Justice Thomas in his dissent in *City of Chicago v. Morales*. *Morales* explored the meaning of the term loiter, but what is "vagrancy"? The term is often associated with idleness, but as a criminal offence, vagrancy is notoriously hard to define. Arguably, that is the point of the term: to capture an array of behaviors or conditions that are not easily defined in a written statute. Here is one typical vagrancy statute:

Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction in the Municipal Court shall be punished as provided for Class D offenses.

What is a rogue, a vagabond, a wanton person, a habitual loafer? This particular statute, Jacksonville Ordinance Code § 26-57, was found to be unconstitutionally vague in *Papachristou v. City of Jacksonville* (1972). Until *Papachristou*, the legitimacy of vagrancy law was largely taken for granted, and even after *Papachristou*, new versions of vagrancy have persisted, as discussed below. According to one scholar, vagrancy laws were popular among ruling authorities for two reasons. "First, the laws' breadth and ambiguity gave the police virtually unlimited discretion…. [I]t was almost always possible to justify a vagrancy arrest." Risa Goluboff, *Vagrant Nation* 2 (2016). Additionally, "vagrancy laws made it a crime to be a certain type of person…. Where most American laws required people to do something criminal before they could be arrested, vagrancy laws emphatically did not." *Id*. "The goals was to prevent crimes which may likely flow from a vagrant's mode of life…. Such preventive purpose wholly fails if a law enforcement officer must wait until a crime is committed." Id. (internal quotation marks omitted). Another function of vagrancy and loitering laws, echoed by Chicago's approach to "gang loitering," was simply to enable police to clear public spaces of people thought to be dangerous or otherwise undesirable. Once brought to court, many persons arrested for vagrancy would be offered dismissal of the charges on the condition that they leave the area and not return.

But in other contexts, the point of a vagrancy arrest was very different. As the *Morales* plurality mentioned [Fn. 2 in the opinion as edited above], "vagrancy laws were used after the Civil War to keep former slaves in a state of quasi slavery." The Thirteenth Amendment to the U.S. Constitution abolishes slavery "except as a punishment for crime." After the Thirteenth Amendment was adopted, many southern states sought to replace the lost labor of enslaved persons through a practice known as "convict leasing." Black men and women were arrested and prosecuted for vagrancy, then "leased" or "sold" to companies that would force them to labor. A Pulitzer-Prize-winning historical study of convict leasing opens with this example:

On March 30, 1908, Green Cottenham was arrested by the sheriff of Shelby County, Alabama, and charged with vagrancy.

Cottenham had committed no true crime. Vagrancy, the offense of a person not being able to prove at a given moment that he or she is employed, was … dredged up from legal obscurity at the end of the nineteenth century by the state legislatures of Alabama and other southern states. It was capriciously enforced by local sheriffs and constables, adjudicated by mayors and notaries public … and, most tellingly in a time of massive unemployment among all southern men, was reserved almost exclusively for black men. Cottenham's offense was blackness.

… Cottenham was found guilty in a swift appearance before the county judge and immediately sentenced to a thirty-day term of hard labor. Unable to pay the array of fees assessed on every prisoner … Cottenham's sentence was extended to nearly a year of hard labor. The next day, Cottenham was sold [to a mining company which would] pay off Cottenham's fine and fees.

Douglas Blackmon, *Slavery By Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (2008).

Convict leasing eventually came to an end after World War II, in part because of a change in enforcement decisions: federal prosecutors finally began to enforce the federal statutes that made "peonage," or the use of forced labor, into a crime. Even so, the separate vagrancy statutes remained valid law. Indeed, even after the 1972 *Papachristou* decision struck down the Jacksonville vagrancy ordinance quoted above, and called into question the constitutionality of similar laws, vagrancy did not exactly fade to obscurity. Florida enacted a new vagrancy law that made it a crime "to loiter or prowl in a place, at a time or in a manner not usual for law-abiding individuals, under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity." (See Goluboff, *Vagrant Nation*, p. 331.) Chicago similarly re-enacted a new version of its gang loitering ordinance after *Morales*, as discussed above. The revised Florida loitering law and the revised gang loitering ordinance are still in place as of 2021.

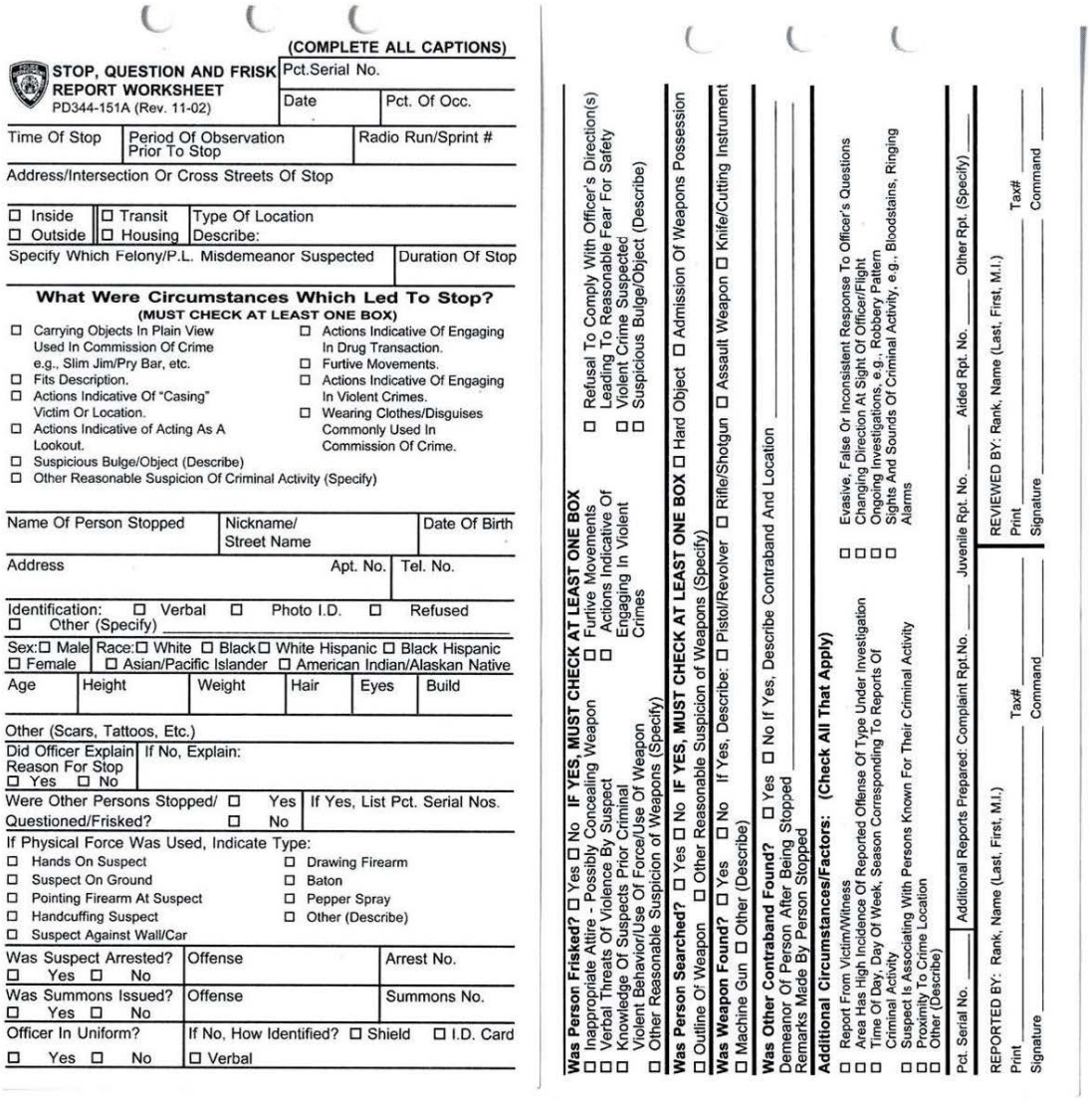
Suspicion: A Closer Look

City of Chicago v. Morales concerned a statute that specifically empowered police to act in particular way—to order persons to disperse. Most criminal statutes don't explicitly authorize police actions or even mention the police at all, but any criminal statute is nonetheless a source of power for the police. That is because police are generally empowered to stop and arrest persons, or conduct other investigative activities, whenever they have adequate suspicion of criminal activity. In other words, if a statute defines a crime of "knowing conversion" of government property, like the statute that was applied in *United States v. Morissette* in Chapter Two, then an officer who has legally adequate suspicion of knowing conversion is automatically empowered to stop, question, or arrest the person suspected of this offense. You first encountered this point with *Commonwealth v. Copenhaver* in Chapter One, but it is sufficiently important to emphasize again: once an act is defined as criminal, state officials have not only the authority to punish that act, but also the authority to police it – to investigate, search, and arrest when the officials suspect that someone has engaged or is going to engage in the proscribed act.

The requisite levels of suspicion are defined primarily by constitutional doctrine. The Fourth Amendment prohibits "unreasonable searches and seizures," and this language is the basis of the constitutional framework to evaluate police stops, searches, arrests, and other investigative activities. In the course of interpreting the Fourth Amendment, the Supreme Court has determined that a reasonable search or seizure is one that is based on "reasonable suspicion" of criminal activity or "probable cause" to believe that a crime has occurred.

"Reasonable suspicion" and "probable cause" are notoriously ambiguous concepts, but each of these legal standards generally requires an officer to identify some attribute of the individual person or place that led the officer to suspect criminal activity. An officer can establish reasonable suspicion by noting that the individual matched a description of a specific suspect, for example, or was behaving in a manner known to the officer to be characteristic of persons engaged in narcotics trafficking. Officers are empowered to stop and question an individual whenever they have "reasonable suspicion," but a full arrest requires "probable cause." The Supreme Court has said very little about the distinction between reasonable suspicion and probable cause, other than to indicate that probable cause is a slightly higher threshold than reasonable suspicion. But either standard is relatively easy for officers to satisfy. A record-keeping form used by the New York Police Department, UF-250, is reproduced below to give you an idea of the kinds of observations police frequently invoke to establish reasonable suspicion. For example, the UF-250 form identifies as possible reasons for a stop, "furtive movements," "wearing clothing/disguises commonly used in commission of crime," "area has high incidence of reported offense of type under investigation," and "changing direction at sight of officer / flight."

APPENDIX B
Blank UF-250 Form



(COMPLETE ALL CAPTIONS)

STOP, QUESTION AND FRISK REPORT WORKSHEET
PD344-151A (Rev. 11-02)

Pct.Serial No. | Date | Pct. Of Occ.

Time Of Stop | Period Of Observation Prior To Stop | Radio Run/Sprint #

Address/Intersection Or Cross Streets Of Stop

☐ Inside ☐ Outside | ☐ Transit ☐ Housing | Type Of Location Describe:

Specify Which Felony/P.L. Misdemeanor Suspected | Duration Of Stop

What Were Circumstances Which Led To Stop?
(MUST CHECK AT LEAST ONE BOX)

- ☐ Carrying Objects In Plain View Used In Commission Of Crime e.g., Slim Jim/Pry Bar, etc.
- ☐ Fits Description.
- ☐ Actions Indicative Of "Casing" Victim Or Location.
- ☐ Actions Indicative of Acting As A Lookout.
- ☐ Suspicious Bulge/Object (Describe)
- ☐ Other Reasonable Suspicion Of Criminal Activity (Specify)
- ☐ Actions Indicative Of Engaging In Drug Transaction.
- ☐ Furtive Movements.
- ☐ Actions Indicative Of Engaging In Violent Crimes.
- ☐ Wearing Clothes/Disguises Commonly Used In Commission Of Crime.

Name Of Person Stopped | Nickname/ Street Name | Date Of Birth

Address | Apt. No. | Tel. No.

Identification: ☐ Verbal ☐ Photo I.D. ☐ Refused ☐ Other (Specify) _____

Sex: ☐ Male ☐ Female | Race: ☐ White ☐ Black ☐ White Hispanic ☐ Black Hispanic ☐ Asian/Pacific Islander ☐ American Indian/Alaskan Native

Age | Height | Weight | Hair | Eyes | Build

Other (Scars, Tattoos, Etc.)

Did Officer Explain Reason For Stop ☐ Yes ☐ No | If No, Explain:

Were Other Persons Stopped/ Questioned/Frisked? ☐ Yes ☐ No | If Yes, List Pct. Serial Nos.

If Physical Force Was Used, Indicate Type:

- ☐ Hands On Suspect
- ☐ Suspect On Ground
- ☐ Pointing Firearm At Suspect
- ☐ Handcuffing Suspect
- ☐ Suspect Against Wall/Car
- ☐ Drawing Firearm
- ☐ Baton
- ☐ Pepper Spray
- ☐ Other (Describe)

Was Suspect Arrested? ☐ Yes ☐ No | Offense | Arrest No.

Was Summons Issued? ☐ Yes ☐ No | Offense | Summons No.

Officer In Uniform? ☐ Yes ☐ No | If No, How Identified? ☐ Shield ☐ I.D. Card ☐ Verbal

Was Person Frisked? ☐ Yes ☐ No **IF YES, MUST CHECK AT LEAST ONE BOX**
☐ Inappropriate Attire ☐ Possibly Concealing Weapon ☐ Furtive Movements ☐ Verbal Threats Of Violence By Suspect ☐ Actions Indicative Of ☐ Knowledge Of Suspects Prior Criminal Violent Behavior/Use Of Force/Use Of Weapon Engaging In Violent Crimes ☐ Other Reasonable Suspicion of Weapons (Specify) ☐ Refusal To Comply With Officer's Direction(s) ☐ Leading To Reasonable Fear For Safety ☐ Violent Crime Suspected ☐ Suspicious Bulge/Object (Describe)

Was Person Searched? ☐ Yes ☐ No **IF YES, MUST CHECK AT LEAST ONE BOX** ☐ Hard Object ☐ Admission Of Weapons Possession ☐ Outline Of Weapon ☐ Other Reasonable Suspicion of Weapons (Specify)

Was Weapon Found? ☐ Yes ☐ No If Yes, Describe: ☐ Pistol/Revolver ☐ Rifle/Shotgun ☐ Assault Weapon ☐ Knife/Cutting Instrument ☐ Machine Gun ☐ Other (Describe)

Was Other Contraband Found? ☐ Yes ☐ No If Yes, Describe Contraband And Location _____
Demeanor Of Person After Being Stopped _____
Remarks Made By Person Stopped _____

Additional Circumstances/Factors: (Check All That Apply)

- ☐ Report From Victim/Witness
- ☐ Area Has High Incidence Of Reported Offense Of Type Under Investigation
- ☐ Time Of Day, Day Of Week, Season Corresponding To Reports Of Criminal Activity
- ☐ Suspect Is Associating With Persons Known For Their Criminal Activity
- ☐ Proximity To Crime Location
- ☐ Other (Describe)
- ☐ Evasive, False Or Inconsistent Response To Officer's Questions
- ☐ Changing Direction At Sight Of Officer/Flight
- ☐ Ongoing Investigations, e.g., Robbery Pattern
- ☐ Sights And Sounds Of Criminal Activity, e.g., Bloodstains, Ringing Alarms

Pct. Serial No. _____ | Additional Reports Prepared: Complaint Rpt.No. _____ | Juvenile Rpt. No. _____ | Aided Rpt. No. _____ | Other Rpt. (Specify) _____

REPORTED BY: Rank, Name (Last, First, M.I.) _____ Tax# _____
Print _____
Signature _____ Command _____

REVIEWED BY: Rank, Name (Last, First, M.I.) _____ Tax# _____
Print _____
Signature _____ Command _____

Given that reasonable suspicion and probable cause are low thresholds, police officers will have the legal authority to stop, question, or arrest many more individuals than they can actually pursue. That means that officers must choose when, given the presence of reasonable suspicion or probable cause, they will actually initiate an investigation. What factors influence this choice? How do officers decide which persons merit a stop or arrest, and which ones can be ignored? Police officers are not necessarily motivated by the same goals as prosecutors. Prosecutors are typically more focused on securing convictions than police officers

are. Officers may have more immediate aims, such as to resolve a present conflict, to preserve order, or to protect their own authority. They may make an arrest without necessarily expecting a conviction to be the ultimate result.

The UF-250 form presented above provides one source of insight into police decisionmaking. Over the course of litigation against the New York Police Department, advocates and social scientists analyzed extensive data concerning millions of police stops, including details of the factors cited by police as giving rise to suspicion. The analysis suggested that, especially when pressured by commanders to maximize the number of people stopped, officers followed certain "scripts" to rationalize stops based on very little information about the individual who is stopped. Over time, officers identified "evasive / furtive movements" and "high crime area" with increasing frequency as reasons for stops. See Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in Terry Stops in Street Policing*, 82 U. Chi. L. Rev. 51 (2015).

The UF-250 form tracks other information beyond the basis of suspicion, such as the race of the person stopped, whether the police used force, whether the police did find a weapon or other contraband. By analyzing records of millions of stops, litigants were able to establish that police stopped Black and Latino persons, and used force against them, disproportionately often in relation to the overall population of these groups in New York City. But the police were actually slightly more likely to find weapons or other contraband when they stopped white persons (perhaps because stops of white persons were based on more careful determinations of suspicion). See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 558-559 (S.D.N.Y. 2013). The *Floyd* court found that "blacks are likely targeted for stops based on a lesser degree of objectively founded suspicion than whites," id. at 560, and the court found NYPD's stop-and-frisk practices to violate both the Fourth and Fourteenth Amendments.

The data discussed by the *Floyd* court is consistent with broader empirical data discussed in Chapter One: persons of color (especially Black persons) are subject to criminal interventions, including stops and arrests, disproportionately often. According to the U.S. Supreme Court, the Fourth Amendment does not prohibit police from using race as a relevant factor in selecting among persons to stop or arrest (so long as the police can satisfy the reasonable suspicion or probable cause standards), but other provisions of the federal constitution may prohibit race-based enforcement choices. The last section of this chapter considers equal protection doctrine and its application to both policing and prosecutorial choices.

You will have the opportunity to study Fourth Amendment law in much more detail in an upper-level course on constitutional criminal procedure. For purposes of this first-year course, you need not worry about the nuances of either of the Fourth Amendment suspicion thresholds mentioned above, "probable cause" or "reasonable suspicion." It is enough to know that once an officer does have the requisite suspicion that a person is engaging in, or has engaged in, a crime, the officer is then empowered to investigate further. And because the Fourth Amendment suspicion thresholds are low, officers usually have the opportunity, and indeed the necessity, to select some individuals for further investigation and let others go.

There is thus some tension between Fourth Amendment doctrine, which grants police broad discretion, and the void-for-vagueness doctrine as presented by the plurality in *Chicago v. Morales*. Justice Thomas noted this tension in his *Morales* dissent, arguing that we should simply embrace police discretion in both contexts: "Just as we trust officers to rely on their experience and expertise to make spur-of-the-moment determinations about amorphous legal standards such as 'probable cause' and 'reasonable suspicion,' so we must trust them to determine whether a group of loiterers contains individuals (in this case members of criminal street gangs) whom the city has determined threaten the public peace." *City of Chicago v. Morales*, 527 U.S. 41, 109-110 (1999) (Thomas, J., dissenting). One scholar has argued that "vagueness doctrine is best seen as an adjunct to Fourth Amendment law, not as a serious check on crime definition." William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 Harv. L. Rev. 780, 790 n. 54 (2006).

Prosecutorial Decisions

Basic Requirements

It is a prosecutor, not a police officer, who decides whether a person suspected of criminal activity, or even arrested for it, will ultimately be formally charged with a crime. Charging decisions include choices such as whether a given person will be charged at all; which offense or offenses will be charged; whether charges will later be dropped or added. Prosecutors typically have the power to make these decisions with relatively few constraints. A victim or a police officer may file a complaint alleging the commission of a crime, but even then, it is usually the prosecutor who decides whether to file formal charges. In most U.S. jurisdictions, the minimum threshold for a formal charge is again "probable cause" – a prosecutor should not bring charges if the

evidence does not establish "probable cause" to believe the defendant is guilty. As in the context of police decisions, probable cause is a difficult-to-define term that does not express a specific probability that the defendant is guilty. A typical explanation of probable cause is that it requires "a reasonable ground for belief in guilt." Later in this book, we will consider some cases in which courts evaluate whether sufficient evidence exists to establish probable cause for a specific charge. But to emphasize: once the probable cause threshold is crossed, whether to bring charges at all, and which charges to bring, is a matter of prosecutorial discretion.

The prosecutor's charging decision is usually recorded in a charging document, which could be called an information, a complaint, or an indictment. Depending on the jurisdiction, the prosecutor may be able to initiate charges at his or her sole discretion, or he or she may need to obtain an indictment from a grand jury—a group of jurors who hear the prosecution's statement of evidence (but usually not any evidence from the defense) and who then determine whether there is sufficient probable cause to proceed with the charges. We saw the text of an indictment in *Commonwealth v. Mochan*, the very first case we read in Chapter One. In *Mochan*, the defendant was prosecuted under Pennsylvania common law rather than a specific statute. Today, since common law crimes have been abolished in most jurisdictions, an indictment will generally refer to a specific statute or statutes. For one example, you can find the text of the indictment in *United States v. Morissette* in Chapter Two. An indictment should allege all the specific elements of the charged offense; otherwise, a court may find it "deficient" and dismiss the charges. But an indictment is not itself evidence; it states the allegations against the defendant but does not prove them.

Charging decisions are often revisited or revised over the course of a criminal case. For example, a prosecutor may file an indictment, then later file a superseding indictment that adds new charges. And plea negotiations with the defense will often involve agreements to drop or reduce charges in exchange for a guilty plea. Overlapping statutes, previously mentioned in Chapter Two, are especially useful to prosecutors in this context. If there are multiple statutes that could plausibly be applied to a defendant's conduct, the prosecutor may be able to threaten multiple convictions and a more severe penalty, then offer reduced charges and a less severe sentence in exchange for a guilty plea. We will consider this aspect of prosecutorial discretion in more detail later in this chapter.

Check Your Understanding (3-2)

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The original version of this chapter contained H5P content. You may want to remove or replace this element.

Discretion Not to Prosecute

The previous section identified the basic requirements a prosecutor must fulfill in order to bring a charge. But what if a prosecutor decides not to bring any criminal charges? Do prosecutors have a duty to bring charges if they know of facts that indicate the violation of a criminal law?

INMATES OF ATTICA CORRECTIONAL FACILITY et al., Plaintiffs-Appellants

v.

Nelson A. ROCKEFELLER et al., Defendants-Appellees

U.S. Court of Appeals, Second Circuit
477 F.2d 375

Decided April 18, 1973

MANSFIELD, Circuit Judge:

…Plaintiffs … [include] certain present and former inmates of New York State's Attica Correctional Facility ("Attica") [and] the mother of an inmate who was killed…. The complaint alleges that before, during, and after the prisoner revolt at and subsequent recapture of Attica in September 1971, which resulted in the killing of 32 inmates and the wounding of many others, the defendants, including the Governor of New York [and various other state] officials, either committed, conspired to commit, or aided and abetted in the commission of various crimes against the complaining inmates and members of the class they seek to represent. It is charged that the inmates were intentionally subjected to cruel and inhuman treatment prior to the inmate riot, that State Police, Troopers, and Correction Officers … intentionally killed some of the inmate victims without provocation during the

recovery of Attica, that state officers (several of whom are named and whom the inmates claim they can identify) assaulted and beat prisoners after the prison had been successfully retaken and the prisoners had surrendered, that personal property of the inmates was thereafter stolen or destroyed, and that medical assistance was maliciously denied to over 400 inmates wounded during the recovery of the prison.

The complaint further alleges that Robert E. Fischer, a Deputy State Attorney General specially appointed by the Governor … to investigate crimes relating to the inmates' takeover of Attica and the resumption of control by the state authorities, "has not investigated, nor does he intend to investigate, any crimes committed by state officers." Plaintiffs claim, moreover, that because Fischer was appointed by the Governor he cannot neutrally investigate the responsibility of the Governor and other state officers said to have conspired to commit the crimes alleged. It is also asserted that since Fischer is the sole state official currently authorized under state law to prosecute the offenses allegedly committed by the state officers, no one in the State of New York is investigating or prosecuting them.

With respect to the sole federal defendant, the United States Attorney for the Western District of New York, the complaint simply alleges that he has not arrested, investigated, or instituted prosecutions against any of the state officers accused of criminal violation of plaintiffs' federal civil rights….

As a remedy for the asserted failure of the defendants to prosecute violations of state and federal criminal laws, plaintiffs request relief in the nature of mandamus (1) against state officials, requiring the State of New York to submit a plan for the independent and impartial investigation and prosecution of the offenses charged against the named and unknown state officers, and insuring the appointment of an impartial state prosecutor and state judge to "prosecute the defendants forthwith," and (2) against the United States Attorney, requiring him to investigate, arrest and prosecute the same state officers for having committed [federal civil rights] offenses….

(1) Claim Against the United States Attorney

With respect to the defendant United States Attorney, plaintiffs seek mandamus to compel him to investigate and institute prosecutions against state officers, most of whom are not identified, for alleged violations of [federal law]. Federal mandamus is, of course, available only "to compel an officer or employee of the United States . . . to perform a duty owed to the plaintiff." … [O]rdinarily the courts are "not to direct or influence the exercise of discretion of the officer or agency in the making of the decision." More particularly, federal courts have traditionally and, to our knowledge, uniformly refrained from overturning, at the instance of a private person, discretionary decisions of federal prosecuting authorities not to prosecute persons regarding whom a complaint of criminal conduct is made.

This judicial reluctance to direct federal prosecutions at the instance of a private party asserting the failure of United States officials to prosecute alleged criminal violations has been applied even in cases such as the present one where, according to the allegations of the complaint, which we must accept as true for purposes of this appeal, serious questions are raised as to the protection of the civil rights and physical security of a definable class of victims of crime and as to the fair administration of the criminal justice system.

The primary ground upon which this traditional judicial aversion to compelling prosecutions has been based is the separation of powers doctrine. "Although as a member of the bar, the attorney for the United States is an officer of the court, he is nevertheless an executive official of the Government, and it is as an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions."

Although … this broad view [has been criticized as] unsound and incompatible with the normal function of the judiciary in reviewing for abuse or arbitrariness administrative acts that fall within the discretion of executive officers, … the manifold imponderables which enter into the prosecutor's decision to prosecute or not to prosecute make the choice not readily amenable to judicial supervision.

In the absence of statutorily defined standards governing reviewability, or regulatory or statutory policies of prosecution, the problems inherent in the task of supervising prosecutorial decisions do not lend themselves to resolution by the judiciary. The reviewing courts would be placed in the undesirable and injudicious posture of becoming "superprosecutors." In the normal case of

review of executive acts of discretion, the administrative record is open, public and reviewable on the basis of what it contains. The decision not to prosecute, on the other hand, may be based upon the insufficiency of the available evidence, in which event the secrecy of the grand jury and of the prosecutor's file may serve to protect the accused's reputation from public damage based upon insufficient, improper, or even malicious charges. In camera review would not be meaningful without access by the complaining party to the evidence before the grand jury or U.S. Attorney. Such interference with the normal operations of criminal investigations, in turn, based solely upon allegations of criminal conduct, raises serious questions of potential abuse by persons seeking to have other persons prosecuted. Any person, merely by filing a complaint containing allegations in general terms (permitted by the Federal Rules) of unlawful failure to prosecute, could gain access to the prosecutor's file and the grand jury's minutes, notwithstanding the secrecy normally attaching to the latter by law.

Nor is it clear what the judiciary's role of supervision should be…. At what point would the prosecutor be entitled to call a halt to further investigation as unlikely to be productive? What evidentiary standard would be used to decide whether prosecution should be compelled? How much judgment would the United States Attorney be allowed? Would he be permitted to limit himself to a strong "test" case rather than pursue weaker cases? … What sort of review should be available in cases like the present one where the conduct complained of allegedly violates state as well as federal laws? With limited personnel and facilities at his disposal, what priority would the prosecutor be required to give to cases in which investigation or prosecution was directed by the court?

These difficult questions engender serious doubts as to the judiciary's capacity to review and as to the problem of arbitrariness inherent in any judicial decision to order prosecution. On balance, we believe that substitution of a court's decision to compel prosecution for the U.S. Attorney's decision not to prosecute, even upon an abuse of discretion standard of review and even if limited to directing that a prosecution be undertaken in good faith, … would be unwise.

Plaintiffs urge, however, that Congress withdrew the normal prosecutorial discretion for the kind of conduct alleged here by providing … that the United States Attorneys are "authorized and required . . . to institute prosecutions against all persons violating any of the provisions of 18 U.S.C. §§ 241, 242" (emphasis supplied), and, therefore, that no barrier to a judicial directive to institute prosecutions remains. This contention must be rejected. The mandatory nature of the word "required" … is insufficient to evince a broad Congressional purpose to bar the exercise of executive discretion in the prosecution of federal civil rights crimes. Similar mandatory language is contained in [various other federal statutes].

Such language has never been thought to preclude the exercise of prosecutorial discretion. Indeed the same contention made here was specifically rejected in Moses v. Kennedy, 219 F. Supp. 762 (D.D.C. 1963), where seven black residents and one white resident of Mississippi sought mandamus to compel the Attorney General of the United States and the Director of the F.B.I. to investigate, arrest, and prosecute certain individuals, including state and local law enforcement officers, for willfully depriving the plaintiffs of their civil rights. There the Court noted that "considerations of judgment and discretion apply with special strength to the area of civil rights, where the Executive Department must be largely free to exercise its considered judgment on questions of whether to proceed by means of prosecution, injunction, varying forms of persuasion, or other types of action."

… It therefore becomes unnecessary to decide whether, if Congress were by explicit direction and guidelines to remove all prosecutorial discretion with respect to certain crimes or in certain circumstances we would properly direct that a prosecution be undertaken.

(2) Claims Against the State Officials

With respect to the state defendants, plaintiffs also seek prosecution of named and unknown persons for the violation of state crimes. However, they have pointed to no statutory language even arguably creating any mandatory duty upon the state officials to bring such prosecutions. To the contrary, New York law reposes in its prosecutors a discretion to decide whether or not to prosecute in a given case, which is not subject to review in the state courts….

Plaintiffs point to language in our earlier opinion, Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12, 20 (2d Cir. 1971), to the effect that "the State has the duty to investigate and prosecute all persons, including inmates, who may have engaged in criminal conduct before, during and after the uprising." But the statement does not support their present demands. The existence of such a duty does not define its dimensions or imply that an alleged failure to perform the duty completely or equally, as between inmates and state officials, will support federal judicial supervision of state criminal prosecutions. The serious charge that the state's investigation is proceeding against inmates but not against state officers, if shown to be accurate, might lead the Governor to

supplement or replace those presently in charge of the investigation or the state legislature to act. But the gravity of the allegation does not reduce the inherent judicial incapacity to supervise.

The only authority supporting the extraordinary relief requested here is the Seventh Circuit's recent decision in Littleton v. Berbling, 468 F.2d 389 (1972), cert. granted, 411 U.S. 915 (1973). There a class of black citizens of Cairo, Illinois, brought suit for damages and injunctive relief against a state prosecutor, an investigator for him, a magistrate and a state judge, charging that the defendants had "systematically applied the state criminal laws so as to discriminate against plaintiffs and their class on the basis of race, interfering thereby with the free exercise of their constitutional rights." They alleged a long history indicating a concerted pattern of officially sponsored racial discrimination. In reversing the district court's dismissal of the complaint, a divided panel concluded that a state judge … may be enjoined from unconstitutionally fixing bails and imposing sentences that discriminated sharply against black persons, and that the State Attorney's quasi-judicial immunity from suit for damages when performing his prosecutorial function "does not extend to complete freedom from injunction." Finding other possible remedies either unavailable or ineffective, the Court approved the possibility of some type of injunctive relief, not fully specified, but which might include a requirement of "periodic reports of various types of aggregate data on actions on bail and sentencing and dispositions of complaints."

However, the decision in Littleton is clearly distinguishable. There the claim, unlike that here, alleged a systematic and lengthy course of egregious racial discrimination in which black persons were denied equal access to and treatment by the state criminal justice system. Furthermore, the Court's decision does not appear to have compelled the institution of criminal prosecutions, which is the principal relief sought here. In short, we believe that Littleton should be strictly limited to its peculiar facts, as apparently did the Court itself. To the extent that it may be construed as approving federal judicial review and supervision of the exercise of prosecutorial discretion and as compelling the institution of criminal proceedings, we do not share such an extension of its views.

The order of the district court [dismissing the complaint] is affirmed.

Notes and questions on *Inmates of Attica*

1. The Second Circuit opinion refers to "the prisoner revolt … and subsequent recapture" of the Attica prison, but doesn't otherwise provide many details of the events that gave rise to this case. The Attica revolt, or uprising, is the subject of historian Heather Ann Thompson's *Blood in the Water* (2016) (also a Pulitzer-Prize-winning book, like Douglas Blackmon's *Slavery by Another Name*, which was mentioned above in the discussion of vagrancy). Here's the publisher's blurb, reprinted on the Pulitzer website:

   On September 9, 1971, nearly 1,300 prisoners took over the Attica Correctional Facility in upstate New York to protest years of mistreatment. Holding guards and civilian employees hostage, the prisoners negotiated with officials for improved conditions during the four long days and nights that followed.

   On September 13, the state abruptly sent hundreds of heavily armed troopers and correction officers to retake the prison by force. Their gunfire killed thirty-nine men—hostages as well as prisoners—and severely wounded more than one hundred others. In the ensuing hours, weeks, and months, troopers and officers brutally retaliated against the prisoners. And, ultimately, New York State authorities prosecuted only the prisoners, never once bringing charges against the officials involved in the retaking and its aftermath and neglecting to provide support to the survivors and the families of the men who had been killed.

   Thompson's book argues that there existed considerable evidence that prison officials committed murder and other crimes after regaining control of the prison.

2. Notice that the prisoners were the plaintiffs in this case, not the defendants. Unlike most of the appellate opinions included in this book, *Inmates of Attica*was not an appeal from a criminal conviction. Instead, persons who were incarcerated at the Attica prison sued to try to force federal and state prosecutors to bring criminal charges against various prison employees and state officials. The federal appeals court declined to order prosecutors to bring charges, emphasizing the separation of powers. Although prosecutors are "officers of the court," as the Second Circuit recognizes, they are also executive branch officials. In this case and in many other contexts, courts decline to review prosecutorial decisions on the grounds that it would be improper for the judiciary to interfere in executive decision-making. Of course, American courts do review the decisions of other branches quite frequently: for example, they review legislation to determine if it complies with constitutional requirements, as

you saw in *City of Chicago v. Morales*in this chapter, and in *Lambert*in the previous chapter. Is there something distinctive about prosecutorial decisions that makes them less suitable for judicial review than other government decisions?

3. As the prisoner-plaintiffs in *Attica* emphasized, one of the applicable federal criminal statutes included seemingly mandatory language: federal prosecutors were "authorized and required to institute prosecutions" against violators. The Second Circuit acknowledged the language, but found it "insufficient to evince a broad Congressional purpose to bar the exercise of executive discretion." Recall a similar dynamic in *Morales*, above, where the plurality found it implausible that the word "shall" in the Chicago ordinance removed police discretion not to invoke the statute. In *Castle Rock v. Gonzales*, 545 U.S. 748 (2005), the U.S. Supreme Court determined that a seemingly mandatory domestic violence restraining order, which included directions that officers should "use every reasonable means to enforce" it, did not overcome the usual rule of police discretion. Thus, for both police and prosecutors, the general rule is that the decision to enforce is discretionary; police may decline to arrest and prosecutors may decline to charge.
4. This chapter focuses on enforcement decisions; the previous chapter examined criminalization decisions. Notice that the two types of decisions can overlap in some circumstances. If a prosecutor choses not to enforce a statute against one specific individual, we might still think of the conduct defined in that statute as criminalized conduct. But if a prosecutor announces that he or she will never enforce a particular criminal statute, the conduct in that statute has become effectively decriminalized. "Categorical nonenforcement" has captured attention, and generated controversy, in recent years. President Obama's immigration policy included some categorical nonenforcement decisions to protect certain groups such as "Dreamers," or persons who arrived in the United States as children without legal authorization. More recently, at the state and local level, some prosecutors have announced that they will not enforce certain offenses, such as possession of small amounts of marijuana for recreational use, or gun possession laws that the prosecutor believes to violate the Second Amendment. Critics of these nonenforcement decisions argue that they violate the obligation of the executive branch to "Take Care that the Laws be faithfully executed" (U.S. Const., Art. II). For a discussion of the recent controversies and an argument in favor of nonenforcement policies in some instances, see Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. Rev. 173 (2021). For an argument that nonenforcement policies (but not decisions not to enforce in an individual case) should be subject to judicial review, see Zachary Price, *Law Enforcement as Political Question*, 91 Notre Dame L. Rev. 1571 (2016).
5. Executive discretion not to prosecute has drawn controversy in recent years, but you should not assume that prosecutors always exercise their discretion in the direction of more leniency. The Trump administration ended some of President Obama's nonenforcement policies and sought increased prosecutions of immigration offenses. It is crucial to see that changes in executive policy can lead to major changes in what is prosecuted and punished – without any legislative change at all. Again, criminalization is a decision to be made by the legislature in the first instance, but executive choices can certainly influence what kinds of conduct are actually treated as criminal.

Discretion Among Offenses

You have seen so far that prosecutors can initiate charges so long as they have probable cause to believe an offense has occurred. And you have seen that prosecutors also have discretion not to charge an offense even if they have probable cause – or indeed, a much greater level of certainty – that the offense has taken place. In this section, we consider a third aspect of prosecutorial discretion: the discretion to choose which statute to use to charge a given defendant. *State v. Cissell*, below, considers two Wisconsin statutes that criminalize the same conduct, but impose different penalties. The first statute defines a felony, or a crime with a possible punishment of more than one year in prison. The second statute establishes a misdemeanor offense, or an offense with a maximum punishment of one year or less.

Wisconsin Statutes § 52.05 Abandonment; uniform act. (1) Any person who deserts or wilfully neglects or refuses to provide for the support and maintenance of his or her spouse or marital or nonmarital child under 18 years in destitute or necessitous circumstances shall be fined not more than $500 or imprisoned not more than 2 years or both. It is a defense to criminal liability that the person has just cause to desert, wilfully neglect or refuse to provide support and maintenance…

§52.055 Failure to support. (1) Any parent who intentionally neglects or refuses to provide for the necessary and adequate support of his or her marital or nonmarital child under 18 years, or any person who, without just cause, intentionally neglects or refuses to provide for the necessary and adequate maintenance of his or her spouse, shall be guilty of a misdemeanor and may be fined not more than $100 or imprisoned not more than 3 months in the county jail or both…

STATE of Wisconsin, Plaintiff-Appellant-Petitioner

v.

Ronnie D. CISSELL, Defendant-Respondent

Supreme Court of Wisconsin
127 Wis.2d 205

Opinion Filed Dec. 23, 1985

STEINMETZ, Justice.

The issues of the case are:

(1) Whether the elements of the crime of felony abandonment are identical to the elements of the crime of misdeameanor failure to support.

(2) If the elements of felony abandonment are identical to the elements of misdemeanor failure to support, does the state violate a defendant's right to equal protection or due process by charging him with the felony instead of the misdemeanor….

Although we conclude that the elements of the two crimes are identical, we hold that there is no constitutional infirmity in the felony abandonment statute.

On March 2, 1979, a court liaison worker for the Milwaukee County Department of Social Services signed a criminal complaint charging the defendant, Ronnie D. Cissell, with intentionally and willfully neglecting to provide for the support and maintenance of his minor child, leaving her in destitute and necessitous circumstances, contrary to sec. 52.05(1).

The complaint alleged that the defendant had not paid any money for his child's support from 1973 through 1979, and that he had been ordered to make such payments in the amount of $12,459.33.

[After several pretrial motions], [t]he Milwaukee circuit court, Judge Janine Geske, held that the defendant's constitutional rights to due process and equal protection of the law were violated by charging him with the felony and ordered that the charge against the defendant be reduced to the misdemeanor of nonsupport. The court based its holding on the conclusion that the elements of the two crimes are identical. The court of appeals … affirmed the circuit court's decision solely on equal protection grounds.

The first issue we consider is whether the felony abandonment statute has elements that are identical to the misdemeanor nonsupport statute. The circuit court construed the element of "willful" nonsupport under the felony statute to be equivalent to "intentional" nonsupport under the misdemeanor statute. The court also construed "destitute or necessitous circumstances" in the felony to mean any breach of the duty of support. Based on this construction, the need for support under the felony statute does not have to be greater than the need that satisfies the misdemeanor statute.

As a general proposition, the word willful cannot be defined without reference to its use in a specific statute. [But given the interpretations of the terms willful and intentional in prior cases involving other statutes,] [w]e conclude from our analysis that willful has the same meaning in sec. 52.05, as intentionally does in sec. 52.055.

We must next consider whether the phrase "destitute or necessitous circumstances" [in the felony statute] requires a different element of proof than failure to satisfy the duty of support [in the misdemeanor statute]. ….None of our decisions considering the felony abandonment statute has required the state to prove a greater level of deprivation than under the misdemeanor nonsupport statute. We see no difference in the degree of deprivation of the dependents to be proven under the felony or misdemeanor statutes even though the wording is different. Our decisions make it clear that the dependents need not actually be in need of the goods and necessities of life under either statute as long as the defendant is able to provide for them. It is irrelevant if others have provided the support needed for the dependents because the defendant cannot rely on the efforts of others as a valid defense.

Because we construe the willful and destitute or necessitous circumstance requirements of sec. 52.05, to be the same as the elements of sec. 52.055, the two statutes have substantively identical elements.

The defendant contends that statutes with identical substantive elements but different penalty schemes violate due process and equal protection….

We are persuaded by the reasoning of *United States v. Batchelder*, 442 U.S. 114 (1979), that identical element crimes with different penalties do not violate due process or equal protection. In *Batchelder*, the United States Supreme Court held that overlapping criminal statutes with different penalty schemes do not violate constitutional principles unless the prosecutor selectively bases the charging decision upon an unjustifiable standard such as race, religion, or other arbitrary classification. This court concludes that the *Batchelder* reasoning concerning overlapping statutes is equally applicable to identical element crimes.

At issue in *Batchelder* were two overlapping provisions of the Omnibus Crime Control and Safe Streets Act of 1968. Overlapping statutes proscribe a variety of acts, not all of which are the same, but where some of the proscribed acts are identical. By contrast, identical statutes proscribe the same conduct; they completely overlap. The statutory provisions under consideration in *Batchelder* both prohibited convicted felons from receiving and possessing firearms shipped in interstate commerce. The statutes were not identical, however, because the full ranges of prohibited conduct were not identical. The maximum penalty exposure under the two statutes also differed, even for the identical prohibited conduct. The Supreme Court, therefore, had to determine whether a defendant convicted of the offense carrying the greater penalty may be sentenced only under the more lenient provision when his conduct violates both statutes.

The Supreme Court analyzed the problem of overlapping statutes with different penalties as an issue of prosecutorial discretion. The Court stated that: "This Court has long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants." Under this approach, the fact that the defendant's conduct may be chargeable under either of two statutes does not make prosecution under one or the other statute improper *per se*; the focus instead is on whether the prosecutor unjustifiably discriminated against any class of defendants.

In upholding the constitutionality of overlapping statutes with different penalties, the Supreme Court rejected three specific arguments against the validity of such statutes. The Court considered whether overlapping statutes might: (1) be void for vagueness; (2) implicate due process and equal protection interests in avoiding excessive prosecutorial discretion and in obtaining equal justice; and (3) constitute an impermissible delegation of legislative authority.

The Supreme Court decided that overlapping statutes are not vague merely because they impose different penalties…. "Although the statutes create uncertainty as to which crime may be charged and therefore what penalties may be imposed, they do so to no greater extent than would a single statute authorizing various alternative punishments." …

The Supreme Court also rejected the argument that overlapping criminal statutes create unfettered prosecutorial discretion. "More importantly, there is no appreciable difference between the discretion a prosecutor exercises when deciding whether to charge under one of two statutes with different elements and the discretion he exercises when choosing one of two statutes with identical elements… The prosecutor may be influenced by the penalties available upon conviction, but this fact, standing alone, does not give rise to a violation of the Equal Protection or Due Process Clause…."

Finally, the *Batchelder* decision dismissed the argument that overlapping statutes impermissibly delegate to prosecutors the legislative responsibility to fix criminal penalties. The Supreme Court noted that the legislature fixed the penalty under each statute and, therefore, the prosecutor's control over the penalty exposure was not greater than in other charging situations where conduct could be prosecuted under either of two statutes with different penalties….

The fact that the statutes under consideration in *Batchelder* were [overlapping rather than exactly identical] was not decisive. Instead, the fact that the statutes were identical at the point of overlap and as applied to the facts of that case was decisive…. Overlapping statutes thus present the same issues as identical statutes because the point of overlap essentially creates an identical statute situation….

Our conclusion that *Batchelder* controls in the identical statute situation is consistent with the recent decisions of other jurisdictions….

The statutes involved [here] do not classify which persons should be charged under the felony statute and which under the misdemeanor statute. Differences in treatment between individuals, therefore, are determined as a matter of prosecutorial discretion. As *Batchelder* recognizes, such discretion is not unconstitutional unless the prosecutor discriminates on the basis of unjustifiable criteria. Here, the defendant makes no claim of impermissible discrimination and we can readily see legitimate bases for exercising prosecutorial discretion. For example, prosecutors reasonably may make their charging decision on the basis of the length of continuous nonsupport and the amount of money owed.

… Finally, although *Batchelder* technically is decisive on the identical crimes issue only under the federal constitution, we are persuaded that the same reasoning should control under the Wisconsin constitution. We previously have held that the due process and equal protection clauses of our state constitution and the United States Constitution are essentially the same.

… The decision of the court of appeals is reversed and the cause is remanded to the trial court for further proceedings.

SHIRLEY S. ABRAHAMSON, Justice dissenting.

…The majority opinion permits the legislature to adopt two or more criminal statutes identical in every respect except for the penalty provision without establishing criteria to guide the prosecutor in deciding under which statute an accused should be prosecuted. Thus the legislature could, for example, adopt the following three statutes making burglary a crime.

"**Sec. 943.10. Burglary.** Whoever intentionally enters a dwelling without the consent of the person in lawful possession and with the intent to steal shall be fined no more than $1,000 or imprisoned not more than 3 months in the county jail or both.

"**Sec. 943.101. Burglary.** Whoever intentionally enters a dwelling without the consent of the person in lawful possession and with the intent to steal shall be fined no more than $3,000 or imprisoned not more than 2 years or both.

"**Sec. 943.102. Burglary.** Whoever intentionally enters a dwelling without the consent of the person in lawful possession and with the intent to steal shall be fined no more than $10,000 or imprisoned not more than 10 years or both."

These statutes define the same conduct, under the identical circumstances, as a felony when committed by one person and as a misdemeanor when committed by another. The legislature gives the prosecutor no guidance in selecting the statute under which to prosecute.

It is axiomatic that the state prosecutes people for crimes under statutes enacted by the legislature. "The legislature determines what constitutes a crime in Wisconsin and establishes maximum penalties for each class of crime."

By establishing more than one maximum penalty for the identical crime the legislature has effectively failed to fix a penalty for the crime of burglary. The legislature has abdicated its responsibility to set a penalty by allowing the prosecutor to determine the maximum penalty for the crime through selecting the statute under which to charge.

… [T]here is a distinction between identical and overlapping statutes that renders *Batchelder* unpersuasive. In enacting overlapping statutes the legislature defines two or more different crimes and establishes a range of punishments for each. The legislature performs its constitutional task: it sets different penalties for legally distinguishable offenses, even though in some circumstances the same conduct may be punishable under each statute. As a practical matter, the legislature may not be able to define crimes without including conduct that may also be proscribed by another statute. Thus, empowering a prosecutor to choose among overlapping statutes may be necessary and unavoidable.

By contrast, in enacting multiple criminal statutes identical except for the penalty, the legislature defines one crime, establishes several different ranges of punishments for that crime, and, without setting forth guidance, empowers the prosecutor to determine which of the ranges should be imposed in a particular case. The power to fix a range of punishments for a defined crime is the essence of the legislative function. In enacting identical criminal statutes except for the penalty, the legislature has delegated its power to the executive branch without establishing standards for the exercise of the power. This is indeed "delegation running riot."

… The legislature can, of course, adopt a single statute setting forth the same range of punishments for burglary as the three burglary statutes I described above. Empowering the prosecutor to prosecute under one burglary statute which has a range of punishments is different from empowering the prosecutor to choose among three criminal statutes identical except for penalty. In the former situation, the prosecutor does not establish the penalty; the circuit court imposes a sentence within the legislatively established range according to criteria established by the legislature and this court. The circuit court must set forth its reasons for imposing the sentence, and the judgment is subject to appellate review. Thus the circuit court's discretion in selecting punishment from a statutory range of penalties established by the legislature is regulated and guided. In the latter situation the circuit court imposes a sentence within the range established by the prosecutor who functions without regulation or guidance by the legislature or the court….

Check Your Understanding (3-3)

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Notes and questions about *State v. Cissell*

1. Overlapping statutes are a common phenomenon. Most jurisdictions take same approach as *Cissell* and follow the Supreme Court's approach in *United States v. Batchelder*, concluding that overlapping statutes are permissible even under state constitutions. To be clear, *Batchelder* applies the due process and equal protection clauses of the federal constitution, and the Supreme Court's interpretation of the federal constitution is binding on state courts. But defendants can also raise claims under the relevant state constitution, and state courts are free to interpret their own constitutions, including any state due process or equal protection clause, differently from the federal constitution. The *Cissell* court chose to follow the federal approach. But for an example of a state court interpreting its own state constitution to provide more protection than the federal constitution, see *People v. Lee*, 476 P.3d 351 (Co. 2020), discussed in Chapter Six.
2. Although the *Cissell* court (like the U.S. Supreme Court, and most American jurisdictions) found overlapping statutes to be permissible, it is important to understand why critics object to such statutes. The arguments against overlapping statutes can help clarify the scope of prosecutorial power. Consider carefully Judge Abrahamson's dissent in *Cissell*. Judge Abrahamson argues that the legislature should not be able to enact three burglary statutes with identical elements but different penalties, and yet she acknowledges that a legislature could certainly enact one burglary statute with a range of possible penalties as broad (or broader) as the different penalties in her three imagined statutes. Why does Judge Abrahamson see one statute, with a wide range of possible penalties, as meaningfully different from three statutes, each with a more precise penalty range?
3. Notice that the *Cissell* opinion is concerned with the choice to charge under one statute rather another, not with actual convictions under multiple statutes for the same conduct. Actual convictions under multiple statutes could potentially violate the Fifth Amendment of the federal constitution, which includes the provision, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." The Double Jeopardy Clause, as this provision is known, is a potential constitutional constraint on prosecutorial choices that is separate from the equal protection and due process arguments raised in *Cissell*. Whether the Double Jeopardy Clause bars multiple punishments depends on whether the punishments are for "the same offense," and the analysis of that question can be complex. We will not cover double jeopardy doctrine extensively in this course, but we will look at it in a little more detail in Chapter Five.
4. The phenomenon of overlapping (or even identical) statutes is partly a product of the breadth of American criminal codes. So much conduct is criminalized that it is nearly inevitable that some statutes will overlap with another. As one notable illustration of the breadth of American criminal codes, consider this anecdote:

   At the federal prosecutor's office in the Southern District of New York, the staff, over beer and pretzels, used to play a darkly humorous game. Junior and senior prosecutors would sit around, and someone would name a random celebrity—say, Mother Theresa or John Lennon.

   It would then be up to the junior prosecutors to figure out a plausible crime for which to indict him or her. The crimes were not usually rape, murder, or other crimes you'd see on *Law & Order* but rather the incredibly broad yet obscure crimes that populate the U.S. Code like a kind of jurisprudential minefield: Crimes like "false statements" (a felony, up to five years), "obstructing the mails" (five years), or "false pretenses on the high seas" (also five years). The trick and the skill lay in finding the more obscure offenses that fit the character of the celebrity and carried the toughest sentences. The, result, however, was inevitable: "prison time."

   Tim Wu, *Introduction: American Lawbreaking*, Slate (Oct. 14, 2007). "False statements" is not really an obscure offense; it's fairly frequently prosecuted, and it was the offense that sent Martha Stewart to federal prison. But otherwise, Professor Wu's story captures the sense in which American criminal codes function as menus for prosecutors: for any individual who attracts a prosecutor's attention, there is likely to be some offense that might be plausibly charged against that person. And given overlapping statutes, there may well be more than one possible charge. The potential applicability of multiple statutes gives a prosecutor leverage in plea negotiations, as discussed more in the next chapter.

5. *Cissell* is included in this chapter primarily to help you understand the range of decisions open to prosecutors. Most state courts take the same approach, seeing no constitutional problem when prosecutors have broad leeway to choose among statutes that punish the same conduct, but impose different penalties. But this case, like most in the book, can also help you build upon and further develop your understanding of several different aspects of criminal law. *Cissell* also involved issues of statutory interpretation, and the defendant raised a vagueness challenge to the felony statute. The defendant argued that "willful" meant intentional and "neglect" referred to negligence, and thus the phrase "willfully neglects" in the felony statute was nonsensical

because intentional conduct cannot also be negligent conduct. In a passage of the opinion not included above, the Wisconsin court rejected the defendant's interpretation of the word neglect and thus rejected the vagueness challenge. Although the vagueness challenge failed here, it is important to see that overlapping or identical statutes do create many of the same problems that void-for-vagueness doctrine seeks to remedy. Here is one scholar's recent summary, which echoes much of what you've read so far in this chapter:

> There are two important features of the modern criminal justice system that create vagueness concerns in the enforcement of non-vague statutes. First, criminal codes have expanded dramatically in modern times. Not only are new statutes enacted to prohibit increasing amounts of behavior, but broadly worded statutes also allow the executive to find some criminal provision into which it can shoehorn any undesirable behavior. And for behavior that should obviously be prohibited, Congress and most state legislatures have enacted a wide array of overlapping criminal statutes with different penalty provisions. These overlapping statutes allow prosecutors to choose from a large "menu" of criminal charges–a defendant may be charged with a crime carrying a harsh sentence or a more lenient one, as the prosecutor sees fit…. Second, courts have largely exempted law enforcement decisionmaking from judicial review. Aside from asking whether a police officer had probable cause to arrest, or whether a prosecutor had probable cause to bring charges, courts will not review arrest, charging, or plea bargaining decisions…. The Supreme Court says that these decisions are committed to the discretion of the executive….
>
> Carissa Byrne Hessick, *Vagueness Principles*, 48 Ariz. St. L.J. 1137 (2016).

Equal Protection and Other Possible Limitations

UNITED STATES, Petitioner

v.

Christopher Lee ARMSTRONG et al.

Supreme Court of the United States
517 U.S. 456

Decided May 13, 1996

Chief Justice REHNQUIST delivered the opinion of the Court.

In this case, we consider the showing necessary for a defendant to be entitled to discovery on a claim that the prosecuting attorney singled him out for prosecution on the basis of his race. We conclude that respondents failed to satisfy the threshold showing: They failed to show that the Government declined to prosecute similarly situated suspects of other races.

In April 1992, respondents were indicted in the United States District Court for the Central District of California on charges of conspiring to possess with intent to distribute more than 50 grams of cocaine base (crack) and conspiring to distribute the same, in violation of 21 U.S.C. §§ 841 and 846, and federal firearms offenses. For three months prior to the indictment, agents of the Federal Bureau of Alcohol, Tobacco, and Firearms and the Narcotics Division of the Inglewood, California, Police Department had infiltrated a suspected crack distribution ring by using three confidential informants. On seven separate occasions during this period, the informants had bought a total of 124.3 grams of crack from respondents and witnessed respondents carrying firearms during the sales….

In response to the indictment, respondents filed a motion for discovery or for dismissal of the indictment, alleging that they were selected for federal prosecution because they are black. In support of their motion, they offered only an affidavit by a "Paralegal Specialist," employed by the Office of the Federal Public Defender representing one of the respondents. The only allegation in the affidavit was that, in every one of the 24 § 841 or § 846 cases closed by the office during 1991, the defendant was black. Accompanying the affidavit was a "study" listing the 24 defendants, their race, whether they were prosecuted for dealing cocaine as well as crack, and the status of each case. [3]

The Government opposed the discovery motion, arguing, among other things, that there was no evidence or allegation "that the Government has acted unfairly or has prosecuted non-black defendants or failed to prosecute them." The District Court granted the motion. It ordered the Government (1) to provide a list of all cases from the last three years in which the Government charged both cocaine and firearms offenses, (2) to identify the race of the defendants in those cases, (3) to identify what levels of law

enforcement were involved in the investigations of those cases, and (4) to explain its criteria for deciding to prosecute those defendants for federal cocaine offenses.

The Government moved for reconsideration of the District Court's discovery order. With this motion it submitted affidavits and other evidence to explain why it had chosen to prosecute respondents and why respondents' study did not support the inference that the Government was singling out blacks for cocaine prosecution. The federal and local agents participating in the case alleged in affidavits that race played no role in their investigation. An Assistant United States Attorney explained in an affidavit that the decision to prosecute met the general criteria for prosecution, [including the quantity of drugs involved, multiple defendants indicating a distribution ring, firearms violations, strong overall evidence including audio and videotapes, and] "several of the defendants had criminal histories including narcotics and firearms violations."

The Government also submitted sections of a published 1989 Drug Enforcement Administration report which concluded that "[l]arge-scale, interstate trafficking networks controlled by Jamaicans, Haitians and Black street gangs dominate the manufacture and distribution of crack."

In response, one of respondents' attorneys submitted an affidavit alleging that an intake coordinator at a drug treatment center had told her that there are "an equal number of caucasian users and dealers to minority users and dealers." Respondents also submitted an affidavit from a criminal defense attorney alleging that in his experience many nonblacks are prosecuted in state court for crack offenses, and a newspaper article reporting that federal "crack criminals … are being punished far more severely than if they had been caught with powder cocaine, and almost every single one of them is black," Newton, Harsher Crack Sentences Criticized as Racial Inequity, Los Angeles Times, Nov. 23, 1992, p. 1.

The District Court denied the motion for reconsideration. When the Government indicated it would not comply with the court's discovery order, the court dismissed the case.

A divided three-judge panel of the Court of Appeals for the Ninth Circuit reversed, [but subsequently] the en banc panel affirmed the District Court's order of dismissal, holding that "a defendant is not required to demonstrate that the government has failed to prosecute others who are similarly situated." We granted certiorari to determine the appropriate standard for discovery for a selective-prosecution claim.

… A selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution. Our cases delineating the necessary elements to prove a claim of selective prosecution have taken great pains to explain that the standard is a demanding one.

A selective-prosecution claim asks a court to exercise judicial power over a "special province" of the Executive. The Attorney General and United States Attorneys retain "broad discretion" to enforce the Nation's criminal laws. They have this latitude because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to "take Care that the Laws be faithfully executed." U.S. Const., Art. II, § 3; see 28 U.S.C. §§ 516, 547. As a result, "[t]he presumption of regularity supports" their prosecutorial decisions and, "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." In the ordinary case, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

Of course, a prosecutor's discretion is "subject to constitutional constraints." One of these constraints, imposed by the equal protection component of the Due Process Clause of the Fifth Amendment, is that the decision whether to prosecute may not be based on "an unjustifiable standard such as race, religion, or other arbitrary classification." A defendant may demonstrate that the administration of a criminal law is "directed so exclusively against a particular class of persons … with a mind so unequal and oppressive" that the system of prosecution amounts to "a practical denial" of equal protection of the law. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present "clear evidence to the contrary." …[C]ourts are "properly hesitant to examine the decision whether to prosecute." Judicial deference to the decisions of these executive officers rests in part on an assessment of the relative competence of prosecutors and courts. "Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are

competent to undertake." It also stems from a concern not to unnecessarily impair the performance of a core executive constitutional function. "Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy."

The requirements for a selective-prosecution claim draw on "ordinary equal protection standards." The claimant must demonstrate that the federal prosecutorial policy "had a discriminatory effect and that it was motivated by a discriminatory purpose." To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted. This requirement has been established in our case law since *Ah Sin v. Wittman*, 198 U.S. 500 (1905). Ah Sin, a subject of China, petitioned a California state court for a writ of habeas corpus, seeking discharge from imprisonment under a San Francisco County ordinance prohibiting persons from setting up gambling tables in rooms barricaded to stop police from entering. He alleged in his habeas petition "that the ordinance is enforced 'solely and exclusively against persons of the Chinese race and not otherwise.' " We rejected his contention that this averment made out a claim under the Equal Protection Clause, because it did not allege "that the conditions and practices to which the ordinance was directed did not exist exclusively among the Chinese, or that there were other offenders against the ordinance than the Chinese as to whom it was not enforced."

The similarly situated requirement does not make a selective-prosecution claim impossible to prove. Twenty years before *Ah Sin*, we invalidated an ordinance, also adopted by San Francisco, that prohibited the operation of laundries in wooden buildings. *Yick Wo*. The plaintiff in error successfully demonstrated that the ordinance was applied against Chinese nationals but not against other laundry-shop operators. The authorities had denied the applications of 200 Chinese subjects for permits to operate shops in wooden buildings, but granted the applications of 80 individuals who were not Chinese subjects to operate laundries in wooden buildings "under similar conditions." We explained in *Ah Sin* why the similarly situated requirement is necessary:

"… There should be certainty to every intent. Plaintiff in error seeks to set aside a criminal law of the State, not on the ground that it is unconstitutional on its face, not that it is discriminatory in tendency and ultimate actual operation as the ordinance was which was passed on in the *Yick Wo* case, but that it was made so by the manner of its administration. This is a matter of proof, and *no fact should be omitted to make it out completely*, when the power of a Federal court is invoked to interfere with the course of criminal justice of a State." 198 U.S. at 508 (emphasis added).

… Having reviewed the requirements to prove a selective-prosecution claim, we turn to the showing necessary to obtain discovery in support of such a claim. If discovery is ordered, the Government must assemble from its own files documents which might corroborate or refute the defendant's claim. Discovery thus imposes many of the costs present when the Government must respond to a prima facie case of selective prosecution. It will divert prosecutors' resources and may disclose the Government's prosecutorial strategy. The justifications for a rigorous standard for the elements of a selective-prosecution claim thus require a correspondingly rigorous standard for discovery in aid of such a claim.

The parties, and the Courts of Appeals which have considered the requisite showing to establish entitlement to discovery, describe this showing with a variety of phrases, like "colorable basis," "substantial threshold showing," "substantial and concrete basis," or "reasonable likelihood." However, the many labels for this showing conceal the degree of consensus about the evidence necessary to meet it. The Courts of Appeals "require some evidence tending to show the existence of the essential elements of the defense," discriminatory effect and discriminatory intent.

In this case … [the] Court of Appeals held that a defendant may establish a colorable basis for discriminatory effect without evidence that the Government has failed to prosecute others who are similarly situated to the defendant. We think it was mistaken in this view. The vast majority of the Courts of Appeals require the defendant to produce some evidence that similarly situated defendants of other races could have been prosecuted, but were not, and this requirement is consistent with our equal protection case law.

The Court of Appeals reached its decision in part because it started "with the presumption that people of *all* races commit *all* types of crimes—not with the premise that any type of crime is the exclusive province of any particular racial or ethnic group." It cited no authority for this proposition, which seems contradicted by the most recent statistics of the United States Sentencing Commission. Those statistics show: More than 90% of the persons sentenced in 1994 for crack cocaine trafficking were black, United States Sentencing Comm'n, 1994 Annual Report 107 (Table 45); 93.4% of convicted LSD dealers were white, *ibid.;* and

91% of those convicted for pornography or prostitution were white, *id.*, at 41 (Table 13). Presumptions at war with presumably reliable statistics have no proper place in the analysis of this issue.

… In the present case, if the claim of selective prosecution were well founded, it should not have been an insuperable task to prove that persons of other races were being treated differently than respondents. For instance, respondents could have investigated whether similarly situated persons of other races were prosecuted by the State of California and were known to federal law enforcement officers, but were not prosecuted in federal court. We think the required threshold—a credible showing of different treatment of similarly situated persons—adequately balances the Government's interest in vigorous prosecution and the defendant's interest in avoiding selective prosecution.

In the case before us, respondents' "study" did not constitute "some evidence tending to show the existence of the essential elements of" a selective-prosecution claim. The study failed to identify individuals who were not black and could have been prosecuted for the offenses for which respondents were charged, but were not so prosecuted. This omission was not remedied by respondents' evidence in opposition to the Government's motion for reconsideration. The newspaper article, which discussed the discriminatory effect of federal drug sentencing laws, was not relevant to an allegation of discrimination in decisions to prosecute. Respondents' affidavits, which recounted one attorney's conversation with a drug treatment center employee and the experience of another attorney defending drug prosecutions in state court, recounted hearsay and reported personal conclusions based on anecdotal evidence. The judgment of the Court of Appeals is therefore reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

[Opinions by Justices SOUTER and GINSBURG, concurring, omitted.]

[Opinion by Justice BREYER, concurring in part and concurring in the judgment, omitted.]

Justice STEVENS, dissenting.

Federal prosecutors are respected members of a respected profession. Despite an occasional misstep, the excellence of their work abundantly justifies the presumption that "they have properly discharged their official duties." Nevertheless, the possibility that political or racial animosity may infect a decision to institute criminal proceedings cannot be ignored. For that reason, it has long been settled that the prosecutor's broad discretion to determine when criminal charges should be filed is not completely unbridled. As the Court notes, however, the scope of judicial review of particular exercises of that discretion is not fully defined.

The United States Attorney for the Central District of California is a member and an officer of the bar of that District Court. As such, she has a duty to the judges of that Court to maintain the standards of the profession in the performance of her official functions. If a District Judge has reason to suspect that she, or a member of her staff, has singled out particular defendants for prosecution on the basis of their race, it is surely appropriate for the judge to determine whether there is a factual basis for such a concern…

The Court correctly concludes that in this case the facts presented to the District Court in support of respondents' claim that they had been singled out for prosecution because of their race were not sufficient to prove that defense. Moreover, I agree with the Court that their showing was not strong enough to give them a *right* to discovery…. [H]owever, I am persuaded that the District Judge did not abuse her discretion when she concluded that the factual showing was sufficiently disturbing to require some response from the United States Attorney's Office. Perhaps the discovery order was broader than necessary, but I cannot agree with the Court's apparent conclusion that no inquiry was permissible.

The District Judge's order should be evaluated in light of three circumstances that underscore the need for judicial vigilance over certain types of drug prosecutions. First, the Anti–Drug Abuse Act of 1986 and subsequent legislation established a regime of extremely high penalties for the possession and distribution of so-called "crack" cocaine. Those provisions treat one gram of crack as the equivalent of 100 grams of powder cocaine. The distribution of 50 grams of crack is thus punishable by the same mandatory minimum sentence of 10 years in prison that applies to the distribution of 5,000 grams of powder cocaine. The Sentencing Guidelines extend this ratio to penalty levels above the mandatory minimums: For any given quantity of crack, the guideline range is the same as if the offense had involved 100 times that amount in powder cocaine. These penalties result in sentences for crack offenders that average three to eight times longer than sentences for comparable powder offenders.

Second, the disparity between the treatment of crack cocaine and powder cocaine is matched by the disparity between the severity of the punishment imposed by federal law and that imposed by state law for the same conduct. For a variety of reasons, often including the absence of mandatory minimums, the existence of parole, and lower baseline penalties, terms of imprisonment for drug offenses tend to be substantially lower in state systems than in the federal system. The difference is especially marked in the case of crack offenses. The majority of States draw no distinction between types of cocaine in their penalty schemes; of those that do, none has established as stark a differential as the Federal Government. For example, if respondent Hampton is found guilty, his federal sentence might be as long as a mandatory life term. Had he been tried in state court, his sentence could have been as short as 12 years, less worktime credits of half that amount.

Finally, it is undisputed that the brunt of the elevated federal penalties falls heavily on blacks. While 65% of the persons who have used crack are white, in 1993 they represented only 4% of the federal offenders convicted of trafficking in crack. Eighty-eight percent of such defendants were black. During the first 18 months of full guideline implementation, the sentencing disparity between black and white defendants grew from preguideline levels: Blacks on average received sentences over 40% longer than whites. See Bureau of Justice Statistics, Sentencing in the Federal Courts: Does Race Matter? 6–7 (Dec.1993). Those figures represent a major threat to the integrity of federal sentencing reform, whose main purpose was the elimination of disparity (especially racial) in sentencing. The Sentencing Commission acknowledges that the heightened crack penalties are a "primary cause of the growing disparity between sentences for Black and White federal defendants."

The extraordinary severity of the imposed penalties and the troubling racial patterns of enforcement give rise to a special concern about the fairness of charging practices for crack offenses. Evidence tending to prove that black defendants charged with distribution of crack in the Central District of California are prosecuted in federal court, whereas members of other races charged with similar offenses are prosecuted in state court, warrants close scrutiny by the federal judges in that district. In my view, the District Judge, who has sat on both the federal and the state benches in Los Angeles, acted well within her discretion to call for the development of facts that would demonstrate what standards, if any, governed the choice of forum where similarly situated offenders are prosecuted.

Respondents submitted a study showing that of all cases involving crack offenses that were closed by the Federal Public Defender's Office in 1991, 24 out of 24 involved black defendants. To supplement this evidence, they submitted affidavits from two … attorneys…. The first reported a statement from an intake coordinator at a local drug treatment center that, in his experience, an equal number of crack users and dealers were caucasian as belonged to minorities. The second was from David R. Reed, counsel for respondent Armstrong. Reed was both an active court-appointed attorney in the Central District of California and one of the directors of the leading association of criminal defense lawyers who practice before the Los Angeles County courts. Reed stated that he did not recall "ever handling a [crack] cocaine case involving non-black defendants" in federal court, nor had he even heard of one. He further stated that "[t]here are many crack cocaine sales cases prosecuted in state court that *do* involve racial groups other than blacks."

The majority discounts the probative value of the affidavits, claiming that they recounted "hearsay" and reported "personal conclusions based on anecdotal evidence." But the Reed affidavit plainly contained more than mere hearsay; Reed offered information based on his own extensive experience in both federal and state courts. Given the breadth of his background, he was well qualified to compare the practices of federal and state prosecutors. In any event, the Government never objected to the admission of either affidavit on hearsay or any other grounds. It was certainly within the District Court's discretion to credit the affidavits of two members of the bar of that Court, at least one of whom had presumably acquired a reputation by his frequent appearances there, and both of whose statements were made on pains of perjury.

The criticism that the affidavits were based on "anecdotal evidence" is also unpersuasive. I thought it was agreed that defendants do not need to prepare sophisticated statistical studies in order to receive mere discovery in cases like this one….

Even if respondents failed to carry their burden of showing that there were individuals who were not black but who could have been prosecuted in federal court for the same offenses, it does not follow that the District Court abused its discretion in ordering discovery. There can be no doubt that such individuals exist, and indeed the Government has never denied the same. In those circumstances, I fail to see why the District Court was unable to take judicial notice of this obvious fact and demand information from the Government's files to support or refute respondents' evidence. The presumption that some whites are prosecuted in state court is not "contradicted" by the statistics the majority cites, which show only that high percentages of blacks are *convicted* of certain federal crimes, while high percentages of whites are convicted of other federal crimes. Those figures are entirely consistent

with the allegation of selective prosecution. The relevant comparison, rather, would be with the percentages of blacks and whites who *commit* those crimes. But, as discussed above, in the case of crack far greater numbers of whites are believed guilty of using the substance. The District Court, therefore, was entitled to find the evidence before it significant and to require some explanation from the Government.

In sum, I agree with the Sentencing Commission that "[w]hile the exercise of discretion by prosecutors and investigators has an impact on sentences in almost all cases to some extent, because of the 100–to–1 quantity ratio and federal mandatory minimum penalties, discretionary decisions in cocaine cases often have dramatic effects." The severity of the penalty heightens both the danger of arbitrary enforcement and the need for careful scrutiny of any colorable claim of discriminatory enforcement. C.f. *McCleskey v. Kemp* (1987) (Stevens, J., dissenting). In this case, the evidence was sufficiently disturbing to persuade the District Judge to order discovery that might help explain the conspicuous racial pattern of cases before her court. I cannot accept the majority's conclusion that the District Judge either exceeded her power or abused her discretion when she did so. I therefore respectfully dissent.

Notes and questions on *United States v. Armstrong*

1. Most of the analysis in *Armstrong* focuses on the enforcement decisions of prosecutors, since the defendant argued that prosecutors had selected him for prosecution on the basis of his race. But criminalization decisions can also contribute to racial disparities, as emphasized by Justice Stevens's dissent. That dissent points out that federal law distinguished between drug offenses involving crack cocaine and those involving powder cocaine, and punished crack offenses more severely. At the time *Armstrong* was decided, the crack-powder disparity was 100:1, meaning a defendant needed to possess 100 times as much powder cocaine to trigger the same mandatory minimum sentence applicable to possession of crack cocaine. In 2010, Congress amended the law to reduce the disparity to 18:1.
2. A legal presumption is a kind of default rule: A fact will be presumed true unless there is the requisite degree of evidence to conclude otherwise. You have probably heard about the presumption of innocence, or the principle that a criminal defendant is presumed to be innocent until the prosecution has proven each element of the charged offense to be true "beyond a reasonable doubt." We will consider the presumption of innocence, and the reasonable doubt standard, in more detail in Chapter Four. For now, notice that *Armstrong* rests on a different presumption, one that favors prosecutors: "the presumption of regularity." As the Supreme Court describes this presumption, "in the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly charged their official duties." In the context of this case, a presumption of regularity is a presumption that prosecutors have not engaged in racial discrimination. The question then becomes what evidence is necessary to overcome that presumption. The Court has said that "clear evidence" is necessary, and such evidence was not presented here.
3. To get still more into the details: the defendant in *Armstrong* faced two different evidentiary challenges. To show unconstitutional racial discrimination, he would have to show that both a discriminatory effect and a discriminatory intent. This is the basic formula for an Equal Protection claim under the Fourteenth Amendment, and you will study it in much more detail in a constitutional law course. Discriminatory effects can often be established by patterns of racial disparities, but proving discriminatory intent often turns out to be difficult and nearly impossible, because courts usually will not accept statistical evidence of racial disparities as proof of discriminatory intent. We can leave these details of Equal Protection doctrine aside for now, though, because Christopher Armstrong's challenge faltered at a still earlier stage. Before he could try to prove unconstitutional discrimination, he needed more information from the prosecution: he needed discovery of information about who was prosecuted for cocaine offenses and how federal prosecutors made those decisions. The Supreme Court's opinion is not about whether Christopher Armstrong has adequately proved discrimination, but whether he should get discovery – in other words, the question is whether he has introduced sufficient evidence to be allowed to get more evidence.
4. What degree of statistical disparity should be sufficient to grant a defendant's motion for discovery about prosecutorial charging practices? In a footnote in his dissent, Justice Stevens emphasized that the federal government had not been able to identify a single white defendant in this federal district who had been prosecuted for crack offenses; the government did identify eleven non-Black defendants prosecuted for crack offenses, but these eleven defendants were all members of other minority groups. According to Stevens, "[t]he District Court was authorized to draw adverse inferences from the Government's inability to produce a single example of a white defendant, especially when the very purpose of its exercise was to allay the court's concerns about the evidence of racially selective prosecutions. As another court has said: 'Statistics are not, of course, the whole answer, but nothing is as emphatic as zero….'"

5. The Supreme Court in *Armstrong* does not explain how its "clear evidence" standard compares to other standards of proof, such as "preponderance of the evidence" or "beyond a reasonable doubt." At least one lower federal court has interpreted *Armstrong*'s "clear evidence" standard as a "clear and convincing" requirement. Clear and convincing evidence is typically understood as requiring more evidence than a "preponderance," but less than "beyond a reasonable doubt." Again, we will return to these various legal terms when we consider adjudication decisions in Chapter Four.
6. Several years before *Armstrong* reached the Supreme Court, the Court considered an equal protection challenge to Georgia's death penalty. Warren McCleskey was a Black man who had been sentenced to death after he was convicted of killing a white police officer. McCleskey argued that Georgia's capital sentencing procedures operated in a racially discriminatory manner such that Black defendants who killed white victims were sentenced to death disproportionately often. McCleskey supported his argument with empirical analysis by Professor David Baldus and other researchers, described by the Supreme Court as "two sophisticated statistical studies that examine[d] over 2000 murder cases that occurred in Georgia during the 1970s." *McCleskey v. Kemp*, 481 U.S. 279, 286 (1987). The Court acknowledged that the studies indicated that Black defendants who killed white victims were more likely to receive the death penalty, even after controlling for other potential variables. *Id*. at 287. But the Court nonetheless rejected the equal protection claim:

   [A] defendant who alleges an equal protection violation has the burden of proving "the existence of purposeful discrimination." A corollary to this principle is that a criminal defendant must prove that the purposeful discrimination "had a discriminatory effect" on him. Thus, to prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in *his* case acted with discriminatory purpose. He offers no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence. …

   McCleskey's statistical proffer must be viewed in the context of his challenge. McCleskey challenges decisions at the heart of the State's criminal justice system. "[O]ne of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through criminal laws against murder." Implementation of these laws necessarily requires discretionary judgments. Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused. The unique nature of the decisions at issue in this case also counsels against adopting such an inference from the disparities indicated by the Baldus study. Accordingly, we hold that the Baldus study is clearly insufficient to support an inference that any of the decisionmakers in McCleskey's case acted with discriminatory purpose.

   McCleskey, 481 U.S. at 292; *id*. at 297. Warren McCleskey also argued that racial bias in Georgia's capital sentencing practices violated the Eighth Amendment's prohibition on cruel and unusual punishment. The Court rejected the Eighth Amendment argument as well. The Court did not use the precise phrase "presumption of regularity," but it did explain that "we may lawfully presume that McCleskey's death sentence was not 'wantonly and freakishly' imposed, and thus that the sentence is not disproportionate within any recognized meaning under the Eighth Amendment." *Id*. at 308. The Court reiterated "the fundamental role of discretion in our criminal justice system," *id*. at 311, and concluded:

   At most, the Baldus study indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system…. As this Court has recognized, any mode for determining guilt or punishment "has its weaknesses and the potential for misuse." Specifically, "there can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death.' " Despite these imperfections, our consistent rule has been that constitutional guarantees are met when "the mode [for determining guilt or punishment] itself has been surrounded with safeguards to make it as fair as possible." Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious.

   McCleskey, 481 U.S. at 312-313.

7. Courts sometimes distinguish between a selective prosecution claim, like that raised in *Armstrong* , and a selective enforcement claim. The difference turns primarily on whose enforcement decision is challenged – a prosecutor or another enforcement official. Here is one court's recent explanation of the difference:

   Selective prosecution occurs when, from among the pool of people referred by police, a prosecutor pursues similar cases differently based on race. Selective enforcement occurs when police investigate people of one race but not similarly-situated people of a different race. Hence, with selective enforcement, "the constitutional problem … precede[s] the prosecutor's role."

It does not matter if prosecutors then pursue each case equally because the pool of defendants itself was racially selected. As equal protection claims, both selective prosecution and selective enforcement require proof "that the defendants' actions had a discriminatory effect and were motivated by a discriminatory purpose." A plaintiff must show discriminatory purpose "in *his* case." And discriminatory purpose "implies more than … awareness of consequences. It implies that the decisionmaker … selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."

Conley v. United States, 5 F.4th 781, 789 (7th Cir. 2021). *Conley* involved a controversial federal practice known as "stash house" stings, in which undercover agents approached individuals and proposed robbing a stash house. In the usual situation in which this practice was deployed, there was no actual stash house, but the staged robbery would enable federal agents to collect extensive evidence to prosecute the target for conspiring or attempting federal drug and weapons offenses. Like Warren McCleskey, the defendant in *Conley* relied on an academic study, this one indicating that the persons targeted in stash house stings were disproportionately Black. The Seventh Circuit determined that a lower standard of proof—preponderance of the evidence—applied to selective enforcement claims, but ultimately found that the defendant could not prove his equal protection claim even under the lower standard of proof.

8. The *Armstrong* Court mentions *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), to demonstrate that selective prosecution claims are not impossible to prove. (Later courts and commentators, including the *Conley* court, describe *Yick Wo* as a selective enforcement case rather than a selective prosecution case, since it involved apparently discriminatory decisions by city licensing officials to permit non-Chinese persons, but not Chinese persons, to operate laundries in wooden buildings.) As of 2022, *Yick Wo* remains the only case in which the Supreme Court has found adequate evidence to support either a selective enforcement or a selective prosecution claim under equal protection doctrine.

End of Chapter Review

Check Your Understanding (3-4)

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1. In fact the city already has several laws that serve this purpose. See, e.g., Ill. Comp. Stat., ch. 720 §§ 5/12–6 (1998) (intimidation); 570/405.2 (streetgang criminal drug conspiracy); 147/1 et seq. (Illinois Streetgang Terrorism Omnibus Prevention Act); 5/25–1 (mob action). Deputy Superintendent Cooper, the only representative of the police department at the Committee on Police and Fire hearing on the ordinance, testified that, of the kinds of behavior people had discussed at the hearing, "90 percent of those instances are actually criminal offenses where people, in fact, can be arrested." [Fn. 17 in original Supreme Court Opinion.] ↵
2. Petitioner cites historical precedent against recognizing what it describes as the "fundamental right to loiter." While antiloitering ordinances have long existed in this country, their pedigree does not ensure their constitutionality. … [Vagrancy] laws went virtually unchallenged in this country until attorneys became widely available to the indigent following our decision in Gideon v. Wainwright, 372 U.S. 335 (1963). In addition, vagrancy laws were used after the Civil War to keep former slaves in a state of quasi slavery. In 1865, for example, Alabama broadened its vagrancy statute to include "any runaway, stubborn servant or child" and "a laborer or servant who loiters away his time, or refuses to comply with any contract for a term of service without just cause." T. Wilson, Black Codes of the South 76 (1965). The Reconstruction-era vagrancy laws had especially harsh consequences on African–American women and children. L. Kerber, No Constitutional Right to be Ladies: Women and the Obligations of Citizenship 50–69 (1998). Neither this history nor … Justice THOMAS' dissent persuades us that the right to engage in loitering that is entirely harmless in both purpose and effect is not a part of the liberty protected by the Due Process Clause. [Fn. 20 in original Supreme Court opinion.] ↵
3. Other defendants had introduced this study in support of similar discovery motions in at least two other Central District cocaine prosecutions. Both motions were denied. One District Judge explained from the bench that the 23–person sample before him

was “statistically insignificant,” and that the evidence did not indicate “whether there is a bias in the distribution of crime that says black people use crack cocaine, hispanic people use powdered cocaine, caucasian people use whatever it is they use.” [Fn. 1 in original opinion.] ↵

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1.4: Adjudication Decisions

Deciding to Convict

After a criminal statute has been enacted, and after enforcement officials have brought charges against a specific individual under that statute, there is still one more key legal decision to be made: someone must decide whether the defendant is guilty of the charged offense. In one standard account of the criminal process, this adjudication decision is made by a jury after evidence is presented at trial. Adjudication by trial does sometimes occur in criminal law, but it is rare. Instead, most criminal convictions are the result of guilty pleas. And in some states, even the trials that do take place are typically bench trials, or trials in which a judge rather than a jury serves as the fact-finder. This chapter seeks to illuminate all of these various types of adjudication decisions, and to prompt reflection on the systemic consequences of the fact that adjudication is almost always a matter of pleas rather than trials.

The types of decisions examined in the previous two chapters—criminalization and enforcement decisions—have significant influence at the adjudication stage. As you know, criminalization decisions are made by a legislature in the first instance, expressed in the form of a statute that should define precisely the conduct designated as a crime. Criminal statutes structure adjudication decisions by identifying the key factors – the "elements" of the offense – that must be established in order to convict a defendant. Legislative decisions about how to define a crime, and enforcement decisions about which particular statute to charge, thus play an important role in shaping the adjudication decision. Indeed, a prosecutor's power to select which statute(s) to use to charge the defendant is a key factor influencing guilty pleas, as discussed below. Moreover, enforcement decisions by police officers will often determine what evidence is available at the adjudication stage. When officers decide to question or search an individual based on "reasonable suspicion" or "probable cause," the legal standards for enforcement decisions discussed in Chapter Three, police may then discover evidence that can meet the higher legal standards applicable to adjudication decisions. Recall *Copenhaver* from Chapter One, where a sheriff's decision to stop a car for an expired registration led to the discovery of evidence of drug offenses.

In the next section of this chapter, we consider a phrase that is probably already familiar to you: "proof beyond a reasonable doubt." In the rare instances in which criminal adjudication occurs at a trial, the fact-finder (whether judge or jury) is directed to find the defendant guilty only upon proof beyond a reasonable doubt. We will examine both the concept of proof in criminal law, comparing it to the suspicion thresholds discussed in the last chapter, and the concept of reasonable doubt. Examining proof requirements also gives us another opportunity to practice statutory analysis: you will need to be able to identify the separate elements of a statute that need to be proven to establish guilt.

Although it is important to understand the beyond a reasonable doubt standard, and to be able to analyze questions of proof in relation to specific statutory elements, it is also important to know that most criminal adjudication occurs by means of a guilty plea. When a defendant pleads guilty, he or she waives the right to a trial and relieves the prosecution of the burden to prove guilt. In this chapter, we will examine the basic legal requirements of a guilty plea, and we will consider some of the features of the criminal legal system that make guilty pleas so common.

A decision by a jury to convict, or a decision by a defendant to plead guilty, is a decision made and recorded at the trial court. That is where most adjudication decisions are made, and where most criminal cases end. But a minority of criminal cases do go to an appeals court, and appellate court opinions comprise a disproportionate share of the judicial opinions you will read to learn criminal law. After considering adjudication through trials or plea bargaining, this chapter turns to appellate adjudication, both to help you put the appellate opinions you read into context, and to illustrate the ways that appellate judges can review and revise criminalization, enforcement, and adjudication decisions made by other actors.

This chapter concludes Unit One, which has introduced you to three types of key decisions in criminal law: criminalization, enforcement, and adjudication decisions. But even as you learn about the decisions made by public officials, you should also be thinking about the arguments that lawyers make to try to influence those decisions. A concluding section of this chapter reviews the main types of arguments that lawyers have raised in the cases you've read so far in this book. Familiarity with these arguments will be useful as you begin to study specific categories of criminal offenses in Unit Two.

Legal "Proof" and Reasonable Doubt

A note about statutes: the next case, In re *Winship*, concerns a juvenile defendant who was charged with "the equivalent of larceny." That means he was alleged to have committed acts that would constitute larceny were he an adult. The text of New York's larceny

statute is not important to the opinion below and not reprinted here, but larceny is discussed in detail in Chapter Five. In general, you should continue to look closely at the relevant statutes when they are included before or within a judicial opinion. The next section of this chapter will examine proof requirements in relation to the "elements" of criminal statutes, and the statutory text is always the place to start as you seek to identify the elements of a crime.

In the Matter of Samuel WINSHIP, Appellant

Supreme Court of the United States
397 U.S. 358

Decided March 31, 1970

Mr. Justice BRENNAN delivered the opinion of the Court.

Constitutional questions decided by this Court concerning the juvenile process have centered on the adjudicatory stage at "which a determination is made as to whether a juvenile is a 'delinquent' as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution." In re *Gault* , 387 U.S. 1 (1967). *Gault* decided that, although the Fourteenth Amendment does not require that the hearing at this stage conform with all the requirements of a criminal trial or even of the usual administrative proceeding, the Due Process Clause does require application during the adjudicatory hearing of "the essentials of due process and fair treatment. " This case presents the single, narrow question whether proof beyond a reasonable doubt is among [those essentials of due process] required during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult.

…[A judge in New York Family Court found that appellant, then a 12-year-old boy, had entered a locker and stolen $112… The petition which charged appellant with delinquency alleged that his act, " if done by an adult, would constitute the crime or crimes of Larceny. " The judge acknowledged that the proof might not establish guilt beyond a reasonable doubt, but rejected appellant ' s contention that such proof was required by the Fourteenth Amendment. [Section 744(b) of the Family Court Act] provides that " (a) ny determination at the conclusion of (an adjudicatory) hearing that a (juvenile) did an act or acts must be based on a preponderance of the evidence. " …

I

The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation. The "demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, (though) its crystallization into the formula 'beyond a reasonable doubt' seems to have occurred as late as 1798. It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt." …

Expressions in many opinions of this Court indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required. Mr. Justice Frankfurter [identified] "the duty of the Government to establish … guilt beyond a reasonable doubt. This notion—basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of due process of law in the historic, procedural content of 'due process.'" *Leland v. Oregon* , 343 U.S. 790 (1952) (dissenting opinion). In a similar vein, the Court said in *Brinegar v. United States* (1949) that "(g) uilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property. " … This Court [has] said … " No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them … is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged."

The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence —that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law." As the dissenters in the New York Court of Appeals observed, and we agree, "a person accused of a crime … would

be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case."

The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt. … "T here is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty —this margin of error is reduced as to him by the process of placing on the other party the burden of … persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of … convincing the factfinder of his guilt." To this end, the reasonable-doubt standard is indispensable, for it "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue."

Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

II

We turn to the question whether juveniles, like adults, are constitutionally entitled to proof beyond a reasonable doubt when they are charged with violation of a criminal law. The same considerations that demand extreme caution in factfinding to protect the innocent adult apply as well to the innocent child. … [*Gault*] made clear … that civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts, for "(a) proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution."

… Finally, we reject the Court of Appeals' suggestion that there is, in any event, only a " tenuous difference " between the reasonable-doubt and preponderance standards. The suggestion is singularly unpersuasive. In this very case, the trial judge's ability to distinguish between the two standards enabled him to make a finding of guilt that he conceded he might not have made under the standard of proof beyond a reasonable doubt. Indeed, the trial judge ' s action evidences the accuracy of the observation of commentators that " the preponderance test is susceptible to the misinterpretation that it calls on the trier of fact merely to perform an abstract weighing of the evidence in order to determine which side has produced the greater quantum, without regard to its effect in convincing his mind of the truth of the proposition asserted. "

III

In sum, the constitutional safeguard of proof beyond a reasonable doubt is as much required during the adjudicatory stage of a delinquency proceeding as are those constitutional safeguards applied in *Gault* —notice of charges, right to counsel, the rights of confrontation and examination, and the privilege against self-incrimination. We therefore hold, in agreement with Chief Judge Fuld in dissent in the Court of Appeals, " that, where a 12-year-old child is charged with an act of stealing which renders him liable to confinement for as long as six years, then, as a matter of due process … the case against him must be proved beyond a reasonable doubt. "

Reversed.

Mr. Justice HARLAN, concurring.

…I begin by stating two propositions, neither of which I believe can be fairly disputed. First, in a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what

happened. Instead, all the fact-finder can acquire is a belief of what probably happened. The intensity of this belief—the degree to which a factfinder is convinced that a given act actually occurred—can, of course, vary. In this regard, a standard of proof represents an attempt to instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. Although the phrases 'preponderance of the evidence' and 'proof beyond a reasonable doubt' are quantitatively imprecise, they do communicate to the finder of fact different notions concerning the degree of confidence he is expected to have in the correctness of his factual conclusions.

A second proposition, which is really nothing more than a corollary of the first, is that the trier of fact will sometimes, despite his best efforts, be wrong in his factual conclusions. In a lawsuit between two parties, a factual error can make a difference in one of two ways. First, it can result in a judgment in favor of the plaintiff when the true facts warrant a judgment for the defendant. The analogue in a criminal case would be the conviction of an innocent man. On the other hand, an erroneous factual determination can result in a judgment for the defendant when the true facts justify a judgment in plaintiff ' s favor. The criminal analogue would be the acquittal of a guilty man.

The standard of proof influences the relative frequency of these two types of erroneous outcomes. If, for example, the standard of proof for a criminal trial were a preponderance of the evidence rather than proof beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons, but a far greater risk of factual errors that result in convicting the innocent. Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each.

… In this context, I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free. It is only because of the nearly complete and long-standing acceptance of the reasonable-doubt standard by the States in criminal trials that the Court has not before today had to hold explicitly that due process, as an expression of fundamental procedural fairness, requires a more stringent standard for criminal trials than for ordinary civil litigation.

[Dissenting opinions of BURGER, STEWART, and BLACK omitted.]

Notes and questions on *Winship*

1. *Winship* has been called "the civil case at the heart of criminal procedure," and that phrase captures an oddity of the decision: it was technically a civil case, since New York (like other states) had created a separate juvenile court to address wrongdoing by minors and had classified these juvenile proceedings as civil rather than criminal. See W. David Ball, *The Civil Case at the Heart of Criminal Procedure: Winship, Stigma, and the Civil-Criminal Distinction* , 38 Am. J. Crim. L . 117 (2011). Since the creation of juvenile courts, the extent to which juvenile defendants in these ostensibly civil proceedings are entitled to the same constitutional protections as adult criminal defendants has been a recurring question. In the decision you've just read, the Supreme Court determined that the consequences of being labeled "delinquent" as a juvenile were sufficiently similar to the consequences of being labeled "guilty" as an adult that the same standard of proof should apply in both contexts. And although, prior to 1970, the Court had not formally declared "proof beyond a reasonable doubt" to be a constitutional requirement in criminal cases, it used *Winship* to make that declaration.
2. The *Winship*majority refers at times to "proof beyond a reasonable doubt," which is a phrase you have probably heard before. But the Court also describes this legal standard as "the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt" (emphasis added). Is there a difference between proving a fact, on one hand, and persuading or convincing another person that the fact is true?If so, what is that difference?
3. To expand on the question in the last note, consider how the legal concept of "proof" may differ from a mathematical or scientific conception of proof. As Justice Harlan emphasizes in his concurring opinionin *Winship*, fact-finders do not and cannot "acquire unassailably accurate knowledge of what happened.Instead, all the fact-find can acquire is a belief of what probably happened." (This observation seemsespecially true with regard to mental states. A fact-finder cannot discover or know with certainty exactly what a defendant was thinking at the time of the alleged crime.)Thus, in Justice Harlan's words, a legal standard of proof "represents an attempt to instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."Alegal standard of proof has to do with the confidence of a human decisionmaker. Ina sense, legal proof is a state of mind– the adjudicator's state of mind. The

conviction (in the sense of firmly held belief) of the fact-finder produces the conviction (in the sense of legal designation as guilty) of the defendant. Although the phrase "proofbeyond a reasonable doubt" has become the usual description of the standard of proof in criminal cases, especially after *Winship*, some courts before and even after *Winship*describe the issue as whether the factfinder is "convincedbeyond a reasonable doubt." Look closely at the Court's definition of proof here: "*Winship*presupposes as an essential of … due process … that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *Jackson v. Virginia*, 443 U.S. 307, 316 (1979).

4. The *Winship* Court argues that individuals must have confidence that the government will not be able to convict anyone "without convincing a proper factfinder of … guilt with utmost certainty." Many defendants have cited this language to argue that juries should be instructed that they should not vote to convict unless they have "utmost certainty" of the defendant's guilt. Courts routinely refuse this request, however. Several years after *Winship*, theSupreme Court described therequisitedegree of certainty as "near certitude" rather than "utmost certainty."*Jackson v. Virginia*, 443 U.S. 307, 315 (1979).More generally, the Court hastreated "beyond a reasonable doubt" as a constitutional requirement without a fixed meaning. The Court hasrefused to require states to adhere to any specific definition of "beyond a reasonable doubt," and it has allowed states to refuse to define the term or to allow conflicting definitions.See Miller W. Shealy, Jr., *A Reasonable Doubt About "Reasonable Doubt,"*65 Okla. L. Rev. 225 (2013).As Shealy reports, "[o]ne very frustrated trial judge, instructing the jury on 'reasonable doubt,' deftly summarized the current state of the law when he said, '[W]hoare we to tell you what is reasonable and what is not? That is wholly within your province.'" Id. at 228.
5. The family court judge who presided over Samuel Winship's trial explicitly stated that he was "convinced" by a "preponderance of the evidence," but he didn't think the evidence satisfied a "beyond a reasonable doubt" standard. How would you describe the difference between "preponderance of the evidence" as a legal standard and "beyond a reasonable doubt"? Can you imagine why someone might argue, as did the lower appellate court in this case, that there is only a "tenuous difference" between the two standards?"Preponderance of the evidence" is often described as a "more likely than not" standard, but courts are usually reluctant to quantify"beyond a reasonable doubt" as a percentage or probability.One Rhode Island judge used a scale —apparently, an old-fashioned balance scale of the type frequently depicted as "the scales of justice"—to explain reasonable doubt to a jury:

   I just happen to have a *scale* here. Are they about equal? In a civil case the moving party or petitioner must prove the case by a fair preponderance of the evidence. Remember I told you that the scale just has to tilt ever so slightly for the plaintiff to prevail? But this is a criminal case where the burden is greater[;] beyond a reasonable doubt. The scale must go down significantly more, but not all the way. It's not beyond all doubt, or you would have the scale touch the bench. That's not the standard. It's not beyond all doubt. It's beyond a reasonable doubt.

   The defendant appealed his conviction, arguing that the jury instruction was erroneous. The Rhode Island Supreme Court found no reversible error, but expressed reservations about the trial judge's explanation:

   Although we agree that the "beyond a reasonable doubt" standard cannot be reduced to a single percentage figure to represent the likelihood that a defendant is guilty, it is still true, as the trial justice instructed the jury, that if the level of certainty needed to convict were subject to quantification the figure would be appreciably greater than 50 percent but still less than 100 percent. Here, the trial justice merely defined the range, by stating that "[t]he scale must go down significantly more [than 50 percent], but not all the way."

   Yet, although we conclude that the trial justice did not commit reversible error in giving this instruction, use of a scale metaphor, even if it is invoked merely to define a range, may misleadingly tend to quantify the reasonable-doubt standard by suggesting that, within a certain range, a single percentage figure exists beyond which the jury would have to conclude that they were convinced of a defendant's guilt beyond a reasonable doubt. Therefore, we hold that although the trial justice did not commit reversible error by adverting to the scale metaphor in defining reasonable doubt to the jury, his "characterization of the standard as quantitative rather than qualitative might better have been omitted."

   State v. O'Brien, 774 A.2d 89, 110 (R.I. 2001).

6. Be sure to understand the difference between two separate issues: the standard of proof, on one hand, and allocation of the burden of proof, on the other. "Beyond a reasonable doubt," "preponderance of the evidence," and "clear and convincing evidence" are typical formulations of standards of proof. Again, these phrases describe the degree of confidence that the fact-

finder should hold. Beyond a reasonable doubt requires the highest degree of confidence, while preponderance of the evidence requires only that the factfinder think the fact in question is more likely than not to be true. Clear and convincing evidence is an intermediate standard between beyond a reasonable doubt and preponderance. (All of these standards of proof are understood to require much greater levels of confidence than the suspicion standards discussed in Chapter Three, "reasonable suspicion" and "probable cause.")The allocation of the burden of proof refers not to the factfinder's degree of confidence, but to which party is obligated to convince the factfinder. In criminal cases, the prosecution carries the burden of proof with regard to each element of the charged offense, which means that it is up to the prosecution to present evidence that persuades the factfinder of guilt (unless, of course, the defendant pleads guilty and relieves the prosecution of this burden). But there are specific kinds of claims raised by defendants called affirmative defenses, and for these claims a state can require the defendant to carry the burden of proof. We will discuss affirmative defenses and defendants' burdens of proof in relation to *Patterson v. New York*in Chapter Six, and again as they arise in later cases.

7. In addition to the two issues just discussed (standard of proof, and allocation of burden), adjudication raises a third issue: who will serve as the fact-finder, or the person who must be convinced that the necessary facts have been established? In *Winship*itself, a family court judge had served as the factfinder, not a jury. Shortly after *Winship*, the Supreme Court considered whether juvenile defendants have the same constitutional right to a jury trial that the Sixth Amendment grants to adult criminal defendants, and ultimately decided that the right to a jury did not apply in juvenile proceedings. *McKeiver v. Pennsylvania*, 403 U.S. 528, 545-548 (1971). For adult defendants in criminal proceedings, however, the Court has recognized a right to have a jury serve as fact-finder if the potential penalty is six months imprisonment or longer. See *Blanton v. City of North Las Vegas*, 489 U.S. 538 (1989); *Duncan v. Louisiana*, 391 U.S. 145 (1967). As previously emphasized, however, and as discussed further in the next section of this chapter, most criminal defendants waive this right to a jury.
8. It is often said that a standard of proof allocates the risk of error. How does the *Winship*Court use this claim in support of its conclusion that the reasonable doubt standard is a constitutional requirement in criminal cases (and thus also in a juvenile delinquency proceeding)?
9. In his concurrence, Justice Harlan quoted a famous evidence scholar, John Henry Wigmore, who had examined courts' attempts to describe the reasonable doubt standard and concluded, "The truth is that no one has yet invented or discovered a mode of measurement for the intensity of human belief. Hence there can be yet no successful method of communicating intelligibly … a sound method of self-analysis for one's [own] belief." 9 J. Wigmore, *Evidence* 325 (3d ed. 1940), quoted in Winship, 397 U.S. 358, 369 (Harlan, J., concurring). Harlan seemed to share some of Wigmore's skepticism, noting that standards of proof were "not a very sure guide to decisionmaking," but he ultimately agreed with the *Winship* majority that it was important to adopt "beyond a reasonable doubt" in criminal cases. As Harlan explained, "the choice of the standard of proof for a particular variety of adjudication does, I think, reflect a very fundamental assessment of the comparative social costs of erroneous factual determinations." Id. at 370.
10. The previous two notes recount a frequently repeated rationale for a beyond-a-reasonable-doubt standard in criminal cases: the standard allocates the risks of error in a way that favors the defendant, and this allocation reflects a societal assessment that the costs to an individual of a wrongful conviction are so high that we want the government to bear the greater risk of error. This idea is often expressed with the claim that it is better that ten guilty men go free than one innocent man be convicted. As a historical matter, though, "beyond a reasonable doubt" may have entered the law for very different reasons. Legal historian James Whitman has argued that the standard first as a response to a reluctance to convict among medieval Christians, who feared that to convict a fellow human would expose themselves to eternal damnation. The beyond a reasonable doubt standard emerged to provide "moral comfort" to jurors by reassuring them that God would not condemn them for convicting a defendant when the evidence was sufficiently persuasive. James Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (2008).

Evidence Sufficiency and Elements of Offenses

Winship requires proof beyond a reasonable doubt, but proof of what, exactly? In the Supreme Court's words, "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Winship*, 397 U.S. at 364. Elsewhere, the Court said that the reasonable doubt standard was "the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt." Id. at 361. Thus, under *Winship*, it is important to identify the separate "elements" of a criminal offense, or the specific facts that must be established

to support a conviction. *Owens v. State*, below, will help you think about how to identify all the elements of an offense and how to determine whether the evidence is sufficient to prove those elements.

Md. Transportation Art. § 21-902. Driving while intoxicated, under the influence of alcohol, or under the influence of a drug, a combination of alcohol and a drug, or a controlled dangerous substance.

(a) *Driving while intoxicated.*—A person may not drive or attempt to drive any vehicle while intoxicated.

Md. Transportation Art. § 21-101.1

(a) *In general.*—The provisions of this title relating to the driving of vehicles refer only to the driving of vehicles on highways, except …

(b) *Applicability to private property.*—(1) A person may not drive a motor vehicle in violation of any provision of this title on any private property that is used by the public in general.

Christopher C. OWENS, Jr.

v.

STATE of Maryland

Court of Special Appeals of Maryland
93 Md. App. 162

Sept. 3, 1992

MOYLAN, Judge.

This appeal presents us with a small gem of a problem from the borderland of legal sufficiency. It is one of those few occasions when some frequently invoked but rarely appropriate language is actually pertinent. Ironically, in this case it was not invoked. The language is, "[A] conviction upon circumstantial evidence *alone* is not to be sustained unless the circumstances are inconsistent with any reasonable hypothesis of innocence." West v. State, 539 A.2d 231 (1988) (emphasis in original).

We have here a conviction based upon circumstantial evidence alone. The circumstance is that a suspect was found behind the wheel of an automobile parked on a private driveway at night with the lights on and with the motor running. Although there are many far-fetched and speculative hypotheses that might be conjured up (but which require no affirmative elimination), there are only two unstrained and likely inferences that could reasonably arise. One is that the vehicle and its driver had arrived at the driveway from somewhere else. The other is that the driver had gotten into and started up the vehicle and was about to depart for somewhere else.

The first hypothesis, combined with the added factor that the likely driver was intoxicated, is consistent with guilt. The second hypothesis, because the law intervened before the forbidden deed could be done, is consistent with innocence. With either inference equally likely, a fact finder could not fairly draw the guilty inference and reject the innocent with the requisite certainty beyond a reasonable doubt. We are called upon, therefore, to examine the circumstantial predicate more closely and to ascertain whether there were any attendant and ancillary circumstances to render less likely, and therefore less reasonable, the hypothesis of innocence. Thereon hangs the decision.

The appellant, Christopher Columbus Owens, Jr., was convicted in the Circuit Court … by Judge D. William Simpson, sitting without a jury, of driving while intoxicated. Upon this appeal, he raises the single contention that Judge Simpson was clearly erroneous in finding him guilty because the evidence was not legally sufficient to support such finding.

The evidence, to be sure, was meager. The State ' s only witness was Trooper Samuel Cottman , who testified that at approximately 11 P.M. on March 17, 1991, he drove to the area of Sackertown Road … in response to a complaint that had been called in about a suspicious vehicle. He spotted a truck matching the description of the "suspicious vehicle." It was parked in the driveway of a private residence.

The truck ' s engine was running and its lights were on. The appellant was asleep in the driver ' s seat, with an open can of Budweiser clasped between his legs. Two more empty beer cans were inside the vehicle. As Trooper Cottman awakened him, the appellant appeared confused and did not know where he was. He stumbled out of the vehicle. There was a strong odor of alcohol

on his breath. His face was flushed and his eyes were red. When asked to recite the alphabet, the appellant "mumbled through the letters, didn ' t state any of the letters clearly and failed to say them in the correct order." His speech generally was "slurred and very unclear." When taken into custody, the appellant was "very argumentative … and uncooperative." A check with the Motor Vehicles Administration revealed … that the appellant had an alcohol restriction on his license. The appellant declined to submit to a blood test for alcohol.

After the brief direct examination of Trooper Cottman … defense counsel asked only two questions, establishing that the driveway was private property and that the vehicle was sitting on that private driveway. The appellant did not take the stand and no defense witnesses were called. The appellant ' s argument as to legal insufficiency is clever. He chooses to fight not over the fact of drunkenness but over the place of drunkenness. He points out that his conviction was under the Transportation Article, which is limited in its coverage to the driving of vehicles on "highways" and does not extend to driving on a "private road or driveway."

We agree with the appellant that he could not properly have been convicted for driving, no matter how intoxicated, back and forth along the short span of a private driveway. The theory of the State ' s case, however, rests upon the almost Newtonian principle that present stasis on the driveway implies earlier motion on the highway. The appellant was not convicted of drunken driving on the private driveway, but of drunken driving on the public highway before coming to rest on the private driveway.

It is a classic case of circumstantial evidence. From his presence behind the wheel of a vehicle on a private driveway with the lights on and the motor running, it can reasonably be inferred that such individual either 1) had just arrived by way of the public highway or 2) was just about to set forth upon the public highway. The binary nature of the probabilities — that a vehicular odyssey had just concluded or was just about to begin — is strengthened by the lack of evidence of any third reasonable explanation, such as the presence beside him of an inamorata or of a baseball game blaring forth on the car radio. Either he was coming or he was going.

The first inference would render the appellant guilty; the second would not. Mere presence behind the wheel with the lights on and the motor running could give rise to either inference, the guilty one and the innocent one. For the State to prevail, there has to be some other factor to enhance the likelihood of the first inference and to diminish the likelihood of the second. We must look for a tiebreaker.

The State had several opportunities to break the game wide open but failed to capitalize on either of them. As Trooper Cottman woke the appellant, he asked him what he was doing there. The appellant responded that *he had just driven* the occupant of the residence home. Without explanation, the appellant ' s objection to the answer was sustained. For purposes of the present analysis, therefore, it is not in the case. We must look for a tiebreaker elsewhere.

In trying to resolve whether the appellant 1) had just been driving or 2) was just about to drive, it would have been helpful to know whether the driveway in which he was found was that of his own residence or that of some other residence. If he were parked in someone else's driveway with the motor still running, it would be more likely that he had just driven there a short time before. If parked in his own driveway at home, on the other hand, the relative strength of the inbound inference over the outbound inference would diminish.

The driveway where the arrest took place was on Sackertown Road. The charging document (which, of course, is not evidence) listed the appellant ' s address as 112 Cove Second Street. When the appellant was arrested, presumably his driver ' s license was taken from him. Since one of the charges against the appellant was that of driving in violation of an alcohol restriction on his license, it would have been routine procedure to have offered the license, showing the restriction, into evidence. In terms of our present legal sufficiency exercise, the license would fortuitously have shown the appellant ' s residence as well. Because of the summary nature of the trial, however, the license was never offered in evidence. For purposes of the present analysis, therefore, the appellant ' s home address is not in the case. We must continue to look for a tiebreaker elsewhere.

Three beer cans were in evidence. The presence of a partially consumed can of beer between the appellant ' s legs and two other empty cans in the back seat would give rise to a reasonable inference that the appellant ' s drinking spree was on the downslope rather than at an early stage. At least a partial venue of the spree, moreover, would reasonably appear to have been the automobile. One does not typically drink in the house and then carry the empties out to the car. Some significant drinking, it may be inferred, had taken place while the appellant was in the car. The appellant ' s state of unconsciousness, moreover, enforces that inference. One passes out on the steering wheel after one has been drinking for some time, not as one only begins to drink. It is not a reasonable hypothesis that one would leave the house, get in the car, turn on the lights, turn on the motor, and then, before putting

the car in gear and driving off, consume enough alcohol to pass out on the steering wheel. Whatever had been going on (driving and drinking) would seem more likely to have been at a terminal stage than at an incipient one.

Yet another factor would have sufficed, we conclude, to break the tie between whether the appellant had not yet left home or was already abroad upon the town. Without anything further as to its contents being revealed, it was nonetheless in evidence that the thing that had brought Trooper Cottman to the scene was a complaint about a suspicious vehicle. The inference is reasonable that the vehicle had been observed driving in some sort of erratic fashion. Had the appellant simply been sitting, with his motor idling, on the driveway of his own residence, it is not likely that someone from the immediate vicinity would have found suspicious the presence of a familiar neighbor in a familiar car sitting in his own driveway. The call to the police, even without more being shown, inferentially augurs more than that. It does not prove guilt in and of itself. It simply makes one of two alternative inferences less reasonable and its alternative inference thereby more reasonable.

The totality of the circumstances are, in the last analysis, inconsistent with a *reasonable* hypothesis of innocence. They do not, of course, foreclose the hypothesis but such has never been required. They do make the hypothesis more strained and less likely. By an inverse proportion, the diminishing force of one inference enhances the force of its alternative. It makes the drawing of the inference of guilt more than a mere flip of a coin between guilt and innocence. It makes it rational and therefore within the proper purview of the factfinder. We affirm.

Notes and questions on *Owens*

1. The Maryland drunk driving statute, § 21-902, is reprinted just before the court's opinion and seems short and simple. It requires that the defendant a) drive or attempt to drive, b) any vehicle, c) while intoxicated. But the defense argued that because the statute was part of the Transportation Article, which applied to "highways," there was an additional element of the offense: the prosecution had to show that the driving (or the attempt to drive) took place on a public roadway rather than private property. The *Owens* court apparently accepted this interpretation of the statute (but the state supreme court later disagreed, as explained in the last note below). One lesson to take from *Owens* is the fact that criminalization decisions—the precise definition of an offense—are designed to structure adjudication decisions. The factfinder is not supposed to make his own determination of whether a man attempting to drive on a private driveway is guilty of a crime; rather, the factfinder is supposed to take the specific elements of the offense as defined by the legislature, and then determine whether the evidence establishes those pre-defined elements.
2. The *Owens* court doesn't give a crisp definition of "circumstantial evidence," but can you figure out what the term means? Here is one explanation from a pattern jury instruction:
   You may have heard the phrases "direct evidence" and "circumstantial evidence." Direct evidence is proof that does not require an inference, such as the testimony of someone who claims to have personal knowledge of a fact. Circumstantial Evidence is proof of a fact, or a series of facts, that tends to show that some other fact is true. As an example, direct evidence that it is raining is testimony from a … witness who says, "I was outside a minute ago and I saw it raining." Circumstantial evidence that it is raining is the observation of someone entering a room carrying a wet umbrella. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. You should decide how much weight to give to any evidence. In reaching your verdict, you should consider all the evidence in the case, including the circumstantial evidence.

   Stephen E. Arthur & Robert S. Hunter, *Federal Trial Handbook: Criminal*, 41:3 (2020). Although this federal instruction says direct and circumstantial evidence should be given the same weight, some states do treat direct and circumstantial evidence differently, as discussed below.
3. Would you have voted to convict Christopher Columbus Owens? Why or why not? Which facts or details seem most important to you? Notice that some facts (such as the defendant's statement that he had just given someone a ride home) are known to the court, but are not officially "in evidence." Which facts that are "in evidence" seem most important to your vote to acquit or convict?
4. Why does the *Owens* court mention facts not in evidence – that is, facts supposedly not relevant to its decision? Keep in mind that judges are human decisionmakers, and judicial opinions are carefully crafted documents. Are the facts not officially in evidence—such as the fact that Owens was not at his own residence, or that Owens stated that he had just driven a friend home—included to influence the reader of the opinion, even as the court claims that these facts must not influence its own decision?

5. The appellate court says that it is looking for a "tiebreaker" to choose between two possible inferences, one of innocence and one of guilt. It ultimately finds "the totality of the circumstances" to be "inconsistent with a reasonable hypothesis of innocence" even if they do not "foreclose" a hypothesis of innocence. The inference of guilt, the court says, is "more than a mere flip of a coin." Are the concepts of a "tiebreaker" or a coin flip consistent with proof beyond a reasonable doubt? Is this court applying a reasonable doubt standard?
6. In relation to the question raised in the previous note, it is important to see that the appellate court is not in the same position as a jury or a trial judge serving as fact-finder, and it is not applying exactly the same legal standard. When an appellate court reviews a conviction for sufficiency of the evidence, the appellate judges are not asking themselves whether they are convinced beyond a reasonable doubt. Rather, the usual standard for a sufficiency of the evidence claim is whether there is enough evidence of guilt so that a reasonable factfinder could have been convinced. Put differently, an appellate court will not typically reverse a conviction for insufficiency of evidence unless the court concludes that the evidence is so weak that no reasonable factfinder could have been convinced beyond a reasonable doubt. (Of course, the issue raised by Wigmore and referenced in *Winship* still remains: how do human decisionmakers measure the intensity of their own beliefs? And we could now add with regard to appellate review, how do appellate judges evaluate the reasonableness of the intensity of a hypothetical juror's beliefs?)
7. The *Owens* court states, in the last paragraph of the opinion, that the evidence need not "foreclose the hypothesis" of innocence in order to be sufficient. Some states adopt a more rigorous standard for convictions based on circumstantial evidence. For example, Georgia law provides that if an element of a crime is established only by circumstantial evidence, "the proved facts shall not only be consistent with the hypothesis of guilt, but shall exclude every other reasonable hypothesis save that of guilt of the accused." Ga. Code. Ann. § 24-4-6. In other words, in contrast to the federal instruction quoted in the first note above, Georgia purports to treat circumstantial evidence differently than direct evidence.
8. A few years after the Court of Special Appeals (an intermediate appellate court) decided *Owens*, the Maryland Court of Appeals (the state's highest court) considered a similar case, *Rettig v. State*, 639 A.2d 670 (Ct. App. Md. 1994). The defendant in that case, Craig Rettig, was represented by the state public defender, the same office that had represented Owens. And Rettig's attorney raised a similar argument against a drunk driving conviction. Rettig was arrested after he got in an accident while driving an all-terrain vehicle on his own property in the early morning hours; by his own admission, Rettig was "toasted" at the time of the accident. Though Rettig argued (through his attorney) that he could not be convicted because the state drunk driving law applied only to public roadways, the state supreme court rejected this argument, overruling this aspect of *Owens*. The state supreme court noted that still another provision of the Transportation Article, one not mentioned in *Owens*, stated "The provisions of this subtitle apply throughout this State, whether on or off a highway." After *Rettig*, Maryland prosecutors do not need to show that drunk driving occurred on a public roadway in order to secure a conviction. *Owens* and *Rettig* can thus remind us that statutes are subject to different interpretations—especially if different parts of a statute contain seeming contradictory language! Within a given jurisdiction, an interpretation by a higher court displaces a contrary interpretation by a lower court. We look again at statutory interpretation by appellate courts at the end of this chapter with *Yates v. United States*.

Check Your Understanding (4-1)

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Expand on Your Understanding (4-2)

The original version of this chapter contained H5P content. You may want to remove or replace this element.

A System of Pleas

The two cases you've read so far in this chapter both involved trials, albeit bench trials to a judge serving as fact-finder rather than jury trials. But most criminal defendants do not go to trial, either jury trial or bench trial. Instead, most criminal cases are resolved without a trial. If the case ends in a conviction, that conviction is almost always the result of a guilty plea rather than a trial. Given that a defendant has a constitutional right to a jury trial, and a due process right to demand that the prosecution prove each element of the offense beyond a reasonable doubt, why do so many defendants plead guilty? To begin to understand the dynamics of criminal prosecutions and the prevalence of pleas, consider the next case. The applicable statutes are reprinted before the opinion, but please note that neither statute is still in force today.

Ky Rev. Stat. § 434.1 30.

Any person who forges or counterfeits any writing in order to obtain fraudulently the possession of or to deprive another of any money or property, or to cause another to be injured in his estate or lawful rights, or any person who utters and publishes such an instrument as true, knowing it to be forged and counterfeited, shall be confined in the penitentiary for not less than two nor more than ten years.

Ky. Rev. Stat. § 431.190. Conviction of felony; punishment on second and third offenses.

Any person convicted a second time of felony shall be confined in the penitentiary not less than double the time of the sentence under the first conviction; if convicted a third time of felony, he shall be confined in the penitentiary during his life….

Don BORDENKIRCHER
Superintendent, Kentucky State Penitentiary, Petitioner

v.

Paul Lewis HAYES

Supreme Court of the United States
434 U.S. 357

Decided Jan. 18, 1978

Justice STEWART delivered the opinion of the Court.

The question in this case is whether the Due Process Clause of the Fourteenth Amendment is violated when a state prosecutor carries out a threat made during plea negotiations to reindict the accused on more serious charges if he does not plead guilty to the offense with which he was originally charged.

I

The respondent, Paul Lewis Hayes, was indicted by a Fayette County, Ky., grand jury on a charge of uttering a forged instrument in the amount of $88.30, an offense then punishable by a term of 2 to 10 years in prison. Ky. Rev. Stat. § 434.130 (1973) (repealed 1975). After arraignment, Hayes, his retained counsel, and the [prosecutor] met … to discuss a possible plea agreement. During these conferences the prosecutor offered to recommend a sentence of five years in prison if Hayes would plead guilty to the indictment. He also said that if Hayes did not plead guilty and "save[d] the court the inconvenience and necessity of a trial," he would return to the grand jury to seek an indictment under the Kentucky Habitual Criminal Act, which would subject Hayes to a mandatory sentence of life imprisonment by reason of his two prior felony convictions. Hayes chose not to plead guilty, and the prosecutor did obtain an indictment charging him under the Habitual Criminal Act. It is not disputed that the recidivist charge was fully justified by the evidence, that the prosecutor was in possession of this evidence at the time of the original indictment, and that Hayes' refusal to plead guilty to the original charge was what led to his indictment under the habitual criminal statute.

A jury found Hayes guilty on the principal charge of uttering a forged instrument and, in a separate proceeding, further found that he had twice before been convicted of felonies. As required by the habitual offender statute, he was sentenced to a life term in the penitentiary…

II

It may be helpful to clarify at the outset the nature of the issue in this case. While the prosecutor did not actually obtain the recidivist indictment until after the plea conferences had ended, his intention to do so was clearly expressed at the outset of the plea negotiations. Hayes was thus fully informed of the true terms of the offer when he made his decision to plead not guilty. This is not a situation, therefore, where the prosecutor without notice brought an additional and more serious charge after plea negotiations relating only to the original indictment had ended with the defendant's insistence on pleading not guilty. As a practical matter, in short, this case would be no different if the grand jury had indicted Hayes as a recidivist from the outset, and the prosecutor had offered to drop that charge as part of the plea bargain.

The Court of Appeals nonetheless drew a distinction between "concessions relating to prosecution under an existing indictment," and threats to bring more severe charges not contained in the original indictment—a line it thought necessary in order to establish a prophylactic rule to guard against the evil of prosecutorial vindictiveness. Quite apart from this chronological distinction, however, the Court of Appeals found that the prosecutor had acted vindictively in the present case since he had conceded that the indictment

was influenced by his desire to induce a guilty plea. The ultimate conclusion of the Court of Appeals thus seems to have been that a prosecutor acts vindictively and in violation of due process of law whenever his charging decision is influenced by what he hopes to gain in the course of plea bargaining negotiations.

III

We have recently had occasion to observe: "[W]hatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned." *Blackledge v. Allison* (1977). The open acknowledgment of this previously clandestine practice has led this Court to recognize the importance of counsel during plea negotiations, the need for a public record indicating that a plea was knowingly and voluntarily made, and the requirement that a prosecutor's plea-bargaining promise must be kept. The decision of the Court of Appeals in the present case, however, did not deal with considerations such as these, but held that the substance of the plea offer itself violated the limitations imposed by the Due Process Clause of the Fourteenth Amendment. For the reasons that follow, we have concluded that the Court of Appeals was mistaken in so ruling.

IV

This Court held in *North Carolina v. Pearce* (1969) that the Due Process Clause of the Fourteenth Amendment "requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." The same principle was later applied to prohibit a prosecutor from reindicting a convicted misdemeanant on a felony charge after the defendant had invoked an appellate remedy, since in this situation there was also a "realistic likelihood of vindictiveness." *Blackledge v. Perry* (1974).

In those cases the Court was dealing with the State's unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right to attack his original conviction—a situation "very different from the give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power." …[I]n the "give-and-take" of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer.

Plea bargaining flows from "the mutuality of advantage" to defendants and prosecutors, each with his own reasons for wanting to avoid trial. Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation. Indeed, acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process. By hypothesis, the plea may have been induced by promises of a recommendation of a lenient sentence or a reduction of charges, and thus by fear of the possibility of a greater penalty upon conviction after a trial.

While confronting a defendant with the risk of more severe punishment clearly may have a "discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable"—and permissible—"attribute of any legitimate system which tolerates and encourages the negotiation of pleas." It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty.

It is not disputed here that Hayes was properly chargeable under the recidivist statute, since he had in fact been convicted of two previous felonies. In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion. Within the limits set by the legislature's constitutionally valid definition of chargeable offenses, "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation" so long as "the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." To hold that the prosecutor's desire to induce a guilty plea is an "unjustifiable standard," which, like race or religion, may play no part in his charging decision, would contradict the very premises that underlie the concept of plea bargaining itself. Moreover, a rigid constitutional rule that would prohibit a prosecutor from acting forthrightly in his dealings with the defense could only invite unhealthy subterfuge that would drive the practice of plea bargaining back into the shadows from which it has so recently emerged.

There is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse. And broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise. We hold only that the course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause of the Fourteenth Amendment.

Accordingly, the judgment of the Court of Appeals is

Reversed.

Mr. Justice BLACKMUN, with whom Mr. Justice BRENNAN and Mr. Justice MARSHALL join, dissenting.

…It might be argued that it really makes little difference how this case, now that it is here, is decided. The Court's holding gives plea bargaining full sway despite vindictiveness. A contrary result, however, merely would prompt the aggressive prosecutor to bring the greater charge initially in every case, and only thereafter to bargain. The consequences to the accused would still be adverse, for then he would bargain against a greater charge, face the likelihood of increased bail, and run the risk that the court would be less inclined to accept a bargained plea. Nonetheless, it is far preferable to hold the prosecution to the charge it was originally content to bring and to justify in the eyes of its public.

[Blackmun added in a footnote:] That prosecutors, without saying so, may sometimes bring charges more serious than they think appropriate for the ultimate disposition of a case, in order to gain bargaining leverage with a defendant, does not add support to today's decision, for this Court, in its approval of the advantages to be gained from plea negotiations, has never openly sanctioned such deliberate overcharging or taken such a cynical view of the bargaining process. Normally, of course, it is impossible to show that this is what the prosecutor is doing, and the courts necessarily have deferred to the prosecutor's exercise of discretion in initial charging decisions.

Even if overcharging is to be sanctioned, there are strong reasons of fairness why the charges should be presented at the beginning of the bargaining process, rather than as a filliped threat at the end. First, it means that a prosecutor is required to reach a charging decision without any knowledge of the particular defendant's willingness to plead guilty; hence the defendant who truly believes himself to be innocent, and wishes for that reason to go to trial, is not likely to be subject to quite such a devastating gamble since the prosecutor has fixed the incentives for the average case.

Second, it is healthful to keep charging practices visible to the general public, so that political bodies can judge whether the policy being followed is a fair one. Visibility is enhanced if the prosecutor is required to lay his cards on the table with an indictment of public record at the beginning of the bargaining process, rather than making use of unrecorded verbal warnings of more serious indictments yet to come.

Finally, I would question whether it is fair to pressure defendants to plead guilty by threat of reindictment on an enhanced charge for the same conduct when the defendant has no way of knowing whether the prosecutor would indeed be entitled to bring him to trial on the enhanced charge. Here, though there is no dispute that respondent met the then-current definition of a habitual offender under Kentucky law, it is conceivable that a properly instructed Kentucky grand jury, in response to the same considerations that ultimately moved the Kentucky Legislature to amend the habitual offender statute, would have refused to subject respondent to such an onerous penalty for his forgery charge. There is no indication in the record that, once the new indictment was obtained, respondent was given another chance to plead guilty to the forged check charge in exchange for a five-year sentence.

Mr. Justice POWELL, dissenting.

Although I agree with much of the Court's opinion, I am not satisfied that the result in this case is just or that the conduct of the plea bargaining met the requirements of due process.

… It seems to me that the question to be asked under the circumstances is whether the prosecutor reasonably might have charged respondent under the Habitual Criminal Act in the first place. The deference that courts properly accord the exercise of a prosecutor's discretion perhaps would foreclose judicial criticism if the prosecutor originally had sought an indictment under that Act, as unreasonable as it would have seemed. But here the prosecutor evidently made a reasonable, responsible judgment not to subject an individual to a mandatory life sentence when his only new offense had societal implications as limited as those accompanying the uttering of a single $88 forged check and when the circumstances of his prior convictions confirmed the

inappropriateness of applying the habitual criminal statute. I think it may be inferred that the prosecutor himself deemed it unreasonable and not in the public interest to put this defendant in jeopardy of a sentence of life imprisonment.

There may be situations in which a prosecutor would be fully justified in seeking a fresh indictment for a more serious offense. The most plausible justification might be that it would have been reasonable and in the public interest initially to have charged the defendant with the greater offense. In most cases a court could not know why the harsher indictment was sought, and an inquiry into the prosecutor's motive would neither be indicated nor likely to be fruitful. In those cases, I would agree with the majority that the situation would not differ materially from one in which the higher charge was brought at the outset.

But this is not such a case. Here, any inquiry into the prosecutor's purpose is made unnecessary by his candid acknowledgment that he threatened to procure and in fact procured the habitual criminal indictment because of respondent's insistence on exercising his constitutional rights….

The plea-bargaining process, as recognized by this Court, is essential to the functioning of the criminal-justice system. It normally affords genuine benefits to defendants as well as to society. And if the system is to work effectively, prosecutors must be accorded the widest discretion, within constitutional limits, in conducting bargaining. This is especially true when a defendant is represented by counsel and presumably is fully advised of his rights. Only in the most exceptional case should a court conclude that the scales of the bargaining are so unevenly balanced as to arouse suspicion. In this case, the prosecutor's actions denied respondent due process because their admitted purpose was to discourage and then to penalize with unique severity his exercise of constitutional rights. Implementation of a strategy calculated solely to deter the exercise of constitutional rights is not a constitutionally permissible exercise of discretion. I would affirm the opinion of the Court of Appeals on the facts of this case.

Check Your Understanding (4-3)

The original version of this chapter contained H5P content. You may want to remove or replace this element.

Notes and questions on *Bordenkircher v. Hayes*

1. A guilty plea is a waiver of the defendant's right to a trial. It relieves the prosecution of the burden of convincing a factfinder that the defendant is guilty. About 97% of criminal convictions in the federal system, and about 94% of state convictions, are the product of guilty pleas. These numbers have led the Supreme Court to observe, "[C]riminal justice today is for the most part a system of pleas, not a system of trials." *Laflerv. Cooper*, 566 U.S. 156 (2012). In the federal system, guilty pleas are not only a large portion of convictions, but also a large portion of all cases: in 2018, about 90% of all federal defendants pled guilty. See John Gramlich, *Only 2% of Federal Defendants Go To Trial, and Most Who Do Are Found Guilty* (Pew Research Center, June 11, 2019). Because it involved a guilty plea, *Hayes* is far more representative of criminal cases than the many appellate opinions in this book that follow a bench or jury trial.
2. A guilty plea is also a waiver of the defendant's constitutional right against self-incrimination and the right to confront witnesses. The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself," and a guilty plea is a literal and direct act of self-incrimination. The general legal requirement for waivers of constitutional rights is that the waiver must be voluntary, knowing, and intelligent. But the courts' interpretations of "voluntary," "knowing," and "intelligent" vary depending on the context. The Supreme Court has made clear that the threat of a more severe sentence if one goes to trial does not render a plea involuntary. See *Brady v. United States*, 397 U.S. 742 (1970). In that case, Robert Brady was charged with the federal offense of kidnaping in 1959. At that time, the federal statute authorized the death penalty as a possible punishment for kidnaping, but only "if the verdict of the jury shall so recommend." (See 18 U.S.C. § 1201(a), reprinted in footnote 1 of the opinion.) This meant that a defendant could avoid the risk of a death sentence by pleading guilty. Robert Brady later argued that the possibility of a death sentence if he went to trial created so much pressure to plead guilty that his plea was involuntary, but the Court rejected his claim.
3. Are guilty pleas subject to specific criteria or conditions in order to be valid resolutions of a criminal case? Although "knowing" and "voluntary" are often listed as separate requirements, many courts treat a knowing plea—that is, one made after the defendant is duly informed of the charges against him and other key details of the case—as necessarily voluntary. See, e.g., *Wilson v. State*, 577 So.2d 394, 396-97 (Miss. 1991) ("A plea is voluntary if the defendant knows what the elements are of the charge against him including an understanding of the charge and its relation to him, what effect the plea will have, and what the possible sentence might be because of his plea."). The conception of voluntariness as a necessary implication of knowledge

often leads to what might be called a procedural approach to the validity of pleas, in the sense that pleas are treated as valid when certain procedures are followed. One typical requirement is a "plea colloquy," in which the defendant is addressed directly by the judge and asked if he understands certain aspects of the case. Federal Rule of Criminal Procedure 11 sets forth the guidelines for guilty pleas in the federal system, including the necessary components of the plea colloquy:

(a) Entering a Plea.

(1) In General. A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere. …

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) Advising and Questioning the Defendant. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

[various other sentencing considerations…]

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence; and

(O) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

(2) Ensuring That a Plea Is Voluntary. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

(3) Determining the Factual Basis for a Plea. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

(c) Plea Agreement Procedure.

(1) In General. An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(2) Disclosing a Plea Agreement. The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) Judicial Consideration of a Plea Agreement.

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

(B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request. …

F.R.C.P. 11. Notice that the federal rule requires the court to determine that there is "a factual basis" for the guilty plea. Most states have a similar "factual basis" requirement, at least as a matter of written guidelines for pleas. In practice, there is considerable evidence of "fictional pleas." Professor Thea Johnson describes a fictional plea as "a plea bargain agreement in which a defendant pleads guilty to a crime he did not commit, with the consent and knowledge of multiple actors in the criminal justice system." Thea Johnson, *Fictional Pleas*, 94 Ind. L.J. 855, 857 (2019). Like other guilty pleas, a fictional plea may be a way for a defendant to obtain a more favorable outcome than would otherwise be available.

4. Note 2 above described the Supreme Court's approach to voluntariness in *Brady v. United States* (1970); the *Brady* Court rejected the defendant's argument that the fact that he could be sentenced to death if he went to trial, but not if he pled guilty, rendered his guilty plea involuntary. In *Brady*, the different penalties were determined by the applicable federal kidnapping statute. *Hayes*, decided several years after *Brady*, involved a slightly different situation in which the prosecutor could alter the potential sentence by choosing to charge under one statute rather than another. When a defendant who exercises the right to trial faces a more severe sentence than one who pleads guilty, commentators often characterize the situation as a "trial penalty," or a "plea discount." Whether penalty or discount is the better characterization depends in part on one's view of the appropriate baseline. Do we assume each defendant will be sentenced to the harshest available penalty, in which case anything less is a discount? Or do we assume that most defendants will be sentenced to something less than maximum, in which case more severe sentences for those who go to trial does seem to punish the choice to go to trial? Whatever the best name for the practice, the *Hayes* Court found the imposition of a more severe sentence on a defendant who refused to plead guilty to be acceptable, in part because the Court characterized plea bargaining as a "give-and-take negotiation" in which "the prosecution and defense … possess relatively equal bargaining power." In sharp contrast to the Supreme Court's view of plea bargaining as a negotiation between equals, critics have characterized plea bargaining as coercive for decades. One memorable article compares plea bargaining to the medieval European use of judicially supervised torture to induce confessions. "There is, of course, a difference between having your limbs crushed if you refuse to confess, or suffering some extra years of imprisonment if you refuse to confess, but the difference is of degree, not kind. Plea bargaining, like torture, is coercive." John Langbein, *Torture and Plea Bargaining*, 46 U. Chi. L. Rev. 3, 12-13 (1978).
5. Consider Hayes in relation to the aspects of prosecutorial discretion that you studied in Chapter Three. When more than one statute is potentially applicable to a defendant's conduct, and when different statutes carry different penalties, what rules, if any, apply to the prosecutor's charging decision?
6. Ultimately, if there is a plausible chance that a prosecutor could prevail at a trial—at least, if the defendant believes there is a plausible chance the prosecutor could prevail—then there exists a very strong incentive for the defendant to plead guilty. This incentive is especially powerful if the prosecutor can both raise the prospect of charging a more severe offense and offer an opportunity to secure a lesser penalty by pleading to a lesser offense. The charging decisions of a prosecutor (themselves made possible by earlier criminalization decisions by a legislature) can create sufficiently strong pressures to plead guilty that the adjudication decision becomes fairly insignificant in relation to the earlier criminalization and enforcement decisions. Here is one federal judge's description of the usual dynamics of plea negotiations:

   In the majority of criminal cases, a defense lawyer only meets her client when or shortly after the client is arrested, so that, at the outset, she is at a considerable informational disadvantage to the prosecutor. If, as is very often the case … bail is set so high

that the client is detained, the defense lawyer has only modest opportunities, within … limited visiting hours and other arduous restrictions imposed by most jails, to interview her client and find out his version of the facts.

The prosecutor, by contrast, will typically have a full police report, complete with witness interviews and other evidence, shortly followed by grand jury testimony, forensic test reports, and follow-up investigations. While much of this may be one--sided and inaccurate … it not only gives the prosecutor a huge advantage over the defense counsel but also makes the prosecutor confident, maybe overconfident, of the strength of his case.

Against this background, the information-deprived defense lawyer, typically within a few days after the arrest, meets with the overconfident prosecutor, who makes clear that, unless the case can be promptly resolved by a plea bargain, he intends to charge the defendant with the most severe offenses he can prove. Indeed, until late last year, federal prosecutors were under orders from a series of attorney generals to charge the defendant with the most serious charges that could be proved—unless, of course, the defendant was willing to enter into a plea bargain. If, however, the defendant wants to plead guilty, the prosecutor will offer him a considerably reduced charge—but only if the plea is agreed to promptly (thus saving the prosecutor valuable resources). Otherwise, he will charge the maximum, and, while he will not close the door to any later plea bargain, it will be to a higher-level offense than the one offered at the outset of the case.

In this typical situation, the prosecutor has all the advantages. He knows a lot about the case (and, as noted, probably feels more confident about it than he should, since he has only heard from one side), whereas the defense lawyer knows very little. Furthermore, the prosecutor controls the decision to charge the defendant with a crime. Indeed, the law of every US jurisdiction leaves this to the prosecutor's unfettered discretion…. But what really puts the prosecutor in the driver's seat is the fact that he —because of mandatory minimums, sentencing guidelines … and simply his ability to shape whatever charges are brought— can effectively dictate the sentence by how he publicly describes the offense. For example, the prosecutor can agree with the defense counsel in a federal narcotics case that, if there is a plea bargain, the defendant will only have to plead guilty to the personal sale of a few ounces of heroin, which carries no mandatory minimum and a guidelines range of less than two years; but if the defendant does not plead guilty, he will be charged with the drug conspiracy of which his sale was a small part, a conspiracy involving many kilograms of heroin, which could mean a ten-year mandatory minimum and a guidelines range of twenty years or more. Put another way, it is the prosecutor, not the judge, who effectively exercises the sentencing power, albeit cloaked as a charging decision.

The defense lawyer understands this fully, and so she recognizes that the best outcome for her client is likely to be an early plea bargain, while the prosecutor is still willing to accept a plea to a relatively low-level offense. Indeed, in 2012, the average sentence for federal narcotics defendants who entered into any kind of plea bargain was five years and four months, while the average sentence for defendants who went to trial was sixteen years.

Jed Rakoff, Why Innocent People Plead Guilty, N.Y. Rev. Books (Nov. 20, 2014).

7. The first paragraph of the Rakoff excerpt above mentions bail and pretrial detention, noting that pretrial detention often makes it difficult for defense attorneys to gather necessary information about their clients. Bail practices are related to guilty pleas in other ways: a number of empirical studies have found that defendants who are detained pretrial are both more likely to be convicted (including convictions at trial) and more likely to plead guilty. It appears to be the detention itself, and not other factors such as prior offenses or severity of the charges, that increases the likelihood of a guilty plea. See, e.g., Samuel Wiseman, *Bail and Mass Incarceration*, 53 Ga. L. Rev. 235, 250252 (2018) (citing and summarizing research). Critics have pointed out that money bail systems disproportionately impact poor people of color, who often must choose between an extended jail stay as they wait for trial or a quick guilty plea and the ensuing consequences of conviction. See, e.g., Jocelyn Simonson, *Bail Nullification*, 115 Mich. L. Rev. 585 (2017).
8. Paul Lewis Hayes, the defendant in the case above, was sentenced to life imprisonment for forging a check in the amount of $88.30. The life sentence was mandated by Kentucky's Habitual Criminal Act, a statute akin to the "Three Strikes" laws you may have heard discussed today. These laws provide for severe sentences when a defendant is convicted of a third (or greater) offense. The Kentucky law made a life sentence "mandatory" upon a third felony conviction, but it is important to identify the discretion – the enforcement choices – that led to Hayes's life sentence. The prosecutor could choose whether to seek an indictment under the Habitual Criminal Act, and he initially did not do so. The "mandatory" life sentence was thus a product of the prosecutor's choice, after Hayes refused to plead, to apply the Habitual Criminal Act.

9. At least one of Hayes's prior convictions was itself the product of a guilty plea obtained when Hayes was 17 years old; in that case Hayes had denied participating in the crime but agreed to plead guilty anyway. For more background on *Bordenkircherv. Hayes* and a discussion of the case's contribution to mass incarceration, see William J. Stuntz, Bordenkircher v. Hayes: *Plea Bargaining and the Decline of the Rule of Law*, in Criminal Procedure Stories (Carol Steiker ed., 2006). Stuntz gives some background on the racial dynamics of the case – Hayes was a Black man with prior convictions, and Kentucky in 1973 was "not a racially enlightened place." Id. at 355. At the federal appeals court, Judge Wade McCree Jr., the first Black judge on the Sixth Circuit Court of Appeals, agreed with Hayes that the prosecutor's choice to pursue a life sentence was "vindictive" and unconstitutional. Of course, the Supreme Court later reversed Judge McCree. More broadly, Stuntz argues that *Bordenkircherv. Hayes*helped contribute to mass incarceration:

   Even if Hayes's lawyers had made precisely the right arguments at precisely the right times, and even if the Court had heeded those arguments, ours would still be a society where criminal punishment is a massive industry, of a size and severity unknown anywhere else in the democratic world. But the Court's decision does bear some responsibility for the punitive turn America's criminal justice system has taken—for its harshness, for the sheer magnitude of our two-million-plus inmate population. Also for the inexorable rise of plea bargaining, now the means by which nearly nineteen of every twenty convicted felons reach that status. … As the prisoners have multiplied, laws have multiplied as well, adding more criminal prohibitions and harsher sentences to criminal codes. As those bodies of law have grown in size, they have shrunk in consequence. In the criminal justice system, the men and women who work in district attorneys' offices increasingly rule. The law no longer does. Anyone who wants to understand how that happened would do well to start by studying an obscure case from the 1970s in Lexington, Kentucky.

Stuntz, *Plea Bargaining and the Decline of the Rule of Law*, at 379.

Appellate Adjudication: Ways to Revise Criminalization, Enforcement, or Conviction Decisions

So far, this chapter has focused on adjudication decisions at the trial court level: the decision of a jury or a judge serving as fact-finder in a bench trial to convict a defendant, or the decision of a defendant to plead guilty and waive the right to a trial. But none of the judicial opinions you've read thus far come from trial courts; almost every case in this book comes from an appellate court. It may be a good time to think again about the role of appellate opinions in this book. As explained in Chapter One, most criminal cases don't go to an appellate court or produce an appellate opinion, but appellate court opinions make good teaching tools and are standard fare for law school courses. This book does not depart from the tradition of teaching law primarily through appellate opinions, but it does seek to put those opinions in context. Again, you should think of the cases in this book as case studies. They are not assigned to you because the words of appellate courts are the only or most important sources of criminal law; rather, appellate cases are selected and included here because each provides a concrete illustration of various aspects of criminal law in practice. Cases give us stories and real-world examples through which to learn criminal law—a concrete set of facts, a particular statute, specific pieces of evidence, and the actual decisions of various actors within the criminal legal system. Moreover, appellate opinions, more than many other important legal documents, often make explicit the arguments that lawyers have made on behalf of their clients. Making arguments about statutes, or about evidence, or about constitutional principles, is one of the key skills that you need to learn, and close analysis of appellate opinions can help you develop this skill.

There is an additional reason to read appellate cases: appellate adjudication—in that fraction of criminal cases where it does take place—is an important part of the legal process, in part because it gives appellate courts a chance to revise or reverse earlier criminalization, enforcement, or adjudication decisions. The cases in this book provide you with many different types of appellate arguments, but a few standard types of argument will recur often, such as sufficiency of evidence claims (as you saw in *Owens*), challenges to jury instructions (as in *State v. O'Brien*, discussed in the notes after *Winship*, above), constitutional challenges (as you have seen in *Winship*, *City of Chicago v. Morales*, *Lambert v. California*, and other cases); and statutory interpretation arguments (as you saw in *Morissette* in Chapter Two). Because crimes are defined by statute, statutory interpretation is an important skill in criminal law. The next case offers a much deeper look at statutory interpretation, and also illustrates the power of appellate courts in the criminal process.

[The key statutory provision is quoted at the beginning of the opinion below.]

John L. YATES, Petitioner

v.

UNITED STATES

Supreme Court of the United States
574 U.S. 528

Decided Feb. 25, 2015

Justice GINSBURG announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, Justice BREYER, and Justice SOTOMAYOR join.

John Yates, a commercial fisherman, caught undersized red grouper in federal waters in the Gulf of Mexico. To prevent federal authorities from confirming that he had harvested undersized fish, Yates ordered a crew member to toss the suspect catch into the sea. For this offense, he was charged with, and convicted of, violating 18 U.S.C. § 1519, which provides:

"Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both."

… Yates … maintains that fish are not trapped within the term "tangible object," as that term is used in § 1519.

Section 1519 was enacted as part of the Sarbanes–Oxley Act of 2002, legislation designed to protect investors and restore trust in financial markets following the collapse of Enron Corporation. A fish is no doubt an object that is tangible; fish can be seen, caught, and handled, and a catch, as this case illustrates, is vulnerable to destruction. But it would cut § 1519 loose from its financial-fraud mooring to hold that it encompasses any and all objects, whatever their size or significance, destroyed with obstructive intent. Mindful that in Sarbanes–Oxley, Congress trained its attention on corporate and accounting deception and coverups, we conclude that a matching construction of § 1519 is in order: A tangible object captured by § 1519, we hold, must be one used to record or preserve information.

I

On August 23, 2007, the *Miss Katie*, a commercial fishing boat, was six days into an expedition in the Gulf of Mexico. … Officer John Jones of the Florida Fish and Wildlife Conservation Commission decided to board the *Miss Katie* to check on the vessel's compliance with fishing rules. … Because he had been deputized as a federal agent…, Officer Jones had authority to enforce federal, as well as state, fishing laws.

Upon boarding the *Miss Katie*, Officer Jones noticed three red grouper that appeared to be undersized hanging from a hook on the deck. At the time, federal conservation regulations required immediate release of red grouper less than 20 inches long. Violation of those regulations is a civil offense punishable by a fine or fishing license suspension.

Suspecting that other undersized fish might be on board, Officer Jones proceeded to inspect the ship's catch…. Officer Jones ultimately determined that 72 fish fell short of the 20–inch mark. A fellow officer recorded the length of each of the undersized fish on a catch measurement verification form. With few exceptions, the measured fish were between 19 and 20 inches; … none were less than 18.75 inches. After separating the fish measuring below 20 inches from the rest of the catch by placing them in wooden crates, Officer Jones directed Yates to leave the fish … in the crates until the *Miss Katie* returned to port. Before departing, Officer Jones issued Yates a citation for possession of undersized fish.

Four days later, after the *Miss Katie* had docked… Officer Jones measured the fish contained in the wooden crates. This time, however, the measured fish, although still less than 20 inches, slightly exceeded the lengths recorded on board…. Under questioning, one of the crew members admitted that, at Yates's direction, he had thrown overboard the fish Officer Jones had measured at sea, and that he and Yates had replaced the tossed grouper with fish from the rest of the catch.

For reasons not disclosed in the record before us, more than 32 months passed before criminal charges were lodged against Yates. On May 5, 2010, he was indicted… By the time of the indictment, the minimum legal length for Gulf red grouper had been lowered from 20 inches to 18 inches. No measured fish in Yates's catch fell below that limit. The record does not reveal what civil penalty, if any, Yates received for his possession of fish undersized under the 2007 regulation.

Yates was tried on the criminal charges in August 2011 [and convicted. The court] sentenced Yates to imprisonment for 30 days, followed by supervised release for three years. For life, he will bear the stigma of having a federal felony conviction….

II

The Sarbanes–Oxley Act, all agree, was prompted by the exposure of Enron's massive accounting fraud and revelations that the company's outside auditor, Arthur Andersen LLP, had systematically destroyed potentially incriminating documents. The Government acknowledges that § 1519 was intended to prohibit, in particular, corporate document-shredding to hide evidence of financial wrongdoing….

In the Government's view, § 1519 extends beyond the principal evil motivating its passage. The words of § 1519, the Government argues, support reading the provision as a general ban on the spoliation of evidence, covering all physical items that might be relevant to any matter under federal investigation.

Yates urges a contextual reading of § 1519…. Section 1519, he maintains, targets not all manner of evidence, but records, documents, and tangible objects used to preserve them, *e.g.*, computers, servers, and other media on which information is stored….

A

The ordinary meaning of an "object" that is "tangible," as stated in dictionary definitions, is "a discrete … thing," Webster's Third New International Dictionary 1555 (2002), that "possess[es] physical form," Black's Law Dictionary 1683 (10th ed. 2014). From this premise, the Government concludes that "tangible object," as that term appears in § 1519, covers the waterfront, including fish from the sea.

Whether a statutory term is unambiguous, however, does not turn solely on dictionary definitions of its component words. Rather, "[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole." … Ordinarily, a word's usage accords with its dictionary definition. In law as in life, however, the same words, placed in different contexts, sometimes mean different things.

We have several times affirmed that identical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute…. "Where the subject matter to which the words refer is not the same in the several places where [the words] are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed." In short, although dictionary definitions of the words "tangible" and "object" bear consideration, they are not dispositive of the meaning of "tangible object" in § 1519.

Supporting a reading of "tangible object," as used in § 1519, in accord with dictionary definitions, the Government points to the appearance of that term in Federal Rule of Criminal Procedure 16. That Rule requires the prosecution to grant a defendant's request to inspect "tangible objects" within the Government's control that have utility for the defense. Rule 16's reference to "tangible objects" has been interpreted to include any physical evidence. Rule 16 is a discovery rule designed to protect defendants by compelling the prosecution to turn over to the defense evidence material to the charges at issue. In that context, a comprehensive construction of "tangible objects" is fitting. In contrast, § 1519 is a penal provision that refers to "tangible object" not in relation to a request for information relevant to a specific court proceeding, but rather in relation to federal investigations or proceedings of every kind, including those not yet begun. See *Commissioner v. National Carbide Corp.*, 167 F.2d 304, 306 (2nd Cir.1948) (Hand, J.) ("words are chameleons, which reflect the color of their environment"). Just as the context of Rule 16 supports giving "tangible object" a meaning as broad as its dictionary definition, the context of § 1519 tugs strongly in favor of a narrower reading.

B

Familiar interpretive guides aid our construction of the words "tangible object" as they appear in § 1519.

We note first § 1519's caption: "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy." That heading conveys no suggestion that the section prohibits spoliation of any and all physical evidence, however remote from records. …[T]he title of the section of the Sarbanes–Oxley Act in which § 1519 was placed refers to "Criminal penalties for altering documents," [and] the only other provision [in that section] is titled "Destruction of corporate audit records"…. While these

headings are not commanding, they supply cues that Congress did not intend "tangible object" in § 1519 to sweep within its reach physical objects of every kind, including things no one would describe as records, documents, or devices closely associated with them. If Congress indeed meant to make § 1519 an all-encompassing ban on the spoliation of evidence, as the dissent believes Congress did, one would have expected a clearer indication of that intent.

… The contemporaneous passage of § 1512(c)(1), [in another] section of the Sarbanes–Oxley Act … is also instructive. Section 1512(c)(1) provides: "Whoever corruptly … alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding … shall be fined under this title or imprisoned not more than 20 years, or both." … The Government argues, and Yates does not dispute, that § 1512(c)(1)'s reference to "other object" includes any and every physical object. But if §1519's reference to "tangible object" already included all physical objects, as the Government and the dissent contend, then Congress had no reason to enact § 1512(c)(1): Virtually any act that would violate § 1512(c)(1) no doubt would violate § 1519 as well. See *Marx v. General Revenue Corp*. (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.").

… The words immediately surrounding "tangible object" in § 1519—"falsifies, or makes a false entry in any record [or] document"—also cabin the contextual meaning of that term. As explained in *Gustafson v. AlloydCo.* (1995), we rely on the principle of *noscitur a sociis*—a word is known by the company it keeps—to "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." In *Gustafson*, we interpreted the word "communication" in § 2(10) of the Securities Act of 1933 to refer to a public communication, rather than any communication, because the word appeared in a list with other words, notably "notice, circular, [and] advertisement," making it "apparent that the list refer[red] to documents of wide dissemination." And we did so even though the list began with the word "any."

The *noscitur a sociis* canon operates in a similar manner here. "Tangible object" is the last in a list of terms that begins "any record [or] document." The term is therefore appropriately read to refer, not to any tangible object, but specifically to the subset of tangible objects involving records and documents, *i.e.*, objects used to record or preserve information….

This moderate interpretation of "tangible object" accords with the list of actions § 1519 proscribes. The section applies to anyone who "alters, destroys, mutilates, conceals, covers up, *falsifies*, or *makes a false entry in* any record, document, or tangible object" with the requisite obstructive intent. (Emphasis added.) The last two verbs, "falsif[y]" and "mak[e] a false entry in," typically take as grammatical objects records, documents, or things used to record or preserve information, such as logbooks or hard drives. See, *e.g.*, Black's Law Dictionary 720 (10th ed. 2014) (defining "falsify" as "[t]o make deceptive; to counterfeit, forge, or misrepresent; esp., to tamper with (a document, record, etc.)"). It would be unnatural, for example, to describe a killer's act of wiping his fingerprints from a gun as "falsifying" the murder weapon. But it would not be strange to refer to "falsifying" data stored on a hard drive as simply "falsifying" a hard drive….

A canon related to *noscitur a sociis*, *ejusdem generis*, counsels: "[W] here general words follow specific words in a statutory enumeration, the general words are [usually] construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." … Had Congress intended "tangible object" in § 1519 to be interpreted so generically as to capture physical objects as dissimilar as documents and fish, Congress would have had no reason to refer specifically to "record" or "document." The Government's unbounded reading of "tangible object" would render those words misleading surplusage.

Having used traditional tools of statutory interpretation to examine markers of congressional intent within the Sarbanes–Oxley Act and § 1519 itself, we are persuaded that an aggressive interpretation of "tangible object" must be rejected. It is highly improbable that Congress would have buried a general spoliation statute covering objects of any and every kind in a provision targeting fraud in financial recordkeeping.

The Government argues, however, that our inquiry would be incomplete if we failed to consider the origins of the phrase "record, document, or tangible object." Congress drew that phrase, the Government says, from a 1962 Model Penal Code (MPC) provision, and reform proposals based on that provision. The MPC provision and proposals prompted by it would have imposed liability on anyone who "alters, destroys, mutilates, conceals, or removes a record, document or thing." Those proscriptions were understood to refer to all physical evidence. See MPC § 241.7, Comment 3 (1980)… Accordingly, the Government reasons, and the dissent exuberantly agrees, Congress must have intended § 1519 to apply to the universe of physical evidence.

The inference is unwarranted. True, the 1962 MPC provision prohibited tampering with any kind of physical evidence. But unlike § 1519, the MPC provision did not prohibit actions that specifically relate to records, documents, and objects used to record or preserve information. The MPC provision also ranked the offense as a misdemeanor and limited liability to instances in which the actor "believ[es] that an official proceeding or investigation is pending or about to be instituted." Yates would have had scant reason to anticipate a felony prosecution, and certainly not one instituted at a time when even the smallest of the fish he caught came within the legal limit. A proposed federal offense in line with the MPC provision, advanced by a federal commission in 1971, was similarly qualified.

Section 1519 conspicuously lacks the limits built into the MPC provision and the federal proposal. It describes not a misdemeanor, but a felony punishable by up to 20 years in prison. And the section covers conduct intended to impede any federal investigation or proceeding, including one not even on the verge of commencement. Given these significant differences, the meaning of "record, document, or thing" in the MPC provision and a kindred proposal is not a reliable indicator of the meaning Congress assigned to "record, document, or tangible object" in § 1519. The MPC provision, in short, tells us neither "what Congress wrote [nor] what Congress wanted," concerning Yates's small fish as the subject of a federal felony prosecution.

C

Finally, if our recourse to traditional tools of statutory construction leaves any doubt about the meaning of "tangible object," as that term is used in § 1519, we would invoke the rule that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." That interpretative principle is relevant here, where the Government urges a reading of § 1519 that exposes individuals to 20–year prison sentences for tampering with *any* physical object that *might* have evidentiary value in *any* federal investigation into *any* offense, no matter whether the investigation is pending or merely contemplated, or whether the offense subject to investigation is criminal or civil. See *Liparotav. United States* (1985) ("Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability."). In determining the meaning of "tangible object" in § 1519, "it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite."

For the reasons stated, we resist reading § 1519 expansively to create a coverall spoliation of evidence statute, advisable as such a measure might be. Leaving that important decision to Congress, we hold that a "tangible object" within § 1519's compass is one used to record or preserve information. The judgment of the U.S. Court of Appeals for the Eleventh Circuit is therefore reversed, and the case is remanded for further proceedings.

It is so ordered.

[Opinion of Justice ALITO, concurring in the judgment, omitted.]

Justice KAGAN, with whom Justice SCALIA, Justice KENNEDY, and Justice THOMAS join, dissenting.

… This case raises the question whether the term "tangible object" means the same thing in § 1519 as it means in everyday language—any object capable of being touched. The answer should be easy: Yes. The term "tangible object" is broad, but clear…. I would apply the statute that Congress enacted and affirm the judgment below.

I

While the plurality starts its analysis with § 1519's heading, I would begin with § 1519's text. When Congress has not supplied a definition, we generally give a statutory term its ordinary meaning. As the plurality must acknowledge, the ordinary meaning of "tangible object" is "a discrete thing that possesses physical form." A fish is, of course, a discrete thing that possesses physical form. See generally Dr. Seuss, *One Fish Two Fish Red Fish Blue Fish* (1960). So the ordinary meaning of the term "tangible object" in § 1519, as no one here disputes, covers fish (including too-small red grouper).

That interpretation accords with endless uses of the term in statute and rule books…. Dozens of federal laws and rules of procedure (and hundreds of state enactments) include the term "tangible object" or its first cousin "tangible thing"—some in association with documents, others not….

That is not necessarily the end of the matter; I agree with the plurality (really, who doesn't?) that context matters in interpreting statutes. We do not "construe the meaning of statutory terms in a vacuum." Rather, we interpret particular words "in their context

and with a view to their place in the overall statutory scheme." And sometimes that means, as the plurality says, that the dictionary definition of a disputed term cannot control. But this is not such an occasion, for here the text and its context point the same way. Stepping back from the words "tangible object" provides only further evidence that Congress said what it meant and meant what it said.

Begin with the way the surrounding words in § 1519 reinforce the breadth of the term at issue. Section 1519 refers to "any" tangible object, thus indicating (in line with *that* word's plain meaning) a tangible object "of whatever kind." Webster's Third New International Dictionary 97 (2002). This Court has time and again recognized that "any" has "an expansive meaning," bringing within a statute's reach *all* types of the item (here, "tangible object") to which the law refers. And the adjacent laundry list of verbs in § 1519 ("alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry") further shows that Congress wrote a statute with a wide scope. Those words are supposed to ensure—just as "tangible object" is meant to—that § 1519 covers the whole world of evidence-tampering, in all its prodigious variety….

Still more, "tangible object" appears as part of a three-noun phrase (including also "records" and "documents") common to evidence-tampering laws and always understood to embrace things of all kinds. The Model Penal Code's evidence-tampering section, drafted more than 50 years ago, similarly prohibits a person from "alter[ing], destroy[ing], conceal[ing] or remov[ing] any *record, document or thing* " in an effort to thwart an official investigation or proceeding. The Code's commentary emphasizes that the offense described in that provision is "not limited to conduct that [alters] a written instrument." Rather, the language extends to "any physical object." Consistent with that statement—and, of course, with ordinary meaning—courts in the more than 15 States that have laws based on the Model Code's tampering provision apply them to all tangible objects, including drugs, guns, vehicles and … yes, animals.

… And legislative history, for those who care about it, puts extra icing on a cake already frosted. Section 1519, as the plurality notes, was enacted after the Enron Corporation's collapse, as part of the Sarbanes–Oxley Act of 2002. But the provision began its life in a separate bill, and the drafters emphasized that Enron was "only a case study exposing the shortcomings in our current laws" relating to both "corporate and criminal" fraud. The primary "loophole[ ]" Congress identified [in the law prior to Sarbanes-Oxley was that it] prohibited a person from inducing another to destroy "record[s], document[s], or other object[s]"—of every type—but not from doing so himself. Congress … enacted § 1519 to close that yawning gap…. And so § 1519 was written to do exactly that—"to apply broadly to any acts to destroy or fabricate physical evidence," as long as performed with the requisite intent. "When a person destroys evidence," the drafters explained, "overly technical legal distinctions should neither hinder nor prevent prosecution." Ah well: Congress, meet today's Court, which here invents just such a distinction with just such an effect. …

As Congress recognized in using a broad term, giving immunity to those who destroy non-documentary evidence has no sensible basis in penal policy. A person who hides a murder victim's body is no less culpable than one who burns the victim's diary. A fisherman, like John Yates, who dumps undersized fish to avoid a fine is no less blameworthy than one who shreds his vessel's catch log for the same reason. Congress thus treated both offenders in the same way. It understood, in enacting § 1519, that destroying evidence is destroying evidence, whether or not that evidence takes documentary form.

II

The plurality searches far and wide for anything—*anything*—to support its interpretation of § 1519. But its fishing expedition comes up empty.

The plurality's analysis starts with § 1519's title: "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy." That's already a sign something is amiss. I know of no other case in which we have *begun* our interpretation of a statute with the title, or relied on a title to override the law's clear terms. Instead, we have followed "the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text." …The reason for that "wise rule" is easy to see: A title is, almost necessarily, an abridgment.…

The plurality's [reliance] on the surplusage canon[] at least invokes a known tool of statutory construction—but it too comes to nothing. Says the plurality: If read naturally, § 1519 "would render superfluous" § 1512(c)(1) which Congress passed "as part of the same Act." But that is not so: Although the two provisions significantly overlap, each applies to conduct the other does not. … Overlap—even significant overlap—abounds in the criminal law. This Court has never thought that of such ordinary stuff surplusage is made. …

… Section 1512(c)(1) criminalizes the destruction of any "record, document, or other object"; § 1519 of any "record, document, or tangible object." On the plurality's view, one "object" is really an object, whereas the other is only an object that preserves or stores information. But "[t]he normal rule of statutory construction assumes that identical words used in different parts of the same act," passed at the same time, "are intended to have the same meaning." And that is especially true when the different provisions pertain to the same subject. The plurality doesn't—really, can't—explain why it instead interprets the same words used in two provisions of the same Act addressing the same basic problem to mean fundamentally different things.

Getting nowhere with surplusage, the plurality switches canons, hoping that *noscitur a sociis* and *ejusdem generis* will save it. The first of those related canons advises that words grouped in a list be given similar meanings. The second counsels that a general term following specific words embraces only things of a similar kind. According to the plurality, those Latin maxims change the English meaning of "tangible object" to only things, like records and documents, "used to record or preserve information." But understood as this Court always has, the canons have no such transformative effect on the workaday language Congress chose.

As an initial matter, this Court uses *noscitur a sociis* and *ejusdem generis* to resolve ambiguity, not create it. Those principles are "useful rule[s] of construction where words are of obscure or doubtful meaning." But when words have a clear definition, and all other contextual clues support that meaning, the canons cannot properly defeat Congress's decision to draft broad legislation.

Anyway, assigning "tangible object" its ordinary meaning comports with *noscitur a sociis* and *ejusdem generis* when applied, as they should be, with attention to § 1519's subject and purpose. Those canons require identifying a common trait that links all the words in a statutory phrase. In responding to that demand, the plurality characterizes records and documents as things that preserve information—and so they are. But just as much, they are things that provide information, and thus potentially serve as evidence relevant to matters under review. And in a statute pertaining to obstruction of federal investigations, that evidentiary function comes to the fore. The destruction of records and documents prevents law enforcement agents from gathering facts relevant to official inquiries. And so too does the destruction of tangible objects—of whatever kind. Whether the item is a fisherman's ledger or an undersized fish, throwing it overboard has the identical effect on the administration of justice. For purposes of § 1519, records, documents, and (all) tangible objects are therefore alike….

Finally, when all else fails, the plurality invokes the rule of lenity. But even in its most robust form, that rule only kicks in when, "after all legitimate tools of interpretation have been exhausted, 'a reasonable doubt persists' regarding whether Congress has made the defendant's conduct a federal crime." No such doubt lingers here. The plurality points to the breadth of § 1519 as though breadth were equivalent to ambiguity. It is not. Section 1519 *is* very broad. It is also very clear. Every traditional tool of statutory interpretation points in the same direction, toward "object" meaning object. Lenity offers no proper refuge from that straightforward (even though capacious) construction.

III

If none of the traditional tools of statutory interpretation can produce today's result, then what accounts for it? The plurality offers a clue when it emphasizes the disproportionate penalties § 1519 imposes if the law is read broadly. Section 1519, the plurality objects, would then "expose[ ] individuals to 20–year prison sentences for tampering with *any* physical object that *might* have evidentiary value in *any* federal investigation into *any* offense." That brings to the surface the real issue: overcriminalization and excessive punishment in the U.S. Code.

Now as to this statute, I think the plurality somewhat—though only somewhat—exaggerates the matter. The plurality omits from its description of § 1519 the requirement that a person act "knowingly" and with "the intent to impede, obstruct, or influence" federal law enforcement. And in highlighting § 1519's maximum penalty, the plurality glosses over the absence of any prescribed minimum. (Let's not forget that Yates's sentence was not 20 years, but 30 days.) Congress presumably enacts laws with high maximums and no minimums when it thinks the prohibited conduct may run the gamut from major to minor. That is assuredly true of acts obstructing justice. Compare this case with the following, all of which properly come within, but now fall outside, § 1519: *United States v. McRae* (5th Cir. 2012) (burning human body to thwart murder investigation); *United States v. Maury* (3rd Cir. 2012) (altering cement mixer to impede inquiry into amputation of employee's fingers); *United States v. Natal* (D.Conn., Aug. 7, 2014) (repainting van to cover up evidence of fatal arson). Most district judges, as Congress knows, will recognize differences between such cases and prosecutions like this one, and will try to make the punishment fit the crime. Still and all, I tend to think, for the reasons the plurality gives, that § 1519 is a bad law—too broad and undifferentiated, with too-high maximum penalties, which give

prosecutors too much leverage and sentencers too much discretion. And I'd go further: In those ways, § 1519 is unfortunately not an outlier, but an emblem of a deeper pathology in the federal criminal code.

But whatever the wisdom or folly of § 1519, this Court does not get to rewrite the law. "Resolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress." If judges disagree with Congress's choice, we are perfectly entitled to say so—in lectures, in law review articles, and even in dicta. But we are not entitled to replace the statute Congress enacted with an alternative of our own design.

I respectfully dissent.

Check Your Understanding (4-4)

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Notes and questions on *Yates*

1. The Supreme Court's opinion focuses on 18 U.S.C. § 1519, but Yates was also charged and convicted with a violation of another federal statute, 18 U.S.C. § 2232(a), which criminalizes destruction of property to prevent a seizure and authorizes a maximum penalty of five years. The § 2232(a) conviction was not part of the appeal to the Supreme Court. Why might enforcement officials have chosen to charge both offenses? Why might Yates have appealed only the § 1519 conviction?
2. "A fish is no doubt an object that is tangible," Justice Ginsburg writes for the plurality, but the Court concludes that a fish is not "[a] tangible object captured by § 1519" (emphasis added). That is, "tangible object" within the statute may not have the same meaning that the phrase would have outside of the specific statutory context. Or, as put by Judge Learned Hand and quoted by the *Yates* plurality, "words are chameleons, which reflect the color of their environment."
3. Because words are chameleons, they need to be interpreted. We first considered statutory interpretation when we were considering criminalization decisions in Chapter Two. Recall the Supreme Court's analysis of the federal knowing conversion statute in *Morissette v. United States*. Through statutory interpretation, appellate courts participate in criminalization decisions (because they decide what types of conduct are covered by a given statute), enforcement decisions (because they decide whether a statute applies to a particular defendant), and adjudication decisions (because the reviewing court has the power to reverse a conviction on the ground that the initial decision to convict was based on an incorrect interpretation of the statute).But notice: appellate courts are not the only actors that engage in statutory interpretation. Long before this case reached the Supreme Court, a federal prosecutor had to decide that the Sarbanes-Oxley Act, which was indeed passed to address corporate fraud after the collapse of Enron, was also applicable to a fisherman who discarded undersized fish.That is, statutory interpretation is often part of an enforcement decision. When you consider whether a given statute might apply to a particular defendant's conduct, you should think about the different ways the statute might be interpretedby enforcement officials, defense attorneys, and (eventually) a court. How might a prosecutor interpret it to apply to the defendant's conduct? Is there a different plausible interpretation that a defense lawyer might urge, one that would make the statute inapplicable to the defendant?
4. Both the plurality and dissenting opinions refer to "traditional tools of statutory construction." What are these tools of construction? You should identify the various principles or canons applied throughout the case, and try to be sure you understand each one. These "tools" will be hammers, screwdrivers, and wrenches that you may need as you analyze a statute and construct your own arguments about what the statute means. Among the tools to consider: *noscitur a sociis*, *ejusdem generis*, ordinary meaning, surplusage, and legislative history.
5. Justice Kagan says (twice! In Part I, and again in Part II of her dissent) that the plurality "starts" or "begins" its analysis with the title of § 1519—with the brief title of the section of the statute. To Kagan, this initial focus on the title is a mistake, because statutory interpretation should begin with the text of the operative portion of the statute. But look again at the plurality opinion. The discussion of the title, or "caption," of 1519 comes in Part II.B of the plurality opinion, *after*the plurality has discussed the "ordinary meaning" of the phrase "tangible object" in Part II.A. Did the plurality reorganize its opinion after seeing a preliminary draft of Justice Kagan's dissent? Or did Justice Kagan just not notice that the plurality did, in fact, discuss the plain language of § 1519 before discussing the title or caption? It's difficult to know, but either way, this contradiction should remind us that judicial opinions are the work of human beings, crafted to persuade their readers of the rightness of their conclusions. Keep this in mind as you read appellate opinions. All judges, even the most brilliant judges in the country, are human beings,

and the proclamations of appellate courts should not be mistaken for the mechanical product of an impersonal, extra-human adjudicator.

6. Consider Part III of Justice Kagan's dissent carefully. She says that she agrees with the plurality that § 1519 is "a bad law," and "an emblem of a deeper pathology within the federal criminal code." What is this pathology, and why doesn't Justice Kagan think the Court can do anything about it? (But also, compare Part III of Kagan's dissent to the last paragraph of Part I. In Part I of the dissent, does Kagan suggest that § 1519 is a bad law, or a necessary and wise one?)

Key Decisions and Key Arguments

You have now looked closely at three types of decisions that are important to criminal law: decisions to criminalize conduct, decisions to enforce a statute against a particular person, and decisions to convict (or acquit) a defendant at the adjudication stage. You should be able to see all of these types of decisions at work in the cases you read in the remainder of the book. Now that you know the key types of decisions that public officials must make to convict someone of a crime, it may be useful to begin thinking explicitly about types of arguments that lawyers make to try to influence those decisions.

Start with the prosecutor, who is both a public official empowered to make enforcement decisions and also a lawyer who must make arguments to courts. At the most basic level, the prosecutor must argue that the evidence presented establishes proof of each element of any offense charged. Of course, to make this argument, the prosecutor must have an interpretation of the relevant statute and an argument about what elements are included within the statute. Sometimes, the elements will be clear and uncontested; at other times, the prosecution may advance a more novel or controversial reading of a statute.

Now consider defense arguments. So far, you have seen a few cases involving what might be called "failure of proof" arguments, and also cases involving constitutional challenges. A failure of proof argument is a claim that the prosecution has not met its burden to prove each element of the crime beyond a reasonable doubt. A failure of proof argument could focus on the sufficiency of the evidence, on the correct interpretation of the statute, or both. In *Owens* in this chapter, the defense argued that the drunk driving statute, properly interpreted, required proof of driving on public roads, and then the defense argued that the prosecution had not introduced sufficient evidence that the defendant had actually driven on a public road while intoxicated. Failure of proof arguments sometimes are framed as challenges to jury instructions, as in *Morissette v. United States*. The defense argued that the federal knowing conversion statute, properly interpreted, required proof that the defendant knew he was taking property that belonged to someone else. The defense then argued that since Morissette's jury had not been instructed properly about the mental state elements of the offense, the jury's decision to convict was not legally sound – the jury had not determined that the prosecution had proven all relevant elements (since the jury did not know all the relevant elements).

You have also read several cases in which the defense does not focus on the elements of the charged offense, but instead makes an argument that the criminalization, enforcement, or adjudication decisions made in his case violate some aspect of the federal constitution. For example, in *Lambert v. California*, the defense argued that to criminalize inaction of malum prohibitum conduct (failure to register), without requiring knowledge of a duty to act, was a violation of the Due Process Clause of the Fourteenth Amendment. In *City of Chicago v. Morales*, the defendants challenged both criminalization and enforcement decisions, arguing that the city of Chicago had enacted a statute that was so broad that it gave enforcement officials unconstitutionally wide discretion. In *United States v. Armstrong*, the defense argued that prosecutors had selected Armstrong for prosecution on the basis of his race, in violation of the Equal Protection Clause of the federal constitution. And in *Winship* in this chapter, the defense argued that the New York state juvenile court had reached its adjudication decision in violation of the Due Process Clause, since it had used a preponderance of the evidence standard rather than proof beyond a reasonable doubt.

Of course, each side needs to respond to the arguments of the other side. Once the defense raises constitutional arguments, the prosecution will need to respond to them.

In the next chapters, you will encounter another type of defense argument: the affirmative defense. Criminal law includes some doctrines, such as self-defense and insanity, that permit a defendant to concede that evidence establishes the elements of the charged offense, but argue against conviction nonetheless. These doctrines are called affirmative defenses, and we'll explore them in more detail in later chapters.

For now, your goal should be to begin thinking about the types of arguments lawyers make to influence legal decision-makers – including prosecutors, trial courts, juries, and appellate courts. Think about the types of arguments, and how different arguments

might be combined. Examples of defense arguments from the cases you've read:

- Given a correct interpretation of the relevant statute, the jury was not properly instructed and thus the prosecution cannot show that it met its burden of proof. (*Morissette*)
- Given a correct interpretation of the relevant statute, the evidence presented to the fact-finder was insufficient to prove all elements beyond a reasonable doubt. (*Owens*; *Yates*)
- The enforcement decisions of the prosecutor violated a constitutional right. (*Cissell*; *Armstrong*; *Bordenkircherv. Hayes*) (But note that the defense claim was not successful in any of these particular cases.)

As a lawyer, you'll need to make arguments on behalf of your client – and also, anticipate the arguments likely to be made by the other side. To develop this skill, it's important to become familiar with typical categories of argument.

End of Chapter Review

Check Your Understanding (4-5)

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1.5: Property Crimes

Introduction

The first four chapters of this book have offered an overview of how criminal law works. They have examined a human practice in which written texts are used to express, guide, authorize, or constrain decisions to classify and condemn certain acts, and certain people, as criminal. Our coverage of the basic structure and operation of criminal law has not, so far, focused on any single type of criminal offense. This chapter and the next two do focus on specific categories of offenses. Before discussing property crimes and the reasons to study them, it may help to take note of the criminal offenses that were charged in the cases you've read so far:

- *Commonwealth v. Mochan*: misdemeanor injury to public morality (harassing telephone calls)
- *Commonwealth v. Copenhaver*: driving while intoxicated and drug offenses (after traffic stop for expired registration)
- *Morissette v. United States*: knowing conversion of government property (a kind of theft)
- *State v. Alvarado*: possessing contraband in prison
- *Lambert v. California*: failure to register as felon
- *People v. Kellogg*: public intoxication
- *City of Chicago v. Morales*: gang loitering
- *Inmates of Attica v. Rockefeller*: [no charges; this was a civil lawsuit seeking to compel prosecutors to charge prison officials with assault, homicide, and civil rights violations]
- *State v. Cissell*: failure to pay child support
- *United States v. Armstrong*: drug offenses
- In re *Winship*: juvenile equivalent of larceny (theft)
- *Owens v. Maryland*: driving while intoxicated
- *Bordenkircher v. Hayes*: check forgery
- *Yates v. United States*: concealing a tangible object related to government investigation

The cases listed above were selected to illustrate the process of criminalization, enforcement, and adjudication; they were not selected on the basis of the types of crimes that were charged. All the same, these cases have offered a useful sampling of activities that are frequently classified as criminal: the possession or distribution of drugs; taking property; risky activities (drunk driving); regulatory violations (failure to register); and, in just one of the above cases, physical violence. Most states organize their criminal codes into categories defined by the type of prohibited conduct: Offenses Against Property; Offenses Against the Person; Offenses Against Public Administration; Offenses Against Public Order; Offenses Against Public Health, Safety, and Morals; and so on. States do not always use the same labels or classify particular offenses under the same headings, but you will see some common patterns if you browse the tables of contents of a few state criminal codes, which is easy to do:

- Kansas: https://www.ksrevisor.org/statutes/ksa_ch21.html
- New York: https://www.nysenate.gov/legislation/laws/PEN/P3
- Ohio: https://codes.ohio.gov/ohio-revised-code/title-29
- Pennsylvania: https://www.legis.state.pa.us/WU01/LI/LI/CT/HTM/18/18.HTM
- Texas: https://statutes.capitol.texas.gov/?link=PE

Most states post their codes online, so you can probably find yours easily even if it is not listed above. Browsing penal codes can help you gain a sense of the usual structure and content of codes, but it should also reinforce this point: you should not think of learning criminal law as simply a matter of learning the definitions of offenses. If someone wants to know the exact definition of burglary in Texas (to take one example), they can find it online relatively easily. As a lawyer, the value you bring to your clients will not come from your ability to recite the elements of any given statute, or even from your ability to describe typical patterns of burglary definitions—though it is indeed useful to be familiar with those patterns. Rather, your services as a lawyer will be valuable if you understand how the criminal system works and how to help your clients navigate through it. You will need to understand the key decisions to be made and the texts that will matter to those decisions, and you will need to be able to make persuasive arguments to the relevant decisionmakers. With that in mind, this chapter has two broad goals: it seeks to teach the basic components and usual definitions of property crimes, and it aims to use this category of offenses to expand and reinforce your broader understanding of how criminal law works.

Property crimes are, roughly, crimes that involve some sort of misappropriation or misuse of property. That is only a rough description, we should emphasize. Many offense definitions include both a misappropriation of property and some other core element, such as the infliction or threat of physical harm to a person. Robbery (usually defined as theft by use or threat of force) is a clear example, and robbery is often classified as a violent crime or a "crime against the person" rather than a property crime. Arson is also sometimes classified as a violent crime, or placed in a separate category of "crimes against the habitation." For our purposes, though, "property crimes" is a useful label for an array of offenses that involve misappropriation or misuse of property. Robbery and arson are addressed in this chapter, rather than the next chapter on crimes against the person, because they both are based in part on concerns about property. But both robbery and arson could be – and often are – classified as "violent crimes" or crimes against the person. The next chapter explores in more detail the classification of crimes as violent.

Property crime is the focus here; what is property? That question is more difficult than it may first appear, and you're likely to tackle it in a separate course focused on property law. For now, recognize that property includes not just land, money, and objects but also, sometimes, information or other intangibles. Happily, most of the cases we consider in this chapter concern relatively easily recognizable forms of property, such as a car, a purse, or money. Recognize also that ideas about property and ownership change over time. American law once treated certain persons – enslaved persons – as themselves a form of property, and criminal law was used to enforce the property rights of slaveholders. Today, to use someone else's labor and then refuse to pay for it could itself be the crime of "wage theft." It should also be noted that the very existence of the United States as an independent, sovereign nation is premised on the claim that European settlers eventually became the legitimate owners of the land they occupied, notwithstanding the fact that indigenous peoples had previously lived on and used that land. This chapter will not delve deeply into these important issues or radical critiques of property itself (such as Proudhon's quip that "property is theft!"). Instead, for the most part this chapter will take for granted the determinations about what is property, and who is an owner, that have been made outside of criminal law. We will focus on the ways in which criminal law is used to enforce those determinations. But it is worth remembering that these determinations about property and owners are human judgments rather than natural truths. The idea that it is wrong to take property from an owner may seem natural and intuitive, but what constitutes property and who qualifies as an owner are political and legal questions.

Similarly, it is worth noting that there are deep moral and political questions about the distribution of property, and again criminal law operates mainly to enforce whatever answers to those questions have been reached in other arenas. Some fields of law or policy, such as tax law or social welfare spending programs, may openly embrace redistributive aims. The criminal law of property, in contrast, mostly aims to preserve existing distributions of property. Put differently, redistribution through self-help is disfavored by criminal law, as you'll see in this chapter.

As we will see, the criminalization of property offenses may be motivated by any of several different goals. A legislature may wish to protect owners' rights in possession and control of the things they own. But property crimes also often seem designed to protect somewhat more abstract interests in trust, security, or "civil order." Again, the interests that criminal law has seemingly sought to protect have evolved over time. In cases in this chapter, you will find both appeals to the past and efforts to break from it. In particular, you'll see the continuing influence of common law concepts even in a world of statutes, as courts often trace the development and evolution of property crimes in order to make sense of a modern-day statute.

Property crimes are a significant source of criminal convictions (about one-quarter of all felony convictions) and of prison sentences (about one-fifth of all prison sentences). In state prisons, where most incarcerated persons are held, property crimes are the second-most frequent source of a prison sentence, after offenses classified as "violent." Drug crimes, discussed in more detail in Chapter Seven, are the third most frequent type of conviction among persons held in state prison. (In the federal system, property crimes are not quite as important as a source of incarceration; violent offenses, drug offenses, and "public order" offenses all generate more federal prison sentences.) For more granular details on property crimes as a source of imprisonment in comparison to other types of crime, you can consult the Prison Policy Initiative's "Whole Pie" chart, referenced earlier in this book and available at https://www.prisonpolicy.org/reports/pie2020.html.

There's one other reason that property crimes are important: for better or worse, they're a particular favorite of the people who write multiple choice questions for the Multistate Bar Exam (MBE). The MBE often features several questions about larceny, embezzlement, burglary, and other property offenses, usually assuming common law definitions of those offenses rather than providing a specific statutory definition. You may wish to wait until you're actively preparing for a bar exam to memorize the

MBE's definitions of property offenses. But learning the basic contours of various property offenses now, including traditional common law definitions of those offenses, will certainly make bar preparation easier when that time comes.

By the end of this chapter, you should be able to analyze and apply statutory or common law definitions of a number of property crimes: larceny, embezzlement, "theft" more generally, burglary, trespass, robbery, and arson. You should be familiar with interpretive questions that arise frequently in relation to these offenses. And, as always, you should see how criminalization, enforcement, and adjudication decisions interact with one another. Look for ways in which changes to the criminalization of property offenses have shaped the enforcement and adjudication of these offenses.

Common Law to Consolidation: Larceny and Beyond

California Penal Code § 211. Robbery

Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.

California Penal Code § 484. Theft defined

a) Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. …

California Penal Code § 487. Grand theft defined

Grand theft is theft committed in any of the following cases:

a) When the money, labor, or real or personal property taken is of a value exceeding nine hundred fifty dollars ($950)…

The PEOPLE

v.

Demetrius Lamont WILLIAMS

Supreme Court of California
305 P.3d 1241

Aug. 26, 2013

KENNARD, J.

… On July 4, 2009, defendant Demetrius Lamont Williams entered a Walmart department store in Palmdale. Using either a MasterCard or a Visa payment card, which was re-encoded with a third party's credit card information, defendant bought a $200 Walmart gift card from a recently hired cashier, who was filling in for a cashier on a break. Defendant then tried to buy three more gift cards from the same cashier. At that point, the regular cashier came back and, after learning of the previous transaction, told defendant of Walmart's policy prohibiting the use of credit cards for purchases of gift cards. Defendant was permitted to keep the $200 gift card he had initially bought.

Defendant then went to a different cash register and again presented a re-encoded payment card to buy another $200 gift card. The transaction was observed by a Walmart security guard who, accompanied by another guard, asked defendant for the receipt and payment card used. Defendant complied. When told that the payment card's last four digits did not match those on the receipt, defendant produced two other re-encoded payment cards, but their numbers did not match those on the receipt either.

Defendant began walking toward the exit, followed by the two security guards. When defendant was told to stop, he produced yet another re-encoded payment card, but this card's last four digits also did not match those on the receipt. As defendant continued walking toward the exit, he pushed one of the guards, dropped some receipts, and started running away. After a brief struggle inside

the store, the guards wrestled defendant to the ground and handcuffed him. Recovered from defendant's possession were four payment cards issued by MasterCard and Visa. Also retrieved from defendant were several gift cards from Walmart and elsewhere.

Defendant was charged with four counts of second degree robbery (§ 211), one count of second degree burglary (§ 459), one count of fraudulent use of an access card (§ 484g), one count of grand theft (§ 487, subd. (a)), and three counts of forgery (§ 484i, subd. (b)), a total of 10 counts… Regarding the grand theft count, the court instructed the jury on grand theft by false pretenses. The jury found defendant guilty as charged, and the trial court sentenced him to a total prison term of 23 years eight months. The Court of Appeal reversed defendant's forgery convictions for insufficient evidence and [stayed] imposition of the burglary sentence… [but affirmed] defendant's robbery convictions.

As he did in the Court of Appeal, defendant here argues his robbery convictions should be reversed because robbery requires theft by larceny, whereas the theft he committed was by false pretenses. We agree.

II

Robbery is "the *felonious taking* of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." The term "felonious taking" originated in the common law and was later adopted in California's robbery statute. At issue here is the meaning of "felonious taking." Can that element of robbery be satisfied only by the crime of theft by larceny, as defendant argues? Or can it also be committed through theft by false pretenses, as the Attorney General contends?

To help us ascertain the meaning that the Legislature intended when it used the words "felonious taking" in California's robbery statute, we need to examine that statute's common law roots.

A. Crime of Larceny

California statutorily defines the crime of theft by larceny as the felonious stealing, taking, carrying, leading, or driving away of the personal property of another. That statutory definition reflects its English common law roots.

Unlike statutory law, whose authority rests upon an express declaration by a legislative body, the common law "consists of those principles and forms which grow out of the customs and habits of a people," enshrined in law by virtue of judicial decisions. Much of the law developed in English courts was later applied in England's American colonies and then, after independence, in this nation's states. As used in this opinion, the term "common law" denotes a "body of judge-made law … developed originally in England." And, as used here, the term "common law crime" means a "crime that [was] punishable under the common law, rather than by force of statute."

The common law defined larceny as the taking and carrying away of someone else's personal property, by trespass, with the intent to permanently deprive the owner of possession. Larceny was considered to be an offense less serious than robbery because of robbery's additional requirement of personal violence against, or intimidation of, the victim. Not that the distinction made any difference to the accused: Under the common law, robbery and larceny were felonies, and all felonies were punishable by death.

… By [the late 18th century], English society and its judiciary had become troubled by that excessively harsh punishment for theft crimes. This concern led the English courts to limit the scope of larceny. For instance, it was held not to be larceny—and not a crime at all—if someone in lawful possession of another's property misappropriated it for personal use (the later offense of embezzlement), or if someone acquired title to another's property by fraud (the later offense of false pretenses). These limitations to the law of larceny made sense in light of that crime's original purpose of preventing breaches of the peace; because embezzlement and false pretenses lacked larceny's requirement of a "trespass in the taking," they were viewed as less likely to result in violence.

Although common law larceny was in some ways narrowed to limit punishment by death, the scope of larceny was in other ways broadened to provide greater protection of private property. For instance, in 1799 an English court decision introduced the concept of "larceny by trick." Larceny by trick … involves taking possession of another's property by fraud.

[Again,] larceny requires a *trespassory* taking, which is a taking without the property owner's consent. Although a trespassory taking is not immediately evident when larceny occurs "by trick" because of the crime's fraudulent nature, English courts held that a property owner who is fraudulently induced to transfer possession of the property to another does not do so with free and genuine consent, so "the one who thus fraudulently obtains possession commits a trespass…."

The reasoning supporting larceny by trick's inclusion within the crime of larceny—that fraud vitiates the property owner's consent to the taking—was not extended, however, to cases involving the fraudulent transfer of title. Under the common law, if title was transferred, there was no trespass and hence no larceny. The theory was that once title to property was voluntarily transferred by its owner to another, the recipient owned the property and therefore could not be said to be trespassing upon it. … These subtle limitations on the common law crime of larceny spurred the British Parliament in the 18th century to create the separate statutory offenses of theft by false pretenses and embezzlement….

B. Crimes of Theft by False Pretenses and Embezzlement

… Britain's 18th century division of theft into the three separate crimes of larceny, false pretenses, and embezzlement made its way into the early criminal laws of the American states. That import has been widely criticized in this nation's legal community because of the seemingly arbitrary distinctions between the three offenses and the burden these distinctions have posed for prosecutors….

For instance, it was difficult at times to determine whether a defendant had acquired title to the property, or merely possession, a distinction separating theft by false pretenses from larceny by trick. It was similarly difficult at times to determine whether a defendant, clearly guilty of some theft offense, had committed embezzlement or larceny, as an 1867 Massachusetts case illustrates. There, a defendant was first indicted for larceny and acquitted; later, on the same facts, he was indicted for embezzlement and convicted; and thereafter, on appeal, his conviction was set aside on the ground that his offense was larceny, not embezzlement. *Com. v. O'Malley*, 97 Mass. 584 (1867).

In the early 20th century, many state legislatures, recognizing the burdens imposed on prosecutors by the separation of the three crimes of larceny, false pretenses, and embezzlement, consolidated those offenses into a single crime, usually called "theft." The California Legislature did so in 1927, by statutory amendment. In a 1954 decision, this court explained: "The purpose of the consolidation was to remove the technicalities that existed in the pleading and proof of these crimes at common law. Indictments and informations charging the crime of 'theft' can now simply allege an 'unlawful taking.' [Citations.] Juries need no longer be concerned with the technical differences between the several types of theft, and can return a general verdict of guilty if they find that an 'unlawful taking' has been proved [Citations.]. The elements of the several types of theft included within section 484 have not been changed, however, and a judgment of conviction of theft, based on a general verdict of guilty, can be sustained only if the evidence discloses the elements of one of the consolidated offenses." *People v. Ashley* (1954).

As we pointed out in *Ashley*, the California Legislature's consolidation of larceny, false pretenses, and embezzlement into the single crime of theft did not change the elements of those offenses….

C. Elements of Robbery, Larceny, and Theft by False Pretenses and Their Application Here

We now consider the issue here: whether robbery's element of "felonious taking" can be satisfied through theft by false pretenses, the type of theft defendant committed.

Robbery is "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." Reflected in that statutory definition are larceny's elements of "the taking of another's property, with the intent to steal and carry it away." The taking required in larceny, as in robbery, must be "felonious."

By adopting in the robbery statute the phrase "felonious taking" that was used in the common law with regard to both robbery and larceny, the California Legislature in all likelihood intended to attach to the statutory phrase the same meaning the phrase had under the common law.

…[A]ll larceny at common law was a felony, and thus the common law defined larceny as a "felonious taking." Because California's robbery statute uses the common law's phrase "felonious taking," and because at common law "felonious taking" was synonymous with larceny, we conclude that larceny is a necessary element of robbery….

Two differences in the crimes of larceny and theft by false pretenses tend to support our conclusion that only theft by larceny, not by false pretenses, can fulfill the "felonious taking" requirement of robbery.

First, *larceny* requires "asportation," which is a carrying away of stolen property. This element of larceny, although satisfied by only the slightest movement, continues until the perpetrator reaches a place of temporary safety. Asportation is what makes larceny a continuing offense. Because larceny is a continuing offense, a defendant who uses force or fear in an attempt to escape with property taken by larceny has committed robbery. Similarly, the Attorney General asserts that defendant committed robbery

because he shoved the Walmart security guards during his attempt to flee the store after acquiring the store gift cards through theft by false pretenses.

But *theft by false pretenses*, unlike larceny, has no requirement of asportation. The offense requires only that "(1) the defendant made a false pretense or representation to the owner of property; (2) with the intent to defraud the owner of that property; and (3) the owner transferred the property to the defendant in reliance on the representation." *People v. Wooten* (1996). The crime of theft by false pretenses ends at the moment title to the property is acquired, and thus cannot become robbery by the defendant's later use of force or fear. Here, when defendant shoved the store security guards, he was no longer engaged in the commission of theft because he had already acquired title to the Walmart gift cards; therefore, defendant did not commit robbery.

… We now consider another significant difference between larceny and theft by false pretenses. …[L]arceny requires a "trespassory taking," which is a taking without the property owner's consent. This element of larceny, like all its other elements, is incorporated into California's robbery statute. By contrast, theft by false pretenses involves the *consensual* transfer of possession as well as *title* of property; therefore, it cannot be committed by trespass. This is illustrated by the facts in a recent Court of Appeal decision, *People v. Beaver* (2010). There, the defendant staged an accident at his place of employment, a ski resort, to obtain medical expenses for a preexisting [knee injury]. The defendant was convicted of grand theft. The Court of Appeal reversed the conviction, holding that the jury was instructed on the incorrect type of theft—theft by larceny—and instead should have been instructed on theft by false pretenses. *Beaver* said: "The present matter did not involve a taking of property from another without his consent. [The ski resort] willingly paid for defendant's medical treatment on the false representation that [it] had caused defendant's injuries. This was theft by false pretenses, not larceny." The essence of *Beaver*'s holding is this: Because the ski resort consented to paying for the defendant's medical treatment, the defendant did not commit a trespassory taking, and hence did not commit larceny.

Here too defendant did not commit larceny. Walmart, through its store employees, consented to transferring title to the gift cards to defendant. Defendant acquired ownership of the gift cards through his false representation, on which Walmart relied, that he was using valid payment cards to purchase the gift cards. Only after discovering the fraud did the store seek to reclaim possession. Because a "felonious taking," as required [for robbery] must be *without the consent* of the property owner, or "against his will," and Walmart *consented* to the sale of the gift cards, defendant did not commit a *trespassory* (nonconsensual) taking, and hence did not commit robbery….

The dissent proposes a theory, not discussed in the parties' briefs, to bring defendant within the robbery statute…. The gist of the dissent's reasoning is this: Section 490a [of the California Penal Code] says any law or statute that refers to or mentions larceny or stealing must be construed as meaning "theft"; although the robbery statute does not expressly mention larceny or stealing, it refers to them indirectly through the words "felonious taking," which should be interpreted under § 490a as meaning "theft," a crime that includes theft by false pretenses. Therefore, the dissent concludes, the "felonious taking" element in the robbery statute encompasses defendant's conduct in this case.

The dissent's theory would require us to conclude that, by enacting § 490a, the Legislature intended to alter two of the substantive elements of robbery: asportation and a trespassory taking. But the 1927 legislation enacting § 490a and the theft consolidation statute (§ 484) left unchanged the elements of theft. We are not persuaded that the Legislature intended to alter the elements of *robbery*, to which § 490a makes no reference whatever, while also intending to leave intact the elements of *theft*, to which it explicitly refers. As this court said more than 80 years ago, "the essence of § 490a is simply to effect a change in nomenclature *without disturbing the substance of any law.*" *People v. Myers* (1929).

III

In resolving many complex legal issues, as Justice Oliver Wendell Holmes, Jr., observed, "a page of history is worth a volume of logic." To determine the meaning of the words "felonious taking" in our statutory definition of robbery, we have delved into the sources of this statutory definition and, in turn, into the history of the common law crime of larceny and the statutory crime of theft by false pretenses. This review has led us to conclude that the words "felonious taking" in the robbery definition were intended to refer only to theft committed by larceny and not to theft by false pretenses.

The logic and fairness of this conclusion may be open to question because a thief who uses force to resist capture may be equally culpable whether the theft was committed by larceny (for example, ordinary shoplifting) or by false pretenses (as occurred here).

Nevertheless, our task is simply to interpret and apply the laws as the Legislature has enacted them, not to revise or reform them to better reflect contemporary standards.

We reverse the Court of Appeal's judgment upholding defendant's four robbery convictions. Because other aspects of the Court of Appeal's decision may be affected by our reversal of defendant's robbery convictions, the matter is remanded to that court for further proceedings consistent with the views expressed in this opinion.

Dissenting opinion by BAXTER, J.

…[The majority's] reasoning and result contradict[] the legislative intent behind California's robbery and unified theft statutes. is in conflict with long-standing California jurisprudence, including several decisions of this court that have reached the opposite conclusion. And it is patently at odds with the important public policies served by the robbery statute. "Robbery violates the social interest in the *safety and security of the person* [robbed] as well as the social interest in the protection of property rights." Both interests are implicated when a thief enters a business establishment, steals property, and then uses force or fear against a robbery victim or victims while fleeing, regardless of the particular manner of theft employed. I respectfully dissent.

… At the same time as the 1927 consolidation of all common law forms of theft into a unified "theft" crime (§ 484), our Legislature also enacted this provision: "Wherever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall … be read and interpreted as if the word 'theft' were substituted therefor." (§ 490a).

Section 490a indicates the Legislature's intent that the different types of common law theft consolidated in § 484 are to be treated as the single crime of "theft" in California…

True, unlike the burglary statute, the robbery statute does not utilize either the term "larceny," or the term "stealing." Rather, it uses the broader phrase "felonious taking of personal property" to denote the taking element of robbery. Section 490a, however, states that any law or statute that "*refers to or mentions* larceny … *or stealing* " (italics added) should be read and interpreted as if the word "theft" were substituted. Thus, the statute need not specifically mention larceny or stealing; to simply refer to larceny or stealing is enough. A felonious taking *is* a taking done with the intent to steal another's property…

In short, the robbery statute *is* a statute that "refers to … larceny *or stealing*." (§ 490a, italics added.) That is because the "felonious taking" element of robbery *is* a taking done with the intent to steal another's property "against his will." Because § 490a directs that any law that "refers to … larceny or stealing" is to be read and interpreted as if the term "theft" was inserted therein, and because the robbery statute incorporates such a reference, albeit indirectly, the "felonious taking" element of robbery must be interpreted as synonymous with "theft." …Here, defendant's conduct in *stealing* gift cards from Walmart, although accomplished by false pretenses, plainly satisfied the felonious taking element of robbery.

The majority's analysis of the 18th century English common law roots of the various common law forms of theft … in support of its conclusion that the common law crime of theft by false pretenses is not a continuing form of theft, and cannot be transformed into robbery where force or fear is later used, overlooks the important remedial legislation that consolidated the common law forms of theft into the unified crime of "theft" in California….

I would affirm the judgment of the Court of Appeal.

Notes and questions on *People v. Williams*

1. *Williams* offers both an overview of common law theft offenses and an alternative statutory approach that is typical of many contemporary criminal codes. Note the multiple different offenses mentioned in the majority's discussion of the common law: larceny, robbery, theft by false pretenses, embezzlement, and larceny by trick. It may be helpful to identify the different elements of these offenses as they were typically defined at common law. To do so, it is useful to keep in mind a distinction between possession of property (having immediate control over it) and holding legal title to it (being recognized as the owner by law). Possession and ownership can coincide, but they can also diverge. If you've allowed me to borrow your car, I'm in temporary possession of it but I'm not the owner. The chart below captures the common law definitions of property offenses as

identified by the California court in *Williams*. Each of these offenses will be discussed in more detail later in this chapter, but comparing the definitions can help you get used to thinking of crimes in terms of their elements.

Larceny	◦ Taking (by trespass) ◦ Carrying away ◦ The property ◦ Of another ◦ With intent to permanently deprive the owner of possession
Robbery	◦ Larceny ◦ By force
False pretenses	◦ Acquiring title ◦ To the property ◦ Of another ◦ By fraud
Embezzlement	◦ While in possession ◦ Of the property ◦ of another, ◦ Converting that property to personal use ◦ By fraud
Larceny by trick	◦ Taking (by fraud, as a form of trespass) ◦ And carrying away ◦ The property ◦ Of another ◦ With intent to permanently deprive the owner of possession

2. According to the *Williams* court, larceny and related offenses emerged not primarily out of a concern to protect property rights, but rather with the "original purpose of preventing breaches of the peace." It was taking property in a way likely to produce violence or conflict that was criminalized; appropriation of property by fraud or secrecy was not initially seen to warrant criminal intervention. Today, criminal law is concerned with both force and fraud, and with the protection of property rights even when neither force nor fraud is deployed. Think about how and why societies have made different criminalization choices over the centuries. Both in the ancient past and here in the twenty-first century, people have disagreed about whether violence is categorically worse than deception. For example, after Bernie Madoff was convicted of fraud offenses involving over 64 billion dollars, one of the investors defrauded by Madoff invoked the ancient Italian poet Dante Aligheri, whose *Divine Comedy* famously imagines the descending circles of hell. According to Dante, those who commit fraud are subject to even more severe divine punishments than those who use violence. Though violence is certainly terrible, fraud was still more displeasing to God, since "the vice of fraud is man's alone." See Dante, *The Divine Comedy*; see also Burt Ross, *What I Told Madoff Today*, Daily Beast (June 29, 2009).
3. Common law larceny required both i) a taking (sometimes called "caption") by trespass, otherwise known as a taking without consent, and ii) "asportation," or the carrying away of the property. In most states, these somewhat archaic concepts have been replaced with the unified concept of "possession or control." For more details, see *State v. Donaldson*, the next case in this chapter.
4. At the beginning of Part III of its opinion, the *Williams*majority quotes Oliver Wendell Holmes, Jr.: "[A] page of history is worth a volume of logic." And the court then concedes that "the logic and fairness of [our] conclusion may be open to question…." Is the court sacrificing fairness unnecessarily in order to preserve dated and obscure legal concepts? Or is the reversal of Williams's robbery convictions a fair outcome after all? Is the court's decision dictated by earlier criminalization

decisions, and if so, which ones—common law decisions or legislative decisions? As you read the cases in this chapter, consider whether logic and history are in tension in theft law, and if so, which has prevailed.

Check Your Understanding (5-1)

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For the *Williams* majority (but not the dissent), common law categories and concepts continue to be relevant even for a modern theft statute. For a different assessment of the relevance of the common law, consider *State v. Donaldson*, below. It may be helpful first to consider the text of the Iowa statute applied in *Donaldson*, along with the text of the Model Penal Code provision on which the Iowa statute is based.

Iowa Code § 714.1. Theft defined

A person commits theft when the person does any of the following:
1. Takes possession or control of the property of another, or property in the possession of another, with the intent to deprive the other thereof.

Model Penal Code § 223.2 . Theft by unlawful taking or disposition

(1) **Movable Property.** A person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with purpose to deprive him thereof.

(2) **Immovable Property.** A person is guilty of theft if he unlawfully transfers immovable property of another or any interest therein with purpose to benefit himself or another not entitled thereto.

STATE of Iowa, Appellee

v.

Dean Lester DONALDSON, Appellant

Supreme Court of Iowa
663 N.W.2d 882

June 11, 2003

STREIT, Justice.

…At 1:50 a.m., a Sioux City police officer saw a van parked in front of Combined Pool & Spa with its sliding door partially open. The officer illuminated the van. As he walked towards the van, the brake lights flashed. Two men hotfooted across Highway 75. The officer gave chase, but was unable to find them. Upon returning to his squad car, the officer saw the steering column in the van had been forcibly removed and there were wires protruding from it. The radio was on and the “check engine” sign was lit on the console. Later, one of the men was found and identified as Dean Lester Donaldson.

Donaldson was charged with one count of second-degree theft as an habitual offender. Prior to the trial, Donaldson filed a motion to adjudicate law points arguing the facts did not support a charge of theft. Donaldson asserted because he never possessed the van, he could not be convicted of theft. Donaldson argued, at most, the facts supported a charge of attempted theft. However, Iowa does not recognize a separate crime of attempted theft. The State asserted Donaldson took possession of the van when he hot-wired it. The district court agreed with the State and denied Donaldson’s motion… After a trial, Donaldson was convicted of second-degree theft. Prior to sentencing Donaldson renewed his motion raising the same arguments in the original motion to adjudicate law points. The district court overruled the motion and sentenced Donaldson. Donaldson appeals.

…This appeal is limited to one main issue. We must determine whether the district court properly denied Donaldson’s motion for judgment of acquittal challenging the sufficiency of the facts to support a conviction of second-degree theft. The question is whether Donaldson possessed or controlled another’s van when he broke into it, dismantled the steering column, and manipulated

the ignition switch turning the radio on, lighting the "check engine" sign, and causing the brake lights to flash. Our review is for correction of errors of law.

…The State charged Donaldson with second-degree theft pursuant to Iowa Code § 714.1(1) [and with other offenses]. This statute provides "a person commits theft when" he or she "[t]akes possession or control of the property of another, or property in the possession of another, with the intent to deprive the other thereof." At the end of the State's case, Donaldson moved for a judgment of acquittal. He argued the State failed to prove the elements of theft…. Counsel argued the "starter must be engaged for there to be actual control over that vehicle." The court disagreed and overruled Donaldson's motion.

The Iowa theft statute is modeled after the Model Penal Code, with slight variation. Model Penal Code § 223.2. Our terms "possession or control" of another's property replace the common law larceny requirements of "caption" and "asportation." "Caption," or taking, occurred when the actor secured dominion over the property of another. The element of "asportation," or carrying away, was satisfied with even the most slight change in position of the stolen object. At common law, to prove a theft, the State had to show a defendant took the property of another, i.e., secured dominion over it, and carried the property away.

The asportation requirement was important at common law because if a defendant's actions fell short of causing the object of the theft to move, the defendant was guilty of attempt only. Because a completed larceny was generally a felony whereas attempt was a misdemeanor, significant differences in "procedure and punishment turned on the criminologically insignificant fact of slight movement of the object of theft." In modern criminal law, however, the penal consequences between attempt and a completed theft are so minimal that it has become less important to draw a bright line between the two actions. As such, the element of asportation is no longer necessary.

Iowa, like many other states following the Model Penal Code, has abandoned the common law asportation requirement. …The key to our statute is the words "possession or control." In determining the meaning of "possession" and "control," we look to the Model Penal Code for guidance as our statute is modeled after it. The Model Penal Code contemplates "control" of the object to begin when the defendant "use[s] it in a manner beyond his authority." The method of exerting control over the object of the theft is important only insofar as it "sheds light on the authority of the actor to behave as he did." Our statute replaces the common law element of "taking" with "possession." The Model Penal Code provides a person commits theft if he or she "unlawfully takes, or exercises unlawful control over" the property of another. A taking in this sense concerns whether the offender exerted control over the object "adverse to or usurpatory of the owner's dominion." That is, one possesses an object if he or she secures dominion over it. To summarize the above concepts, "possession or control" begins and a theft is completed when the actor secures dominion over the object or uses it in a manner beyond his authority.

Donaldson argues his conduct, at most, is sufficient to prove attempted theft, not a completed theft. We acknowledge the issue before us is complicated because "all theft partakes of the character of attempt." The line between attempt and a completed theft is a thin one. "The thief proposes to make the property his own more or less permanently; but he is nonetheless a thief if, shortly after he exerts his dominion over the property of another, he is prevented from making off with it."…

The question before us concerns whether the defendant possessed or controlled the object of the theft. The critical issue, as the statute dictates, is *not* whether the defendant used or operated the object of the theft. As to Donaldson's conduct, we must determine whether he exercised wrongful dominion or unauthorized control of the van. The judge instructed the jury on "possession" using the Iowa Criminal Jury Instructions.[1] Bearing in mind the definitions of "control" and "possession" as contemplated by the Model Penal Code, we turn to the facts.

The undisputed facts of the case [establish that] Donaldson entered a van owned by Combined Pool & Spa…. As the officer approached, Donaldson got out of the driver's side and ran away. The officer called after Donaldson, identified himself as a police officer, and ordered him to stop. Donaldson kept running. When the officer checked the van, he saw the steering column had been forcibly dismantled; there were wires hanging from the column. The ignition switch had been removed. The radio was operating. The "check engine" sign on the dashboard was lit. At trial, one of the officers testified Donaldson had engaged all of the electric systems. After turning on the electric accessory systems in the car, according to the officer, all Donaldson had left to do was engage the starter.

There is no evidence in the record to suggest Donaldson's tearing apart the steering column was intended for any purpose other than to deprive the owner of her possession of the van. Donaldson argues he did not possess or control the van because he did not have the "ability to readily move or remove" it. This, however, is not the test for possession or control. Because we have abandoned

the common law asportation requirement, movement or motion of the car is not essential to finding a defendant had possession or control of the car. Our theft statute does not state possession or control is tantamount to "operation" of the object of the theft. To interpret our statute in this manner is to restrict the definition of theft more narrowly than the legislature intended. Given a strict interpretation of the statute, the State only had to show Donaldson had control of the van, i.e., he had dominion over it in a manner inconsistent with his authority. We are unwilling to imply an "operation" requirement for certain kinds of property that are normally operated by its possessor.

The mere fact that Donaldson was interrupted by the police officer before he engaged the starter motor does not remove this case from the realm of a completed theft. It is not necessary that the engine was running and the van could have been moved. That is, technical operation of the van is not necessary to find Donaldson exercised wrongful dominion or unauthorized control over the van. … Certainly, Donaldson's acts were sufficient to set into motion the steps necessary to power the van. It was not necessary that the engine was actually running. Rather, at the moment Donaldson began to manipulate the electrical wires for the purpose of starting the engine, he exerted complete control over the vehicle.

In sum, the facts before us show Donaldson was using the van owned by another person. He had the power and intention at the given time to exercise unfettered dominion over the van. Donaldson was in a position to exclude all others from the van, for example, by locking it. No one else could have hot-wired the van or started it with a key while Donaldson had control over it. Moreover, he used the van without the owner's consent and in a manner beyond his authority. Donaldson entered the company's van around 1:30 in the morning. He tore apart the steering column. The ignition switch had been removed; wires protruded from the ignition. The brake lights flashed. The radio worked. The "check engine" sign was lit. When the officer approached the van, Donaldson got out of the driver's side and ran away. All of these facts together are sufficient to show Donaldson controlled the van within the meaning of § 714.1(1). As such, the trial court properly denied Donaldson's motion for judgment of acquittal. We affirm.

[The court noted in a footnote that in future theft prosecutions under 714.1, "the district court should sculpt its jury instructions using the concepts articulated in the Model Penal Code. The jury should be instructed a theft is completed when the defendant secures dominion over the object of the theft or uses it in a manner beyond his authority."]

Notes and questions on *State v. Donaldson*

1. In Chapter Seven, which covers gun and drug offenses, we will study the concept of "possession" in more detail. This case gives you a preview. The *Donaldson* court says that "possession" for purposes of property offenses should be defined differently than "possession" as that term is used in contraband offenses. What are the key differences between the different definitions of possession? Are the differences significant enough that Donaldson's conviction should have been reversed due to inadequate jury instructions? If not, why does the court advise the use of different instructions in future theft prosecutions?
2. In the second half of the twentieth century, inspired in part by the Model Penal Code, many U.S. jurisdictions consolidated the various narrowly defined property offenses that had existed at common law and created one new, broader offense called "theft." But in some states, like California, the old common law categories have continued to influence judicial interpretations of the new consolidated crime, as you saw in *People v. Williams*, above. In other states, including Iowa as illustrated by *Donaldson*, courts have viewed the consolidation of theft as a more substantial redefinition of property crimes. Had Dean Lester Donaldson "hot-wired" this van in California rather than Iowa, would he have been guilty of theft under Cal. Penal Code § 484?
3. A related question: does the Model Penal Code approach change the scope of property offenses? That is, is the same range of conduct treated as criminal under the common law definitions and the MPC, or does the MPC broaden (or narrow) the scope of liability for property offenses?
4. To help you assess the previous question, consider *Lee v. State*, 474 A.2d 537 (Ct. Sp. App. Md. 1984). *Lee* was a shoplifting case: the defendant put a bottle of liquor into his trousers in a store, was approached by an employee, and then put the bottle back on the shelf and fled the store. Was this conduct "theft"? The *Lee* court, like the courts in *Williams* and *Donaldson*, discussed in detail the history of common law property offenses, and the eventual consolidation of these offenses into one crime of theft. The court argued that consolidation created broader criminal liability for shoplifting than would have existed under common law.

   In Maryland… [s]everal separate offenses, each involving some sort of taking and carrying away of property with an intent to deprive the owner, were consolidated under Article § 27… The legislature consolidated these offenses in an effort to eliminate the "technical and absurd distinctions that have plagued the larceny related offenses and produced a plethora of special

provisions in the criminal law." …The evolution of theft law is particularly relevant to thefts occurring in modern self-service stores where customers are impliedly invited to examine, try on, and carry about the merchandise on display. In a self-service store, the owner has in a sense, consented to the customer's possession of the goods for a limited purpose. Under common law principles of theft, a person could not have been convicted if apprehended while still in the store because the perpetrator would have rightful possession (albeit temporarily) and thus could not perform the element of trespassory taking until he left the store without paying (at which point it might be too late). Under the present law, the fact that the owner temporarily consents to possession does not preclude a conviction for larceny if the customer exercises dominion and control over the property by using or concealing it in an unauthorized manner. Such conduct would satisfy the element of trespassory taking as it could provide the basis for the inference of the intent to deprive the owner of the property.

Lee, 474 A.2d at 540-541.

5. Both the *Williams* and *Donaldson* courts observe that one explicit aim of consolidation was easing the path of enforcement and making convictions easier to obtain. If indeed the consolidation of theft offenses resulted in an expansion of the scope of criminal law, then consolidation has not simply eased the burden on enforcement officials: it has increased their power and discretion. With that in mind, note that arrests, convictions, and sentences for property offenses show similar patterns of racial disparity as those identified for violent crimes and drug offenses. Racial disparities in the enforcement of property offenses have not (so far) received nearly as much scholarly or public attention as racial disparities in the enforcement of drug offenses, but there is evidence that enforcement officials do target persons of color for theft prosecutions more often than white persons who engage in similar conduct. For example, one study found that while persons who reported (anonymously) that they had engaged in shoplifting were overwhelmingly young and white, the individuals who were actually prosecuted for shoplifting were mostly "very old or very young Hispanic or black men." Rachel Shteir, The Steal: A Cultural History of Shoplifting 88-89 (2011). Some commentators describe the increased surveillance and detention of minority shoppers as the de facto criminalization of "shopping while black." Id.
6. The *Donaldson* court observes, "'All theft partakes of the character of attempt.' The line between attempt and a completed theft is a thin one." This observation raises difficult questions about the timing and completion of crimes. We will examine these questions in much greater detail in Chapter Eight, which addresses inchoate crimes including attempt. For now, notice that neither common law definitions of property crimes nor modern statutory definitions require the defendant to keep property permanently in order to be guilty of the offense. A defendant completed common law larceny by "taking" and "carrying away" the property (with the right mental state), but carrying away (also called asportation) could be achieved simply by a slight change in the position of the property, as the *Donaldson* court notes. For the Iowa statute applied in Donaldson, asportation is not necessary, and the crime of theft is complete as soon as the defendant "takes possession or control" of the property (with the right mental state).
7. As the previous note explains, most definitions of property offenses do not require the defendant to keep the property permanently. However, many definitions do require an intention to keep the property permanently. See, for example, the definition of larceny in *People v. Williams* earlier in this chapter: "The common law defined larceny as the taking and carrying away of someone else's personal property, by trespass, with the intent to permanently deprive the owner of possession" (emphasis added). Many courts characterize this intent requirement as a "specific intent" requirement.
8. In *People v. Perry*, 864 N.E.2d 196 (Ill. 2007), a defendant was charged with theft by deception after he occupied a hotel room for over three months but did not pay the bill. Under the Illinois statute, "A person commits theft when he knowingly … obtains by deception control over property of the owner … and intends to deprive the owner permanently of the use or benefit of the property." Is occupancy of a hotel room "property"? And did a defendant who did not intend to stay in the room forever act with the requisite intent to permanently deprive the owner? The Illinois Supreme Court upheld the defendant's conviction, finding that "[t]he property at issue here is the use of a hotel room. … One night in one room is a thing of value. When this thing of value is taken by deception, the owner has permanently lost the benefit of one night's income." Id. at 211.
9. Under the reasoning of *Perry* in the previous note, could non-payment of rent be a criminal offense? In fact, in almost every jurisdiction, rent disputes (including non-payment) are classified as civil matters. In Arkansas, however, a landlord can file a notice to vacate if a tenant is late with a rent payment, and if the tenant does not vacate within ten days, a warrant is issued for arrest. This "criminal evictions" law has drawn criticism from civil rights advocates for years, in part because the tenants prosecuted are disproportionately poor Black women. See Human Rights Watch, *Pay the Rent or Face Arrest: Abusive Impacts of Arkansas's Draconian Evictions Law* (2013). As of 2022, a challenge to the Arkansas law is pending in federal court.

10. Arkansas's criminal evictions statute is one of a kind. But the imposition of criminal liability for a failure to pay fees or other assessments is quite common. Commentators have used the term "the criminalization of poverty" to describe the heavy fees often assessed of criminal defendants and the additional sanctions imposed when defendants do not pay. The same phrase is also sometimes used to critique cash bail systems, which often require defendants without money to choose between lengthy pretrial detention or a quick guilty plea. See also Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. Crim. L. & Criminology 643 (2009) (discussing "the social construction of welfare fraud" and ways in which the welfare system and the criminal legal system have become increasingly intertwined).

The relevant statute for the next case is included within the text of the court's opinion.

STATE of Florida, Appellant

v.

David Paul SIEGEL, Appellee

District Court of Appeal of Florida, Fifth District
778 So.2d 426

Feb. 2, 2001

THOMPSON, C.J.

…[David Paul] Siegel was charged by Information with grand theft. This charge followed Siegel's expulsion from the University of Central Florida (UCF) for submitting fraudulent financial vouchers as a member of student government. The Information charged that Siegel:

[D]id … knowingly obtain or use, or endeavor to obtain or use a computer and computer equipment, of a value of THREE HUNDRED DOLLARS ($300.00) or more, the property of another, to-wit: UNIVERSITY OF CENTRAL FLORIDA … as owner or custodian thereof, with the intent to temporarily or permanently deprive said owner or custodian of a right to the property or a benefit therefrom, or to appropriate the property to the defendant's own use or to the use of a person not entitled thereto.

Both sides agree that Siegel was allowed to use, as part of his responsibilities as a member of the UCF student government, an IBM Thinkpad 755 CDV (laptop computer) owned by UCF. At some point, UCF officials demanded that Siegel return the laptop computer pursuant to UCF Student Government Laptop Policy. … Siegel refused to return the computer and, among other things, this criminal case resulted from that refus[al].

[Under Florida law,] a defendant may move for dismissal [by alleging] that "[t]here are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against the defendant." Under this rule it is the defendant's burden to specifically allege and swear to the undisputed facts in a motion to dismiss and to demonstrate that no prima facie case exists upon the facts set forth in detail in the motion. The purpose of this procedure is to avoid a trial when there are no material facts genuinely in issue.

The trial court dismissed this case, according to the record, because when Siegel first received the laptop computer, he did not have the criminal intent to deprive UCF of the computer. The theft statute Siegel is charged under provides in part:

A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently: (a) Deprive the other person of a right to the property or a benefit from the property.

§ 812.014(1)(a). In defining "obtains or uses," the theft chapter provides in pertinent part:

"Obtains or uses" means any manner of:

…[c]onduct previously known as stealing; larceny; purloining; abstracting; *embezzlement;* misapplication; misappropriation; conversion; or obtaining money or property by false pretenses, fraud, or deception….

§ 812.012(2)(d) 1., Fla.Stat. (emphasis added). In certain types of theft cases, like larceny or false pretenses, criminal intent must be formed at the time of the original taking… Under [this statute], however, theft is more than just larceny or theft by false pretenses. Theft also includes the common-law crime of embezzlement.

[In a footnote, the court explained:

Embezzlement "may be defined as: (1) the fraudulent (2) conversion of (3) the property (4) of another (5) by one who is already in lawful possession of it." LaFave & Scott, *Criminal Law* at § 8.6. Under the state's theory of the case, Siegel lawfully possessed UCF's laptop computer, but refused to return it when the owner of the computer requested that he do so. This conduct arguably worked as an attempt to fraudulently convert the computer to Siegel's possession.]

Unlike the crimes of larceny and false pretenses, embezzlement does not require that the defendant have criminal intent when he obtains the property in question. The alleged facts, if proven, fit the crime formerly known as embezzlement and now known as theft under the omnibus theft statute.

Notes and questions on *State v. Siegel*

1. This case has a somewhat different procedural history than many of the appellate opinions included in this book, because it does not involve an appeal after a conviction. In this case, the trial court dismissed the charges against Siegel before any trial took place, and the prosecution then appealed that dismissal. Notice Siegel was charged with grand theft by an "Information," which is quoted in the court's opinion. Unlike an indictment, an information does not require the prosecutor to submit the charges to a grand jury for approval. But there may exist other limits on the prosecutor's discretion. Here, Siegel argued that the facts as alleged in the Information did not constitute the offense of grand theft.
2. Siegel was charged with grand theft, not a crime called embezzlement. Be sure you understand how the definition of embezzlement becomes important in this case. As you've seen earlier in this chapter, many states interpret their general "theft" statutes with reference to common law definitions of property crimes. The theft statute used to charge Siegel includes an element that the defendant "obtains or uses" the property of another. And a portion of the Florida statute provides that "obtains or uses" includes conduct previously known as embezzlement.
3. Look carefully at the elements of embezzlement as described by the Florida court. To commit this crime, the defendant must already be in "lawful possession" of the property in question. For example, an employee who is entrusted with company funds may be in lawful possession of that money. But if he takes the money for personal use, he may be guilty of embezzlement.
4. In other words, embezzlement does not require that the defendant have any wrongful intention at the time that he or she first takes possession of the property. That becomes important in this case. Siegel argued that he did not commit theft because he had no criminal intent when he first took possession of the laptop. For many theft crimes, this lack of criminal intent would be a plausible defense, thanks to a principle sometimes referred to as "concurrence of the elements." This principle requires that the prosecution must establish all necessary elements of the offense and show that they occurred simultaneously: the defendant must have held the requisite mental state at the time that the conduct elements took place. If Siegel "obtained" the laptop only at the moment that he first took possession of it, then he did not have the right mens rea at the time of the actus reus. But if Siegel's ongoing possession was an ongoing act of "obtaining or using" the property, then it does not matter if Siegel formed the intent to keep the laptop for his own personal use only later.

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10 U.S.C. § 921. Uniform Code of Military Justice, Article 121. Larceny and wrongful appropriation

(a) Any person subject to this chapter who wrongfully takes, obtains, or withholds, by any means, from the possession of the owner or of any other person any money, personal property, or article of value of any kind–

(1) with intent permanently to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner, steals that property and is guilty of larceny; or

(2) with intent temporarily to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner, is guilty of wrongful appropriation.

(b) Any person found guilty of larceny or wrongful appropriation shall be punished as a court-martial may direct.

UNITED STATES

v.

Andrew S. COFFMAN, Lance Corporal (E–3), U.S. Marine Corps

U.S. Navy–Marine Corps Court of Criminal Appeals
62 M.J. 676

Decided 22 Feb. 2006

DORMAN, Chief Judge:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of a false official statement and larceny….

The appellant pleaded guilty to the theft of several items of special operations equipment, such as a force vest, canteen covers, and a duty belt (hereinafter referred to as "gear"). The total value of the stolen gear exceeded $500.00. The gear belonged to another Marine…

The appellant was serving in Al Hillah, Iraq, when he took the gear he was charged with stealing. The gear was located in an open box, and, at the time he took it, the appellant did not know who owned the gear. The appellant found the box in a room that he and others had been told to clean out in preparation for another platoon's arrival. Unit personnel had previously used this room to store their packs. The room contained several boxes that they had been instructed to dispose of, including the box containing the gear. As they cleaned out the room, they discovered items that were never picked up by their owners and appeared to have been left behind for trash. The appellant took the box from a room where unit personnel had been storing their packs and he brought it to his rack. There was no name on the gear, but the appellant knew it did not belong to him. The appellant was the first one to find the box containing the gear. The appellant also knew that the items should not have been discarded. He went up and down the passageway asking whether anyone had left a box of gear in the room. He asked almost the entire platoon. When he could not determine who owned the gear, he decided to use it himself.

The appellant used the gear for about a month while going on patrols. The use continued until his section leader confronted him about whether the gear belonged to him. Initially, the appellant told the section leader that he had purchased the gear. This false statement was prosecuted under Article 107, UCMJ. The appellant did not learn who owned the gear until after he had surrendered it. The owner was a member of the appellant's battalion, and the appellant was acquainted with him. The appellant informed the military judge that if he had not been confronted by the command, he would have continued to use the gear.

As the providence inquiry continued, the appellant then answered "yes" or "no" to a series of questions dealing with the legality of his actions. He admitted that he knew it was wrongful to take the gear, that the gear was not abandoned, that he intended to permanently deprive the owner of the gear, that he had no legal justification or excuse for his actions, and that he took and retained the gear with a criminal state of mind.

… The appellant now argues that his plea is improvident because the military judge failed to adequately inquire into the "apparent defense of ignorance or mistake of fact as to whether the gear … was abandoned, lost, or mislaid."…

… Before accepting a guilty plea, the military judge must explain the elements of the offense and ensure that a factual basis for the plea exists. Mere conclusions of law recited by the accused are insufficient to provide a factual basis for a guilty plea. The accused "must be convinced of, and able to describe all the facts necessary to establish guilt." Acceptance of a guilty plea requires the accused to substantiate the facts that objectively support his plea.

…The standard of review to determine whether a plea is provident is whether the record reveals a substantial basis in law and fact for questioning the plea. Such rejection must overcome the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty, and the only exception to the general rule of waiver arises when an error materially prejudicial to the substantial rights of the appellant occurs. … An abuse of discretion standard is applied in reviewing the question of whether a military judge erred in accepting a guilty plea. In considering the adequacy of guilty pleas, we consider the entire record…

In our review of the record, we determined that the military judge accurately listed the elements of larceny and defined the terms relevant to those elements. We also determined that the appellant indicated an understanding of the elements of the offense and that he acknowledged that they correctly described what he did. Thereafter, the military judge conducted an inquiry with the appellant to determine whether a factual basis for the plea existed. The inquiry went well until such time as the appellant essentially informed the military judge that the gear he took had been left in the room as trash. After that point, most of the questions asked by the military judge called for a "yes" or "no" answer, and many called for legal conclusions.

Abandoned property cannot be the subject of a larceny. The appellant's statement to the military judge that the gear had been left there as trash raised the issue of mistake of fact. Furthermore, since larceny is a specific intent offense, if the appellant had an honest belief that the property was abandoned, he has a complete defense.

For a complex offense such as conspiracy, robbery, or murder, a failure to discuss and explain the elements of the offense during the providence inquiry has been held to be fatal to the guilty plea on appeal. Similarly, a military judge should explain the elements of defenses, such as mistake of fact and abandonment, if raised by the appellant during the providence inquiry. Failure to do so can leave unresolved substantial inconsistencies in the pleas and/or raise questions concerning whether the appellant was armed with sufficient information to knowingly plead guilty. Where the elements of an offense, or defenses, are commonly known by most servicemembers, however, it is not necessary for the military judge to explain them, if it is otherwise apparent on the record that the accused understood the elements or the defense.

In the case before us, the military judge failed to explain the mistake of fact defense to the appellant. Although the military judge did ask the appellant if he believed the gear was abandoned, he did not provide the appellant with the legal definition of abandoned property. A reading of the case law with respect to this issue makes clear that the legal significance of the term "abandoned" is not one that would be "commonly known and understood by servicemembers."

Applying the standards of review noted above, we conclude that the record reveals a substantial basis in law and fact to question the appellant's guilty plea to larceny. Thus, we conclude that the military judge erred by failing to inform the appellant of the defense of mistake of fact and the definitions and legal significance of abandoned property. He did not adequately resolve the issue of mistake of fact. When the appellant informed the military judge that the gear had been left behind as trash, the military judge inappropriately asked the appellant "yes" or "no" type questions that called for legal conclusions. By not explaining the relevant legal terms, the military judge denied the appellant the ability to make an informed decision concerning the answers he provided. In light of these errors, we conclude that the appellant's guilty pleas to Charge II and its specification are not provident.

We take this opportunity to note that the error in this case does not fall solely on the shoulders of the military judge. At the conclusion of his inquiry into the providence of the guilty plea to the specification under Charge II, he asked counsel if either desired further questioning. Both counsel said they did not. Such a reply is all too common in cases where the issue before us is the providence of the plea. Trial counsel, in particular, should be ever vigilant during the plea providence inquiry and assist the military judge by suggesting areas of further inquiry concerning the elements of the offense or potential defenses.

Conclusion

Accordingly, the findings to Charge II and its specification are set aside. The remaining findings are affirmed….

Notes and questions on *United States v. Coffman*

1. The kind of problem that arises in *Coffman* is often called a "mistake of fact." When a defendant is mistaken about some key fact, will that mistake provide a defense to criminal liability? As is often true in law, it depends. Whether a defendant's mistake about a factual issue is a defense to a criminal charge is a question of the mens rea requirement of the charged offense. Does larceny, as defined in the Code of Military Justice, require the defendant to know that the property he took belonged to another specific person (and was not abandoned)? Because the military court interprets the applicable statute to require knowledge that the property is owned by someone, the defendant's mistaken belief that this property had been abandoned is relevant to his criminal liability. Compare to *Morisette v. United States* in Chapter Two.
2. Looking at the larceny statute in the military code, can you identify other mistakes that would be relevant to a determination of guilt? What if the defendant knew that the gear belonged to a Marine, but mistakenly thought it belonged to one of his close friends in the platoon who "wouldn't make a big deal" if the defendant took it? What if the defendant mistakenly believed the gear was worth less than $100, and mistakenly believed that the military larceny statute applied only to property worth over $100? A mistaken belief about what the statute criminalized would be characterized as a "mistake of law" rather than a mistake of fact. And whether mistakes of law matter to liability is again a question about the mens rea requirements of a particular statute. The key question is whether an accurate understanding of the applicable law is an element of the charged offense. Most statutes do not require knowledge of the law as an element, so it is usually true that "ignorance of the law is no excuse," or not a valid defense. For more on mistakes of law and the rare circumstances in which a mistake of law can serve as a valid defense, see *People v. Marrero* in Chapter Seven.

3. For our purposes, *Coffman* is useful not only to illustrate principles of mistake, but also as a rare instance of close judicial review of a guilty plea. The "providence inquiry" described by the appellate court is essentially a plea hearing, in which a military judge questions the defendant to be sure there is an adequate factual basis for the guilty plea. The appellate opinion that you've read then reviews (and reverses) the first judge's finding that the plea was supported by fact, or "provident." The basic principle that a guilty plea must have an adequate factual basis applies in state and federal courts as well as military ones. However, state and federal courts rarely scrutinize guilty pleas closely to ensure compliance with this requirement. The vast majority of guilty pleas (and the vast majority of all convictions in state and federal court) are not subject to any appellate review at all. Indeed, as discussed in Chapter Four, civilian courts sometimes accept "fictional pleas," or guilty pleas to charges that could not possibly be proven given the available evidence. What factors might distinguish military courts from civilian ones, and lead to closer scrutiny of pleas in the military judicial system?

Burglary and Trespass

New Mexico Stat. Ann. 30-16-3. Burglary.

Burglary consists of the unauthorized entry of any vehicle, watercraft, aircraft, dwelling or other structure, movable or immovable, with the intent to commit any felony or theft therein.

A. Any person who, without authorization, enters a dwelling house with intent to commit any felony or theft therein is guilty of a third degree felony.

B. Any person who, without authorization, enters any vehicle, watercraft, aircraft or other structure, movable or immovable, with intent to commit any felony or theft therein is guilty of a fourth degree felony.

New Mexico Stat. Ann. 30-14-8. Breaking and entering.

A. Breaking and entering consists of the unauthorized entry of any vehicle, watercraft, aircraft, dwelling or other structure, movable or immovable, where entry is obtained by fraud or deception, or by the breaking or dismantling of any part of the vehicle, watercraft, aircraft, dwelling or other structure, or by the breaking or dismantling of any device used to secure the vehicle, watercraft, aircraft, dwelling or other structure.

B. Whoever commits breaking and entering is guilty of a fourth degree felony.

New Mexico Stat. Ann. 30-1 6 – 5. Possession of burglary tools.

Possession of burglary tools consists of having in the person's possession a device or instrumentality designed or commonly used for the commission of burglary and under circumstances evincing an intent to use the same in the commission of burglary.

Whoever commits possession of burglary tools is guilty of a fourth degree felony.

STATE of New Mexico, Plaintiff-Appellee

v.

Franklin D. BEGAYE, Defendant-Appellant

Court of Appeals of New Mexico
505 P.3d 855

March 30, 2021

HANISEE, Chief Judge.

Defendant Franklin Begaye … was arrested on February 28, 2017, following a report of a break-in at Ram Signs, a business in Farmington, New Mexico. Testimony established that around 8:00 p.m. that night, Ram Signs co-owner Michael Mordecki heard a loud bang coming from the front of the building. Soon thereafter, Mr. Mordecki discovered that the front window had been smashed in and called the police. Officer Justin Nichols arrived [and] observed a broken window, an overturned cash box, and disarray around an employee's desk. Nothing had been taken by the intruder, but the front office area had been rifled through….

Security footage provided by Monica Mordecki, also a co-owner of Ram Signs, revealed that the suspect was a male wearing light shoes, dark pants, and a dark jacket over a light hoodie. In searching nearby areas, Officer Nichols observed Defendant, who matched the description of the individual in the video, walking along Farmington's main street, and upon approach, Officer Nichols saw what appeared to be shards of glass on Defendant's jacket…. Officer Nichols detained and searched Defendant, finding a pair of black mechanic's gloves, and a small red flathead screwdriver in the front pocket of Defendant's pants….

Defendant was charged with fourth degree felony offenses of non-residential burglary, breaking and entering, and possession of burglary tools. At Defendant's jury trial, the State presented testimony from, among other witnesses, Mr. and Mrs. Mordecki and Officer Nichols. The State also played the security camera footage, presented photographs of the scene, and admitted the clothing, boots, gloves, and screwdriver that Officer Nichols collected from Defendant on the night of the incident. Defendant was convicted on all charges. This appeal followed.

Defendant argues that his convictions for burglary and breaking and entering violate his right to be free from double jeopardy because both convictions are premised on the same act of a single unauthorized entry…. Double jeopardy protects defendants from receiving multiple punishments for the same offense.

Here, Defendant raises a double-description double jeopardy claim, "in which a single act results in multiple charges under different criminal statutes[.]" *State v. Bernal* (2006). "In analyzing double-description challenges, we employ [a] two-part test, … in which we examine: (1) whether the conduct is unitary, and, if so, (2) whether the Legislature intended to punish the offenses separately." … "Only if the first part of the test is answered in the affirmative, and the second in the negative, will the double jeopardy clause prohibit multiple punishment in the same trial." *State v. Silvas* (2015). Here, the State does not dispute Defendant's contention that the conduct—the single unauthorized entry—was unitary. Accordingly, we consider the first part of the test to be satisfied…

Where, as here, Defendant's conduct is unitary, we next analyze legislative intent, looking first to the language of the statutes. "Absent a clear intent for multiple punishments, we apply" [the test from *Blockburger v. United States*, 284 U.S. 299 (1932).] *Blockburger* provides that "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." "If one statute requires proof of a fact that the other does not, then the Legislature is presumed to have intended a separate punishment for each statute without offending principles of double jeopardy." *Silvas*. "That presumption, however, is not conclusive and it may be overcome by other indicia of legislative intent."

Since its adoption, the New Mexico Supreme Court has modified the *Blockburger* test, clarifying that application of the test "should not be so mechanical that it is enough for two statutes to have different elements." When discerning legislative intent for the purpose of the modified *Blockburger* test, we may look to the "language, structure, history, and purpose" of the relevant statutes. "If the statutes can be violated in more than one way, by alternative conduct, the modified *Blockburger* analysis demands that we compare the elements of the offense, looking at the [s]tate's legal theory of how the statutes were violated." We may ascertain the state's legal theory "by examining the charging documents and the jury instructions given in the case."

Here, Defendant argues that the modified *Blockburger* test should apply to [his] double jeopardy claim. Defendant contends that within a modified analysis and under the State's legal theory of the case, breaking and entering was subsumed within the burglary conviction, therefore, double jeopardy bars his conviction under the breaking and entering statute. Defendant further claims, in the alternative, that even if the elements of each statute are distinct, other indicia of legislative intent make clear that the Legislature did not intend to permit separate convictions under both the burglary and the breaking and entering statutes based on a single unauthorized entry. The State argues, in turn, that under either a strict or modified *Blockburger* test, Defendant's convictions are not barred by double jeopardy because both offenses require proof of an element the other does not and the Legislature intended to permit separate convictions under the two statutes.

While there is no stated intent that the burglary and breaking and entering statutes allow for multiple punishments, we can presume the Legislature intended to allow separate punishment under the statutes because each provision requires proof of a factual element that the other does not. Section 30-16-3, prohibiting non-residential burglary, reads in pertinent part, "[b]urglary consists of the unauthorized entry of any … dwelling or other structure, movable or immovable, with the intent to commit any felony or theft therein." Meanwhile, Section 30-14-8(A) prohibits breaking and entering and reads, in pertinent part, "[b]reaking and entering consists of the unauthorized entry of any … dwelling or other structure, movable or immovable, where entry is obtained by fraud or deception, or by the breaking or dismantling of any part of the … dwelling or other structure[.]" While both offenses require an

unauthorized entry into a dwelling, the burglary statute requires a defendant to have a specific intent "to commit any felony or theft therein." Further, the breaking and entering statute requires the unauthorized entry to be effectuated by a specified means, which the burglary statute does not. Therefore, under the *Blockburger* strict elements test, both offenses require proof of an element the other does not, and we can infer therefrom that the Legislature intended to authorize separate punishments under the burglary and breaking and entering statutes.

This inference, however, is not conclusive … [and] we apply the modified *Blockburger* test to examine other indicia of legislative intent. *SeeState v. Ramirez* (2016) (explaining that "[w]hen applying *Blockburger* to statutes that are vague and unspecific or written with many alternatives, we look to the charging documents and jury instructions to identify the specific criminal causes of action for which the defendant was convicted" and to determine whether the Legislature intended to allow separate punishments under multiple statutes).

Although we recognize that the purpose of "New Mexico's breaking[ ] and[ ] entering statute is itself grounded in common law burglary[,]" each statute presents distinct objectives that we rely on to guide our analysis. To reiterate, breaking and entering requires an unauthorized means of entry, such as an actual "breaking." … In *State v. Sorrelhorse* (2011), we held that the offense of criminal damage to property was a lesser included offense of breaking and entering because both offenses require actual property damage. *Sorrelhorse* indicates that, where entry is obtained by breaking or dismantling physical property, the evident purpose of the breaking and entering statute is to punish unauthorized entry accomplished by physical damage to property.

In comparison, while the burglary statute is likewise intended to safeguard possessory property interests, the evolution of common law burglary in New Mexico leads us to believe that the Legislature intended to authorize separate punishments under the statutes. At common law, "[b]urglary consisted of breaking and entering a dwelling of another in the night time with the intent to commit a felony." Initially, the crime required some physical act or element of force but did not specifically require damage to property. However, as the common law developed, the "breaking" component of common law burglary could be satisfied by a constructive breaking and did not necessarily require a physical act. For example, this Court held that "entry by fraud, deceit, or pretense was sufficient to constitute the 'unauthorized entry' requirement, which had been adopted by the New Mexico Legislature instead of the common law requirement of 'breaking.' " Therefore, we conclude the purpose of the breaking and entering statute is sufficiently distinct from the purpose of the burglary statute. The crime of burglary punishes the broader criminal conduct of any unauthorized entry when there is specific criminal intent.

Having concluded that the Legislature intended to allow separate punishments under the two statutes, we turn next to the State's theory of the case. A comparison of the instructions tendered to the jury for the two offenses establishes that the breaking and entering charge was not subsumed into the burglary charge. To convict Defendant of breaking and entering, the jury was required to find, in pertinent part, that (1) "[D]efendant entered a structure without permission"; and (2) "[t]he entry was obtained by the breaking of a window[.]" Meanwhile, a guilty verdict on the burglary charge required the jury to find, in pertinent part, that Defendant (1) "entered a structure without authorization[,]" and did so (2) "with the intent to commit a theft when inside."

Although it agrees on appeal that Defendant's entrance through the window of Ram Signs constituted unitary conduct for the purposes of both statutes, at trial the State did not suggest that the jury rely on the unauthorized entrance as the sole basis for conviction of each crime. Here, the crucial distinction in the two crimes is that the unauthorized entrance required by the burglary charge jury instruction also included the specific intent "to commit a theft when inside." Hence, the State's theory of the case for burglary required the jury to find something more than what was required for breaking and entering. Similarly, although the unauthorized entrance through the broken window was a common element of both charges, to convict Defendant of breaking and entering, the jury had to find that the unauthorized entrance was effectuated by breaking the window. That additional element—one that was not required by the burglary instruction—establishes that Defendant's conviction for breaking and entering could not have been subsumed within the aggravated burglary conviction.

The charging documents specifically relied on the "breaking or dismantling" component of the breaking and entering statute in charging Defendant with breaking and entering, and relied on the "intent to commit a felony or theft therein" component of the burglary statute in charging Defendant with burglary. As such, the State's theory of the case regarding the conduct required by the two charges was adequately distinguishable and not solely premised on the unitary conduct. Therefore, we hold that Defendant's convictions for breaking and entering and aggravated burglary did not offend his right to be free from double jeopardy….

Notes and questions on *State v. Begaye*

1. In addition to the burglary and breaking and entering charges, Franklin Begaye was also charged with possession of burglary tools—namely, gloves and a screwdriver, which were found in his pockets when he was arrested. The possession of burglary tools charge required proof that the items were commonly used in burglaries or that they had in fact been used in a specific burglary. In a portion of the opinion omitted here, the New Mexico court found that there was insufficient evidence that Begaye had actually used gloves or a screwdriver in the break-in at Ram Signs. Thus the court did not have to consider whether a defendant could be convicted of separate offenses of burglary and possession of burglary tools. Can you imagine why a legislature might want to criminalize the possession of burglary tools as a separate offense? Do you think the legislature likely intended to punish burglary, and possession of burglary tools, with separate punishments?
2. *Begaye* involves a very common situation: multiple criminal statutes could potentially apply to a particular act by a defendant. You have previously encountered this scenario with *State v. Cissell* in Chapter Three. In that case, the defendant objected because he was convicted and sentenced under a statute with a more severe penalty when another statute, with a less severe penalty, was equally applicable to his conduct. Cissell argued that to charge him with the more severe offense violated equal protection and due process, but the Wisconsin court rejected his claim. Notice that Begaye's claim here is a little bit different. Begaye raised a double jeopardy challenge, arguing that to punish him for both burglary and breaking and entering is to punish him twice for the same conduct. The Double Jeopardy Clause of the Fifth Amendment provides, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Whether the Double Jeopardy Clause bars multiple punishments depends on whether the punishments are for "the same offense," and the analysis of that question can be complex. To evaluate such challenges, most states follow *Blockburger v. United States*, which is explained and discussed in this case.
3. The facts of *Begaye* probably coincide with a fairly common perception of the crime of burglary: entry with probable intent to steal. Notably, though, burglary (as defined at common law, and also as defined in most modern statutes) does not actually require any intent to take property or otherwise commit a property offense rather than some other kind of crime. As the court notes, common law burglary was "breaking and entering a dwelling of another in the night time with intent to commit a felony." Any felony would suffice, so a person who entered another's dwelling with intent to kill the resident would be guilty of burglary. Modern statutes typically define burglary with an equivalent or similar mens rea requirement – intent to commit a felony or other crime inside the place burglarized. But many jurisdictions have eliminated other aspects of common law burglary, such as the requirement of "breaking," as the *Begaye* court mentions and as discussed further in the next note. Modern burglary statutes also often omit any requirement that the entry be into a dwelling or that it take place at night.
4. Again, the *Begaye* court describes common law burglary as "breaking and entering a dwelling of another in the night time with intent to commit a felony." What is a "breaking," as that term was understood at common law? Must a lock, a window, or some other part of the property actually get broken? Early judicial accounts of burglary required some act of physical force to enter the property, though this "breaking" by force did not need to cause lasting damage to the property. For example, many courts held that opening an unlocked but closed door or window was a sufficient "breaking" for the crime of burglary, but simply walking through an open door was not breaking. "As the common law developed," the *Begaye* court tells us, "the 'breaking' component of common law burglary could be satisfied by a constructive breaking and did not necessarily require a physical act." A person who tricked a homeowner into letting him in – pretending to be a city inspector, for example – could be guilty of burglary by "constructive" breaking.
5. The usual mens rea of burglary – intent to commit a felony – is often described as a "specific intent" requirement. As discussed above, larceny is also often described as a "specific intent" crime, given the typical requirement of intent to permanently deprive the owner of the property. Courts often distinguish between "specific intent" and "general intent" crimes. These terms developed at common law and do not have a single uniform definition, but you should know how the terms are most commonly used. Usually, a description of a crime as a "specific intent" crime means that the crime is defined to include some mental state requirement beyond the defendant's mental state regarding the actus reus of the offense. In contrast, the classification of an offense as one of "general intent" usually means that the only mens rea requirement is one related to the defendant's mental state regarding the conduct elements of the offense. This explanation will probably be hard to grapple in the abstract, so an example is useful. In *Begaye*, the breaking and entering statute would probably be treated as a "general intent" offense. Notice that the New Mexico breaking and entering statute does not actually specify a mental state requirement at all. But given courts' usual presumptions against strict liability, and given the mens rea default rules discussed in Chapter Two, a court would probably require that the defendant commit the actus reus of the offense – unauthorized entry – with at least knowledge or recklessness. The prosecution thus must establish something about the defendant's mental state, but only the defendant's mental state toward the actus reus of the offense: the defendant knew she was entering without authorization, or the defendant was at

least reckless with regard to whether she was entering without authorization. Contrast that "general intent" with burglary, which requires evidence of a further mental state – namely, a plan to do something specific (commit a crime) once inside the place entered. In rejecting the defendant's double jeopardy claim, one factor emphasized by the *Begaye* court is that burglary is a "specific intent" crime while breaking and entering is not.

6. Given that burglary is entry with intent to commit any felony, prosecutors have often charged this offense in the context of domestic violence, when a person enters a residence in violation of a protective order or with intent to harm someone inside in the resident. Burglary statutes have even been used to prosecute persons for entering what is technically their own legal residence. In that context, burglary statutes sometimes come into conflict with "anti-ousting" statutes which provide that a husband and wife cannot exclude one another from their shared dwelling. Consider *State v. Lilly*, below.

Ohio R.C. 2911.12. Burglary; trespass in a habitation[ ]

(A) No person, by force, stealth, or deception, shall do any of the following:

(1) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense;

(2) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present, with purpose to commit in the habitation any criminal offense;

(3) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, with purpose to commit in the structure or separately secured or separately occupied portion of the structure any criminal offense.

(B) No person, by force, stealth, or deception, shall trespass in a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present.

…

(D) Whoever violates division (A) of this section is guilty of burglary. A violation of division (A)(1) or (2) of this section is a felony of the second degree. A violation of division (A)(3) of this section is a felony of the third degree.

(E) Whoever violates division (B) of this section is guilty of trespass in a habitation when a person is present or likely to be present, a felony of the fourth degree.

Ohio R.C. 2911.21. Criminal trespass

(A) No person, without privilege to do so, shall do any of the following:

(1) Knowingly enter or remain on the land or premises of another…

Ohio R.C. 3103.04. Interest in the property of the other

Neither husband nor wife has any interest in the property of the other, except [as provided by a statutory duty to support one's spouse], the right to dower, and the right to remain in the mansion house after the death of either. Neither can be excluded from the other's dwelling, except upon a decree or order of injunction made by a court of competent jurisdiction.

The STATE of Ohio, Appellant

v.

Harold Dean LILLY, Appellee

Supreme Court of Ohio
87 Ohio St.3d 97

Decided Oct. 20, 1999

[Syllabus by the Court:] On February 5, 1997, Harold Dean Lilly, Jr., defendant-appellee, was indicted on nineteen criminal counts: twelve counts of rape, two counts of attempt to commit rape, three counts of possessing criminal tools, one count of kidnapping, and one count of burglary. All offenses were alleged to have been against his estranged wife, Jacqueline K. Lilly.

Count nineteen of the indictment [charging burglary] stated that on or about January 26, 1997, defendant had trespassed in Jacqueline Lilly's residence when she was present or likely to have been present, with the purpose of committing a criminal offense therein. Defendant pled not guilty on February 11, 1997 to all of the charges.

Defendant and Jacqueline K. Lilly ("Mrs. Lilly") married in August 1988. They separated in early 1996 and got back together in September of that year. In November 1996, they separated again… [In January 1997] Mrs. Lilly … leased an apartment in West Carrollton, Ohio…. Defendant moved in with his own mother after the couple separated.

Mrs. Lilly testified that on January 26, 1997, she and the defendant spent the morning and afternoon together doing various errands. The defendant repeatedly asked Mrs. Lilly if they could watch the Super Bowl that evening together, but she declined. Mrs. Lilly testified that over the course of the evening, defendant asked her to have sex with him and she asked him to leave. She told the jury that defendant became angry, slapped her repeatedly, and burned her with a cigarette. She further explained that, to avoid further harm, she engaged in various sexual acts with defendant, which Mrs. Lilly testified were against her will.

Mrs. Lilly testified that later in the evening, the defendant drove her to two bars. At the 1470 Club, in Kettering, Ohio, Mrs. Lilly quietly asked one of the bar employees to call the police. After defendant followed her into the women's restroom at the bar, one of the bar's security guards went into the restroom to check on Mrs. Lilly. The security guard told defendant that he wanted to speak to Mrs. Lilly alone and defendant refused. The security guard pushed defendant out of the way while Mrs. Lilly and a female bar employee ran into the back office and locked the door. After the defendant's attempts to kick the door in were unsuccessful, he fled.

Mrs. Lilly was taken to the hospital to be examined and then to the police station to be interviewed… Police officers then took her to her apartment to get some clothing and personal items in order for her to stay in a shelter. At her apartment, Mrs. Lilly discovered that her purse was missing and about six pairs of her jeans had been ripped up. Officers noticed that the attic cover was open [and] smelled fresh cigarette smoke.

After Mrs. Lilly had collected her belongings and was ready to get in her car, she discovered that her automatic garage door opener was missing from her car. She tried to start her car, and when it would not start, officers investigated and found that the car's spark plug wires had been detached. In addition, Mrs. Lilly noticed a pair of defendant's gym shoes that were not there previously. At approximately 8:00 a.m. on January 27, officers drove Mrs. Lilly to a shelter.

Detective Mark Allison testified that on the afternoon of January 27, he informed defendant that a warrant had been issued for his arrest. The next day, Detective Allison interviewed defendant… Defendant admitted to the officers that he drove back to Mrs. Lilly's apartment in the early morning of January 27…. Defendant stated that he had left the door unlocked prior to leaving with Mrs. Lilly earlier in the evening so he could get back in. Defendant told the detectives that he ripped up several pairs of Mrs. Lilly's jeans, yanked the spark plug wires on her car, and took her purse. Defendant stated that he arrived at the apartment around 12:30 a.m. on January 27, after leaving the bar and was there until 12:00 p.m. that day. Defendant admitted that he was hiding at the apartment when police searched it.

At trial, Mrs. Lilly testified that the lease for her apartment was in her name and the defendant did not have a key. Mrs. Lilly testified that defendant did not contribute money for her apartment. She further testified that defendant knew that it was her place.

During the trial, the state withdrew one count of rape and one count of attempted rape. The jury returned a verdict of guilty on the burglary charge and not guilty on the remaining charges. Defendant appealed his burglary conviction, and the Montgomery County Court of Appeals reversed the trial court's conviction, finding that [a civil anti-ousting law] negated the state's proof of the element of trespass as a matter of law.

Opinion

LUNDBERG STRATTON, J.

This case presents the court with the question of whether R.C. 3103.04 precludes prosecution of one spouse for burglary committed in the residence of the other spouse. For the reasons that follow, we hold that a spouse may be criminally liable for trespass and/or burglary in the dwelling of the other spouse who is exercising custody or control over that dwelling. R.C. 3103.04 is inapplicable in criminal cases.

In this case, the evidence showed that defendant entered by deception the separately leased property of his estranged spouse with intent to commit a crime. However, the court of appeals concluded that in the absence of a court order, R.C. 3103.04 prevented

Mrs. Lilly from excluding defendant from her apartment and therefore the element of trespass could not be proven. Although the defendant did not raise this alleged R.C. 3103.04 privilege in the trial court, the court of appeals, nevertheless, found that it amounted to plain error. We disagree…

At common law, husband and wife were regarded as one. The legal existence of the wife during coverture was merged with that of her husband. As such, the wife was incapable of making contracts, of acquiring property, or of disposing of property without her husband's consent. In pursuance of a more liberal policy in favor of the wife, statutes were passed across the country to relieve the married woman from the disabilities imposed upon her as a femme covert by the common law.

…[I]n 1887, the General Assembly enacted what is now R.C. 3103.04 to "define the rights and liabilities of husband and wife." 84 Ohio Laws 132. The Act related both to the relationship between husband and wife and to the rights of each in the property of the other. [After some slight amendments over the years,] [t]he statute today is reflected in R.C. 3103.04:

"[Interest in the property of the other]

"Neither husband nor wife has any interest in the property of the other, except [specific statutory provisions]. Neither can be excluded from the other's dwelling, except upon a decree or order of injunction made by a court of competent jurisdiction."

… Notably, R.C. 3103.04 is situated in the domestic relations chapter of the Revised Code. Further, a review of the 1887 Act reveals that it primarily concerned property rights as they relate to domestic relations.

A review of other jurisdictions reveals seven other jurisdictions with a statute similar to R.C. 3103.04. … Significantly, we note that our review indicates that none of these jurisdictions applies this civil statute in criminal contexts.

Thus, we conclude that R.C. 3103.04 was intended to address property ownership rights of married persons, matters of a civil nature. Privileges of a husband and wife with respect to the property of the other were not meant to be enforced criminally and do not affect criminal liabilities. Because we find that the General Assembly never intended for R.C. 3103.04 to apply in criminal contexts, we must turn to the Criminal Code to address this issue.

The crime of burglary, with which defendant was charged, provides:

"(A) No person, by force, stealth, or deception, shall do any of the following:

" * * *

"(2) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present, with purpose to commit in the habitation any criminal offense * * *." R.C. 2911.12(A)(2).

"Criminal trespass" is defined as:

"(A) No person, without privilege to do so, shall do any of the following:

"(1) Knowingly enter or remain on the land or premises of another." R.C. 2911.21.

The law of burglary evolved out of a desire to protect the habitation. Because intrusions into the habitation are dangerous to occupants, "the offense is viewed as serious, because of the higher risk of personal harm involved in maliciously breaking and entering an occupied, as opposed to an unoccupied, structure." 1974 Legislative Service Commission Comment to R.C. 2911.12.

Because the purpose of burglary law is to protect the dweller, we hold that custody and control, rather than legal title, is dispositive. Thus, in Ohio, one can commit a trespass and burglary against property of which one is the legal owner if another has control or custody of that property.

A majority of other jurisdictions that have addressed this issue have found that the entry of an estranged spouse upon the property of the other spouse constitutes an unauthorized entry to support charges of trespass and burglary….

Civil, peaceful avenues of redress exist to enforce the rights of a person who believes he or she has been wrongfully excluded from certain property. There is no privilege to use force, stealth, or deception to regain possession. See R.C. 2911.21(C) ("It is no defense to a charge under this section that the offender was authorized to enter or remain on the land or premises involved, when such authorization was secured by deception.").

In this case, there is no evidence that defendant had any right to custody or control of the leased property. The apartment was leased solely in Mrs. Lilly's name. Defendant did not pay any part of the rent on Mrs. Lilly's apartment. While defendant claims that he may have stayed at the apartment occasionally and performed maintenance tasks there for Mrs. Lilly, defendant never lived at the apartment, did not have a key to the apartment, and did not keep any of his belongings in the apartment. Accordingly, it was reasonable for the jury to find that when, without permission, defendant entered Mrs. Lilly's apartment through a door he had previously by deception left unlocked, he trespassed. When he trespassed in Mrs. Lilly's apartment for the purpose of committing a crime, *i.e.*, theft of her purse and damage to her property, it was reasonable for the jury to conclude that defendant committed a burglary.

Thus, there was ample evidence at trial for the jury to have determined that the defendant trespassed in Mrs. Lilly's dwelling and that he did so with the purpose or intent of committing a crime. Sufficiency of the evidence is considered in a light most favorable to the prosecution. As such, we find that there was sufficient evidence of burglary to sustain his conviction. Therefore, we reverse the judgment of the court of appeals and reinstate defendant's conviction for burglary…

Notes and questions on *State v. Lilly*

1. In Ohio, and in many other jurisdictions, the offense of burglary is now defined a trespass with the intent to commit a crime (other than the trespass itself) in the place being entered. (What crime did Lilly intend to commit in his wife's apartment, according to this court?) But as you will see in Chapter Eight, doctrines of criminal attempt already impose criminal liability for those who intend to commit an offense and take steps toward the commission of that offense. Someone who enters a home with intent to steal from it is likely liable for attempted theft. Why, then, is it necessary to have burglary as a separate criminal offense? The drafters of the Model Penal Code considered this issue, but ultimately decided to keep a burglary offense as part of their recommended code. As the drafters explained,

   The critical issues to be confronted in the law of burglary are whether the crime has any place in a modern penal code and, if so, how it should be graded. The first question arises because of the development of the law of attempt. Traditionally, an independent substantive offense of burglary has been used to circumvent unwarranted limitations on liability for attempt. Under the Model Code, however, these defects have been corrected. It would be possible, therefore, to eliminate burglary as a separate offense and to treat the covered conduct as an attempt to commit the intended crime plus an offense of criminal trespass. Section 221.1 nevertheless continues burglary as an independent substantive offense carrying felony sanctions. In part, this solution reflects a deference to the momentum of historical tradition. More importantly, however, the maintenance of a crime of burglary reflects a considered judgment that especially severe sanctions are appropriate for criminal invasion of premises under circumstances likely to terrorize occupants.

   Model Penal Code 221.1, explanatory note.

2. Note that Harold Lilly was indicted on nineteen counts, including twelve counts of rape, two counts of attempted rape, and a kidnapping charge. Note also that there were witnesses to some of Mr. Lilly's conduct: security guards at a bar tried to protect Jacqueline Lilly from her husband, and a female bar employee fled to a back office with Jacqueline. But Harold Lilly was acquitted of all charges except the burglary charge. We don't have access to the jury's deliberations, but can you imagine possible reasons that the jury might have convicted only on the burglary charge and acquitted on all others?
3. Does the *Lilly* court rely on a sharp dichotomy between civil law (such as the anti-ousting statute) and criminal law? Or does the court's decision tend to collapse the distinction between civil and criminal law? Professor Jeannie Suk has characterized responses to domestic violence like the one we see in *Lilly* as a form of "state-imposed de facto divorce." She writes,

   …The Ohio Supreme Court took the position that the criminal law would ignore the anti-ousting statute. The anti-ousting provision "was intended to address property ownership rights of married persons, matters of a civil nature. Privileges of a husband and wife with respect to the property of the other were not meant to be enforced criminally and do not affect criminal liabilities." Because the anti-ousting statute regulated in the domains of property and family relations, it simply did not apply in a criminal case…

   What is notable here is the purportedly easy division of the world into criminal and civil spheres of regulation. If applied, the anti-ousting statute would have directly conflicted with the spousal burglary conviction. According to the theory the court adopted, criminal and civil spheres were mutually exclusive and thus the civil anti-ousting statute, which regulated property interests, could have no effect on the criminal law question of burglary.

> But the crime of burglary does not operate apart from a property regime. The court's assertion that property law and criminal law represented wholly separate spheres deviated from the common law relation between burglary and property law. Classically, burglary law was dependent upon the underlying allocation of property rights. The criminal law question of whether a person committed burglary depended on property law for its application. The underlying property arrangement determined whether his entry was burglarious.
>
> The *Lilly* court indicated its intention to treat the criminal and civil spheres as wholly separate for purposes of this case. But by declining to apply the anti-ousting statute in a burglary case, the court was actually allowing criminal law, as [domestic violence] policy, to trump the law of property. The effect was to reallocate property rights between spouses such that burglary would [apply.]
>
> … What we see here is a reversal of the dependence of burglary law on the law of property. Whereas traditionally, burglary depended on the prior allocation of possessory rights determined by property law, we now see the criminal law subordinating property law to its interests, in effect reallocating private rights. While property law had previously set the conditions for burglary, criminal law now takes precedence in defining property rights in this DV context. … Even as it claims to treat civil interests as a separate sphere, the criminal law, through its coercive power and its claim to the public interest, has an unmatched capacity to reorganize private interests.
>
> Jeannie Suk, *Criminal Law Comes Home*, 116 Yale L.J. 2 (2006).

4. Given the serious allegations against Harold Lilly, and given the jury's failure to convict on any of the rape and kidnapping charges, one might be relieved that burglary was available as a proxy charge in this case. Keep in mind that the same broad criminal laws that will make it easier to convict Lilly of something will make it easier to convict other defendants, too. Trespass is even easier to prosecute than burglary, and in some contexts civil rights advocates have contended that trespass laws are used to harass and oppress persons of color. In 2012, a number of civil rights organizations filed a federal lawsuit to challenge "Operation Clean Halls," an NYPD program in public housing projects and other large residential buildings. Under the program, police patrolled the buildings and subjected many occupants to stops and frisks, often filing trespass charges against those who could not prove residence in the building. "Many tenants who live in Clean Halls buildings are restricted in their ability to maintain familial ties and friendships due to the use of aggressive police tactics in their homes," the New York Civil Liberties Union explained in a public statement about its lawsuit. "The program is part of a citywide practice of suspicionless police stops and arrests that primarily impact communities of color." The lawsuit, *Ligon v. City of New York*, eventually settled (along with the more widely publicized lawsuit challenging NYPD stop-and-frisk practices, *Floyd v. City of New York*). But Operation Clean Halls continued in a modified form under a new name, the Trespass Affidavit Program, until it was shut down in the fall of 2020. Other cities continue to operate Trespass Affidavit Programs, under which building owners submit lists of building residents to law enforcement and invite law enforcement to patrol the buildings and arrest non-residents.

Check Your Understanding (5-2)

The original version of this chapter contained H5P content. You may want to remove or replace this element.

Robbery

N.J.S.A. 2C : 15-1a(1)

a. **Robbery defined.** A person is guilty of robbery if, in the course of committing a theft, he:

(1) Inflicts bodily injury or uses force upon another; or

(2) Threatens another with or purposely puts him in fear of immediate bodily injury; or

(3) Commits or threatens immediately to commit any crime of the first or second degree.

An act shall be deemed to be included in the phrase "in the course of committing a theft" if it occurs in an attempt to commit theft or in immediate flight after the attempt or commission.

b. **Grading.** Robbery is a crime of the second degree, except that it is a crime of the first degree if in the course of committing the theft the actor attempts to kill anyone, or purposely inflicts or attempts to inflict serious bodily injury, or is armed with, or uses or threatens the immediate use of a deadly weapon.

STATE of New Jersey

v.

Francisco SEIN

Supreme Court of New Jersey
590 A.2d 665

Decided May 21, 1991

CLIFFORD, J.

The narrow issue on this appeal … is whether the sudden snatching of a purse from the grasp of its owner involves enough force to elevate the offense from theft from the person to robbery as defined by *N.J.S.A.* 2C:15-1a(1)….

-A-

On August 27, 1986, Edythe Williams cashed her unemployment check at Proper Check Cashing, a concession located in the Woolworth store on Main Street in Paterson. Mrs. Williams placed the proceeds in a zipped compartment in the strapless, clutch-type purse that she carried under her arm. After purchasing a notebook in Woolworth's, she left the store and headed for her car, which she had parked a couple of blocks away.

Mrs. Williams arrived at her car intending to drop off the notebook and continue shopping in the area. She went to the passenger side and put her key in the lock, all the while carrying the purse under her right arm. As Mrs. Williams stood in the street, defendant, Francisco Sein, walked up and stood close beside her on her left. Mrs. Williams turned to face the man, thinking he had approached to ask a question, but defendant said nothing. Instead, "he reached across [her] and just slid [her] pocketbook–which wasn't very hard to do–from under [her] arm and took off," running toward Main Street. There was no evidence that defendant used any force other than that required to slide the purse from beneath Mrs. Williams' arm.

The police apprehended defendant, who was subsequently indicted for robbery… At trial, defendant moved at the conclusion of the State's case for a judgment of acquittal in respect of the robbery charge, contending that the case should proceed only on the lesser-included offense of theft from the person, defined by *N.J.S.A.* 2C:20-3a as the "unlawful[ ] tak[ing], or exercis[ing of] unlawful control over, movable property of another with purpose to deprive him thereof." The crux of defendant's argument was that there was no evidence in the record that the taking of Mrs. Williams' purse was accompanied by the use of force against her person, a requirement for conviction under*N.J.S.A.* 2C:15-1a(1). The State, on the other hand, urged that a judgment of acquittal would be improper because the Legislature intended that the force used to remove the purse from the victim was sufficient to elevate the unlawful taking to a robbery. The trial court denied defendant's motion, and the jury subsequently found defendant guilty of second-degree robbery.

On appeal, defendant contended that the trial court had erred by submitting the second-degree-robbery charge to the jury because there was no evidence that defendant had used force on Mrs. Williams in the course of the purse-snatching. The Appellate Division agreed… The court reversed the robbery conviction and remanded for the entry of a judgment of conviction for theft and for resentencing for that offense.

Before us, the State argues that the Appellate Division's construction of the "uses force upon another" language in the robbery statute, *N.J.S.A.* 2C:15-1a(1), both misconstrues the plain meaning of the statute and contravenes the relevant legislative intent. According to the State, the Appellate Division's standard will "change the focus of a robbery committed through the use of force from the conduct of the perpetrator to the nature of the property that he stole * * * and the particular characteristics of the victim as well as the victim's actions." In addition, the State submits that the standard established by the Appellate Division to determine the amount of force necessary to effect a robbery is "inexact and unworkable," and that therefore jurors will be required to use concepts founded in the science of physics to determine whether more force was used than that quantum necessary merely to remove the object.

-B-

Cases involving "snatching" have required courts to determine where to draw the line between robbery and the lesser offense of larceny from the person. A certain amount of "force" is necessary to take property from the person of another, but whether the

amount necessary merely to accomplish that taking is sufficient to warrant the more serious penalties associated with robbery has vexed those courts that have considered the question.

Some jurisdictions have construed the term "force" as used in the state's robbery statute to mean mere physical force or energy, while others have rejected hypertechnical distinctions in favor of a view that acknowledges that snatching an object from the grasp of the owner increases the risk of danger to the victim and justifies enhanced punishment. Those jurisdictions implicitly recognize that victims do not turn over their property willingly, even if they do not resist or struggle with a thief. Thus, the amount of physical energy necessary to take the property is deemed sufficient to support a robbery conviction.

The predominant view, however, is that there is insufficient force to constitute robbery when the thief snatches property from the owner's grasp so suddenly that the owner cannot offer any resistance to the taking. *See* W. LaFave & A. Scott, *Criminal Law* § 8.11(d), at 781 (2d ed.1986). This "majority rule" has been set forth in the following terms:

[A] simple snatching or sudden taking of property from the person of another does not of itself involve sufficient force to constitute robbery, though the act may be robbery where a struggle ensues, the victim is injured in the taking, or the property is so attached to the victim's person or clothing as to create resistance to the taking.

People v. Patton (Ill. 1979).

The legislative history of New Jersey's robbery statute, *N.J.S.A.* 2C:15-1, when read in the context of the Code Commentary on theft, reveals that our Legislature intended to adopt the majority rule.

-C-

At common law, robbery was defined in New Jersey as "the felonious taking of personal property from the person or custody of another by force or intimidation." The pre-Code robbery statute, *N.J.S.A.* 2A:141-1, codified the common law.

The Appellate Division summarized the general state of the law of robbery under the pre-Code statute in*State v. Culver* (1970), where it stated:

N.J.S.A. 2A:141-1 provides that any person who forcibly takes from the person of another money or personal goods and chattels of any value whatever by violence or putting him in fear, is guilty of a high misdemeanor. Thus, force or intimidation is a necessary element of the crime and must precede or be concomitant with the taking. The property stolen need not have been in contact with the person from whom it was taken at the time it was stolen, and if taken by fear it must be the result of such demonstration or threat as to create reasonable apprehension on the part of the victim that, if the theft were resisted, force would be used. *While a secret or sudden taking of property from the owner without putting him in fear and without open violence is deemed larceny, if there be a struggle to keep it or any violence or disruption, the taking is robbery.*

The foregoing summary suggests that [before 1979] New Jersey followed the majority view as stated in *People v. Patton*, above.

In 1979, the Legislature revamped the criminal laws by enacting the New Jersey Code of Criminal Justice… Under [the Code's robbery statute] as originally enacted, "[a] person [was] guilty of robbery if, in the course of committing a theft, he: (1) [i]nflicts bodily injury upon another; or (2) [t]hreatens another with or purposely puts him in fear of immediate bodily injury; or (3) [c]ommits or threatens immediately to commit any crime of the first or second degree."

In 1981, however, the Legislature amended *N.J.S.A.* 2C:15-1a(1) to read that a person is guilty of robbery if in the course of committing a theft he "[i]nflicts bodily injury *or uses force* upon another." *L.* 1981, *c.* 22, § 1 (emphasis added). The Legislature's intention regarding the addition of the "or uses force" language is made clear by the following Statement of the Senate Judiciary Committee:

Senate Bill No. 885 amends *N.J.S.A.* 2C:15-1 to clarify that a person is guilty of robbery if he uses any force upon another in the course of committing a theft. Under present law only a person who inflicts bodily injury upon another in the course of committing a theft is guilty of robbery. Senate Bill 885 extends the definition of robbery to cover the so-called "blind-side" mugging. This occurs when a person commits an act of theft-for example a purse snatching-by approaching the victim from behind *and using some degree of force to wrest the object of his theft from the victim.* Often, however, no bodily injury is inflicted in these cases and therefore the offenses committed could be found to be theft rather than robbery.

[*Statement of the Senate Judiciary Committee to Senate Bill 885* (Apr. 21, 1980) (emphasis added).]

The State contends that that Statement shows that the Legislature contemplated that a sudden, surprise snatching of property held in the grasp of another or in some way in contact with the person of another involves the use of force sufficient to elevate the taking to a robbery.

To the contrary, that the Legislature intended to broaden the concept of force beyond the pre-Code understanding of that term is not at all clear. The Senate Judiciary Committee Statement begins by saying the amendment is to "*clarify* that a person is guilty of robbery if he uses force upon another in the course of committing a theft." (Emphasis added.) That suggests that the omission of the "or uses force" language in the Code as originally enacted in 1979 was an oversight. In amending *N.J.S.A.* 2C:15-1a(1), the Legislature merely intended to clarify that the type of force required to support a robbery conviction under the pre-Code statute still would be sufficient to elevate a theft to a robbery.

As we indicated earlier, "a simple snatching or sudden taking of property from the person of another does not of itself involve sufficient force to constitute robbery" under the pre-Code statute, and nothing in the Senate Judiciary Committee Statement undercuts that standard. Although the Committee Statement refers to a "purse snatching" as an example of the conduct the amendment was intended to cover, it goes on to state that snatchings rising to the level of robbery include only those that involve "some degree of force to *wrest* the object" from the victim. (Emphasis added.) To "wrest" is to "pull, force, or move by violent wringing or twisting movements." *Webster's Third New International Dictionary* 2640 (1971). The Legislature apparently determined that the violence associated with "wresting" is deserving of more severe punishment. It did not, however, intend to eliminate the requirement that robbery by use of force include force exerted "upon another."

Moreover, the Commentary to the Code definition of "theft" strongly suggests that the Legislature did not intend that a surprise purse-snatching unaccompanied by injury, threat, struggle, or attempted resistance would constitute the crime of robbery. In discussing *N.J.S.A.* 2C:20-3 [New Jersey's theft statute], which provides in pertinent part that "a person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with purpose to deprive him thereof," the Legislature made clear the following:

The crime here defined may be committed in many ways, i.e., by a stranger acting by stealth or *snatching from the presence or even the grasp of the owner* or by a person entrusted with the property as agent, bailee, trustee, fiduciary or otherwise.

[II *New Jersey Penal Code: Final Report of the New Jersey Criminal Law Revision Commission*.]

The theft statute thus includes purse-snatchings from the grasp of an owner, while the robbery statute includes purse-snatchings that involve some degree of force to wrest the object from the victim. The only way to reconcile the two statutes is to hold that robbery requires more force than that necessary merely to snatch the object.

If the Legislature had intended that the amount of force necessary to snatch the object would be sufficient to constitute a robbery, it could have amended the theft statute to indicate that it includes only those snatchings in which the object of the theft is loose or can be cut loose, but not those in which the object must be removed from the victim. It did not do so.

The standard we adopt today continues the focus of a robbery on the conduct of the perpetrator rather than on the nature of the property stolen or the characteristics of the victim and his or her actions. Furthermore, we do not agree with the State's contention that this standard is "inexact and unworkable." If in fact jurors will henceforth be required to resort to concepts founded in the science of physics to determine whether more force was used than that quantum necessary merely to remove the object, that is hardly a dismaying by-product of a correct interpretation of the statute. Such concepts are used frequently by juries in their deliberations and are entirely within their ken.

-D-

… There is no indication that the Legislature intended to change the pre-Code rule that "a secret or sudden taking of property from the owner without putting him in fear and without open violence is deemed larceny, [but] if there be struggle to keep it or any violence or disruption, the taking is robbery." To the extent that the robbery statute and the Senate Judiciary Committee Statement are burdened with ambiguity, as so persuasively argued by the Chief Justice in his dissent, that ambiguity surely cannot inure to the benefit of the State. "[P]enal statutes that are open to more than one reasonable construction must be construed strictly against the State."

Because there is no evidence that defendant's conduct involved the type of force sufficient to elevate the theft to a robbery under *N.J.S.A.* 2C:15-1a(1), the judgment of the Appellate Division is affirmed.

WILENTZ, C.J., dissenting.

I would hold that, under the statutory amendment, all purse snatchings are robberies, regardless of the amount of force used. I believe this construction of the amendment achieves the overriding goal of the Legislature: to deter and to prevent purse snatchings, not some kind, one kind, or a particular kind, but all purse snatchings.

I recognize the legitimacy of the majority's decision. The issue of statutory interpretation facing the Court is difficult. But I cannot accept what I believe is an interpretation that falls far short of the legislative intent even in the face of the persuasive analysis in its support. A basic societal interest is left unprotected despite the Legislature's clear intent to protect it. It is our interest in personal safety.

Determining the appropriate judicial role in construing statutes that do not accurately reflect the Legislature's intent is sometimes problematic. That problem is magnified as the distance between the legislative intent and the Legislature's language grows. Where, as here, a criminal statute is involved, the judiciary's attempt to bridge the gap can conflict with notions of fairness and due process: it is the criminal statute that determines a crime—we do not jail people for violating legislative intent.

This case presents an extreme example of the problem. The Legislature clearly intended to make *every* purse snatching a robbery and just as clearly did not say so. The question is how far the judiciary should go to effect the legislative purpose despite the lack of legislative language.

…A literal application of the "uses force upon another" language to the offense of purse snatching suggests that force used solely upon a purse would be insufficient to elevate the crime from theft to robbery. Pursuant to such a construction, one who snatched a purse without touching the victim, even if he exerted a great deal of force in order to pull a purse tightly clutched under his victim's arm, would not be guilty of robbery. A robbery would result only if he pulled the owner's hand itself, pushed her arm to loosen the clutch, or in some way used force upon the *person* as well as on the purse. That reading of the statute, closely conforming to the statutory language, would remove a substantial portion of purse snatching offenses from the robbery statute, contrary to the Legislature's intent… The majority and this dissent both recognize that the statute should not be interpreted so literally. We differ, however, in our reading of the legislative history concerning the nature and strength of the legislative purpose, and therefore differ concerning the appropriate statutory interpretation.

I disagree with the majority's interpretation of the Judiciary Committee's Statement…. The Statement … taken as a whole, clearly suggests that the Legislature (to the extent the Judiciary Committee is its surrogate) intended to make *all* purse snatchings robberies, as did the Governor when he signed the bill.

… Certainly, given the text of the statutory amendment and the less than perfect clarity of the Committee Statement, one cannot fault the majority for concluding that the nature of the force determines the quality of the offense. My own reading of the legislative intent arises from other sources as well, however, sources of which we can fairly take judicial notice. Those sources are the vast increase in muggings and purse snatchings that preceded the law and society's acute concern over these crimes.

For more than a decade we have witnessed a seemingly unprecedented upsurge in crime. Prominent among these offenses have been "street crimes," stranger-to-stranger offenses including ordinary muggings (usually thought to include some degree of violence or its threat) and "purse snatchings," meaning just what it says, not necessarily implying any violence or force whatsoever. That no one could any longer safely walk the streets produced fear and fury on the part of society. Purse snatching was particularly loathsome, given its unpredictability, lack of warning, almost total randomness, and the fact that women were almost invariably the victims. Force and violence were often present and certainly they were major elements of society's concern. But it was the offense itself, and its usual attributes, the insult and offense to the person, the potential danger, the helplessness, and the utter unredeemable ugliness of being "attacked"—for that is the universal perception–with or without force, by some amoral stranger who takes command of your belongings—it was the offense itself, purse snatching, regardless of its differing qualities, that was society's concern. I find it most difficult to believe that either society or the Legislature ever intended to further penalize only "wresting" purse snatchings, but not the swift skillful removals that involve practically no force. Society and the Legislature condemn this offense regardless of whether the victim resists or whether because of "wresting," she becomes immediately aware of the violation. This is not to say that the Legislature could not have selected the extent of force as a critical factor in elevating the crime from theft to robbery. Certainly, the dangers are increased when a thief uses excessive force, whether because of an utter disregard for the victim or because of the necessities caused by her resistance; and to the extent force bears on the victim's "awareness," with its

resulting fear, that is one of the most offensive aspects of the crime. The Legislature did not, however, intend to define the crime by the variables of fear and force. Rather, it intended to define *all* purse snatchings as robberies.

… It seems most unlikely that the Legislature sought to transform a thief into a robber only if the thief encounters resistance while accomplishing his goal. Such a result amounts to equating the defendant's blameworthiness with the victim's reflexes. A thief who finds it necessary to tug the purse from under a woman's arm or from her instinctively tightened grasp is deemed a robber, while one who slides the purse out and removes it, as in this case, remains merely a thief. Similarly, one who takes a purse suspended by a shoulder strap or chain while the woman's arm is resting on the purse is a robber, while one who covertly lifts the purse without engaging her conscious or inertial resistance is but a thief.

…Deterrence of purse snatching is what the Legislature wanted to accomplish, and it would be most surprised to learn that all it had deterred was purse snatching involving wresting, and had left out the many purse snatchers who go out ready and willing to wrest, but who, because of some fortuitous circumstance, grab the purse without such consequence. The announcement it wanted to make to society is that *all* purse snatchings are robberies so that the offenders should know it when they go out in the night—and more and more frequently, even in the day—to prey on their helpless victims.

The Legislature knew what too many of us know—that it is not only the one on a motor bike who takes the tourist's purse as he strolls on the street, not only the person on the down escalator who grabs the shoulder bag from the victim on the up escalator and dashes off into the crowd, but more so it knew what is not shown on the television ads—the street criminal who pulls your purse out from under your arm, from behind, or face-to-face, without noticeable force and without threat other than the perceived possibility that resistance may lead to injury or even death. In each case the victim does not resist, and the only force may be the lifting of the object, but surely this is the force that the Legislature had in mind.

This construction of the statute is, of course, not limited to purses or to women. A person commits a robbery whenever he or she unlawfully takes an article held by or within the possession of a person, or attached to the outside of a person's garments. This definition encompasses any kind of article, not just a purse, and it would presumably extend to pickpocketing, although the legislative history, overwhelmingly indicating an intent to reach purse snatchers, provides no indication of an intent to reach the pickpocket. If, as is entirely possible, the Legislature did not intend so broad a scope for its new definition of robbery when applied to pickpocketing, legislative amendment may be needed. Distinctions exist between the two: purse snatching is usually accompanied by some degree of force and victim awareness, while pickpocketing is usually characterized by stealth, lack of force, and no victim awareness.

…I would reverse the judgment of the Appellate Division and reinstate the guilty verdict.

Notes and questions on *State v. Sein*

1. As noted in the introduction to this chapter, robbery is often classified as a "violent crime" rather than a property offense. Robbery does involve the taking of property, but it typically requires the taking of property by a specific means: the use or threat of physical force. The exercise of force (or the threat to exercise it) is a frequent concern of criminal law, and the next chapter will examine crimes involving force or violence in much greater detail. Once recurring question will be the one raised here in *Sein*: what exactly does the word "force," or the word "violence," mean when it is used in a criminal statute? About a year after deciding *State v. Sein*, the New Jersey Supreme Court addressed the meaning of the term "force" again, this time in the context of sexual assault. You'll that case, *In re. M.T.S.*, in Chapter Six, and have an opportunity then to think more about whether the concept of force is or should be defined uniformly across criminal law.
2. Between majority and dissent in *Sein*, who offers the more convincing interpretation of the state legislature's intent with respect to this particular statute? Is it clear that Judges Clifford (for the majority) and Chief Judge Wilentz (dissenting) are trying to ascertain the legislature's intent, as opposed to trying to vindicate their own instincts about whether purse snatchings should be criminalized as robberies?
3. Consider carefully the end of the dissent, where Chief Judge Wilentz says that his interpretation of the statute is "not limited to purses or women." If that is true, why wouldn't pickpocketing become robbery, according to the dissent?
4. Use robbery to practice your ability to analyze mental state requirements. What is the mens rea requirement of the New Jersey statute? (Remember, the absence of an explicit textual reference to mental states does not mean that a statute lacks a mens rea requirement!) Do you think robbery would be classified as a "specific intent" or "general intent" crime?

N.Y. Penal Law 160.00. Robbery; defined

Robbery is forcible stealing. A person forcibly steals property and commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of:

1. Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or
2. Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.

The People of the State of New York

v.

Edward REID

The People of the State of New York

v.

Walter RIDDLES

Court of Appeals of New York
508 N.E.2d 661

Decided May 5, 1987

SIMONS, J.

The common issue presented by these two appeals is whether a good-faith claim of right, which negates larcenous intent in certain thefts, also negates the intent to commit robbery by a defendant who uses force to recover cash allegedly owed him. We hold that it does not….

I

Defendant Edward Reid was charged in a multicount indictment with felony murder, three counts of robbery in the first degree, one count of criminal possession of a weapon in the third degree and various other crimes. He was acquitted of the murder count but convicted of the robbery and possession counts. The additional charges were dismissed by the trial court.

The convictions stem from defendant's forcible taking of money from three others. The evidence established that defendant and his stepbrother, Andre McLean, approached … three men … standing on a street corner in The Bronx. Defendant and McLean were holding pistols when defendant demanded that the three men hand over money "that belonged to him," apparently referring to money owed him as the result of prior drug transactions. [Two men] gave defendant money but [a third, Donnie Peterson] responded that he had none and would have to go upstairs to his apartment to get some. As the men walked up the stairs, toward Peterson's apartment, defendant "snatched" McLean's pistol, placed it in his waistband and demanded that McLean turn over money he was holding for him. McLean handed defendant $300. A moment later, he rushed at defendant, a "shot went off" striking McLean and defendant fled. McLean subsequently died from a single gunshot wound to his chest.

Defendant Walter Riddles was indicted for robbery in the second degree and assault in the second degree. He was convicted after a bench trial of robbery in the third degree for forcibly taking money from Genevieve Bellamy on November 10, 1982.

Bellamy and defendant both testified at trial, each providing different descriptions of events. Bellamy maintained that while she was waiting for a taxi at a street corner in The Bronx, defendant, whom she did not know, drove up to the curb and asked for directions. According to Bellamy, when she leaned into defendant's automobile to help him, defendant grabbed her, forced her into the car and demanded money from her. Bellamy stated she did not have any, but defendant struck her in the face, searched her pockets, and, upon discovering $50, took the money and ordered her out of the automobile.

Defendant disputed her story. He testified that he knew Bellamy prior to the incident and that she owed him $25. He stated that … on the evening of November 10 … she offered to pay him $15 toward her debt if he drove her downtown so she could pick up a package. Defendant maintained that he took Bellamy downtown, as she asked, but that she was unable to obtain her package so he

drove her back uptown. Defendant testified that during the return trip, Bellamy again offered to pay him $15 toward her debt, but upon seeing her counting a large sum of money, he took the full amount she owed him, $25, and no more.

In pronouncing judgment, the court stated that it credited the portion of defendant's testimony indicating that he had taken the money from Bellamy to satisfy a debt but the court held that because defendant used force he was nevertheless guilty of robbery.

II

A person "commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force." The larceny statute, in turn, provides that an assertion that "property was appropriated under a claim of right made in good faith" is a defense to larceny (*see* Penal Law § 155.15). Since a good-faith claim of right is a defense to larceny, and because robbery is defined as forcible larceny, defendants contend that claim of right is also a defense to robbery. They concede the culpability of their forcible conduct, but maintain that because they acted under a claim of right to recover their own property, they were not guilty of robbery, but only some lesser crime, such as assault or unlawful possession of a weapon.

Defendants' general contention is not without support. Several jurisdictions have held that one who acts under a claim of right lacks the intent to steal and should not be convicted of robbery. That logic is tenable when a person seeks to recover a specific chattel: it is less so when asserted under the circumstances presented in these two cases: in *Reid* to recover the proceeds of crime, and in *Riddles*, to recover cash to satisfy a debt.

We have not had occasion to address the issue but the Appellate Divisions [lower NY courts] to which it has been presented have uniformly ruled that claim of right is not a defense to robbery. Their determinations have been based upon the interpretation of the applicable statutes and a policy decision to discourage self-help and they are consistent with what appears to be the emerging trend of similar appellate court decisions from other jurisdictions. For similar reasons, we conclude that the claim of right defense is not available in these cases. We need not decide the quite different question of whether an individual who uses force to recover a specific chattel which he owns may be convicted of robbery. It should be noted, however, that because taking property "from an owner thereof" is an element of robbery, a person who recovers property which is his own (as compared to the fungible cash taken to satisfy a claimed debt in the cases before us) may not be guilty of robbery.

The claim of right defense is found in the larceny article of the Penal Law, which provides that a good-faith claim of right is a defense to trespassory larceny or embezzlement. The defense does not apply to all forms of larceny. For example, extortion is a form of larceny, but the Legislature, consistent with a prior decision of this court, has not authorized a claim of right defense to extortion. The exception is significant for extortion entails the threat of actual or potential force or some form of coercion. Thus, the inference may reasonably be drawn that in failing to authorize a claim of right defense for extortion in Penal Law § 155.15 (1), and by failing to incorporate it in article 160 of the statute, which governs robbery, the Legislature recognized that an accused should not be permitted to invoke it in crimes involving force. We assume that if the Legislature intended to excuse forcible taking, it would have said so.

Our decision also rests upon policy considerations against expanding the area of permissible self-help. Manifestly, a larceny, in which the accused reacquires property belonging to him without using force, differs from a robbery in which the defendant obtains money allegedly owed to him by threatening or using force. "The former is an instance of mistake, not subjected to penal sanctions because the threat to private property is not so serious as to warrant intervention by the criminal law. The latter is a species of self help and whether or not the exponent of force or threats is correct in estimating his rights, he is resorting to extra-judicial means in order to protect a property interest" (Note, *A Rationale of the Law of Aggravated Theft*, 54 Colum L Rev 84, 98 [1954]). Since such forcible conduct is not merely a transgression against property, but also entails the risk of physical or mental injury to individuals, it should be subjected to criminal sanctions. Consequently, we find the courts in both *People v Reid* and *People v Riddles* correctly denied defendants' requests to assert claim of right defenses.

… We have considered defendant Reid's remaining points and find them either unpreserved or without merit.

Accordingly, the orders of the Appellate Division should be affirmed.

Notes and questions on *People v. Reid*

1. Recall that in *People v. Williams*, the California case presented early in this chapter, the court relied on common law property crime definitions (including larceny) to interpret the state robbery statute. Here in *Reid*, the New York court takes a similar

approach, perhaps with even better statutory authority: the New York statute at issue here explicitly refers to larceny to define the crime of robbery. That approach – understanding robbery as larceny + the use or threat of force – creates the legal question that arises in *Reid*: should a circumstance that provides a defense to larceny also provide a defense to the more serious crime of robbery?

2. To think through that question, it may help to put the use of force aside for a moment and focus solely on larceny. Why is a good faith claim of right a defense to the crime of larceny?
3. Do the considerations that make a good faith claim of right relevant to liability for larceny also apply in the robbery context? Why or why not?
4. In 2007, the former football star O.J. Simpson was arrested after he and five other men confronted sports memorabilia dealers in a Las Vegas Hotel and took items at gunpoint. Simpson later claimed that he was simply recovering commemorative items and awards that had been stolen from him. Would Simpson's claim, if true, exonerate him from a charge of robbery under the analysis of *State v. Reid*? For the analysis of a Nevada court (applying a Nevada robbery statute), see *Simpson v. State*, 367 P.3d 819 (Nev. 2010).

Arson

Md. Crim. L. § 3-204. Reckless endangerment [as of 2001]

(a) A person may not recklessly:

(1) engage in conduct that creates a substantial risk of death or serious physical injury to another; or

(2) discharge a firearm from a motor vehicle in a manner that creates a substantial risk of death or serious physical injury to another.

Md. Crim. L. § 6-102. Arson [as of 2001]

(a) A person may not willfully and maliciously set fire to or burn:

(1) a dwelling; or

(2) a structure in or on which an individual who is not a participant is present.

Reginald T. HOLBROOK

v.

STATE of Maryland

Court of Appeals of Maryland
772 A.2d 1240

June 5, 2001

HARRELL, Judge.

Following a non-jury trial in the Circuit Court for Wicomico County, Reginald T. Holbrook (Petitioner) was convicted of first degree arson, eight counts of reckless endangerment, and making a threat of arson… We granted Petitioner's *writ of certiorari*…

I.

… There is no significant dispute about the facts in this case. In 1998, Alisha Collins leased a residence at 230 Ohio Avenue in Salisbury, Maryland. Between April and May of that year, nine people lived there [including] Alisha Collins, … her aunt, DeKota Collins, … and, Mr. Holbrook, who was DeKota Collins's boyfriend. Mr. Holbrook resided at the home for several months and contributed to the rent.

DeKota Collins was the representative payee for Mr. Holbrook's social security payments. On May 1, 1998, Mr. Holbrook and DeKota Collins had an argument over his money during which he made a menacing gesture toward her with a screwdriver. Alisha Collins called the police. The responding officer told Mr. Holbrook that he would have to leave and not to return to the premises. The officer stayed while Mr. Holbrook removed all of his belongings. Alisha Collins testified at trial that Mr. Holbrook was "really mad."

About an hour after leaving the premises, Mr. Holbrook returned and asked to speak to DeKota. She told him, “Reggie, I don’t want you no more. I just want you to leave me alone and don’t come back here no more.” Mr. Holbrook sat on the porch and cried. About one hour later, Alisha Collins and her husband left the premises with Mr. Holbrook. The three shared a cab ride, during which Mr. Holbrook repeatedly said “I’m going to get all of you.”

On May 6, 1998, Alisha Collins observed Mr. Holbrook walking back and forth across the street from her house. She testified that he said “I’ll burn this mother fucker up.” Over the objection of defense counsel, Alisha Collins testified that a week before Mr. Holbrook left the home, she overheard an argument between him and DeKota Collins during which Mr. Holbrook said “I’ll burn this mother fucker house down” and “I got people that can hurt you that live upstate.”

[Quoted from the lower court opinion:] On the evening of May 7, 1998, Mr. Holbrook came to the door of the home and asked to see DeKota Collins. Alisha Collins lied and said that she was not home. Mr. Holbrook remained outside of the house for about 45 minutes calling DeKota’s name… That night, Alisha Collins fell asleep on the living room sofa. Sometime after midnight, she awoke to the smell of smoke. She awoke her husband, who went out the back door and discovered a pillow burning on the back porch. All of the occupants safely evacuated the house.

[Also from lower court opinion:] Kevin Ward, a firefighter with the Salisbury Fire Department, testified that the flames from the burning pillow were about 6 to 12 inches high when he arrived, and that there were char marks on the threshold to the rear door and smoke in the basement. Alisha Collins testified that she saw Mr. Holbrook across the street 10 to 15 minutes after the fire was discovered. She told the police that Mr. Holbrook started the fire. Mr. Holbrook was questioned by the police and by the fire marshal. He was subsequently arrested and charged with arson, reckless endangerment, and threats of arson.

On 29 April 1999, Petitioner was tried in a bench trial in the Circuit Court for Wicomico County. The court found Petitioner guilty of one count of first degree arson, eight counts of reckless endangerment [one count for each of the eight persons present in the house at the time of the fire], and one count of making a threat of arson. [The threat charge is not before this Court.] At the 28 June 1999 sentencing proceeding, defense counsel requested that the trial judge merge the reckless endangerment convictions into the first degree arson conviction; the court declined. Petitioner received a 30 year sentence for the arson conviction, with all but 22 ½ years suspended. For the first reckless endangerment conviction, Petitioner was sentenced to five years, to run consecutive to the arson sentence. For each of the remaining seven convictions of reckless endangerment, Petitioner received five years, to run consecutive to the arson sentence, but concurrent to the first reckless endangerment sentence, as well as to each other.

… Petitioner contends that the Court of Special Appeals erred in holding that a conviction and consecutive sentence for reckless endangerment did not merge into the conviction and sentence for first degree arson, when the reckless endangerment was the creation of risk of harm to persons inside a dwelling where Petitioner set a fire on a porch, and the first degree arson was the setting of the fire at the dwelling.

II.

Petitioner argues that, under either the required evidence test [for violations of the Double Jeopardy Clause] or the rule of lenity, or for reasons of “fundamental fairness,” the reckless endangerment convictions and sentences should have merged into the arson conviction and sentence. Concluding that arson and reckless endangerment are separate and distinct crimes, we disagree with Petitioner’s assertion. For reasons we shall explain, we hold that, under the circumstances of this case, the Court of Special Appeals did not err when it affirmed the Circuit Court’s refusal to merge reckless endangerment with arson.

III.

We reiterate that “the cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature.” When striving to determine the legislative intent of any statute, we first examine the plain language of the statute.

Ordinarily, we afford the words of the statute their natural and usual meaning in the context of the Legislature’s purpose and objective in enacting the statute. Moreover, we should avoid “resorting to subtle or forced interpretations for the purpose of extending or limiting [the statute’s] operation.”

A. Common Law and Legislative History

1. Reckless Endangerment

Reckless endangerment is purely a statutory crime. Modeled after § 211.2 of the Model Penal Code and first enacted in Maryland [in] 1989, reckless endangerment was codified originally … under the subtitle destroying, Injuring, etc., Property Maliciously. Effective 1 October 1996, the Legislature repealed [the first reckless endangerment statute] … enacting in its stead Md. Code Art. 27, § 12A–2 under the subtitle of assault. This statute presently provides, in pertinent part:

(a) *Creation of substantial risk of death or serious physical injury; penalties.*

—(1) Any person who recklessly engages in conduct that creates a substantial risk of death or serious physical injury to another person is guilty of the misdemeanor of reckless endangerment and on conviction is subject to a fine of not more than $5,000 or imprisonment for not more than 5 years or both.

* * * *

(c) *More than one person endangered.*—If more than one person is endangered by the conduct of the defendant, a separate charge may be brought for each person endangered.

… In two recent cases, we have discussed the legislative underpinnings of the reckless endangerment statute, as well as the elements of the crime. In *State v. Pagotto* (2000), we noted that

[t]his statute is aimed at deterring the commission of potentially harmful conduct before an injury or death occurs. The statute was enacted "to punish, as criminal, reckless conduct which created a substantial risk of death or serious physical injury to another person. It is the reckless conduct and not the harm caused by the conduct, if any, which the statute was intended to criminalize." Thus, the focus is on the conduct of the accused.

… In *Jones v. State* (2000), we concluded that

[t]he elements of a prima facie case of reckless endangerment are: 1) that the defendant engaged in conduct that created a substantial risk of death or serious physical injury to another; 2) that a reasonable person would not have engaged in that conduct; and 3) that the defendant acted recklessly.

Noting that most Maryland cases addressing these elements discuss the requisite mental state to sustain a reckless endangerment conviction, both *Pagotto* and *Jones* cite to *Minor v. State* (1992), where the Court adopted and applied an objective *mens rea:*

[G]uilt under the statute does not depend upon whether the accused intended that his reckless conduct create a substantial risk of death or serious injury to another. The test is whether the appellant's misconduct, viewed objectively, was so reckless as to constitute a gross departure from the standard of conduct that a law-abiding person would observe, and thereby create the substantial risk that the statute was designed to punish.

2. Arson

At common law, arson was defined as the malicious burning of the dwelling of another. Moreover, "at common law, arson [was] an offense against the security of habitation or occupancy, rather than against ownership or property."

To be convicted of common law arson, the State had to establish four elements: (1) that the building burned was a dwelling house or outbuilding within the curtilage; (2) that the building burned was occupied by another; (3) that the building was actually burned, as mere scorching would not suffice; and, (4) that the accused's *mens rea* was willful and malicious.

…The present day arson statute, under which Petitioner was convicted, defines arson as "willfully and maliciously set[ting] fire to or burn[ing] a dwelling or occupied structure, whether the property of the person or another." Md.Code Art. 27, § 6(a). "Dwelling," the term applicable in this case, is defined as "a structure, regardless of whether an individual is actually present, any portion of which has been adapted for overnight accommodation of individuals." Md.Code Art. 27, § 5(b). Additionally, "maliciously" is defined as " an act done with intent to harm a person or property," Md.Code Art. 27, § 5(c), while "willfully" is defined as "an act which is done intentionally, knowingly, and purposefully." Md.Code. Art. 27, § 5(f).

IV.

A. Required Evidence Test

Under the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution, the State can neither hold multiple trials nor punish a defendant multiple times for the same offense. Where a legislature, however, specifically authorizes cumulative punishment under two statutes irrespective of whether they prohibit the same conduct, such punishment may be imposed under the

statutes in a single trial. *Jones* ("[T]he Double Jeopardy Clause does no more than prevent the sentencing court from proscribing greater punishment than the legislature intended.")).

In the present case, Petitioner received multiple punishments for the same conduct under two statutes in a single trial. As the Court of Special Appeals noted correctly, under Maryland common law, the required evidence test is the appropriate "test for determining whether the different statutory or common law offenses, growing out of the same transaction, are to merge and be treated as the same offense for double jeopardy purposes." [In a footnote, the court observed that "the required evidence test is commonly referred to as the *Blockburger* test, see *Blockburger v. United States* (1932)," and is also sometimes called "the same evidence test," the "elements" test, or the "same elements" test.] The required evidence test

is that which is minimally necessary to secure a conviction for each … offense. If each offense requires proof of a fact that the other does not, or in other words, if each offense contains an element which the other does not, the offenses are not the same for double jeopardy [and merger] purposes, even though arising from the same conduct or episode. But, where only one offense requires proof of an additional fact, so that all elements of one offense are present in the other, the offenses are deemed to be the same for double jeopardy [and merger] purposes.

As a matter of course, merger occurs when two offenses are based on the same act or acts and are deemed to be the same under the required evidence test; however, "the Legislature may punish certain conduct more severely if particular aggravating circumstances are present … by imposing punishment under two statutory offenses."

In Petitioner's view, "every first degree arson necessarily involve[s] a reckless endangerment," but not vice versa. This assertion, however, is anomalous in light of the language of the statutes. Instead, we agree with the State's and the Court of Special Appeal's positions that arson and reckless endangerment do not merge under the required evidence test because each offense has an element not present in the other.

As discussed *supra*, the offense of arson requires a defendant to act "willfully and maliciously," while the reckless endangerment offense requires proof that the defendant acted "so reckless[ly] as to constitute a gross departure from the standard of conduct that a law-abiding person would observe." Petitioner argues that these *mens reae* are one and the same… While this reasoning may have been true [under prior versions of our statutes, it is not true today]. Section 5 of Art. 27, which provides the definitions for the terms used within the arson statute, defines "maliciously" as "an act done with intent to harm a person or property," and "willfully" as "an act which is done intentionally, knowingly, and purposefully." Examining the plain language used to define "maliciously" and "wilfully," we conclude that the Legislature intended for arson to be a specific intent crime.

Conversely, the Legislature clearly intended for reckless endangerment to be a general intent crime, one whose *mens rea* requirement is the conscious disregard of the risks and indifference to the consequences to *other persons.*…

We distinguish further the elements of these offenses, for, in contrast with reckless endangerment, arson clearly is defined as a crime against *habitation.* To reiterate, Art. 27, § 6 provides that "[a] person may not wilfully and maliciously set fire to or burn a dwelling or occupied structure, whether the property of the person or another." In the present case, the record reflects that, the day before the incident, Petitioner threatened to "burn this mother fucker up" and to "burn this mother fucker house down." Applying the statute to this evidence, the Circuit Court convicted Petitioner of wilfully and maliciously setting fire to or burning the Collinses' dwelling. Because dwelling "means a structure, *regardless or whether an individual is actually present,* any portion of which has been adapted for overnight accommodation of individuals" (emphasis added), we conclude that, in keeping with its common law roots, first degree arson is a crime against habitation, not persons or property. In contrast, reckless endangerment, in keeping with its statutory construction, is a crime against persons, not habitation or property. This is indicative, though not dispositive, of a legislative intent that the crimes may be punished separately. This bears on our later analysis of the rule of lenity with greater weight.

…We reject Petitioner's argument that, under the required evidence test, the same evidence necessary to convict on the arson offense would always be sufficient to establish the reckless endangerment offense. Accordingly, Petitioner was not convicted twice for the same offense in violation of the Double Jeopardy Clause of the United States Constitution.

B. The Rule of Lenity

When, as in the present case, two offenses do not merge under the required evidence test, we nonetheless may consider, as a principle of statutory construction, the rule of lenity, which "provides that doubt or ambiguity as to whether the legislature intended

that there be multiple punishments for the same act or transaction will be resolved against turning a single transaction into multiple offenses."

… We believe that the Legislature moved the offense of reckless endangerment to its current subtitle in an effort to avoid the very guesswork that Petitioner encourages us to engage in today: whether reckless endangerment could be a crime against property or habitation as well as against persons. We note that, like attempt to commit a crime, reckless endangerment is an inchoate crime, for it "is intended to deal with the situation in which a victim is put at substantial risk of death or serious bodily harm but may, through a stroke of good fortune, be spared the consummated harm itself." In this case, Petitioner was convicted of recklessly endangering the Collins family by setting fire to a pillow on their porch even though, through a stroke of good fortune, he caused no injury to them. But what if Petitioner had intended to harm the Collinses, and he in fact did cause such harm? What if his crime was no longer inchoate, but complete? It is our view that, even if Petitioner's intent was not general, but specific as to harming the Collins family, and even if the act of burning the pillow had caused an injury to one or more of the Collinses, the completion of the *mens rea* and the *actus reus* would not have ripened into the offense of arson, but rather into the offense of battery, or worse. It, however, would not have ripened under the rule of lenity into the offense of arson.

We believe that there is clear legislative intent that persons convicted of arson also may be convicted of reckless endangerment. It is not logical to assume that the Legislature intended that reckless endangerment would merge for purposes of sentencing with arson. Rather, the General Assembly intended arson and reckless endangerment to be separate offenses subject to multiple punishments. Because there is no doubt or ambiguity as to whether the Legislature intended that there be multiple punishments for Petitioner's act, the punishments are permitted and the statutory offenses do not merge for sentencing purposes.

Notes and questions on *Holbrook v. State*

1. Holbrook involves a multiple-charges situation somewhat similar to *State v. Begaye*, discussed earlier in this chapter. Recall that in *Begaye*, the defendant was charged with two separate offenses, burglary and breaking and entering, for the same conduct. The *Begaye* court rejected the defendant's argument that these separate convictions violated his right to be free from double jeopardy. Here in *Holbrook*, the defendant argued that he could not be convicted of both arson and reckless endangerment for the same conduct. Does the Maryland court in *Holbrook* use the same test to assess the double jeopardy claim that the New Mexico court used in *Begaye*?
2. Double jeopardy claims are just one of many contexts in which it is important to be able to identify the separate elements of an offense, including any mens rea requirement. If you were to list the separate elements of the Maryland reckless endangerment offense, what elements would you include? What is the mens rea requirement of that statute?
3. The *Holbrook* court says that arson is an offense against habitation, rather than an offense against property. What might be the difference?
4. Some common law courts held that it was impossible to commit arson against one's own property. As with burglary, this principle has changed with modern criminal statutes. Many states now explicitly define arson to include intentional destruction by fire of one's own property. And some states have a specific offense of burning one's own property in order to collect insurance proceeds.
5. Is arson a "violent" crime? Again, we will discuss the classification of crimes as violent, and consider "force" as an element of criminal offenses, in more detail in the next chapter. But it is worth noting now that one approach to "violent crime" defines the category to include offenses that involve "the use of force against the person or property of another. Under that definition, arson against someone else's property could be a violent crime, but arson against one's own property would not be violent. See, e.g., *United States v. Wilder*, 834 F. App'x 782, 784 (4th Cir. 2020).
6. The Maryland arson statute is fairly typical in requiring "willful and malicious" intent; many other arson statutes use similar mens rea language. The terms "malice" and "malicious" appear frequently in criminal statutes, but there is no single uniform definition of these terms. (Nor do courts always agree what "willful" means.) Chapter Six provides greater detail of the term "malice" in the specific context of homicide law. As the *Holbrook* court notes, the Maryland arson statute defines "maliciously" to mean "with intent to harm a person or property." Given this definition, the court categorizes arson as a "specific intent crime" and thus distinguishes it from reckless endangerment (a "general intent crime"), allowing the defendant to be convicted of both offenses.
7. In California, arson is similarly defined with a mens rea of "willfully and maliciously." "A person is guilty of arson when he or she willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels, or procures the burning of, any

structure, forest land, or property." Cal. Penal Code § 451. But the California Supreme Court has interpreted this language to create a "general intent" crime that requires only that the defendant intend to engage in the conduct that starts the fire. Under California law, it is not necessary to show the defendant intended to cause any harm, or even intended to start a fire, in order to convict a defendant of arson. The California court reached this conclusion in *In re. V.V.*, 252 P.3d 979 (2011), which involved two minors who had lit a firecracker on a hill in Pasadena. The firecracker exploded and caused a brush fire. The Supreme Court found sufficient evidence of "willful and malicious" intent, emphasizing that the minors had deliberately set off the firecracker, and that a reasonable person would realize that the firecracker could start a fire. It did not matter, the court said, if these defendants did not intend to set a fire, or if these defendants were not actually aware of the risk that the firecracker would start a fire.

V.V. and J.H. were not required to know or be subjectively aware that the fire would be the probable consequence of their acts. … A defendant may be guilty of arson if he or she acts with awareness of facts that would lead a reasonable person to realize that the direct, natural, and highly probable consequence of igniting and throwing a firecracker into dry brush would be the burning of the hillside….

Although V.V. and J.H. did not intend to set the hillside on fire, they knew that their intentional acts created a fire hazard. J.H. told the police he attempted to throw the firecracker onto a concrete area on the hillside, while V.V. said they wanted to throw the firecracker onto a green area on the hillside.

In re V.V., 252 P.3d at 985.

End of Chapter Review

Check Your Understanding (5-3)

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Cumulative Review

Check Your Understanding (5-4)

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1. [Fn. 3 of original opinion]. As to the definition of "possession" the judge instructed the jury as follows:
   - The word "possession" includes actual as well as constructive possession, and also sole as well as joint possession.
   - A person who has direct physical control of something on or around his person is in actual possession of it.
   - A person who is not in actual possession, but who has knowledge of the presence of something and has the authority or right to maintain control of it either alone or together with someone else, is in constructive possession of it.
   - If one person alone has possession of something, possession is sole. If two or more persons share possession, possession is joint.

   I Iowa Criminal Jury Instructions no. 200.47. As we address below, these instructions are more helpful in controlled substance cases. Jury instructions on the definition of "possession" and "control" under § 714.1 should be based upon the concepts articulated in the Model Penal Code. ↵

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1.6: Crimes Against the Person

Introduction

In this chapter, we consider offenses that involve the threatened or actual use of force against another person, or the infliction of some kind of bodily injury. This category of offenses is often labeled “Crimes against the person,” a term that emerged at common law but is now replicated in many contemporary penal codes. Crimes against the person are crimes against individual victims, but that is not the only factor that makes them “against the person.” In the typical usage, “against the person” means “against the body”: crimes against the person are crimes that involve injuries or threats to the physical body of a victim. Some courts and commentators equate the category “crimes against the person” with the phrase “violent crime,” and in this chapter we will also explore the classification of certain offenses as “violent.” We will focus on assault, sexual assault, and homicide in this chapter, but many other offenses – including robbery and arson, both discussed in Chapter Five – have been classified as violent on at least some occasions. As you read, look for both patterns of commonality and points of divergence in the ways that different places, at different times, have classified conduct as violent, or violence as criminal.

The offenses discussed in this chapter are important for several reasons. To many law students and lawyers, and indeed to many non-specialists, crimes such as homicide or sexual assault represent the “core” of criminal law, the type of conduct that most warrants criminalization. In an era in which American criminal law is subject to extensive criticism and many commentators have argued for abolition of much of the criminal legal system, crimes against the person may pose a particular challenge. Even if some types of harmful or unpleasant conduct are best addressed through non-criminal legal measures, the anti-abolitionist might argue, murder and rape are acts whose very labels invoke criminal law. As you consider how society should best respond to acts of violence that are presently punished as homicides or assaults, you should be attentive to variations in the legal definitions of those terms and discretion in their application.

By the end of this chapter, you should understand the typical components of assault, sexual assault, and homicide, and you should be familiar with interpretive questions that arise frequently in relation to these offenses. The offenses in this chapter will allow you to develop further your understanding of mens rea, or mental states, since the specific mental state that accompanies the infliction of an injury often makes the difference between one type of assault or another, or one type of homicide versus another. And as in every chapter, you should use the materials here to expand and deepen your understanding of criminal law in practice, with specific focus on the interaction of criminalization, enforcement, and adjudication decisions.

This chapter also introduces a few important topics that have not yet been addressed in depth, but that are relevant even beyond the category of crimes against the person: omission liability, causation, and affirmative defenses. Omission liability, or the imposition of criminal liability for failing to act rather than for acting in a prohibited way, was addressed briefly in Chapter Two, but here we’ll consider it in more detail. Principles of causation are relevant to many criminal offenses, but they arise especially often in the types of crimes addressed in this chapter. And finally, affirmative defenses are a special type of defense argument that we will consider in this chapter (and again later, in Chapter Ten).

We begin our study of crimes against the person with assault. Then we move on to homicide, and finally, at the end of the chapter, we consider rape or sexual assault. As is probably already clear, the factual backgrounds of the cases in this chapter are often disturbing. Please be prepared to encounter sensitive and potentially unsettling material.

Assault

Minnesota Stat. § 609.02

Subd. 10. Assault. “Assault” is:
(1) an act done with intent to cause fear in another of immediate bodily harm or death; or

(2) the intentional infliction of or attempt to inflict bodily harm upon another.

§ 609.221. Assault in the first degree

Subd. 1. Great bodily harm. Whoever assaults another and inflicts great bodily harm may be sentenced to imprisonment for not more than 20 years or to payment of a fine of not more than $30,000, or both.

STATE of Minnesota

v.

Alie Christine Theodore DORN

Supreme Court of Minnesota
887 N.W.2d 826

December 7, 2016

MCKEIG, Justice.

Appellant Alie Dorn [was convicted a]fter a bench trial … of first-degree assault under Minn. Stat. 609.221, subd. 1 (2014) (great bodily harm)…. Dorn maintains that the evidence was insufficient to convict her of first-degree assault because (1) she did not intentionally harm [the victim], and (2) her actions did not "inflict" bodily injury, which Dorn contends requires direct causation. We affirm.

I.

On July 20, 2013, appellant Alie Dorn, then 22 years old, attended a large outdoor party near Thief River Falls in Marshall County. D.E., then 19 years old, also attended. Most people at the party, including Dorn and D.E., were drinking alcohol. Dorn and D.E. did not know each other, but at approximately 1:00 a.m., they were standing about 5 feet away from each other next to a large bonfire. The bonfire was made of wooden pallets… and by 1:00 a.m. it had burned down to embers.

Within earshot of Dorn, D.E. told his friend that Dorn looked like a drug dealer. Dorn overheard and replied, "What?" D.E. repeated that Dorn looked like a drug dealer. Dorn reacted by pushing D.E. in the chest using two hands. D.E. lost his balance and took a step or two backwards toward the fire. Dorn asserts that D.E. then "came at" her, failing to heed the "fair warning" of her first push, at which point she "shoved" D.E. in the chest a second time, again using two hands. D.E. contests Dorn's allegation that he came at her, asserting that he never regained his balance before Dorn shoved him a second time. Both agree that D.E. then fell and landed on his right side in the burning embers, sustaining significant burn injuries.

… Dorn told police that she "shoved" D.E. to get him out of her personal space because he was "in [her] face," "saying a bunch of stuff," "calling [her] a drug dealer," and "standing close" to her. She said she did not intend to push D.E. into the fire. [D.E. did not touch or attempt to touch Dorn, and Dorn has not appealed the district court's finding that she did not act in self-defense.]

Following a bench trial, the district court convicted Dorn of first-degree assault… The court of appeals affirmed…. We granted Dorn's petition for review.

II.

[First-degree assault-harm requires "great bodily harm," which includes "bodily injury … which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ." Dorn does not dispute that D.E.'s injuries constituted great bodily harm.] … [But] Dorn argues that the evidence was insufficient to satisfy the definition of assault-harm … because she did not intentionally harm D.E., and her actions did not directly cause D.E.'s injuries. Dorn's sufficiency challenge requires us to address the mens rea, actus reus, and causation required for assault-harm….

The application of the law to Dorn's conduct requires an evaluation of the sufficiency of the evidence. We will not disturb the verdict if the factfinder, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could have reasonably concluded that the defendant was guilty…. We "view the evidence in the light most favorable to the verdict and assume that the factfinder disbelieved any testimony conflicting with that verdict." This standard applies to both bench trials and jury trials.

A.

We first consider whether Dorn possessed the mens rea required for assault-harm. "Mens rea is the element of a crime that requires 'the defendant know the facts that make [her] conduct illegal.'" Without this mens rea element, a statute imposes strict criminal liability. Strict-liability statutes are "generally disfavored," and therefore, "legislative intent to impose strict criminal liability must be clear."

In *State v. Fleck* (Minn. 2012), we concluded that assault-harm requires only general intent. General intent is satisfied when a defendant "intentionally engag[ed] in the prohibited conduct." In other words, "a general-intent crime only requires proof that 'the defendant intended to do the physical act forbidden, without proof that [she] meant to or knew that [she] would violate the law or cause a particular result.' " Further, the defendant must do the act of her own volition or free will.

For assault-harm, "[t]he forbidden conduct is a physical act, which results in bodily harm upon another." Specifically, assault-harm requires "only an intent to do the prohibited physical act of committing a battery. The State must therefore prove that "the blows to complainant were not accidental but were intentionally inflicted."

…[I]n proving the mens rea element of general-intent crimes, the State need not show that the defendant "meant to or knew that [she] would violate the law or cause a particular result." [To commit assault-harm,] a defendant need only intend "to do the prohibited physical *act* of committing a battery." Nothing in [our precedents] suggests that the defendant must intend *to commit* a battery; rather, the defendant need only intend to commit an act that *constitutes* a battery.

This standard does not impose strict liability because it requires the defendant to "know the facts that make [her] conduct illegal." Specifically, for assault-harm, a defendant must intend the act that makes her conduct a battery; in other words, she must intentionally apply force to another person without his consent. *See* II.B., *infra*. If, instead, we required the intent *to commit* a battery, a defendant would not only need to know the *facts* that make her conduct illegal, but would also need to know that her conduct breaks the law. It is well settled, however, that a mistake of law is generally not a defense to a general-intent crime….

The evidence is sufficient to establish that Dorn possessed the mens rea required for assault-harm. Indeed, Dorn admits that she "shoved" D.E. to get him out of her personal space. She does not contend that she pushed D.E. accidentally or involuntarily. Dorn may not have understood that her conduct constituted an unlawful battery, or that it would result in bodily harm. Dorn did, however, intentionally apply force to another person, which satisfied the mens rea element of assault-harm.

B.

Next, we consider whether Dorn's conduct constituted a battery, and therefore satisfied the actus reus required for assault-harm. The court of appeals determined that Dorn's conduct constituted a battery because she applied physical force to D.E. In Minnesota, the separate crime of battery has been incorporated into the definition of assault. At common law, criminal battery was "the intentional application of unlawful force against the person of another." "Force" was "satisfied by even the slightest offensive touching."

… Dorn correctly points out that the language of the assault-harm definition does not include the word "battery." Rather, the language requires the "infliction" of bodily harm. "Inflict" means "to lay (a blow) on" or "cause (something damaging or painful) to be endured." The definitions of "battery" and "inflict" are therefore similar, requiring the State to show that the defendant engaged in nonconsensual physical contact.

The evidence is sufficient to show that Dorn's conduct constituted a battery or "infliction" of harm. Dorn pushed D.E. twice in the chest with two hands, hard enough to cause him to lose his balance. Dorn admitted that her actions were not consensual or friendly. Rather, Dorn "shoved" D.E. to get him out of her personal space because he was "in [her] face," "saying a bunch of stuff," "calling [her] a drug dealer," and "standing close" to her. She characterized her first push as "fair warning." At that point, Dorn had committed a battery because she intentionally applied nonconsensual force against D.E. She committed a second battery when she shoved D.E. again. Both of these actions also "inflicted" harm because she imposed something unpleasant, "a blow." As such, Dorn's conduct satisfied the actus reus element of assault-harm.

C.

Finally, we consider whether Dorn's conduct was the legal cause of D.E.'s injuries. The Legislature used the word "cause" in the assault-fear provision, but chose the word "infliction" for the assault-harm provision. Dorn argues that "inflict" is a stricter standard than "cause" and requires direct, not just proximate or "substantial factor," causation. *SeeState v. Gatson* (Minn. 2011) (explaining that under a homicide statute in which the word "cause" is used, the State need only prove that the defendant's acts were a " 'substantial causal factor' leading to the death"); *see alsoState v. Olson* (Minn. 1989) (explaining that a defendant may rebut substantial causation by establishing that "intervening conduct [was] the sole cause of the end result").

Dorn contends that she did not inflict bodily harm because her pushes did not harm D.E. directly; rather, D.E. was injured only because he tripped over debris and stumbled into the fire. The district court did not make a finding as to whether D.E. tripped over

debris, concluding that this determination was not essential because "[D.E.]'s movements were initiated by [Dorn]'s actions." The court of appeals held that the same "substantial causal factor" standard that applies to "cause" also applies to "infliction," and that Dorn failed to identify a genuine superseding cause under this standard.

…Assuming without deciding that an "infliction" requires direct causation as Dorn argues, the evidence is sufficient to show that Dorn directly caused D.E.'s bodily harm. Even if D.E. stumbled on debris as he fell, Dorn pushed D.E. hard enough to cause him to lose his balance within a few feet of hot embers, and D.E. fell into the fire within moments of Dorn's push. The causation standard for assault-harm is therefore satisfied, even under Dorn's narrower proposed interpretation.

Thus, the evidence is sufficient to sustain Dorn's conviction for first-degree assault….

Affirmed.

Notes and questions on *State v. Dorn*

1. At common law, the crime of battery was an intentional and offensive (unwanted) use of physical force against another person; the crime required actual physical contact. Assault was usually defined as an attempted battery – an effort to use offensive force against someone else, but not necessarily a successful effort. Assault did not require actual touching. As states codified their criminal laws, many eliminated this distinction between assault and battery and instead adopted a broadly defined assault offense like the one you see in *Dorn*, which encompasses both threats to use force and actual applications of force. The threat prong of assault is often defined, again like the Minnesota statute, as acting with intent to put another person in fear of death or immediate bodily harm.
2. The statutory approach described above means that "assault" now covers a huge range of conduct, from an angry look and a raised fist all the way to a brutal or even deadly physical attack. When we think in terms of threatening conduct rather than actual physical contact, many if not most of us have been victims of assault at one point or another. Thinking again of threatening conduct, perhaps many of us have also committed the offense. Jurisdictions frequently subdivide assault into narrower categories, perhaps using degrees (first-degree assault, second-degree assault, etc.) or distinguishing between "simple assault" and "aggravated assault." For example, Georgia defines simple assault as the attempt to inflict a violent injury or the placing of another person in fear of injury. Aggravated assault occurs when an otherwise simple assault is accompanied by an intent to murder, rape, or rob, or when the defendant uses a deadly weapon, or when the defendant discharges a firearm from a motor vehicle. Note that in Georgia, neither simple nor aggravated assault requires actual physical contact with a victim or actual injury. See Ga. Code Ann. §§ 16-5-20; 16-5-21. The federal Bureau of Justice Statistics (BJS) collects data on crime and criminal prosecutions nationwide, and it uses generic definitions of crimes to create some consistency notwithstanding variations in state statutes. BJS defines "simple assault" as "an unlawful physical attack or threat of attack," and "aggravated assault" as "an attack or attempted attack with a weapon, regardless of whether injury occurred, and an attack without a weapon when a serious injury results." See https://bjs.ojp.gov/topics/violent-crime. Notice that BJS classifies both aggravated and simple assaults as "violent crime." Some courts have taken a narrower approach and held that a simple assault, such as a threat of harm that does not involve a weapon or an actual injury, is not a violent crime.
3. Among the offenses that are labeled as violent, assault tends to be the most frequently charged. It is not a direct source of a large portion of prison sentences, since assault convictions are frequently punished with non-custodial sentences or sentences in jail rather than prison. ("Jail" facilities are usually designed for short-term confinement for persons awaiting trial or sentenced to a year or less of custody; prisons are designed for longer term confinement for persons with sentences of more than one year in custody.). But assault convictions are a significant source of America's "violent crime" rates, and assault convictions contribute indirectly to mass incarceration in the following way: Many jurisdictions impose much longer prison sentences on defendants with prior convictions for violent crime. Thus, a person convicted of assault who is later charged with another offense is more likely to serve a lengthy prison sentence.
4. For serious forms of assault that require an actual injury, the issue of causation becomes important. This issue is also important in many homicide cases, since a homicide conviction requires proof that the defendant caused the victim's death. We'll explore causation principles in more detail in the homicide section of this chapter, but use *State v. Dorn* to begin identifying the terminology and basic ideas. How did Alie Dorn support her claim that she was not the cause of the victim's burn injuries? Why did the court reject her argument?

5. The *Dorn* court characterizes assault-harm as a "general intent" crime, which should bring to mind the discussion of "general intent" and "specific intent" offenses in Chapter Five. What is the mens rea of assault-harm, according to the court? How does the court's description of the required mental state differ from the mental state requirement that the defense would adopt?

Colorado Rev. Stat. § 18-3-203

(1) A person commits the crime of assault in the second degree if:

… (b) With intent to cause bodily injury to another person, he or she causes such injury to any person by means of a deadly weapon; or

(c) With intent to prevent one whom he or she knows, or should know, to be a peace officer, firefighter, emergency medical care provider, or emergency medical service provider from performing a lawful duty, he or she intentionally causes bodily injury to any person; or

(c.5) With intent to prevent one whom he or she knows, or should know, to be a peace officer, firefighter, or emergency medical service provider from performing a lawful duty, he or she intentionally causes serious bodily injury to any person; or

(d) He recklessly causes serious bodily injury to another person by means of a deadly weapon; or…

(i) With the intent to cause bodily injury, he or she applies sufficient pressure to impede or restrict the breathing or circulation of the blood of another person by applying such pressure to the neck or by blocking the nose or mouth of the other person and thereby causes bodily injury.

The PEOPLE of the state of Colorado, Petitioner

v.

Dearies Deshonne Austin LEE, Respondent

Supreme Court of Colorado
476 P.3d 351

November 23, 2020

JUSTICE GABRIEL delivered the Opinion of the Court.

This case requires us to determine whether, under prevailing Colorado equal protection principles, a defendant may be charged with second degree assault based on conduct involving strangulation under both the deadly weapon subsection of the second degree assault statute, and the strangulation subsection of that same statute.…

I. Facts and Procedural History

[Dearies Deshonne Austin] Lee had been together with the alleged victim, T.M., for about two years, and the two had a child but were separated at the time of the incident in question. According to T.M., Lee came to her apartment to pick up their child and demanded that T.M. gather the child's belongings. Lee allegedly became frustrated that T.M. was not moving fast enough, and he became violent, ultimately grabbing T.M. by the neck and pushing her onto her bed. According to T.M., Lee continued to apply pressure to her neck until she lost consciousness.

T.M. subsequently regained consciousness and went into the living room to get her daughter. There, Lee allegedly confronted her again and, according to T.M., pushed her onto the couch and again began to strangle her, causing her to lose consciousness a second time.

Based on these allegations, the People charged Lee with, among other things, two counts of second degree assault under the strangulation subsection of the applicable statute, 18-3-203(1)(i). Eight months later, however, the People moved to add two additional counts of second degree assault under the deadly weapon subsection, 18-3-203(1)(b), asserting that Lee had used his hands as a deadly weapon. The trial court granted this motion.

Thereafter, Lee moved to dismiss the added counts, arguing, among other things, that those counts, as charged, violated his right to equal protection under the Colorado Constitution. The trial court held a hearing on Lee's motion and ultimately granted that

motion, dismissing the added counts on equal protection grounds. [The court of appeals affirmed.] … The People then petitioned this court for certiorari review, and we granted their petition…

II.B. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." "Although the Colorado Constitution contains no equal protection clause, we have construed the due process clause of the Colorado Constitution to imply a similar guarantee." Dean v. People, 366 P.3d 593 (2016). "Equal protection of the laws assures the like treatment of all persons who are similarly situated."

In the criminal law context, the United States Supreme Court has concluded that "where a defendant's conduct violates more than one criminal statute, the government's choice to prosecute under the statute with the harsher penalty does not violate federal equal protection, absent evidence of selective enforcement based on a prohibited standard such as race, religion, or other arbitrary classification." This court, however, has yet to adopt the federal equal protection standard, the People did not ask us to do so in this case, and thus whether we should adopt the federal standard is not now before us. To the contrary, the parties appear to agree on the applicable principles of Colorado law, and we therefore turn to those principles.

We have long held, in contrast with the above-noted federal precedent, that "Colorado's guarantee of equal protection is violated where two criminal statutes proscribe identical conduct, yet one punishes that conduct more harshly." [See *United States v. Batchelder* (1979).] Along the same lines, we have said that "separate statutes proscribing with different penalties what ostensibly might be different acts, but offering no intelligent standard for distinguishing the proscribed conduct, run afoul of equal protection under state constitutional doctrine." Accordingly, we have opined that to overcome an equal protection challenge, "a person of average intelligence" must be able to distinguish the conduct proscribed by one offense from the conduct proscribed by another. Moreover, the distinction between the two offenses must be "sufficiently pragmatic" to "permit an intelligent and uniform application of the law." …

C. Application

Turning, then, to the facts of this case, we start by examining the statutory language of the two provisions at issue.

[The court quoted the statutory definition of second degree assault-strangulation, reprinted above.] Second degree assault-strangulation is a class four felony and an extraordinary risk crime, subject to a potential prison sentence of two to eight years.

A person commits the crime of second degree assault-bodily injury with a deadly weapon if, "[w]ith intent to cause bodily injury to another person, he or she causes such injury to any person by means of a deadly weapon." § 18-3-203(1)(b). A deadly weapon, in turn, is defined as "(I) A firearm, whether loaded or unloaded; or (II) A knife, bludgeon, or any other weapon, device, instrument, material, or substance, whether animate or inanimate, that, in the manner it is used or intended to be used, is capable of producing death or serious bodily injury." § 18-1-901(3)(e). In accordance with this definition, we have opined that hands may be deadly weapons if in the manner they are used, they are capable of producing death or serious bodily injury…. Second degree assault-bodily injury with a deadly weapon, like second degree assault-strangulation, is a class four felony, but because it is also a per se crime of violence, it subjects a defendant to a potential prison sentence of five to sixteen years.

…[Lee] contends that applying [the assault with deadly weapon] provision to an act of strangulation violates prevailing Colorado equal protection principles. To decide this issue, we must determine whether subsections 18-3-203(1)(b) and (1)(i) proscribe identical conduct with one of these subsections punishing that conduct more harshly than the other. The parties do not appear to dispute that the penalties under these subsections differ. Accordingly, we must decide whether these provisions proscribe identical conduct or, as pertinent here, whether they proscribe what ostensibly might be different acts but offer no intelligent standard for allowing a person of average intelligence to distinguish the conduct proscribed by one provision from that proscribed by the other.

As noted above, subsection 18-3-203(1)(b) and subsection 18-3-203(1)(i) both require proof that the perpetrator intended to cause bodily injury and, in fact, caused such injury. The distinction between the two lies in the means used to cause that injury. Subsection 18-3-203(1)(b) requires the use of a deadly weapon. Subsection 18-3-203(1)(i), in contrast, requires proof of bodily injury due to strangulation. Accordingly, on their face, these provisions ostensibly proscribe different acts. The question thus becomes whether they offer any intelligent standard for distinguishing between such acts.

…[To] decide whether second degree assault-strangulation and second degree assault-bodily injury with a deadly weapon proscribe identical conduct, we must consider whether strangulation, as it is defined in the second degree assault statute, will always involve

the use of a deadly weapon….

Our case law "contemplates a two-step inquiry in determining whether an instrument is a deadly weapon. First, the object must be used or intended to be used as a weapon. Second, the object must be capable of causing serious bodily injury." A " 'weapon' is defined as 'an instrument of offensive or defensive combat: something to fight with: something (as a club, sword, gun, or grenade) used in destroying, defeating, or physically injuring an enemy.' "

In the case of strangulation, we have little difficulty concluding that the perpetrator is using an instrument—whether hands or an object of some kind—as a weapon because in such a case, the perpetrator is using the instrument to injure the victim. In addition, when a person is applying sufficient pressure to impede or restrict another's breathing or blood circulation, as required for second degree assault-strangulation, the person is obviously using the instrument of strangulation in a manner capable of causing serious bodily injury, whether or not serious bodily injury actually results: "When a victim is strangled, she is at the edge of a homicide. Unconsciousness may occur within seconds and death within minutes …. In 'strangulation,' external compression of the neck can impede oxygen transport by preventing blood flow to or from the brain or direct airway compression."

Because, in a strangulation, the instrument being used to strangle the victim (whether hands or otherwise) is always being used as a weapon and will always be at least capable of causing serious bodily injury or death, we conclude that strangulation will always involve the use of a deadly weapon. As a result, with regard to acts of strangulation, we further conclude that subsections 18-3-203(1)(b) and (1)(i) proscribe identical conduct. And because these provisions proscribe identical conduct but the deadly weapon subsection punishes that conduct more harshly than the strangulation subsection, we conclude that under prevailing Colorado equal protection principles, a defendant may not be charged with second degree assault based on conduct involving strangulation under both subsections. Rather, the defendant must be charged under the strangulation provision.

In so concluding, we are not persuaded by the People's various hypotheticals purporting to show distinctions between second degree assault-strangulation and second degree assault-bodily injury with a deadly weapon. In one of the People's hypotheticals, an assailant lightly places his or her hands over the mouth or nose of a victim, "applying sufficient pressure to impede or restrict breathing for a matter of moments." In the People's view, such a scenario would satisfy the elements of second degree assault-strangulation but not those of second degree assault-bodily injury with a deadly weapon. For several reasons, we disagree.

First, as noted above, whenever a person, with the intent to cause bodily injury, causes bodily injury by applying sufficient pressure to the neck or by blocking the nose or mouth of another, thereby impeding or restricting the other person's breathing or blood circulation, the hands or other instrument used to apply such pressure will have been used in a manner capable of producing death or serious bodily injury…. Thus, by definition, the perpetrator's hands or other instrumentality of strangulation will have been used as a deadly weapon, even with allegedly "light" pressure.

Second, to the extent that the People's hypotheticals envision scenarios in which the perpetrator is putting a hand over a victim's mouth with allegedly "light" pressure and solely to keep the victim from screaming, it is not clear that this conduct would even constitute second degree assault-strangulation, which, as noted above, requires both an intent to cause bodily injury and resulting bodily injury.

Third, to the extent that the People's hypotheticals turn on the degree of injury caused to the victim (e.g., bodily injury as opposed to serious bodily injury), such distinctions are not relevant to distinguishing between second degree assault-strangulation and second degree assault-bodily injury with a deadly weapon because the statutory scheme already addresses differences based on the degree of injury: strangulation resulting in bodily injury constitutes second degree assault under subsection 18-3-203(1)(i), and strangulation resulting in serious bodily injury constitutes first degree assault….

Finally, in our view, the People's suggestion that the distinction between subsections 18-3-203(1)(b) and (1)(i) should somehow turn on the amount of pressure employed or the length of time a perpetrator applies such pressure does not articulate "a sufficiently pragmatic difference to permit an intelligent and uniform application of the law." In particular, the People do not explain when, in the course of a strangulation, the hands or other instrumentality would cross the line from a non-deadly weapon to a deadly one, and we cannot discern a pragmatic standard that would allow a person of average intelligence to make such a determination.

For these reasons, we conclude that under prevailing Colorado equal protection principles, a defendant may not be charged with second degree assault based on conduct involving strangulation under both the deadly weapon and strangulation subsections of the second degree assault statute but rather must be charged under the strangulation subsection.

Although our analysis is based on the plain language of the statutory provisions at issue and we therefore need not resort to other tools of statutory construction, we note that the legislative history of subsection 18-3-203(1)(i) supports our conclusion here.

The General Assembly added strangulation subsections (and corresponding sentencing provisions) to the assault statutes in 2016. These subsections were intended to institute a change from prosecutors' past practice. *See* Gen. Assemb. Legis. Council, Research Note for H.B. 16-1080, 70th Gen. Assemb., 2d Reg. Sess. (2016). Specifically, prior to these amendments, prosecutors charged strangulation under the deadly weapon subsection of the second degree assault statute. *See* Hearings on H.B. 16-1080 before the H. Judiciary Comm., 70th Gen. Assemb., 2d Sess. (Feb. 9, 2016) (statement of Mark Hurlbert, Assistant Arapahoe County District Attorney). Such a charge, however, frequently required expert testimony, and obtaining such testimony was not always easy, particularly in rural jurisdictions. As a result, strangulation often resulted in convictions of the lesser offense of misdemeanor third degree assault. *See id.* (statement of Rep. Mike Foote, sponsor of H.B. 16-1080).

To address these issues, one goal of the 2016 amendments was to create a specific strangulation statute that dispensed with proof of the deadly weapon element. *Id.* (statement of Rep. Foote) ("The elements [of subsection (1)(i)] don't require the finding of hands as a deadly weapon."). And a second goal was to elevate all forms of strangulation resulting in bodily injury to a felony in order to achieve more consistency in charging decisions and sentencing statewide. *See* Hearings on H.B. 16-1080…. Toward that end, the legislation's sponsor stated that he envisioned that all strangulations would be prosecuted under this new provision. Hearings on H.B. 16-1080 before the H. Judiciary Comm., 70th Gen. Assemb., 2d Sess. (Feb. 9, 2016) (statement of Rep. Mike Foote).

In our view, this legislative history fully supports our conclusion that a defendant in Lee's position must be charged under the strangulation, and not the deadly weapon, subsection of the second degree assault statute. In addition to violating the equal protection principles discussed above, concluding otherwise would undermine the legislature's goal of achieving more consistency in charging decisions and sentencing statewide….

III. Conclusion

For the reasons set forth above, the deadly weapon subsection of the second degree assault statute, subsection 18-3-203(1)(b), and the strangulation subsection of that statute, subsection 18-3-203(1)(i), proscribe identical conduct, yet the deadly weapon subsection punishes that conduct more harshly than does the strangulation subsection. Accordingly, we conclude that under prevailing Colorado equal protection principles, a defendant may not be charged with second degree assault based on conduct involving strangulation under both the deadly weapon and strangulation subsections. Rather, the conduct must be charged under the strangulation subsection. We therefore affirm the judgment of the division below.

JUSTICE SAMOUR dissents and CHIEF JUSTICE COATS and JUSTICE BOATRIGHT join in the dissent.

JUSTICE SAMOUR, dissenting.

"Two roads diverged in a wood, and [this court] took the one less traveled by." As in Robert Frost's seminal poem, "The Road Not Taken," that decision "has made all the difference." But here, the path less trod is not a desirable one: This court's stubborn loyalty to Colorado's unique equal protection doctrine—one that has been soundly rejected by the U.S. Supreme Court and the overwhelming majority of jurisdictions—infringes on the charging discretion of the executive branch of government with no discernible justification beyond "my house, my rules." … And while our court's inexplicable resistance to the logical force of the U.S. Supreme Court's unanimous decision in *United States v. Batchelder* (1979) is reason enough for me to dissent, I further believe that, even under Colorado's peculiar equal protection doctrine, there is no due process violation here. Accordingly, I respectfully dissent on both grounds…

Notes and questions on *People v. Lee*

1. In your study of enforcement decisions in Chapter Three, you read *State v. Cissell*, in which the Supreme Court of Wisconsin found no due process or equal protection violation in Wisconsin's two statutes that both criminalized failure to support one's child, identical for all practical purposes except in the penalties they imposed. As noted in that earlier discussion, the approach of the *Cissell* court is endorsed by the U.S. Supreme Court with respect to the federal constitution, and followed in most states: a jurisdiction can enact overlapping or identical statutes that punish the same conduct, but impose different penalties. Prosecutors then have the discretion to choose which statute to use (and thus to determine what sentencing range will apply), and this structure does not violate the federal constitution or most state constitutions. As the dissenting opinion points out in *People v. Lee*, Colorado is an outlier on this specific issue. The Colorado Supreme Court has interpreted Colorado's own state

constitution to prohibit that kind of prosecutorial discretion. Thus, under Colorado law, when two statutes punish identical conduct but authorize different penalties, the defendant must be charged with the offense that carries the lesser penalty. What are the different penalties for assault by strangulation, 18-3-203(i), and assault by deadly weapon, 18-3-203(b)?

2. The dissent criticizes the majority for what it calls the "my house, my rules" approach. What, if anything, is wrong with "my house, my rules" as justification for Colorado's unique approach? If you were a state court judge deciding whether to follow the majority approach (as in *Cissell*) or the Colorado approach, what factors would you consider? Which precedent would you follow?
3. Setting aside the equal protection / overlapping statutes issue, *People v. Lee* is fairly representative of assault prosecutions in other respects. For example, it is not unusual for jurisdictions to interpret the term "deadly weapon" broadly, as the Colorado courts have done. Many other jurisdictions have similarly held that fists or hands can constitute "deadly weapons" if they are used in a sufficiently violent manner. Note that these interpretations do not mean that all assaults by fist will in fact be charged as assaults with a deadly weapon. Instead, the broad interpretations further expand the discretion of prosecutors, who have the option, but not the obligation, to charge a more serious form of assault.
4. *People v. Lee* is also useful as a source of insight about criminalization choices. Why did the Colorado General Assembly (the state legislature) choose to add a specific strangulation statute even though the state had already criminalized assault by deadly weapon?
5. Another respect in which *Lee* is typical of many assault cases: the violence occurred in the context of an intimate relationship. Should domestic violence be codified as a separate offense? Many jurisdictions do take that approach. Indeed, assault of a spouse, intimate partner, or family member is one offense for which many jurisdictions have enacted mandatory arrest or mandatory prosecution statutes, an exception to the general rule of broad enforcement discretion enjoyed by police and prosecutors. However, courts have not always viewed those mandatory enforcement rules as actually creating an enforceable legal duty to arrest (or prosecute). See, e.g., *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005). Perhaps surprisingly, some advocates for victims of domestic abuse have questioned whether mandatory arrest and prosecution, and indeed the use of criminal interventions more broadly, is the best way to address problems of intimate violence. See Leigh Goodmark, Decriminalizing Domestic Violence: A Balanced Policy Approach to Intimate Partner Violence (2018).

KentuckyRevised Statutes 508.010. Assaultin the first degree.
A person is guilty of assault in the first degree when:

(a) He intentionally causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument; or

(b) Under circumstances manifesting extreme indifference to the value of human life he wantonly engages in conduct which creates a grave risk of death to another and thereby causes serious physical injury to another person.

[An additional statute relevant to the next case is quoted within the court's opinion.]

COMMONWEALTH of Kentucky, Appellant

v.

Rita MITCHELL

Supreme Court of Kentucky
516 S.W.3d 803

April 27, 2017

Opinion of the Court by Justice HUGHES:

Kentucky Revised Statute (KRS) 501.030, one of the foundational provisions of the Penal Code, provides generally that a person may not be found guilty of a criminal offense unless

(1) He has engaged in conduct which includes a voluntary act or *the omission to perform a duty which the law imposes upon him and which he is physically capable of performing*; and (2) He has engaged in such conduct intentionally, knowingly, wantonly or recklessly as the law may require, with respect to each element of the offense.

(emphasis supplied). These are the Penal Code versions of the ancient "*actus re[u]s*" and "*mens rea*" requirements for criminal liability. As the emphasized portion of the statute indicates, the Penal Code allows for criminal liability premised upon a person's failure to act, but only in limited circumstances. At the time of the alleged omission, the defendant must have been under a legal duty to act (as opposed to a moral or some other sort of extra-legal duty), such that his or her inaction amounted to a breach of that duty. And even then liability is appropriate only if the duty was one which the person was physically capable of performing….

RELEVANT FACTS

In October 2010, in response to reports that a "boy" was being "kept" in deplorable conditions, Monroe County police officers, fire and rescue workers, and a social worker … were all summoned to a mobile home … in Tompkinsville. The home was owned by Donna Bartley, but at the time its only occupants, aside from a large pack of dogs, were two people: Rita Mitchell, Bartley's long-time friend and until recently house-mate, and Bartley's then twenty-four year-old son, a young man we shall refer to as James.

Mitchell and James are both impaired and both have received Social Security Disability Benefits for several years. …Mitchell testified that in October 2010 and for some time prior, she suffered from chronic obstructive pulmonary disease (COPD), a condition which limited her mobility and for which she required an artificial oxygen supply. She also suffered, she testified, from chronic depression, which in the fall of 2010 had become acute and disabling.

James suffers from cerebral palsy, significant intellectual disability, and possibly from autism. These significant conditions have, throughout his life, made him highly dependent on others for the provision of even life's most basic necessities, such as food, clothing, shelter, mobility, and health care. The record does not indicate how Bartley managed to care for James during his first seven years, but according to Mitchell's testimony, when James was about seven, Bartley and Mitchell, who had known each other from childhood, agreed to become house-mates. Bartley was to provide the residence and to manage the household in exchange for Mitchell's help with the cooking, cleaning, and care of James as well as Mitchell's contribution of her disability benefits to the household income. This arrangement worked well enough that it continued even after Bartley had a second and then a third child, a son and a daughter, for both of whom Mitchell helped to care. A social worker testified that he visited the Bartley residence in 2003, while Bartley and Mitchell were caring for all three children, and found the home clean and orderly and the children, including James, adequately provided for.

By late spring or early summer of 2010, however, Bartley and Mitchell's arrangement had begun to break down. …Bartley and her two younger children, by then teenagers, moved to a new home in Glasgow, Kentucky, while Mitchell and James were left behind in the Monroe County mobile home…. Bartley increasingly disassociated herself from her son and Mitchell…. Although she remained in control of the purse strings, including Mitchell's and James's social security benefits, Bartley ceased to make the mortgage payments on the mobile home; ceased to provide for trash removal; ceased to pay for water service, which was discontinued in August 2010; and visited the mobile home only on weekends, delivering food and a few gallons of water.

Mitchell was unable to cope with this virtual abandonment. We have described elsewhere the deplorable condition in which the rescue workers found the Monroe County mobile home in October 2010. *SeeBartley v. Commonwealth*, 400 S.W.3d 714 (Ky. 2013). Suffice it to say here, that by then trash had piled up outside the residence, the residence had been overrun by more than twenty semi-feral dogs, whose filth had accumulated on the floors and furniture, and Mitchell had apparently ceased making any effort to care for James, beyond perhaps giving him some water and the microwavable snack foods that Bartley provided. In a back room with the radio blaring to drown out the young man's screams, the rescue workers found James naked on a bare mattress across which had been spread a sheet of plastic….

As bad as James's plight was (and to a person the rescue workers testified that they had never before encountered a scene as wrenching), the treating physician testified that for James the outcome easily could have been [fatal]….

In December 2010 the Monroe County grand jury indicted Bartley and Mitchell. Both women were charged with first-degree criminal abuse of James, under KRS 508.100, and with first-degree assault, under KRS 508.010. With respect to both women, the latter charge alleged, among other things, that they had caused James serious physical injury by "severely neglecting to meet his physical needs."

…The jury found both [defendants] guilty of first-degree assault, found Bartley guilty of first-degree (intentional) criminal abuse, and found Mitchell guilty of second-degree (wanton) criminal abuse. …[I]n December 2014, [the Court of Appeals] affirmed Mitchell's second-degree criminal abuse conviction, but reversed her conviction for first-degree assault. With respect to the assault,

the panel concluded that Mitchell could not be said to have assumed a legal duty to care for James, since she had done nothing to prevent Bartley, the biological mother, from providing that care in the first instance….

The Commonwealth contends that in so ruling the Court of Appeals erred….

ANALYSIS

As the discussions in *Bartley* and *Staplesv. Commonwealth* (Ky. 2014) indicate, our trial courts have been confronted in recent years by a new generation of crime-by-omission cases, cases involving new forms of parental neglect and abuse and cases brought against non-parents for alleged failures to protect or care for the children of others. These cases have posed difficult and intertwined questions of both substance and procedure. This case is yet another of that sort.

As we explained in *Bartley*, "to proceed with a prosecution alleging a criminal omission, the Commonwealth must … identify a specific 'legal duty,' the breach of which would subject the defendant to criminal sanction. Any dispute about the existence of the alleged duty should be resolved by the trial court, and disputes about the facts giving rise to that duty in the particular case should be incorporated in the instructions for jury resolution."

… In *Bartley*, we concluded that the Commonwealth's failure to identify at the outset the specific "legal duty" Bartley was alleged to have breached did not amount to a palpable error. As we explained, a parent's non-delegable duty to support and care for a disabled adult child has long been established in our law, both our statutory law and our case law….

As the Commonwealth notes, Mitchell's appeal raises similar questions. In her case, too, it appears, the Commonwealth failed to make clear at the outset the specific "legal duty" Mitchell was alleged to have breached, and in her case, too, we are initially confronted with a question as to whether Mitchell adequately preserved that error. Inasmuch as Mitchell's objections during trial were essentially the same as Bartley's, we agree with the Commonwealth that she did not…. Accordingly, Mitchell is entitled to relief only if the error was palpable, *i.e.*, only if the error was, or should have been, apparent, and then only if it resulted in "manifest injustice," what we have characterized as either a skewed outcome or a proceeding "so fundamentally tainted … as to threaten [the] defendant's entitlement to due process of law."

Implicitly, at least, the Court of Appeals concluded that the error—the failure to specify Mitchell's alleged duty to care for James—was indeed palpable. The panel relied on *West v. Commonwealth* (Ky. App. 1996) [for the proposition] that affirmative legal duties of care can arise in at least four distinct circumstances:

[F]irst, 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.

Although the Commonwealth did not specify *any* theory whereby Mitchell could be found to have breached a legal duty to care for James, the appellate panel understood the Commonwealth to have alleged only the fourth type of circumstance mentioned [above], *i.e.*, that Mitchell had through her relationship with Bartley voluntarily assumed James's care. In its view, however, Mitchell could not reasonably be found to have secluded James from the aid of others—at least from his mother's aid—and thus, under *West's* fourth scenario, she could not be deemed subject to assault liability for having failed to provide care that it was really Bartley's duty to provide….

[The Commonwealth argues that] even if the Court of Appeals strict and literal reading of *West's* fourth set of duty-creating circumstances accurately reflects the law, *i.e.*, even if no legal duty of care arises from the voluntary assumption of a care-giving role provided there is no concomitant seclusion of the helpless person from all other caregivers, the appeals panel erred by disregarding evidence that Mitchell did indeed isolate James not only from the world at large, but from his mother as well. Bartley's defense, in fact, based on snippets of Mitchell's statements to investigators and her trial testimony, was that James's situation only became distressing during the two or so weeks prior to his rescue, and during that period Bartley relied—carelessly, perhaps, but not criminally—on Mitchell's repeated assurances that James was doing fine. That evidence was sufficient, according to the Commonwealth, to allow even a strict "voluntary assumption of duty" case against Mitchell to go to the jury.

More fundamentally, the Commonwealth contends that the appeals panel's narrow construction of *West's* fourth common-law duty category does not accurately reflect the law. Mitchell's voluntary assumption of James's care could rightfully be deemed to have ripened into a legal duty, a sort of *in-loco-parentis* duty, the Commonwealth implies, notwithstanding Bartley's concomitant and arguably superior duty as a parent. The prosecutor focused on the seventeen-year duration of Mitchell's care of James and the

evidence that Bartley and Mitchell were, on some level, colluding to keep James from being cared for by others lest, as Mitchell testified, Bartley lose custody of James and his accompanying social security benefits. In these circumstances, the Commonwealth insists, Bartley's duty ought not shield Mitchell from the consequences of her own….

We … agree with the Commonwealth that the evidence against Mitchell was sufficient to support potentially viable assault-by-omission theories. We thus further agree that the Court of Appeals panel erred by disregarding that potential and dismissing Mitchell's assault charge altogether. Accordingly, the Court of Appeals' opinion must be reversed.

As the Commonwealth's argument also makes abundantly clear, however, the Commonwealth's failure to specify the duty of care it was alleging against Mitchell had an utterly different effect on Mitchell's case than its similar failure with respect to Bartley had on hers. In *Bartley*, the Commonwealth's error meant little, since it was clear to all—parties, court, and jury alike—that Bartley was being prosecuted for injuries arising from the alleged breach of her parental duty, a legal duty well and clearly established. With respect to Mitchell, however, the Commonwealth's failure to specify the legal duty (or duties) Mitchell was alleged to have breached meant much more.

It meant that no one had a clear idea how to respond to the evidence the Commonwealth presented, and so had to respond uncertainly. Mitchell could not tailor her defense to specific claims that a particular duty had arisen and been breached; the trial court had to rely on generalities in assessing Mitchell's directed-verdict motion; and most importantly, the jury, having not been apprised that a particular legal obligation was being alleged and that moral obligation alone was not enough, was left to its own devices when asked to find whether or not Mitchell had "caused serious physical injury to [James] by severely neglecting to meet his needs." Each of these uncertainties constitutes a serious flaw in the proceedings, and their combination, we are convinced, denied Mitchell a fundamentally fair trial as to the assault charge. The Commonwealth's error in not specifying the legal duty it believed Mitchell had breached (and the court's error in not insisting that it do so), was thus palpable…. [It] so tainted the trial as to threaten Mitchell's entitlement to due process.

… In our view, there is clearly evidence in the record of this case that could support the finding of a legal duty on the part of Mitchell. … [But] the jury must receive a specific instruction on the nature of the duty which Mitchell owed to James and the alleged breach of that duty. Only then has the jury been given the necessary instruction on the law applicable to the criminal omission form of first-degree assault with which Mitchell has been charged.

CONCLUSION

In sum, we agree with the Court of Appeals, *albeit* on different grounds, that Mitchell is entitled to relief, but we also agree with the Commonwealth that the relief awarded by the appeals panel was not legally appropriate. The problem was not that the Commonwealth failed to introduce sufficient evidence of an assault…. The problem, rather, was that the Commonwealth failed adequately to specify the duty giving rise to assault-by-omission it was alleging, and that failure undermined the fairness of Mitchell's trial. Mitchell's remedy is thus not the dismissal of the assault charge, but rather the reversal of her assault conviction and sentence. Accordingly we reverse the Court of Appeals' Opinion and remand this matter to the Monroe Circuit Court for additional proceedings consistent with this Opinion.

Notes and questions on *Commonwealth v. Mitchell*

1. In Chapter Two, we discussed the concept of "actus reus" as well as the "voluntary act requirement." The principle that a crime requires an actus reus, or a guilty act, is widely invoked as a constraint on criminalization choices that prevents legislatures from criminalizing mere thoughts in the absence of action. But doctrines of omission liability do permit the criminalization of inaction in some circumstances. The general rule is that omission liability requires a clear legal duty to act. That duty to act could come from the criminal statute itself, so a legislature could define a duty to act (such as a duty that persons with criminal convictions register with the authorities, as required by the statute in *Lambert v. California*). Or the duty to act could come from another source of law. Citing *West v. Commonwealth*, the Kentucky Supreme Court identifies four possible sources of duties to act that could then support criminal liability for an omission: a statute, a status relationship (such as parent-child), a contract, or a voluntary assumption of care while secluding the victim from other sources of care. Given these four categories, did Rita Mitchell have a legal duty to provide care to James, according to the Kentucky Supreme Court? What are the strongest arguments for or against finding such a duty?

2. Recall (from Chapter Two) that courts treat "actus reus" and "voluntary act" as two separate requirements. The first term captures the idea that a crime should involve some act or conduct (or omission). The second emphasizes volition. The "voluntary act requirement" reflects an effort to distinguish voluntary acts from involuntary ones. Arguably, Kentucky law tries to distinguish voluntary omissions from involuntary ones: note the statutory requirement that an omission be one that the defendant "is physically capable of performing."
3. You are reading about omission liability in the context of an assault charge, but keep in mind that omission liability may be imposed for many different types of offenses – including, again, a failure to register as a convicted person if required by law to do so. Filing requirements that carry criminal penalties, such as a tax crime for failure to file, also rely on omission liability. As the *Mitchell* court notes, omission liability is used fairly often in cases of abuse and neglect, when parents or other designated caregivers are charged with failing to provide adequate care to their dependents.
4. Can omissions be violent? At least some courts have answered in the affirmative. In *United States v. Scott*, 990 F.3d 94 (2d. Cir. 2021), the Second Circuit concluded that assault by omission and manslaughter by omission could be classified as "violent crimes" for purposes of federal sentencing enhancements if the offenses involved the intentional infliction of injury, even if the "infliction" was accomplished by a failure to act. The classification of crimes as "violent" is important, because many U.S. jurisdictions impose more severe sentences on a defendant who has prior convictions for "violent" offenses. Legal definitions of "violent crime" or "crimes of violence" often extend much more broadly to include any crime that involves conduct that creates a risk of physical injury, whether or not any injury is intended or accomplished. See Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 Ala. L. Rev. 571, 602-610 (2011).
5. Rita Mitchell was charged with both first degree assault (the main focus of this opinion) and a separate offense of "criminal abuse." She was convicted of second degree criminal abuse, which occurs when a person "wantonly abuses another person … and thereby … causes torture, cruel confinement, or cruel punishment…." Kentucky Rev. Statutes 508.110. Abuse, in turn, is defined under Kentucky law as "the infliction of physical pain, injury, or mental injury, or the deprivation of services by a person which are necessary to maintain the health and welfare of a person." Kentucky Rev. Statutes 508.090(1). In a footnote not included in the edited opinion above, the Kentucky Supreme Court concluded that criminal abuse was a "result crime" that could be established by showing that a defendant, by either omission or commission, caused a given result (e.g., torture or cruel confinement). Mitchell had directly caused James's confinement, the court concluded, and thus her conviction for criminal abuse did not require proof that she had a legal duty to care for James. See *Mitchell*, 516 S.W.3d 803, 812 n. 3.

Check Your Understanding (6-1)

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Homicide

Homicide is the umbrella term used to describe a group of offenses that all involve causing the death of another person. Murder and manslaughter are the most familiar categories of homicide. These categories existed and evolved in English common law centuries ago, and then were adopted in the American colonies and then in the states. The labels murder and manslaughter are still used in most modern statutory regimes. But jurisdictions may define other types of homicide as well, such as negligent homicide or vehicular homicide, and jurisdictions often divide murder and manslaughter into subcategories, such as first degree murder, second degree murder, and so on. The factors that differentiate murder from manslaughter, or first degree murder from lesser degrees, can again vary by jurisdiction. If you are trying to figure out how a particular killing is most likely to be classified, it is always a good idea to check the statutes of the specific jurisdiction where the killing took place. But with that said, there are some typical patterns that hold true across most jurisdictions. For example, murder statutes usually (but not always) require an intent to kill, while manslaughter or other forms of homicide often do not require intentional killing. This section aims to help you see both commonalities and variations in the law of homicide across different jurisdictions.

The actus reus of any homicide offense is usually simply stated: causing the death of another human being. The simplicity may be deceptive, though, because what it means to "cause" death is frequently contested in homicide cases. Several of the cases in this section will help you identify and apply the principles that courts use to evaluate causation.

The mens rea of homicide offenses, in contrast, varies much more widely. Indeed, the defendant's mental state, or mens rea, is usually the distinguishing factor that separates different types of homicide. To get an idea of the types of mental states that have long been seen as relevant to the legal evaluation of a killing, consider the common law definition of murder as a killing with "malice aforethought." Over time, in homicide law "malice aforethought" came to stand for not one single state of mind, but four different mental states. (The term malice is also sometimes used outside of homicide law; for one example, see the definitions of arson discussed at the end of Chapter Five.) The prosecution could establish malice aforethought by showing that the defendant acted with an intent to kill or an intent to cause serious bodily injury or extreme recklessness (sometimes described as acting with a "depraved heart" or an "abandoned and malignant heart") or intent to commit a felony ("felony murder"). Any of these mental states could suffice to convict a defendant of murder. Common law manslaughter, on the other hand, was usually defined as a killing without malice. One form of manslaughter was an intentional killing "in the heat of passion," or in response to some legally adequate form of provocation. Manslaughter also included unintentional killings, such as causing death through ordinary (but not extreme) recklessness, or causing death in the course of some unlawful but not felonious act ("misdemeanor-manslaughter").

In today's statutory world, different levels of homicide are codified by each jurisdiction, and the influence of common law categories is visible but not determinative. Most U.S. states divide the crime of murder into degrees; first-degree murder may require an intentional, premeditated killing, while second-degree murder may include killings by extreme recklessness or killings in the course of a different felony offense. Manslaughter is often but not always defined similarly to the common law definition. And many jurisdictions include a lesser category of homicide such as negligent homicide or vehicular homicide. Again, there are no universal definitions of any of these specific homicide offenses; always consult the relevant statute! Nevertheless, the cases below should help you get a sense of typical definitions.

The Basics of First Degree Murder

Kansas Stat. § 21-5402 (formerly 21-3401)

a) Murder in the first degree is the killing of a human being committed:

(1) Intentionally, and with premeditation; or

(2) in the commission of, attempt to commit, or flight from any inherently dangerous felony.

STATE of Kansas, Appellee

v.

Joseph Dodds MORTON, Appellant

Supreme Court of Kansas
86 P.3d. 535

March 26, 2004

The opinion of the court was delivered by BEIER, J.:

Defendant Joseph Dodds Morton appeals his first-degree murder and aggravated robbery convictions. He argues that he could not be convicted of first-degree murder on the combined theories of premeditation and felony murder, that the evidence on premeditation presented at his trial was insufficient, and that prosecutorial misconduct and cumulative error require reversal.

Morton was discharged from his employment at a grocery store. He decided to rob the store; he stole an unloaded gun from his mother…, loaded the gun with loose bullets…, and returned to the store with the excuse of returning his uniform.

Before entering the store, Morton parked across the street to check the number of cars in the parking lot and ensure that only the manager remained inside after hours. He hid the gun between his two work shirts. When he entered, store manager David Morrell asked about Morton's box cutter and bailer key. Morton then left the store and sat in his car for approximately 2 minutes, pondering whether he should commit the crime. He then reentered the store and told Morrell he "was [t]here for the money." Morrell offered no resistance and led Morton to the store office, where money was on a desk. According to Morton, he then squeezed the trigger of the gun. He said he was not sure where he was pointing the gun and fired to scare the manager. After pulling the trigger, however, he heard the manager hit the floor. Morton left the store [to the parking lot], … and then returned…. He stole a video recorder and videotape, destroyed security monitors, and took a cordless phone to ensure that Morrell could not call the police. According to

Morton, when he returned to the office, he saw Morrell slumped on the floor. He admitted that Morrell looked dead. He did not check him for signs of life or summon help.

Other evidence at trial demonstrated Morrell had been shot in the face from a distance of not more than three feet.

After the crime, Morton went to play billiards with friends. He told his girlfriend that he robbed the store, purchased stereo equipment for his car and 2 pounds of marijuana, and took his girlfriend shopping. A few days later, Morton offered to pay a friend to destroy the security videotape and then fled the state. He eventually confessed to the crime, making a recorded statement to the police.

At trial, the jury received the following Instruction No. 9:

"In this case, the State has charged the defendant Joseph Dodds Morton with one offense of Murder in the First Degree and has introduced evidence on two alternative theories of proving the crime.

"The State may prove murder in the first degree by proving beyond a reasonable doubt that the defendant killed David Morrell intentionally and with premeditation or in the alternative by proving beyond a reasonable doubt that the defendant killed David Morrell and that such killing was done while in the commission of a felony or in flight from attempting to commit a felony, to-wit: aggravated robbery, as fully set out in these instructions.

"Here evidence is presented on the two alternate theories of proving the crime charged, you must consider both in arriving at your verdict."

Instruction No. 10 stated, in part:

"If you do not have a reasonable doubt from all the evidence that the State has proven murder in the first degree on either or both theories, then you will enter a verdict of guilty."

During closing argument, the prosecutor said:

"Was this killing premeditated? That's the second question we want to look at. And to look at that question, we look at the jury instructions. And if you remember in the jury instructions, premeditation means to have thought it over beforehand for any length of time. Premeditation does not necessarily mean that somebody has to plan it out weeks or months beforehand. And if you remember—you look at that police statement. Detective Zeigler's last question was, okay, did you plan this out last week or weeks before and he said no. But it doesn't have to be weeks or months before.

"We know he walked off the job on Friday. We don't know, though, if he started thinking about it Saturday or Sunday or Monday or Tuesday. But we do know that he started thinking about it before he got to the Save–A–Lot store. And remember one thing. Premeditation means to have thought over the matter beforehand for any length of time."

The prosecutor then gestured with her fingers as though she was firing a gun and continued: "That can be premeditation under the laws of the State of Kansas. One squeeze of the trigger is all it takes." The defense did not object.

The jury returned a guilty verdict, but its verdict form stated the jurors were "unable to agree whether the defendant is guilty of Murder in the First Degree on the theory of premeditated murder or felony murder." The jury "unanimously [found] the defendant guilty of murder in the first degree on the combined theories of premeditated murder and felony murder."

Conviction of First–Degree Murder on Combined Theories

Morton breaks this first issue in two, presenting it first as a violation of his right to a unanimous verdict and second as an error in instructions. Both challenges, when reduced to their essence, require us to decide a question of law, and our review is therefore unlimited.

… Morton points to language from *State v. Vontress* (1998) and *State v. Wakefield* (1999) [that emphasizes] "that as stated in the statute, premeditated murder and felony murder were separate and distinct offenses." This language is confusing when considered in isolation. It is inconsistent with previous and succeeding Kansas case law, as well as the reasoning and outcome of the cases in which it appears. …[T]he statement was dicta, included in *Vontress* without any analysis of whether premeditated murder and felony murder actually constitute separate crimes.

Before *Vontress* and *Wakefield* were decided, this court had stated clearly: "Premeditated and felony murder are not separate, distinct offenses but are two separate theories under which the crime of first-degree murder may be committed." In essence, the

felonious conduct proved in a felony murder is a stand-in for the deliberation and premeditation usually required to be proved in a first-degree murder case.

In *Vontress*, the jury was presented with a verdict form similar to the one used in this case. During deliberations it marked the form to indicate that the first-degree murder conviction was based on the jury's unanimous agreement on the defendant's guilt of premeditated murder *and* its unanimous agreement on the defendant's guilt of felony murder. The defendant received the harsher sentence available only for premeditated murder. The defendant appealed, arguing the verdict was ambiguous. We held that there was no ambiguity. The jury had found the defendant guilty under each theory of first-degree murder, and his sentence for premeditated murder was not illegal.

… Regardless of whether we consider jury unanimity a federal constitutional guarantee or a state statutory right, [our precedents] confirm that Morton got all that he was entitled to in this case. Although we know from the verdict form that Morton's jury could not agree on premeditation or felony murder, it was unanimous as to his guilt of first-degree murder. That was enough as long as the evidence of each means was sufficient. Instruction and conviction on the combined theories was proper. Moreover, because Morton was not given the harsher sentence appropriate only for a unanimous conviction under a premeditation theory, his sentence also would pass muster.

Sufficiency of the Evidence of Premeditation

As discussed above, in order to uphold a conviction based on alternative means under *State v. Timley*, we must see sufficient evidence of each means in the record before us. Morton's next argument is that the evidence of premeditation presented at his trial was insufficient.

"When the sufficiency of the evidence is challenged in a criminal case, the standard of review is whether, after review of all the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt."

We have recognized several factors that will give rise to an inference of premeditation:

"(1) the nature of the weapon used; (2) lack of provocation; (3) the defendant's conduct before and after the killing; (4) threats and declarations of the defendant before and during the occurrence; and (5) the dealing of lethal blows after the deceased was felled and rendered helpless. The jury has a right to infer premeditation from the established circumstances if the inference is a reasonable one." *State v. Murillo* (2000).

We see ample evidence to support the second and third factors in the record before us.

Morton admitted Morrell did nothing to provoke him. There was no resistance on the manager's part.

In addition, Morton's actions before entering and reentering the store and after the shooting reflected careful initial planning, reconsideration and a determination to proceed, and callous disregard of the consequences. Morton admitted deciding ahead of time to rob the store. He then went to no small trouble to steal the gun from his mother and prepared an excuse to use in the event he was questioned about his reappearance at the store after being discharged from employment. He then drove to the store and parked across the street, where he could carefully observe how many cars remained in its parking lot, guaranteeing that he would be alone with Morrell after business hours. After entering the store for the first time, he left and sat in his car awhile, thinking through his plan again and deciding to proceed. He then reentered the store and followed Morrell to the store office, where he took the money on the desk.

After intentionally squeezing the trigger, shooting Morrell in the face, and hearing Morrell hit the floor, Morton left the store a second time. He returned to his car, "took a turn around in the parking lot," and apparently decided he had not done enough to cover his tracks. He entered the store a third time and observed the apparently lifeless Morrell on the floor. Morton did nothing to assist Morrell. Instead, he stole or destroyed the security camera and videotape and monitors that might have led to his apprehension by law enforcement. Morton then went out to socialize, playing billiards and purchasing marijuana. He later offered to pay a friend to destroy the security videotape and then left town.

With all of this evidence in the State's favor, some of it from the defendant himself, members of the jury could have reasonably disregarded Morton's story that he fired the gun only to scare Morrell and did not know where it was pointing. There was ample evidence to support premeditation.

Prosecutorial Misconduct in Closing Argument

When there is no contemporaneous objection to a prosecutor's argument, we reverse only if the prosecutor's misconduct rises to the level of violating a defendant's right to a fair trial and denies the defendant his or her Fourteenth Amendment right to due process. Further, we generally employ a two-step process to analyze prosecutorial misconduct claims. First, we decide whether the prosecutor's comments were outside the wide latitude allowed in discussing the evidence. Second, we decide whether the comments constituted plain error; that is, whether the statements were so gross and flagrant that they could have prejudiced the jury against the defendant and denied him or her a fair trial. If so, reversal is required.

In this case, the prosecutor's questionable conduct consisted of gesturing with her fingers as though she were firing a gun and stating: "That can be premeditation under the laws of the State of Kansas. One squeeze of a trigger is all it takes." This was not a comment on the evidence but a purported statement of controlling law. Because a misstatement of controlling law denies a criminal defendant his or her right to due process, we agree with the defense that the alleged error must be reviewed on appeal despite the absence of an objection at trial.

In *State v. Pabst* (2002), this court held that premeditation was defined adequately in Pattern Instructions for Kansas (PIK) Crim.3d 56.04(b), as "to have thought over the matter beforehand." In our view, premeditation "means something more than the instantaneous, intentional act of taking another's life."

In *Pabst*, the prosecutor had said:

" '[*T*]*here's no amount of time required.*

….

" 'You notice that there's no time element in premeditation. There's no interval that's required. *There's no plan.* You don't have to think about it for weeks.

….

" 'You don't have to think about it for weeks, days, hours, 50 minutes, ten minutes. It means to have thought over the matter beforehand. *It's the conscious act of a person.*'"

We held that this language did not constitute a misstatement of the law and thus did not qualify as prosecutorial misconduct.

However, we cautioned prosecutors to read *State v. Holmes* (2001), [in which] the prosecutor had said: "[P]remeditation can occur in an instant. That's the law in the State of Kansas." We held that this definition did constitute a deliberate misstatement, noting the prosecutor had been cautioned in the instructions conference before argument began. In *Pabst*, we amplified that holding by warning prosecutors to avoid the use of the word "instant" or any synonym or motion that would convey that message.

[In a later case,] we … found the prosecutor's statement that "something can be premeditated as soon as it happens" to be a misstatement of the law. In that case, however, this court saw nothing in the record to indicate the misstatement was deliberate and held it to be harmless.

When the prosecutor in this case pantomimed the firing of a gun and made her accompanying comment that "[o]ne squeeze of a trigger is all it takes," she conveyed the message that premeditation can be instantaneous, or virtually so. This definition of premeditation approximated those given by the prosecutors in *Holmes*… and we conclude that she misstated Kansas law. Although she also mentioned the correct definition from the jury's instructions more than once, we do not regard this as a cure for her colorful misstatement of such a critical point—a definition of one of the crime's essential elements.

The defense argues that we should also hold that the prosecutor's conduct was deliberate rather than unintentional because she was a "seasoned veteran." Morton contends that the prosecutor necessarily knew better and purposely ignored what she knew to bolster weak evidence of premeditation.

We can go along with defendant approximately halfway. Morton is correct that an experienced prosecutor such as the one in his case should have been well aware of … numerous recent cases on prosecutorial misconduct and/or the definition of premeditation. … This prosecutor should have known better and apparently did, given her references to the correct definition in the jury instructions. As our earlier discussion makes evident, however, we cannot agree with Morton that the State's evidence of premeditation was weak. We do not discern any motivation for deliberate misconduct.

That being said, we are nevertheless compelled to hold here that the prosecutor's misstatement regarding premeditation requires reversal. Although we see plenty of evidence of premeditation in Morton's behavior, when judged under the correct definition, we know in this particular case that not every member of the jury was willing to convict on that basis. Because of the jury's specific statement in its verdict form that it could not agree unanimously on the premeditation theory, we are not comfortable calling the prosecutor's error harmless beyond a reasonable doubt. Morton is therefore entitled to reversal and a new trial.

Notes and questions on *Morton*

1. Like many jurisdictions, Kansas separates homicides—unlawful killings—into several subcategories. And like many jurisdictions, Kansas distinguishes among different types of homicides by focusing on the defendant's mental state. Joseph Morton, the defendant here, did not argue that he didn't kill the store manager. Instead, the defense argued that the evidence was insufficient to establish the right mental state for first degree murder. In Kansas (again, like many other jurisdictions), first degree murder requires "premeditation." How is that term defined in Kansas? What evidence here supports a finding of premeditation?
2. Some of the evidence of premeditation submitted here relates to the defendant's actions after the shooting. How do acts taken after a shooting help establish the defendant's state of mind before the shooting?
3. Sufficiency of evidence (or insufficiency) is one common basis for appeals in criminal law; jury instructions are another. In this case, the court focuses also on the prosecutor's characterization of the law in her closing argument. Compare the prosecutor's statements in *Pabst*and *Holmes*, both quoted in this case. The statement in *Pabst*was found to be permissible by an appellate court, but the statement in *Holmes*was found to be a (deliberate) misstatement. What is the key difference between the statements? Were the prosecutor's statements at Morton's trial more like one of these precedents than the other?
4. Kansas law defines first degree murder to include intentional, premeditated killings and killings in the course of "any inherently dangerous felony." There are thus two ways to commit first degree murder in Kansas—premeditated murder, or felony murder. Most U.S. jurisdictions have some form of "felony murder," or a type of murder that involves causing a death while committing some other felony offense. Jurisdictions vary in whether they classify felony murder as first, second, or even third degree murder; they also vary with regard to which felony offenses can serve as the predicate for a felony murder conviction. Among commentators and courts, felony murder is controversial, in part because it typically requires no proof of mens rea other than the mens rea of the underlying felony. Thus, if a defendant commits a felony offense with a mental state of recklessness, but (accidentally and unintentionally) kills someone while committing that felony, the defendant may be guilty of murder.
5. Morton was charged and convicted with aggravated robbery, a felony, along with murder. The prosecution argued both that Morton killed intentionally with premeditation and that Morton killed in the course of an inherently dangerous felony. The jury convicted Morton of first degree murder, but apparently was not unanimous about the underlying rationale for first degree murder—premeditated murder or felony murder. The appellate court found this "alternative means" conviction to be acceptable, so long as there was adequate evidence of each theory of murder. Is this approach consistent with the requirement of *Winship*that the factfinder must be convinced of each element of the offense beyond a reasonable doubt?

Murder v. Manslaughter

N.Y. Penal Law 125.25:
A person is guilty of murder in the second degree when:
1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime."

N.Y. Penal Law 125.20(2):
A person is guilty of manslaughter in the first degree when:
… 2. With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in paragraph (a) of subdivision one of section 125.25. The fact that homicide was committed under the influence of extreme emotional disturbance

constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subdivision.

Gordon G. PATTERSON, Jr., Appellant

v.

State of NEW YORK

432 U.S. 197
Supreme Court of the United States

Decided June 17, 1977

Mr. Justice WHITE delivered the opinion of the Court.

I

…After a brief and unstable marriage, the appellant, Gordon Patterson, Jr., became estranged from his wife, Roberta. Roberta resumed an association with John Northrup, a neighbor to whom she had been engaged prior to her marriage to appellant. On December 27, 1970, Patterson borrowed a rifle from an acquaintance and went to the residence of his father-in-law. There, he observed his wife through a window in a state of semiundress in the presence of John Northrup. He entered the house and killed Northrup by shooting him twice in the head.

Patterson was charged with second-degree murder. In New York there are two elements of this crime: (1) "intent to cause the death of another person"; and (2) "caus(ing) the death of such person or of a third person." N.Y. Penal Law s 125.25. Malice aforethought is not an element of the crime. In addition, the State permits a person accused of murder to raise an affirmative defense that he "acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse."

New York also recognizes the crime of manslaughter. A person is guilty of manslaughter if he intentionally kills another person "under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance." Appellant confessed before trial to killing Northrup, but at trial he raised the defense of extreme emotional disturbance. … The jury found appellant guilty of murder. …

II

It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion," and its decision in this regard is not subject to proscription under the Due Process Clause unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

In determining whether New York's allocation to the defendant of proving the mitigating circumstances of severe emotional disturbance is consistent with due process, it is therefore relevant to note that this defense is a considerably expanded version of the common-law defense of heat of passion on sudden provocation and that at common law the burden of proving the latter, as well as other affirmative defenses indeed, "all . . . circumstances of justification, excuse or alleviation" rested on the defendant….

III

… [I]n revising its criminal code, New York provided the affirmative defense of extreme emotional disturbance, a substantially expanded version of the older heat-of-passion concept; but it was willing to do so only if the facts making out the defense were established by the defendant with sufficient certainty. The State was itself unwilling to undertake to establish the absence of those facts beyond a reasonable doubt, perhaps fearing that proof would be too difficult and that too many persons deserving treatment as murderers would escape that punishment if the evidence need merely raise a reasonable doubt about the defendant's emotional state. It has been said that the new criminal code of New York contains some 25 affirmative defenses which exculpate or mitigate but which must be established by the defendant to be operative. The Due Process Clause, as we see it, does not put New York to the choice of abandoning those defenses or undertaking to disprove their existence in order to convict of a crime which otherwise is within its constitutional powers to sanction by substantial punishment.

The requirement of proof beyond a reasonable doubt in a criminal case is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." In re *Winship* (Harlan, J., concurring). The social cost of placing the burden on the prosecution to prove guilt beyond a reasonable doubt is thus an increased risk that the guilty will go free. While it is clear that our society has willingly chosen to bear a substantial burden in order to protect the innocent, it is equally clear that the risk it must bear is not without limits; and Mr. Justice Harlan's aphorism provides little guidance for determining what those limits are. Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person. Punishment of those found guilty by a jury, for example, is not forbidden merely because there is a remote possibility in some instances that an innocent person might go to jail.

It is said that the common-law rule permits a State to punish one as a murderer when it is as likely as not that he acted in the heat of passion or under severe emotional distress and when, if he did, he is guilty only of manslaughter. But this has always been the case in those jurisdictions adhering to the traditional rule. It is also very likely true that fewer convictions of murder would occur if New York were required to negative the affirmative defense at issue here. But in each instance of a murder conviction under the present law New York will have proved beyond a reasonable doubt that the defendant has intentionally killed another person, an act which it is not disputed the State may constitutionally criminalize and punish. If the State nevertheless chooses to recognize a factor that mitigates the degree of criminality or punishment, we think the State may assure itself that the fact has been established with reasonably certainty…. We thus decline to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused.

This view may seem to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes. But there are obviously constitutional limits beyond which the States may not go in this regard. "(I)t is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime."
…

IV

It is urged that *Mullaney v. Wilbur* necessarily invalidates Patterson's conviction. In *Mullaney* the charge was murder, which the Maine statute defined as the unlawful killing of a human being "with malice aforethought, either express or implied." The trial court instructed the jury that the words "malice aforethought" were most important because "malice aforethought is an essential and indispensable element of the crime of murder." Malice, as the statute indicated and as the court instructed, could be implied and was to be implied from "any deliberate, cruel act committed by one person against another suddenly . . . or without a considerable provocation," in which event an intentional killing was murder unless by a preponderance of the evidence it was shown that the act was committed "in the heat of passion, on sudden provocation." The instructions emphasized that "malice aforethought and heat of passion on sudden provocation are two inconsistent things; thus, by proving the latter the defendant would negate the former."

Wilbur's conviction, which followed, was affirmed. The Maine Supreme Judicial Court held that murder and manslaughter were varying degrees of the crime of felonious homicide and that the presumption of malice arising from the unlawful killing was a mere policy presumption operating to cast on the defendant the burden of proving provocation if he was to be found guilty of manslaughter rather than murder — a burden which the Maine law had allocated to him at least since the mid-1800's.

The Court of Appeals [held] that the presumption unconstitutionally shifted to the defendant the burden of proof with respect to an essential element of the crime…. This Court, accepting the Maine court's interpretation of the Maine law, unanimously agreed with the Court of Appeals that Wilbur's due process rights had been invaded by the presumption casting upon him the burden of proving by a preponderance of the evidence that he had acted in the heat of passion upon sudden provocation.

Mullaney's holding, it is argued, is that the State may not permit the blameworthiness of an act or the severity of punishment authorized for its commission to depend on the presence or absence of an identified fact without assuming the burden of proving the presence or absence of that fact, as the case may be, beyond a reasonable doubt. In our view, the *Mullaney* holding should not be so broadly read….

The Maine Supreme Judicial Court made it clear that malice aforethought, which was mentioned in the statutory definition of the crime, was not equivalent to premeditation and that the presumption of malice traditionally arising in intentional homicide cases carried no factual meaning insofar as premeditation was concerned. Even so, a killing became murder in Maine when it resulted from a deliberate, cruel act committed by one person against another, "suddenly without any, or without a considerable provocation." Premeditation was not within the definition of murder; but malice, in the sense of the absence of provocation, was

part of the definition of that crime. Yet malice, i.e., lack of provocation, was presumed and could be rebutted by the defendant only by proving by a preponderance of the evidence that he acted with heat of passion upon sudden provocation. In *Mullaney* we held that however traditional this mode of proceeding might have been, it is contrary to the Due Process Clause as construed in *Winship*.

As we have explained, nothing was presumed or implied against Patterson; and his conviction is not invalid under any of our prior cases. The judgment of the New York Court of Appeals is

Affirmed.

Mr. Justice POWELL, with whom Mr. Justice BRENNAN and Mr. Justice MARSHALL join, dissenting.

In the name of preserving legislative flexibility, the Court today drains *In re Winship* (1970) of much of its vitality. Legislatures do require broad discretion in the drafting of criminal laws, but the Court surrenders to the legislative branch a significant part of its responsibility to protect the presumption of innocence. …

New York's present homicide laws had their genesis in lingering dissatisfaction with certain aspects of the common-law framework that this Court confronted in *Mullaney*. Critics charged that the archaic language tended to obscure the factors of real importance in the jury's decision. Also, only a limited range of aggravations would lead to mitigation under the common-law formula, usually only those resulting from direct provocation by the victim himself. It was thought that actors whose emotions were stirred by other forms of outrageous conduct, even conduct by someone other than the ultimate victim, also should be punished as manslaughterers rather than murderers. Moreover, the common-law formula was generally applied with rather strict objectivity. Only provocations that might cause the hypothetical reasonable man to lose control could be considered. And even provocations of that sort were inadequate to reduce the crime to manslaughter if enough time had passed for the reasonable man's passions to cool, regardless of whether the actor's own thermometer had registered any decline….

The American Law Institute took the lead in moving to remedy these difficulties. As part of its commendable undertaking to prepare a Model Penal Code, it endeavored to bring modern insights to bear on the law of homicide. The result was a proposal to replace "heat of passion" with the moderately broader concept of "extreme mental or emotional disturbance." The proposal first appeared in a tentative draft published in 1959, and it was accepted by the Institute and included [in] the 1962 Proposed Official Draft.

At about this time the New York Legislature undertook the preparation of a new criminal code, and the Revised Penal Law of 1967 was the ultimate result. The new code adopted virtually word for word the ALI formula for distinguishing murder from manslaughter. Under current New York law, those who kill intentionally are guilty of murder. But there is an affirmative defense left open to a defendant: If his act was committed "under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse," the crime is reduced to manslaughter. The supposed defects of a formulation like Maine's have been removed. Some of the rigid objectivity of the common law is relieved, since reasonableness is to be determined "from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be." The New York law also permits mitigation when emotional disturbance results from situations other than direct provocation by the victim. And the last traces of confusing archaic language have been removed. There is no mention of malice aforethought, no attempt to give a name to the state of mind that exists when extreme emotional disturbance is not present. The statute is framed in lean prose modeled after the ALI approach, giving operative descriptions of the crucial factors rather than attempting to attach the classical labels.

Despite these changes, the major factor that distinguishes murder from manslaughter in New York "extreme emotional disturbance" is undeniably the modern equivalent of "heat of passion." The ALI drafters made this abundantly clear. They were not rejecting the notion that some of those who kill in an emotional outburst deserve lesser punishment; they were merely refining the concept to relieve some of the problems with the classical formulation. The New York drafters left no doubt about their reliance on the ALI work….

But in one important respect the New York drafters chose to parallel Maine's practice precisely, departing markedly from the ALI recommendation. Under the Model Penal Code the prosecution must prove the absence of emotional disturbance beyond a reasonable doubt once the issue is properly raised. In New York, however, extreme emotional disturbance constitutes an affirmative defense rather than a simple defense. Consequently the defendant bears not only the burden of production on this issue; he has the burden of persuasion as well.

Mullaney held invalid Maine's requirement that the defendant prove heat of passion. The Court today, without disavowing the unanimous holding of *Mullaney*, approves New York's requirement that the defendant prove extreme emotional disturbance. The Court manages to run a constitutional boundary line through the barely visible space that separates Maine's law from New York's. It does so on the basis of distinctions in language that are formalistic rather than substantive.

This result is achieved by a narrowly literal parsing of the holding in *Winship*: "(T)he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." The only "facts" necessary to constitute a crime are said to be those that appear on the face of the statute as a part of the definition of the crime….

The test the Court today establishes allows a legislature to shift, virtually at will, the burden of persuasion with respect to any factor in a criminal case, so long as it is careful not to mention the nonexistence of that factor in the statutory language that defines the crime. The sole requirement is that any references to the factor be confined to those sections that provide for an affirmative defense….

With all respect, this type of constitutional adjudication is indefensibly formalistic. A limited but significant check on possible abuses in the criminal law now becomes an exercise in arid formalities. What *Winship* and *Mullaney* had sought to teach about the limits a free society places on its procedures to safeguard the liberty of its citizens becomes a rather simplistic lesson in statutory draftsmanship. Nothing in the Court's opinion prevents a legislature from applying this new learning to many of the classical elements of the crimes it punishes.

For example, a state statute could pass muster under the only solid standard that appears in the Court's opinion if it defined murder as mere physical contact between the defendant and the victim leading to the victim's death, but then set up an affirmative defense leaving it to the defendant to prove that he acted without culpable mens rea. The State, in other words, could be relieved altogether of responsibility for proving anything regarding the defendant's state of mind, provided only that the fact of the statute meets the Court's drafting formulas.

To be sure, it is unlikely that legislatures will rewrite their criminal laws in this extreme form. The Court seems to think this likelihood of restraint is an added reason for limiting review largely to formalistic examination. But it is completely foreign to this Court's responsibility for constitutional adjudication to limit the scope of judicial review because of the expectation however reasonable that legislative bodies will exercise appropriate restraint.

It would be preferable, if the Court has found reason to reject the rationale of *Winship* and *Mullaney*, simply and straightforwardly to overrule those precedents….

Notes and questions on *Patterson*

1. *Patterson* is a very difficult case. It requires you to think carefully about definitions of crimes, affirmative defenses, and allocations of burdens of proof. Murder in New York was defined as intentionally causing the death of another person, but the New York statute also included an affirmative defense. An affirmative defense can provide relief from criminal liability not because the prosecution didn't prove the elements of the statutory offense, but on the basis of some other consideration that has been recognized as a reason not to convict and punish the defendant. Self-defense and insanity are two examples of affirmative defenses. To begin to understand how affirmative defenses work, imagine a statute that defines murder as "the intentional killing of another human being." Now imagine a person who is threatened by an armed assailant and who shoots and kills that assailant. This person might raise a claim of self-defense rather than contest the elements of the murder statute. That is, our imaginary defendant does not deny that she intentionally killed her assailant. Rather, her affirmative defense is that, while she did intentionally kill the assailant, she did so to protect her own life from an unlawful deadly threat. You'll study affirmative defenses in much more detail in Chapter Ten. For now, the notes below will give you helpful background on the particular affirmative defense of "provocation" that gives rise to the arguments in *Patterson*.
2. At common law, provocation doctrine arose as a way of distinguishing among different types of intentional killings. To common law courts, some intentional killings seemed worse than others. Premeditated, planned, cold-blooded killings seemed worse than inflamed, impulsive killings "in the heat of passion." The person who killed in the heat of passion still killed intentionally, but, the courts decided, this person might not kill with "malice." Courts held that a killing was manslaughter, not murder, if it was in response to provocation. In this regard, provocation was a partial defense rather than a complete one: a

successful claim of provocation didn't relieve the defendant of all criminal liability, but merely reduced the severity of the charges. To show provocation and reduce a murder charge to manslaughter, a defendant had to show 1) adequate provocation(something that would cause a reasonable man to become sufficiently inflamed to kill); 2) that the provocationcaused the defendant to kill the victim; and 3) no cooling-off period: the killing must have followed the provocation closely enough in time that a reasonable man would not have "cooled off" or regained his composure and self-control. Courts often took a categorical approach to provocation, meaning that they recognized certain types of acts as "adequate" provocation, but excluded all other acts. Standard categories of adequate provocation included a physical attack, a threat of death or great bodily injury to the defendant or to a third party close to the defendant, such as a child; discovery of infidelity; and illegal arrest.

3. The drafters of the Model Penal Code decided to include in their proposed homicide statute a defense similar to common law provocation, but broader. The Model Penal Code provides

   (1) Criminal homicide constitutes manslaughter when:

   (a) it is committed recklessly; or

   (b) a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.

   Model Penal Code § 210.3.

4. Now consider the New York homicide statute applied in *Patterson*. The New York legislature used the MPC language not in its manslaughter statute, but in its murder statute, and it explicitly characterized the consideration of extreme mental or emotional disturbance as an affirmative defense. What difference does that make, according to the Supreme Court?
5. In the dissenting opinion, Justice Powell suggests that the majority's approach allows states to circumvent the requirements of *Winship*that the prosecution prove all elements of an offense beyond a reasonable doubt. He suggests that under the Court's approach, a state would be permitted to define murder as "mere physical contact between the defendant and victim leading to the victim's death." All mental state considerations, including whether the defendant intended to kill or acted recklessly with regard to death, could be characterized as affirmative defenses. Thus the prosecution would have no burden to prove mens rea for the crime of murder. Do you agree that the majority approach leaves open this possibility? After *Patterson*, does *Winship*remain a meaningful constraint on enforcement and adjudication decisions?

Check Your Understanding (6-2)

The original version of this chapter contained H5P content. You may want to remove or replace this element.

Recklessness and Homicide

Kentucky Rev. Stat. 507.040: Manslaughter in the second degree

(1) A person is guilty of manslaughter in the second degree when he wantonly causes the death of another person, including but not limited to situations where the death results from the person's:

(a) Operation of a motor vehicle;

(b) Leaving a child under the age of eight (8) years in a motor vehicle under circumstances which manifest an extreme indifference to human life and which create a grave risk of death to the child, thereby causing the death of the child; or

(c) Unlawful distribution for remuneration of a Schedule I or II controlled substance when the controlled substance is the proximate cause of death.

Shawnta ROBERTSON, Appellant

v.

COMMONWEALTH of Kentucky, Appellee

Supreme Court of Kentucky
82 S.W.3d 832

Aug. 22, 2002

COOPER, Justice.

Michael Partin, a police officer employed by the city of Covington, Kentucky, was killed when he fell through an opening between the roadway and the walkway of the Clay Wade Bailey Bridge and into the Ohio River while in foot pursuit of Appellant Shawnta Robertson. Following a trial by jury in the Kenton Circuit Court, Appellant was convicted of manslaughter in the second degree for wantonly causing Partin's death, KRS 507.040(1), and was sentenced to imprisonment for six years. The Court of Appeals affirmed, and we granted discretionary review…

At about 2:00 a.m. on January 4, 1998, Officer Brian Kane of the Kenton County Police Department attempted to arrest Appellant in Covington for possession of marijuana. Appellant broke free of Kane's grasp and began running north on Fourth Street toward the Clay Wade Bailey Bridge which spans the Ohio River between Covington and Cincinnati, Ohio. Kane radioed for assistance and pursued Appellant on foot "at a sprint." When Appellant reached the bridge, he vaulted over the concrete barrier between the roadway and the walkway and began running north on the walkway toward Cincinnati. Kane, who, at that point, was running on top of the concrete barrier jumped down to the walkway and continued his pursuit.

Meanwhile, Partin and two other Covington police officers, Steve Sweeney and Cody Stanley, responded to Kane's request for assistance and arrived at the bridge almost simultaneously in three separate vehicles…. Partin's vehicle was the first of the three police cruisers to reach the bridge. He stopped in the right northbound lane just beyond where Appellant was running on the walkway. Stanley stopped his vehicle directly behind Partin's vehicle, and Sweeney stopped in the left northbound lane, also behind Partin's vehicle. Sweeney and Stanley testified that they did not see either Appellant or Kane on the walkway and stopped only because Partin had done so. Both saw Partin exit his vehicle, proceed to the concrete barrier, place his left hand on the barrier, then vault over the barrier "as if he had done it a million times before," and disappear. The concrete barrier was thirty-two inches high. The railing of the walkway was forty-three inches high. There was a forty-one-inch-wide open space between the concrete barrier and the walkway railing. Partin fell through the open space into the river ninety-four feet below. His body was recovered four months later.

[When Partin's vehicle had arrived on the bridge, Appellant had reversed course and ran toward Kane, who ordered him to "get down." Appellant complied and was placed under arrest for marijuana possession. After Partin's body was recovered, appellant was charged with manslaughter.]

No one will ever know why Partin fell through the opening between the concrete barrier and the pedestrian walkway. Perhaps, he did not realize the opening was there. Perhaps, he knew it was there and miscalculated his vault. Either way, however, his death resulted from his own volitional act and not from any force employed against him by Appellant. Whether Appellant's act of resisting arrest by unlawful flight from apprehension was a legal cause of Partin's death requires application of the provisions of KRS 501.020(3) (definition of "wantonly"), KRS 501.020(4) (definition of "recklessly"), and KRS 501.060 ("causal relationships").

KRS 501.020(3) defines "wantonly" as follows:

A person acts wantonly with respect to a result or to a circumstance described by a statute defining an offense *when he is aware of and consciously disregards a substantial and unjustifiable risk* that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that *a reasonable person* would observe in the situation…. (Emphasis added.)

KRS 501.020(4) defines "recklessly" as follows:

A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense *when he fails to perceive a substantial and unjustifiable risk that the result will occur* or that the circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that *a reasonable person* would observe in the situation. (Emphasis added.)

Thus, wantonness is the awareness of and conscious disregard of a risk that a reasonable person in the same situation would not have disregarded, and recklessness is the failure to perceive a risk that a reasonable person in the same situation would have perceived.

KRS 501.060 provides in pertinent part:

(1) Conduct is the cause of a result when it is an antecedent without which the result in question would not have occurred.

…

(3) When wantonly or recklessly causing a particular result is an element of the offense, the element is not established if the actual result is *not within the risk of which the actor is aware or, in the case of recklessness, of which he should be aware unless:*

(a) The actual result differs from the probable result only in the respect that *a different person* or different property *is injured or affected* or that the probable injury or harm would have been more serious or more extensive than that caused; or

(b) The actual result involves the same kind of injury or harm as the probable result and *occurs in a manner which the actor knows or should know is rendered substantially more probable by his conduct.*

(4) The question of whether an actor knew or should have known the result he caused was rendered substantially more probable by his conduct is an issue of fact.

(Emphasis added.)

Obviously, Appellant's unlawful act of resisting arrest by fleeing from apprehension was a "but for" cause of Partin's fatal attempt to pursue him by vaulting from the roadway of the bridge to the walkway. As noted by the 1974 Commentary to KRS 501.060, the issue then becomes primarily one of *mens rea*.

Once an act is found to be a cause in fact of a result and a substantial factor in bringing about that result, it is recognized as the proximate cause unless another cause, independent of the first, intervenes between the first and the result. And even then the first cause is treated as the proximate cause if the harm or injury resulting from the second is deemed to have been reasonably foreseeable by the first actor.

Thus, the fact that Partin vaulted over the concrete barrier of his own volition does not exonerate Appellant if Partin's act was either foreseen or foreseeable by Appellant as a reasonably probable result of his own unlawful act of resisting arrest by fleeing from apprehension. …[I]t is immaterial that it was Partin, as opposed to Kane or one of the other police officers, who fell from the bridge if such was a reasonably foreseeable consequence of the pursuit.

In *Phillips v. Commonwealth* (2000), we [upheld] the wanton murder conviction of a defendant who fired shots at an intended victim from inside a vehicle and thereby induced the intended victim to return fire and kill a passenger in the defendant's vehicle. We held that it was reasonably foreseeable that, if shots were fired at another person from inside a vehicle, the other person would return fire in the direction of the vehicle, thus endangering the lives of its other occupants. Also illustrative is the pre-code case of *Sanders v. Commonwealth* (1932), which upheld the manslaughter conviction of a defendant who had threatened his wife with a deadly weapon while they were in a moving vehicle, causing her to jump from the vehicle to her death—clearly a volitional act by the victim but a probable and reasonably foreseeable consequence of the unlawful act of the defendant.

In both *Phillips* and *Sanders*, a defendant applied unlawful *force* against another whose volitional response to that force caused the victim's death. The case *sub judice* is conceptually more similar to *Lofthouse v. Commonwealth* (2000), which reversed the reckless homicide conviction of a defendant who applied no force against the victim but supplied cocaine and heroin to the victim whose self-ingestion of those drugs caused his death. The result reached by the plurality opinion in *Lofthouse* did not turn on the fact that the victim died as a result of his own volitional act. Rather, in reversing the conviction, the opinion emphasized the absence of any evidence that the defendant knew or should have known that ingestion of those drugs under those circumstances would probably cause the victim's death. Here, as in *Lofthouse*, Appellant's *mens rea*, *i.e.*, what he knew or should have known with respect to the probable consequences of his conduct, is crucial to determining the issue of his criminal liability.

Analogous to this set of facts is the case where a person pursued by the police in a high speed motor vehicle chase is held criminally liable for the death of an innocent bystander accidentally struck by a pursuing police vehicle. In *People v. Schmies* (Cal. 1996), the California Court of Appeal directly addressed the effect of the police officers' conduct vis-a-vis the criminal liability of the defendant.

[T]he negligence or other fault of the officers is not a defense to the charge against defendant. The fact that the officers may have shared responsibility or fault for the accident does nothing to exonerate defendant for his role. In short, whether the officers' conduct could be described with such labels as negligent, careless, tortious, cause for discipline, or even criminal, in an action against them, is not at issue with respect to the defendant here. In this sense the "reasonableness" of the officers' conduct, focused upon their point of view and their blameworthiness for the death, is not relevant.

The issue with respect to defendant focuses upon his point of view, that is, whether the harm that occurred was a reasonably foreseeable consequence of his conduct at the time he acted. Since the officers' conduct was a direct and specific response to defendant's conduct, the claim that their conduct was a superseding cause of the accident can be supported only through a showing that their conduct was so unusual, abnormal, or extraordinary that it could not have been foreseen.

Schmies (emphasis added). Although California does not have a statutory equivalent of KRS 501.060, this common law analysis of causation is consistent with the principles embodied in our statute. Did the defendant commit an illegal act that induced the officer's response? If so, was that response reasonably foreseeable by the defendant at the time that he acted? The fault or negligence of the officer is not determinative of the defendant's guilt. However, the reasonableness of the officer's response is relevant in determining whether the response was foreseeable by the defendant. The more reasonable the response, the more likely that the defendant should have foreseen it. It is immaterial that the ultimate victim was the officer, himself, as opposed to an innocent bystander.

Here, the conduct that supports Appellant's conviction is not, as the Commonwealth suggests, his own act of vaulting over the concrete barrier. Partin was not present when that act occurred; thus, it was not reasonably foreseeable that he would have vaulted over the barrier in reliance on the fact that Appellant had done so without incident. (That analysis might have been appropriate if Officer Kane had fallen from the bridge when he followed Appellant onto the walkway.) The conduct that supports Appellant's conviction is the continuation of his unlawful flight when he obviously knew that Partin intended to pursue him (as evidenced by the fact that when he saw Partin's vehicle stop, he reversed course and began running in the opposite direction), and that, to do so, Partin would be required to cross the open space between the roadway and the walkway and thereby risk falling to his death. "The question of whether [Appellant] knew or should have known [that Partin's death] was rendered substantially more probable by his conduct is an issue of fact." KRS 501.060(4). There was sufficient evidence in this case to present that fact to a jury….

GRAVES, Justice, concurring.

… I write separately concerning Appellant's culpability.

Whether the act of running from an officer when one has been detained, standing alone if it results in the officer's death, would support a second-degree manslaughter conviction is a question we leave until another day. The act of vaulting the gap between the roadway and the sidewalk is sufficiently wanton to support the jury's verdict in this case. Appellant was aware of the danger of the gap and consciously disregarded it when he jumped. Knowing he was being pursued by at least one officer on foot, Appellant had to assume any pursuing officer would attempt to follow him, also becoming susceptible to the risk. A gap of nearly 4 feet across a drop of 94 feet into moving water cannot be described as anything but a substantial unjustifiable risk. It is certainly logical for the jury to conclude that, when Appellant disregarded this risk to which he was subjecting those lawfully pursuing him, he grossly deviated from the standard of conduct that a reasonable person would observe.

[Dissenting opinion of Justice KELLER omitted.]

Notes and questions on *Robertson*

1. Although Kentucky's terminology is somewhat unconventional, this case can help you learn the general distinction between recklessness and negligence in criminal law. It may be helpful to start with the Model Penal Code's definitions of those terms, since the MPC is more representative on this particular issue. Here are the MPC definitions.
   (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.

MPC § 2.02 (c)-(d).

Notice that recklessness, as defined in the Model Penal Code, requires awareness of risk: the defendant must "consciously disregard" a risk. Negligence does not require actual knowledge of risk. Instead, a negligent defendant should be aware of the risk, but instead fails to perceive it.

2. Now compare the Model Penal Code definitions with Kentucky's definitions of the terms "wantonly" and "recklessly," discussed within the *Robertson*opinion. To act "wantonly" in Kentucky is approximately equivalent to acting "recklessly" under the MPC: a conscious disregard of a (known) substantial and unjustifiable risk. And to act "recklessly" in Kentucky is approximately equivalent to acting "negligently" under the MPC: a failure to perceive a substantial and unjustifiable risk. The variations in criminal law terminology by jurisdiction can be confusing, but it helps to let go of the expectation of consistency! It's always wise to check your own jurisdiction's definitions of key terms. It's also helpful to be aware of usual practice. The Model Penal Code's definition of recklessness as conscious disregard of a substantial and unjustifiable risk is fairly common, and Kentucky's approach is unusual.
3. Shawnta Robertson's appeal does not focus directly on evidence of his mental state, but rather on the issue of causation. Like many jurisdictions, though, Kentucky links causation to mental states. KRS 501.060, quoted within the court's opinion, sets forth causation requirements of Kentucky law for crimes with a mens rea of either "wantonly" or "recklessly." Try to articulate clearly the defendant's argument about causation here, and the prosecution's response. Which argument seems more compelling to you?
4. Beyond the law, we sometimes think of cause-and-effect relationships as scientific or empirical questions: does smoking cause lung cancer? Does human behavior cause global warming? It is important to see that in criminal law, causation analysis often involves normative judgments about whether a defendant should be held responsible for an effect that is in some way linked to the defendant's actions. A dissenting opinion in *Robertson*, not included above, emphasized this moral dimension to causation analysis. But-for causation can be interpreted very broadly, the dissent noted; a person who chooses to bear a child is a but-for cause of that child's later death, since but-for the birth the death could not have occurred. "Legal cause" or "proximate cause" is a device to narrow legal liability based on judgments of a particular actor's culpability or blameworthiness. As the dissent explained,

   KRS 501.060 represents a legislative policy determination that "[w]hen the requirement of 'proximate causation' dissociates the actor's conduct from a result of which it is a but-for cause, … the actor's culpability with respect to the result … is such that it would be unjust to permit the result to influence his liability or the gravity of his offense." In other words, "legal causation," … now conceptualized by KRS 501.060 as an issue of *mens rea* or culpability, nevertheless operates to exclude criminal liability in cases where the defendant would otherwise have committed an offense, but "common sense notions of responsibility for the occurrence of results" dictate that the imposition of criminal liability is inappropriate.

   Robertson, 82 S.W.3d 832 at 844 (Keller, J., dissenting).

5. Suppose that while police officers were chasing Robertson, Robertson (rather than one of the officers) had fallen off the bridge and drowned. Would the officers then be liable for manslaughter of Robertson? It's unlikely. Doctrines of "law enforcement justification" empower police officers to engage in many actions that would otherwise violate criminal statutes. "State and federal law generally prohibit assault, battery, use of deadly force, … damage to property, weapons possession, and so forth; all of these prohibitions contain exceptions for police officers on terms not applicable to ordinary citizens." *Stokes v. City of Chicago*, 744 F. Supp. 183, 188 n. 4 (N.D. Ill. 1990). Although law enforcement justifications set ostensible limits to police use of force and other conduct that would otherwise violate criminal laws, the question whether police have exceeded those limits is often controversial. As you are no doubt aware, many police killings of unarmed suspects are not prosecuted, even when some observers find the use of deadly force to be unwarranted. For additional discussion of these cases, see the section entitled "When Killing Isn't Criminal" later in this chapter. For now, notice that an inquiry into the justifiability of risky conduct is built into Kentucky's definition of "wantonly." To act wantonly is to disregard "a substantial and unjustifiable risk." Even if

Robertson had fallen and drowned, a prosecutor deciding whether criminal charges are appropriate might conclude that the risks that police took in chasing this suspect were justifiable ones.

6. Across the Kansas, New York, and Kentucky homicide statutes you've seen so far, there are offenses of first degree murder, second degree murder, first degree manslaughter, and second degree manslaughter. States that retain the death penalty often have a separate offense of "capital murder." Pennsylvania and Florida also each define a crime of third degree murder, and many states define still other homicide offenses, such as vehicular homicide or criminally negligent homicide. None of these terms has a universal definition that applies across all jurisdictions; each state decides how to divide homicide into more narrowly defined offenses. But it is useful to notice that each state does divide criminal homicides into categories, with "murder" typically being a more severe offense that carries more severe penalties than "manslaughter," and with a "first degree" offense typically carrying more severe penalty than a second degree (or third degree) one. What are the reasons that a state might want to divide homicide into multiple, more narrowly defined offenses? What aspects of a killing should be used to distinguish more severe offense from less severe ones, in your view?
7. As noted earlier in this chapter, the actus reus of most homicide offenses is the same – causing the death of a human being. The different types of homicide listed in the previous note are usually distinguished by mens rea standards. A defendant's state of mind can be difficult to ascertain or "prove," as we have seen; mental state elements are frequently established by arguments from circumstantial evidence. When deciding which homicide offense to charge, prosecutors could seek a conviction for the most severe offense that they think the evidence warrants, or they could propose a plea to a lesser homicide offense. It's important to see that prosecutors have choices; the proliferation of different types of homicide is another source of prosecutorial discretion. And as you have seen in other contexts, the exercise of discretion often produces patterns of racial disparities. For example, in both capital murder cases and non-capital homicide cases, empirical researchers have found that black defendants who kill white victims are likely to be charged with a more severe homicide offense than other defendant-victim racial combinations. See, e.g., Yoav Sapir, *Neither Intent Nor Impact: A Critique of the Racially Based Selective Prosecution Jurisprudence and a Reform Proposal* , 19 Harv. BlackLetter L.J. 130-131 (2003).

Check Your Understanding (6-3)

The original version of this chapter contained H5P content. You may want to remove or replace this element.

Negligence and Homicide

Massachusetts G.L. c. 90, 24G(b):

Whoever, upon any way or in any place to which the public has a right of access or upon any way or in any place to which members of the public have access as invitees or licensees, operates a motor vehicle with a percentage, by weight, of alcohol in their blood of .08 or greater, or while under the influence of intoxicating liquor, or of marijuana, narcotic drugs, depressants or stimulant substances…, or whoever operates a motor vehicle negligently so that the lives or safety of the public might be endangered and by any such operation causes the death of another person, shall be guilty of homicide by a motor vehicle and shall be punished by imprisonment in a jail or house of correction for not less than 30 days nor more than 2 ½ years, or by a fine of not less than $300 nor more than $3,000 dollars, or both.

Mass. G.L. c. 265, 13:

Whoever commits manslaughter shall, except as hereinafter provided, be punished by imprisonment in the state prison for not more than twenty years or by a fine of not more than one thousand dollars and imprisonment in jail or a house of correction for not more than two and one half years.

COMMONWEALTH

v.

Sandra CARLSON

Supreme Judicial Court of Massachusetts, Worcester
849 N.E.2d 790

Decided June 21, 2006

Opinion by GREANEY, J.

We transferred this case here on our own motion to consider the scope of criminal liability for the negligent operation of a motor vehicle that results, in the circumstances described below, in death. A jury … convicted the defendant on a complaint charging motor vehicle homicide by negligent operation. The evidence at trial demonstrated that Carol Suprenant (victim) was hospitalized with chest and lung injuries suffered as a result of an accident caused by the defendant's negligent operation of an automobile and died of respiratory failure four days later after her doctors, at her request, removed her from a ventilator that allowed her to breathe and might have ensured her survival. The defendant appeals from her conviction, challenging (as she did at trial) the sufficiency of the evidence proving causation and claiming (for the first time on appeal) that the trial judge's instructions to the jury on the concept of superseding causes were inadequate. We affirm the conviction.

The jury could have found the following facts. On July 4, 2002, the victim and her husband, Robert Suprenant, left their home in Spencer to attend a cookout… At about noon, the Suprenants were traveling south on Mechanic Street and had just entered the intersection of Mechanic and Chestnut Streets, when their automobile was struck on the passenger side by an automobile traveling east on Chestnut Street operated by the defendant. The force of impact pushed the Suprenant's automobile a distance of approximately fifteen to twenty feet, across the road, over a sidewalk, and into a chain link fence. Traffic entering the intersection from the defendant's direction was controlled by both a stop sign and blinking red light. A jury could infer that the defendant had failed to stop (or yield the right of way) at the intersection and, thus, was negligent. The victim was transferred from the accident scene by emergency medical personnel to [a hospital].

As a result of the accident, the victim suffered multiple chest wall fractures, including fractures of the ribs and sternum and a lung contusion. The victim had suffered for several years prior to the accident from chronic obstructive pulmonary disease (COPD), a condition which makes it difficult to breathe and, thus, to supply oxygen to the bloodstream, and had required the use of an oxygen tank in her home to assist in her breathing.[1] The trauma to her chest compromised her ability to breathe as she had before the accident, to the point where she could no longer oxygenate her blood by normal breathing. That night in the intensive care unit, the victim was intubated and placed on a ventilator. The next morning, the doctors removed the victim from the ventilator, and she was transferred from the intensive care unit to a medical floor in the hospital.

Over the next few days, the victim's breathing difficulties increased. Three doctors separately advised the victim of the need to reintubate her and place her again on a ventilator in order to assist her breathing. At first the victim, who had in the past repeatedly told her daughter-in-law (and health proxy) that she never wanted to be kept alive by a ventilator, refused permission for the doctors to do so. After speaking with family members and her doctors, however, the victim acquiesced and allowed herself to be reintubated, at least temporarily, in order to determine if her health would improve.

The next morning the victim's kidneys began to fail, and doctors advised the victim that her worsening condition would require dialysis. At this point, the victim stated that she no longer wished to be attached to a ventilator. Two doctors on the medical staff of the hospital met separately with the victim to discuss the nature of the circumstances facing her and the probable consequences of forgoing mechanical ventilation. The victim's personal physician also spoke with her at great length about her decision and encouraged her to remain on the breathing tube and ventilator to allow her situation time to improve. The victim understood (a jury could infer) that her death was probable if she did not allow intubation and that, conversely, her injuries were potentially survivable if she remained on the ventilator. The victim was adamant that she did not want to be intubated. On July 8, she was taken off the ventilator and the intubation tube was removed. She died a few hours later from respiratory failure.

At trial one doctor testified that, if the accident had not happened, the victim probably would not have needed a ventilator and could have continued being on home oxygen in her usual fragile state of health, but that the chest injuries suffered in the accident "tipped the scales against her." He also opined that the victim's decision not to be intubated "likely played a role in her death." Another doctor stated his opinion "to a reasonable degree of medical certainty" that the victim would have survived her injuries if she had agreed to mechanical ventilatory support, and might even have returned to the state she was in before the accident, but conceded as well that the victim might have required "chronic and continuous ventilatory support." The victim's daughter-in-law assessed the situation as follows: "We all knew that it was a possibility that she might not make it, but [the doctors] couldn't give us a guarantee that she would make it without … hav[ing] to be on a [ventilator] for the rest of her life, and she didn't want to live like that, and we couldn't force her to do that." The victim's primary care physician testified, "I do think her mind was made up."

The judge denied the defendant's motions for the entry of a required finding of not guilty presented at the close of the Commonwealth's case and at the close of all the evidence. The defendant argues that the Commonwealth's proof was insufficient to sustain the conviction because no rational jury could have determined, beyond a reasonable doubt, that the victim's death from respiratory failure was proximately caused by the defendant's negligence.[2] The defendant asserts that the victim's death was a direct result of her independent decision not to undertake medical procedures that could be considered appropriate for a person in her condition and that would, in all probability, have allowed her to survive the accident. The defendant concedes that the victim had the right to make an informed decision to forgo life support, but argues that the victim's choice broke the chain of causation and relieved the defendant of criminal responsibility for the victim's death. We disagree.

… The standard of causation under G.L. c. 90, § 24G, is the same as that employed in tort law. …Conduct is a proximate cause of death if the conduct, "by the natural and continuous sequence of events, causes the death and without which the death would not have occurred." There is no question that the defendant's negligent failure to stop, or yield the right of way, at the intersection (for which the defendant accepts responsibility in this appeal) set in motion a chain of events that resulted in the victim's death. The victim's injuries from the accident exacerbated serious preexisting health problems and required her to be intubated and placed on the ventilator. Her ultimate decision to be removed from life support was not an independent occurrence but the final step in the continuous sequence of events that began with the defendant's negligent operation of her automobile. "But for" the negligence, the accident would not have occurred, and the victim would not have been forced into the position of having to make what was, in retrospect, a true life-or-death decision.

The general rule is that intervening conduct of a third party will relieve a defendant of culpability for antecedent negligence only if such an intervening response was not reasonably foreseeable…. "This is just another way of saying that an intervening act of a third party that was not reasonably foreseeable in the circumstances would prevent the victim's death from following naturally and continuously from the defendant's conduct." *Commonwealth v. Askew* (1989). Whether an intervening act was reasonably foreseeable and, thus, followed naturally from the defendant's conduct, or unforeseeable and, thus, broke the chain of causation as matter of law, is a question of fact for the jury to decide based on an assessment of the circumstances. See Restatement (Second) of Torts § 453 comment b (1965) (if either facts or reasonable foreseeability of intervening act are subject to reasonable difference of opinion, question of proximate cause must go to jury).

Here, the victim's choice was between invasive life support that might have assured her survival, but could also have led to a life of ventilator dependence (and, we may assume, continued pain and suffering), or acceptance of "comfort measures" only. The record shows that the victim was intelligent and coherent at all times. She had an absolute right to make the decision that she did. Modern medicine can sometimes prolong or sustain life by way of invasive procedures, but it is common knowledge that some patients will refuse to consent to such procedures. The jury were warranted in determining, in the circumstances of this case, that the victim's decision to forgo invasive life support was reasonably foreseeable.[3]

The defendant poses the question: "In the realm of crimes of negligence, should the tort concept of 'you take your victim as you find him' apply … even though, by pure chance and coincidence, it has the effect of turning an act of simple negligence into a serious crime?" The answer to this question is "yes."

Through the enactment of G.L. c. 90, § 24G (*b*), the Legislature has decided, as matter of social policy, to deter acts of reckless driving by making the killing of another human being by means of negligent operation of a motor vehicle an offense punishable by up to two and one-half years' imprisonment and a $3,000 fine. Prior to the statute's enactment, prosecutors presented with facts like those before us had to choose between prosecution of a misdemeanor, such as driving so as to endanger, G.L. c. 90, § 24(2) (*a*), or of the far more serious crime of involuntary manslaughter, G.L. c. 265, § 13, which carries a maximum penalty of twenty years' imprisonment. We have concluded that the Legislature intended the statute "to provide a middle ground between the felony of manslaughter and the misdemeanor of driving so as to endanger." A finding of ordinary negligence is sufficient to establish a violation of the statute. The defendant's insistence that this standard is not fair, or leaves "nothing to soften the blow," is irrelevant.

The defendant's suggestion that she should not be held accountable for the victim's death, because the same injuries would have been minor if inflicted on a healthy young person, has no merit. Our long-standing rule in Massachusetts, in criminal law as well as in tort, is that "the wrongdoer takes the victim as he or she finds him."

We now consider the defendant's argument that the judge's instructions to the jury on causation were so inadequate and confusing as to require a new trial. The defendant asserted no challenge to the judge's instructions at trial. She is entitled to relief only if she

demonstrates error in the instructions that created a substantial risk of a miscarriage of justice, namely, "a substantial danger that the jury was misled by [an] erroneous instruction, and that the instruction may have materially influenced their appraisal of the [evidence]."

The judge properly charged the jury on the elements of negligent motor vehicle homicide. He advised the jury that there may be more than one cause of a person's death, but that the Commonwealth is required to prove beyond a reasonable doubt that the defendant "directly and substantially set in motion a chain of events that produced the death in a natural and continuous sequence," and that the death would not have occurred without the defendant's actions. This is a correct statement of the law.

The judge instructed the jury on the law of intervening events and superseding causes, as set forth in the margin,[4] in accordance with what has been said in this opinion. The judge emphasized that the jury must acquit the defendant "if the death would not have occurred without the intervention of another person or event, and a reasonable person in the same circumstances would not have foreseen the likely possibility of such a result." There was no possibility that the jury did not understand that they must find beyond a reasonable doubt that the defendant's negligence directly set in motion a continuous chain of events that produced the death, and that they must acquit the defendant if the death would not have occurred without the intervention of some other person or event that was not reasonably foreseeable. The judge's instructions focused the jury's attention on the issue of causation and correctly left the issue of foreseeability to the jury.

…The judgment of conviction is affirmed.

So ordered.

Notes and questions on *Carlson*

1. *Carlson*, like the case before it, concerns causation, and the link between causation and the defendant's mental state. This appellate opinion is focused on the question whether there is adequate evidence that Sandra Carlson caused the victim's death. As the court points out in footnote 4, at trial the defendant raised two separate, alternative arguments: that her conduct was not negligent, and that her conduct (even if negligent) did not cause the victim's death. But only the causation issue was raised on appeal, for reasons not made clear in the appellate opinion. The court does not explain how negligence is defined in Massachusetts law, but it does identify the relevant evidence of negligence: Carlson failed to stop at a stop sign (or yield the right of way when she was obligated to do so).
2. Assuming Carlson was in fact negligent, the question becomes whether her negligent driving was the cause of Carol Suprenant's death. Carlson's argument on appeal focuses on proximate cause and, more specifically, the concept of an intervening or superceding cause. What is "proximate cause"? That term is often used to express the idea that the defendant's conduct must be sufficiently closely related to the result in question, or sufficiently influential on that result, to merit imposing liability on the defendant. But what does it mean for conduct to be "sufficiently" related to a result? Proximate cause analysis has frequently involved normative, subjective, and hard-to-express judgments about the defendant's culpability or blameworthiness. As the *Carlson*court explained in a footnote not included above,
   The term "proximate cause" has fallen into disfavor. Drafters of the Restatement (Third) of Torts: Liability for Physical Harm § 574 (Proposed Final Draft No. 1, 2005), make clear their dislike for the term as "an especially poor one to describe the idea to which it is connected," and have opted instead to use "scope of liability" as the umbrella term for the concept that, for liability to be imposed, the harm that occurred must be one that results from the hazards that made the defendant's conduct tortious. We continue to use the term as it has been used in the past, as shorthand for the principle that an actor's liability is limited to those physical harms that are within the foreseeable risks of the tortious conduct…. We thus leave for another day, in a case where the matter is appropriately briefed, the issue whether we should replace the term "proximate cause," as defined in our case law, with the term "scope of liability," as defined in the proposed Restatement (Third) of Torts, and the principles accompanying "scope of liability" set forth therein. The judge did not use the term "proximate cause" while instructing the jury.

   Carlson, 849 N.E.2d 790, 794 n. 5 (2006). Does the term "scope of liability" clarify matters? Or does it simply restate the underlying (and inevitably normative, subjective) question – do we think this defendant's actions are sufficiently linked to the bad result to make it appropriate to punish this defendant?
3. Whether a jurisdiction embraces the term "proximate cause" or not, it is fairly standard to consider intervening or superceding factors as part of causation analysis. The idea is often expressed in the metaphor used by Sandra Carlson here: certain

interventions will “break the chain” of causation, or sever the link between the defendant’s conduct and the relevant result. Here, Carlson argued that Carol Suprenant’s rejection of medical treatment broke the chain of causation, separating Carlson’s negligent driving from Suprenant’s eventual death. Why does the Massachusetts court reject this argument?

4. Back to negligence: we use appellate cases as case studies, and the facts of *Carlson*make it a great case study on issues of causation. However, because Massachusetts uses tort-law principles of negligence for its motor vehicle homicide statute, *Carlson*might leave you confused about the relationship between negligence in tort law and negligence in criminal law. Most jurisdictions (even if not Massachusetts) do distinguish between civil negligence (the tort standard) and criminal negligence. Here’s one way to think about the distinction. In tort, negligence is most often a description of someone’s conduct or actions: this person had a duty of care; he did not act in a way consistent with that duty; his failure to exercise some duty of care led to some bad result. Negligence in tort is not primarily about a person’s brain—it’s about what he did or didn’t do, rather than about what he was or wasn’t thinking. In criminal law, in contrast, negligence is most often a description of a mental state: it’s what you might call “culpable obliviousness.” To be sure, to have a crime, the mental state of negligence needs to go along with conduct – you need both mens rea and actus reus to get the crime. But when criminal law uses the word negligence, it’s asking you to think about the person’s state of mind. And usually, criminal negligence is not simply a state of mind of forgetfulness or unawareness, but a state of mind that can be characterized as a “gross deviation” from a reasonable person’s level of awareness or attentiveness. For a typical definition of criminal negligence, look again at Model Penal Code § 2.02(d), reprinted above after *Robertson*.

When Killing Isn’t Criminal

Sometimes, killing another person is not classified as a criminal act, even if the killing is intentional. An affirmative defense of self-defense or insanity could relieve the person who kills from criminal liability, as mentioned briefly above in the notes after *Patterson*, and as discussed in greater depth in Chapter Ten. Similarly, principles of law enforcement justification such as those discussed in the notes after *Robertson* often shield police officers from criminal liability for civilian deaths. Jurisdictions have some leeway in defining the scope of self-defense, insanity, or a law enforcement justification. The guidelines for police use of force are somewhat general, to the frustration of many critics: states often empower police to use as much force (including as much deadly force) as is “reasonable.”

Keep in mind that whether a given killing meets the legal standard for self-defense, insanity, or a law enforcement justification is a question that is not always subject to formal adjudication. If prosecutors simply decline to bring homicide charges (or any other type of criminal charge, for that matter), there is little that other parties can do to challenge that decision. On this point, you may wish to look again at *Inmates of Attica v. Rockefeller* in Chapter Three. Recall that prison officials killed more than 30 prisoners after a disturbance at a state prison. Despite allegations that at least some of the killings were retaliatory rather than defensive, state and federal prosecutors declined to charge the officials with homicide or other criminal offenses. The Second Circuit rejected the surviving prisoners’ efforts to compel prosecution.

Sexual Assault

New Jersey Stat. Ann. 2C:14–2c(1):

c. An actor is guilty of sexual assault if he commits an act of sexual penetration with another person under any one of the following circumstances:

(1) The actor *uses physical force or coercion*, but the victim does not sustain severe personal injury;

(2) The victim is one whom the actor knew or should have known was physically helpless, mentally defective or mentally incapacitated;

(3) The victim is on probation or parole, or is detained in a hospital, prison or other institution and the actor has supervisory or disciplinary power over the victim by virtue of the actor’s legal, professional or occupational status;

(4) The victim is at least 16 but less than 18 years old and:

(a) The actor is related to the victim by blood or affinity to the third degree; or

(b) The actor has supervisory or disciplinary power over the victim; or

(c) The actor is a foster parent, a guardian, or stands in loco parentis within the household;

(5) The victim is at least 13 but less than 16 years old and the actor is at least 4 years older than the victim.

Sexual assault is a crime of the second degree.

STATE of New Jersey In the Interest of M.T.S.

Supreme Court of New Jersey
609 A.2d 1266

Decided July 30, 1992

The opinion of the Court was delivered by HANDLER, J.

Under New Jersey law a person who commits an act of sexual penetration using physical force or coercion is guilty of second-degree sexual assault. The sexual assault statute does not define the words "physical force." The question posed by this appeal is whether the element of "physical force" is met simply by an act of non-consensual penetration involving no more force than necessary to accomplish that result.

That issue is presented in the context of what is often referred to as "acquaintance rape." The record in the case discloses that the juvenile, a seventeen-year-old boy, engaged in consensual kissing and heavy petting with a fifteen-year-old girl and thereafter engaged in actual sexual penetration of the girl to which she had not consented. There was no evidence or suggestion that the juvenile used any unusual or extra force or threats to accomplish the act of penetration.

The trial court determined that the juvenile was delinquent for committing a sexual assault. The Appellate Division reversed…. We granted the State's petition for certification.

I

The issues in this case are perplexing and controversial. We must explain the role of force in the contemporary crime of sexual assault and then define its essential features. We then must consider what evidence is probative to establish the commission of a sexual assault. The factual circumstances of this case expose the complexity and sensitivity of those issues and underscore the analytic difficulty of those seemingly-straightforward legal questions.

On Monday, May 21, 1990, fifteen-year-old C.G. was living with her mother, her three siblings, and several other people, including M.T.S. and his girlfriend. A total of ten people resided in the three-bedroom town-home at the time of the incident. M.T.S., then age seventeen, was temporarily residing at the home with the permission of C.G.'s mother; he slept downstairs on a couch. C.G. had her own room on the second floor. At approximately 11:30 p.m. on May 21, C.G. went upstairs to sleep after having watched television with her mother, M.T.S., and his girlfriend. When C.G. went to bed, she was wearing underpants, a bra, shorts, and a shirt. At trial, C.G. and M.T.S. offered very different accounts concerning the nature of their relationship and the events that occurred after C.G. had gone upstairs. The trial court did not credit fully either teenager's testimony.

C.G. stated that earlier in the day, M.T.S. had told her three or four times that he "was going to make a surprise visit up in [her] bedroom." She said that she had not taken M.T.S. seriously and considered his comments a joke because he frequently teased her. She testified that M.T.S. had attempted to kiss her on numerous other occasions and at least once had attempted to put his hands inside of her pants, but that she had rejected all of his previous advances.

C.G. testified that on May 22, at approximately 1:30 a.m., she awoke to use the bathroom. As she was getting out of bed, she said, she saw M.T.S., fully clothed, standing in her doorway. According to C.G., M.T.S. then said that "he was going to tease [her] a little bit." C.G. testified that she "didn't think anything of it"; she walked past him, used the bathroom, and then returned to bed, falling into a "heavy" sleep within fifteen minutes. The next event C.G. claimed to recall of that morning was waking up with M.T.S. on top of her, her underpants and shorts removed. She said "his penis was into [her] vagina." As soon as C.G. realized what had happened, she said, she immediately slapped M.T.S. once in the face, then "told him to get off [her], and get out." She did not scream or cry out. She testified that M.T.S. complied in less than one minute after being struck; according to C.G., "he jumped right off of [her]." She said she did not know how long M.T.S. had been inside of her before she awoke.

C.G. said that after M.T.S. left the room, she "fell asleep crying" because "[she] couldn't believe that he did what he did to [her]." She explained that she did not immediately tell her mother or anyone else in the house of the events of that morning because she

was “scared and in shock.” According to C.G., M.T.S. engaged in intercourse with her “without [her] wanting it or telling him to come up [to her bedroom].” By her own account, C.G. was not otherwise harmed by M.T.S.

At about 7:00 a.m., C.G. went downstairs and told her mother about her encounter with M.T.S. earlier in the morning and said that they would have to “get [him] out of the house.” While M.T.S. was out on an errand, C.G.’s mother gathered his clothes and put them outside in his car; when he returned, he was told that “[he] better not even get near the house.” C.G. and her mother then filed a complaint with the police.

According to M.T.S., he and C.G. had been good friends for a long time, and their relationship “kept leading on to more and more.” He had been living at C.G.’s home for about five days before the incident occurred; he testified that during the three days preceding the incident they had been “kissing and necking” and had discussed having sexual intercourse. The first time M.T.S. kissed C.G., he said, she “didn’t want him to, but she did after that.” He said C.G. repeatedly had encouraged him to “make a surprise visit up in her room.”

M.T.S. testified that at exactly 1:15 a.m. on May 22, he entered C.G.’s bedroom as she was walking to the bathroom. He said C.G. soon returned from the bathroom, and the two began “kissing and all,” eventually moving to the bed. Once they were in bed, he said, they undressed each other and continued to kiss and touch for about five minutes. M.T.S. and C.G. proceeded to engage in sexual intercourse. According to M.T.S., who was on top of C.G., he “stuck it in” and “did it [thrust] three times, and then the fourth time [he] stuck it in, that’s when [she] pulled [him] off of her.” M.T.S. said that as C.G. pushed him off, she said “stop, get off,” and he “hopped off right away.”

According to M.T.S., after about one minute, he asked C.G. what was wrong; she replied with a back-hand to his face. He recalled asking C.G. what was wrong a second time, and her replying, “how can you take advantage of me or something like that.” M.T.S. said that he proceeded to get dressed and told C.G. to calm down, but that she then told him to get away from her and began to cry. Before leaving the room, he told C.G., “I’m leaving … I’m going with my real girlfriend, don’t talk to me … I don’t want nothing to do with you or anything, stay out of my life … don’t tell anybody about this … it would just screw everything up.” He then walked downstairs and went to sleep.

On May 23, 1990, M.T.S. was charged with conduct that if engaged in by an adult would constitute second-degree sexual assault of the victim, contrary to *N.J.S.A.* 2C:14–2c(1)….

Following a two-day trial on the sexual assault charge, M.T.S. was adjudicated delinquent. After reviewing the testimony, the court concluded that the victim had consented to a session of kissing and heavy petting with M.T.S. The trial court did not find that C.G. had been sleeping at the time of penetration, but nevertheless found that she had not consented to the actual sexual act. Accordingly, the court concluded that the State had proven second-degree sexual assault beyond a reasonable doubt. On appeal, following the imposition of suspended sentences on the sexual assault and the other remaining charges, the Appellate Division determined that the absence of force beyond that involved in the act of sexual penetration precluded a finding of second-degree sexual assault. It therefore reversed the juvenile’s adjudication of delinquency for that offense.

II

The New Jersey Code of Criminal Justice, *N.J.S.A.* 2C:14–2c(1), defines “sexual assault” as the commission “of sexual penetration” “with another person” with the use of “physical force or coercion.” An unconstrained reading of the statutory language indicates that both the act of “sexual penetration” and the use of “physical force or coercion” are separate and distinct elements of the offense. Neither the definitions section of 2C:14 nor the remainder of the Code of Criminal Justice provides assistance in interpreting the words “physical force.” The initial inquiry is, therefore, whether the statutory words are unambiguous on their face and can be understood and applied in accordance with their plain meaning. The answer to that inquiry is revealed by the conflicting decisions of the lower courts and the arguments of the opposing parties. The trial court held that “physical force” had been established by the sexual penetration of the victim without her consent. The Appellate Division believed that the statute requires some amount of force more than that necessary to accomplish penetration.

The parties offer two alternative understandings of the concept of “physical force” as it is used in the statute. The State would read “physical force” to entail any amount of sexual touching brought about involuntarily. A showing of sexual penetration coupled with a lack of consent would satisfy the elements of the statute. The Public Defender urges an interpretation of “physical force” to mean

force "used to overcome lack of consent." That definition equates force with violence and leads to the conclusion that sexual assault requires the application of some amount of force in addition to the act of penetration.

…Resort to common experience or understanding does not yield a conclusive meaning [of the term force]….

Thus, as evidenced by the disagreements among the lower courts and the parties, and the variety of possible usages, the statutory words "physical force" do not evoke a single meaning that is obvious and plain. Hence, we must pursue avenues of construction in order to ascertain the meaning of that statutory language. Those avenues are well charted. When a statute is open to conflicting interpretations, the court seeks the underlying intent of the legislature, relying on legislative history and the contemporary context of the statute. With respect to a law, like the sexual assault statute, that "alters or amends the previous law or creates or abolishes types of actions, it is important, in discovering the legislative intent, to ascertain the old law, the mischief and the proposed remedy." We also remain mindful of the basic tenet of statutory construction that penal statutes are to be strictly construed in favor of the accused. Nevertheless, the construction must conform to the intent of the Legislature.

…. The origin of the rape statute that the current statutory offense of sexual assault replaced can be traced to the English common law. Under the common law, rape was defined as "carnal knowledge of a woman against her will." Cynthia A. Wicktom, Note, *Focusing on the Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws*, 56 *Geo.Wash.L.Rev.* 399, 401 (1988) (*Offender's Forceful Conduct*). American jurisdictions generally adopted the English view, but over time states added the requirement that the carnal knowledge have been forcible, apparently in order to prove that the act was against the victim's will. As of 1796, New Jersey statutory law defined rape as "carnal knowledge of a woman, forcibly and against her will." Crimes Act of March 18, 1796 § 8, [1821] *N.J.Rev.Laws* (Pennington) 246. Those three elements of rape—carnal knowledge, forcibly, and against her will—remained the essential elements of the crime until 1979. Leigh Bienen, *Rape III—National Developments in Rape Reform Legislation*, 6 *Women's Rts.L.Rep.* 170, 207 (1981) (Bienen, *Rape III*).

Under traditional rape law, in order to prove that a rape had occurred, the state had to show both that force had been used and that the penetration had been against the woman's will. Force was identified and determined not as an independent factor but in relation to the response of the victim, which in turn implicated the victim's own state of mind. "Thus, the perpetrator's use of force became criminal only if the victim's state of mind met the statutory requirement. The perpetrator could use all the force imaginable and no crime would be committed if the state could not prove additionally that the victim did not consent." National Institute of Law Enforcement and Criminal Justice, *Forcible Rape—An Analysis of Legal Issues* 5 (March 1978). Although the terms "non-consent" and "against her will" were often treated as equivalent, under the traditional definition of rape, both formulations squarely placed on the victim the burden of proof and of action. Effectively, a woman who was above the age of consent had actively and affirmatively to withdraw that consent for the intercourse to be against her will….

The presence or absence of consent often turned on credibility. To demonstrate that the victim had not consented to the intercourse, and also that sufficient force had been used to accomplish the rape, the state had to prove that the victim had resisted. According to the oft-quoted Lord Hale, to be deemed a credible witness, a woman had to be of good fame, disclose the injury immediately, suffer signs of injury, and cry out for help. 1 Matthew Hale, *History of the Pleas of the Crown* 633 (1st ed. 1847). Courts and commentators historically distrusted the testimony of victims, "assuming that women lie about their lack of consent for various reasons: to blackmail men, to explain the discovery of a consensual affair, or because of psychological illness." Evidence of resistance was viewed as a solution to the credibility problem; it was the "outward manifestation of nonconsent, [a] device for determining whether a woman actually gave consent." Note, *The Resistance Standard in Rape Legislation*, 18 *Stan.L.Rev.* 680, 689 (1966).

The resistance requirement had a profound effect on the kind of conduct that could be deemed criminal and on the type of evidence needed to establish the crime. Courts assumed that any woman who was forced to have intercourse against her will necessarily would resist to the extent of her ability. *People v. Barnes* (Cal. 1986) (observing that "[h]istorically, it was considered inconceivable that a woman who truly did not consent to sexual intercourse would not meet force with force"). In many jurisdictions the requirement was that the woman have resisted to the utmost. "Rape is not committed unless the woman oppose the man to the utmost limit of her power." *People v. Carey* (N.Y.1918). "[A] mere tactical surrender in the face of an assumed superior physical force is not enough. Where the penalty for the defendant may be supreme, so must resistance be unto the uttermost." *Moss v. State* (Miss. 1950). Other states followed a "reasonableness" standard, while some required only sufficient resistance to make non-consent reasonably manifest.

At least by the 1960s courts in New Jersey followed a standard for establishing resistance that was somewhat less drastic than the traditional rule. “The fact that a victim finally submits does not necessarily imply that she consented. Submission to a compelling force, or as a result of being put in fear, is not consent.” *State v. Harris* (N.J. 1961). Nonetheless, the “resistance” requirement remained an essential feature of New Jersey rape law. Thus, in 1965 the Appellate Division stated: “[W]e have rejected the former test that a woman must resist ‘to the uttermost.’ We only require that she resist as much as she possibly can under the circumstances.”

The judicial interpretation of the pre-reform rape law in New Jersey, with its insistence on resistance by the victim, greatly minimized the importance of the forcible and assaultive aspect of the defendant’s conduct. Rape prosecutions turned then not so much on the forcible or assaultive character of the defendant’s actions as on the nature of the victim’s response. Note, *Recent Statutory Developments in the Definition of Forcible Rape*, 61 *Va.L.Rev.* 1500, 1505–07 (1975) (*Definition of Forcible Rape*). “[I]f a woman assaulted is physically and mentally able to resist, is not terrified by threats, and is not in a place and position that resistance would have been useless, it must be shown that she did, in fact, resist the assault.” *State v. Terry.* Under the pre-reform law, the resistance offered had to be “in good faith and without pretense, with an active determination to prevent the violation of her person, and must not be merely passive and perfunctory.” That the law put the rape victim on trial was clear.

The resistance requirement had another untoward influence on traditional rape law. Resistance was necessary not only to prove non-consent but also to demonstrate that the force used by the defendant had been sufficient to overcome the victim’s will. The amount of force used by the defendant was assessed in relation to the resistance of the victim. *See, e.g.,* Tex. Penal Code Ann. § 21.02 (1974) (repealed 1983) (stating that “the amount of force necessary to negate consent is a relative matter to be judged under all the circumstances, the most important of which is the resistance of the female”). In New Jersey the amount of force necessary to establish rape was characterized as “the degree of force sufficient to overcome any resistance that had been put up by the female.” *State v. Terry*. Resistance, often demonstrated by torn clothing and blood, was a sign that the defendant had used significant force to accomplish the sexual intercourse. Thus, if the defendant forced himself on a woman, it was her responsibility to fight back, because force was measured in relation to the resistance she put forward. Only if she resisted, causing him to use more force than was necessary to achieve penetration, would his conduct be criminalized. Indeed, the significance of resistance as the proxy for force is illustrated by cases in which victims were unable to resist; in such cases the force incident to penetration was deemed sufficient to establish the “force” element of the offense.

The importance of resistance as an evidentiary requirement set the law of rape apart from other common-law crimes, particularly in the eyes of those who advocated reform of rape law in the 1970s. *See, e.g.,* Note, *The Victim in a Forcible Rape Case: A Feminist View*, 11 *Am.Crim.L.Rev.* 335, 346 (1973). However, the resistance requirement was not the only special rule applied in the rape context. A host of evidentiary rules and standards of proof distinguished the legal treatment of rape from the treatment of other crimes. Many jurisdictions held that a rape conviction could not be sustained if based solely on the uncorroborated testimony of the victim. Often judges added cautionary instructions to jury charges warning jurors that rape was a particularly difficult charge to prove. Courts in New Jersey allowed greater latitude in cross-examining rape victims and in delving into their backgrounds than in ordinary cases. Rape victims were required to make a prompt complaint or have their allegations rejected or viewed with great skepticism. Some commentators suggested that there be mandatory psychological testing of rape victims. *E.g.,* 3A *Wigmore on Evidence* § 924a (Chadbourn rev. ed. 1970).

During the 1970s feminists and others criticized the stereotype that rape victims were inherently more untrustworthy than other victims of criminal attack…. Reformers condemned such suspicion as discrimination against victims of rape. *See, e.g., The Legal Bias against Rape Victims*, 61 *A.B.A.J.* 464 (1975). They argued that “[d]istrust of the complainant’s credibility [had] led to an exaggerated insistence on evidence of resistance,” resulting in the victim rather than the defendant being put on trial. *Toward a Consent Standard, supra* 43 *U.Chi.L.Rev.* at 626. Reformers also challenged the assumption that a woman would seduce a man and then, in order to protect her virtue, claim to have been raped. If women are no less trustworthy than other purported victims of criminal attack, the reformers argued, then women should face no additional burdens of proving that they had not consented to or had actively resisted the assault. *see* Linda Brookover Bourque, *Defining Rape* 110 (1989) (declaring objective of reform to “bring[ ] legal standards for rape cases in line with those used in other violent crimes by normalizing requirements for evidence”).

To refute the misguided belief that rape was not real unless the victim fought back, reformers emphasized empirical research indicating that women who resisted forcible intercourse often suffered far more serious injury as a result…. That research

discredited the assumption that resistance to the utmost or to the best of a woman's ability was the most reasonable or rational response to a rape.

The research also helped demonstrate the underlying point of the reformers that the crime of rape rested not in the overcoming of a woman's will or the insult to her chastity but in the forcible attack itself—the assault on her person. Reformers criticized the conception of rape as a distinctly sexual crime rather than a crime of violence. They emphasized that rape had its legal origins in laws designed to protect the property rights of men to their wives and daughters. Susan Brownmiller, *Against Our Will: Men, Women, and Rape* 377 (1975); *Acquaintance Rape: The Hidden Crime* 318 (Andrea Parrot & Laurie Bechhofer, eds. 1991). Although the crime had evolved into an offense against women, reformers argued that vestiges of the old law remained, particularly in the understanding of rape as a crime against the purity or chastity of a woman. *Definition of Forcible Rape*, *supra*. The burden of protecting that chastity fell on the woman, with the state offering its protection only after the woman demonstrated that she had resisted sufficiently.

That rape under the traditional approach constituted a sexual rather than an assaultive crime is underscored by the spousal exemption. According to the traditional reasoning, a man could not rape his wife because consent to sexual intercourse was implied by the marriage contract. Therefore, sexual intercourse between spouses was lawful regardless of the force or violence used to accomplish it. *Offender's Forceful Conduct*, *supra*; Note,*To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 *Harv.L.Rev.* 1255, 1258–60 (1986); *see also* Hale, *supra* (noting that "a 'ravished' woman could 'redeem' the convicted offender and save him from execution by marrying him").

Critics of rape law agreed that the focus of the crime should be shifted from the victim's behavior to the defendant's conduct, and particularly to its forceful and assaultive, rather than sexual, character. Reformers also shared the goals of facilitating rape prosecutions and of sparing victims much of the degradation involved in bringing and trying a charge of rape. There were, however, differences over the best way to redefine the crime. Some reformers advocated a standard that defined rape as unconsented-to sexual intercourse; others urged the elimination of any reference to consent from the definition of rape. Nonetheless, all proponents of reform shared a central premise: that the burden of showing non-consent should not fall on the victim of the crime. In dealing with the problem of consent the reform goal was not so much to purge the entire concept of consent from the law as to eliminate the burden that had been placed on victims to prove they had not consented.

Similarly, with regard to force, rape law reform sought to give independent significance to the forceful or assaultive conduct of the defendant and to avoid a definition of force that depended on the reaction of the victim. Traditional interpretations of force were strongly criticized for failing to acknowledge that force may be understood simply as the invasion of "bodily integrity." In urging that the "resistance" requirement be abandoned, reformers sought to break the connection between force and resistance.

III

The history of traditional rape law sheds clearer light on the factors that became most influential in the enactment of current law dealing with sexual offenses. The circumstances surrounding the actual passage of the current law reveal that it was conceived as a reform measure reconstituting the law to address a widely-sensed evil and to effectuate an important public policy. Those circumstances are highly relevant in understanding legislative intent and in determining the objectives of the current law.

In October 1971, the New Jersey Criminal Law Revision Commission promulgated a Final Report and Commentary on its proposed New Jersey Penal Code. New Jersey Criminal Law Revision Commission, *The New Jersey Penal Code, Vol. I: Report and Penal Code* (1971). The proposed Code substantially followed the American Law Institute's Model Penal Code (MPC) with respect to sexual offenses. *See M.P.C.* §§ 213.1 to 213.4. The proposed provisions did not present a break from traditional rape law. They would have established two principal sexual offenses: aggravated rape, a first-degree or second-degree crime involving egregious circumstances; and rape, a crime of the third-degree. 1971 *Penal Code*, § 2C:14–1(a)(1). Rape was defined as sexual intercourse with a female to which she was compelled to submit by any threat that would prevent resistance by a woman of ordinary resolution. *Id.* at § 14–1(b)(1). The comments to the MPC, on which the proposed Code was based, state that "[c]ompulsion plainly implies non-consent," and that the words "compels to submit" require more than "a token initial resistance."

The Legislature did not endorse the Model Penal Code approach to rape. Rather, it passed a fundamentally different proposal in 1978 when it adopted the Code of Criminal Justice. *L.*1978, *c.* 95 § 2C:14–1 to –7; *N.J.S.A.* 2C:14–1 to –7. The new statutory provisions covering rape were formulated by a coalition of feminist groups assisted by the National Organization of Women (NOW) National Task Force on Rape. Both houses of the Legislature adopted the NOW bill, as it was called, without major

changes and Governor Byrne signed it into law on August 10, 1978. The NOW bill had been modeled after the 1976 Philadelphia Center for Rape Concern Model Sex Offense Statute. The Model Sex Offense Statute in turn had been based on selected provisions of the Michigan Criminal Sexual Conduct Statute, Mich. Stat. Ann. § 28.788(4)(b) (Callaghan 1990), and on the reform statutes in New Mexico, Minnesota, and Wisconsin. The stated intent of the drafters of the Philadelphia Center's Model Statute had been to remove all features found to be contrary to the interests of rape victims. John M. Cannel, *New Jersey Criminal Code Annotated* 279 (1991). According to its proponents the statute would "normalize the law. We are no longer saying rape victims are likely to lie. What we are saying is that rape is just like other violent crimes."

Since the 1978 reform, the Code has referred to the crime that was once known as "rape" as "sexual assault." The crime now requires "penetration," not "sexual intercourse." It requires "force" or "coercion," not "submission" or "resistance." It makes no reference to the victim's state of mind or attitude, or conduct in response to the assault. It eliminates the spousal exception based on implied consent. It emphasizes the assaultive character of the offense by defining sexual penetration to encompass a wide range of sexual contacts, going well beyond traditional "carnal knowledge." Consistent with the assaultive character, as opposed to the traditional sexual character, of the offense, the statute also renders the crime gender-neutral: both males and females can be actors or victims.

The reform statute defines sexual assault as penetration accomplished by the use of "physical force" or "coercion," but it does not define either "physical force" or "coercion" or enumerate examples of evidence that would establish those elements. Some reformers had argued that defining "physical force" too specifically in the sexual offense statute might have the effect of limiting force to the enumerated examples. The task of defining "physical force" therefore was left to the courts.

That definitional task runs the risk of undermining the basic legislative intent to reformulate rape law. *See* Susan Estrich, *Real Rape* 60 (1987) (noting that under many modern formulations of rape "[t]he prohibition of force or 'forcible compulsion' ends up being defined in terms of a woman's resistance"). That risk was encountered by the Michigan Supreme Court in *People v. Patterson* (1987). That court considered the sufficiency of the evidence of force or coercion in the prosecution of a sexual contact charge against a defendant who had placed his hands on the genital area of a seventeen-year-old girl while she was sleeping. A majority of the court concluded that the defendant had not used force as required by the statute because there was "no evidence of physical overpowering … [and] there was no submission." Justice Boyle, in dissent, soundly criticized the majority's position as a distortion of the legislature's intent to protect the sexual privacy of persons from the use of force, coercion, or other undue advantage. Concluding that the statute did not require a showing of any extra force, Justice Boyle pointed out that in "defin[ing] force by measuring the degree of resistance by the victim," the majority had effectively "reintroduc[ed] the resistance requirement, when the proper focus ought to be on whether the contact was unpermitted."

Unlike the Michigan statute interpreted in *Patterson*, the New Jersey Code of Criminal Justice does not refer to force in relation to "overcoming the will" of the victim, or to the "physical overpowering" of the victim, or the "submission" of the victim. It does not require the demonstrated non-consent of the victim. As we have noted, in reforming the rape laws, the Legislature placed primary emphasis on the assaultive nature of the crime, altering its constituent elements so that they focus exclusively on the forceful or assaultive conduct of the defendant.

The Legislature's concept of sexual assault and the role of force was significantly colored by its understanding of the law of assault and battery. As a general matter, criminal battery is defined as "the unlawful application of force to the person of another." 2 Wayne LaFave & Austin Scott, *Criminal Law*, § 7.15 at 301 (1986). The application of force is criminal when it results in either (a) a physical injury or (b) an offensive touching. Any "unauthorized touching of another [is] a battery." Thus, by eliminating all references to the victim's state of mind and conduct, and by broadening the definition of penetration to cover not only sexual intercourse between a man and a woman but a range of acts that invade another's body or compel intimate contact, the Legislature emphasized the affinity between sexual assault and other forms of assault and battery.

The intent of the Legislature to redefine rape consistent with the law of assault and battery is further evidenced by the legislative treatment of other sexual crimes less serious than and derivative of traditional rape. The Code redefined the offense of criminal sexual contact to emphasize the involuntary and personally-offensive nature of the touching. N.J.S.A. 2C:14–1(d). Sexual contact is criminal under the same circumstances that render an act of sexual penetration a sexual assault, namely, when "physical force" or "coercion" demonstrates that it is unauthorized and offensive. N.J.S.A. 2C:14–3(b). Thus, just as any unauthorized touching is a crime under traditional laws of assault and battery, so is any unauthorized sexual contact a crime under the reformed law of criminal sexual contact, and so is any unauthorized sexual penetration a crime under the reformed law of sexual assault.

The understanding of sexual assault as a criminal battery, albeit one with especially serious consequences, follows necessarily from the Legislature's decision to eliminate non-consent and resistance from the substantive definition of the offense. Under the new law, the victim no longer is required to resist and therefore need not have said or done anything in order for the sexual penetration to be unlawful. The alleged victim is not put on trial, and his or her responsive or defensive behavior is rendered immaterial. We are thus satisfied that an interpretation of the statutory crime of sexual assault to require physical force in addition to that entailed in an act of involuntary or unwanted sexual penetration would be fundamentally inconsistent with the legislative purpose to eliminate any consideration of whether the victim resisted or expressed non-consent.

We note that the contrary interpretation of force—that the element of force need be extrinsic to the sexual act—would not only reintroduce a resistance requirement into the sexual assault law, but also would immunize many acts of criminal sexual *contact* short of penetration. The characteristics that make a sexual contact unlawful are the same as those that make a sexual penetration unlawful. An actor is guilty of criminal sexual contact if he or she commits an act of sexual contact with another using "physical force" or "coercion." *N.J.S.A.* 2C:14–3(b). That the Legislature would have wanted to decriminalize unauthorized sexual intrusions on the bodily integrity of a victim by requiring a showing of force in addition to that entailed in the sexual contact itself is hardly possible.

Because the statute eschews any reference to the victim's will or resistance, the standard defining the role of force in sexual penetration must prevent the possibility that the establishment of the crime will turn on the alleged victim's state of mind or responsive behavior. We conclude, therefore, that any act of sexual penetration engaged in by the defendant without the affirmative and freely-given permission of the victim to the specific act of penetration constitutes the offense of sexual assault. Therefore, physical force in excess of that inherent in the act of sexual penetration is not required for such penetration to be unlawful. The definition of "physical force" is satisfied under *N.J.S.A.* 2C:14–2c(1) if the defendant applies any amount of force against another person in the absence of what a reasonable person would believe to be affirmative and freely-given permission to the act of sexual penetration.

Under the reformed statute, permission to engage in sexual penetration must be affirmative and it must be given freely, but that permission may be inferred either from acts or statements reasonably viewed in light of the surrounding circumstances. Persons need not, of course, expressly announce their consent to engage in intercourse for there to be affirmative permission. Permission to engage in an act of sexual penetration can be and indeed often is indicated through physical actions rather than words. Permission is demonstrated when the evidence, in whatever form, is sufficient to demonstrate that a reasonable person would have believed that the alleged victim had affirmatively and freely given authorization to the act.

Our understanding of the meaning and application of "physical force" under the sexual assault statute indicates that the term's inclusion was neither inadvertent nor redundant. The term "physical force," like its companion term "coercion," acts to qualify the nature and character of the "sexual penetration." Sexual penetration accomplished through the use of force is unauthorized sexual penetration. That functional understanding of "physical force" encompasses the notion of "unpermitted touching" derived from the Legislature's decision to redefine rape as a sexual assault. As already noted, under assault and battery doctrine, any amount of force that results in either physical injury or offensive touching is sufficient to establish a battery. Hence, as a description of the method of achieving "sexual penetration," the term "physical force" serves to define and explain the acts that are offensive, unauthorized, and unlawful.

That understanding of the crime of sexual assault fully comports with the public policy sought to be effectuated by the Legislature. In redefining rape law as sexual assault, the Legislature adopted the concept of sexual assault as a crime against the bodily integrity of the victim. Although it is possible to imagine a set of rules in which persons must demonstrate affirmatively that sexual contact is unwanted or not permitted, such a regime would be inconsistent with modern principles of personal autonomy. The Legislature recast the law of rape as sexual assault to bring that area of law in line with the expectation of privacy and bodily control that long has characterized most of our private and public law. In interpreting "physical force" to include any touching that occurs without permission we seek to respect that goal.

Today the law of sexual assault is indispensable to the system of legal rules that assures each of us the right to decide who may touch our bodies, when, and under what circumstances. The decision to engage in sexual relations with another person is one of the most private and intimate decisions a person can make. Each person has the right not only to decide whether to engage in sexual contact with another, but also to control the circumstances and character of that contact. No one, neither a spouse, nor a friend, nor an acquaintance, nor a stranger, has the right or the privilege to force sexual contact. See *Definition of Forcible Rape*, *supra*,

(arguing that "forcible rape is viewed as a heinous crime primarily because it is a violent assault on a person's bodily security, particularly degrading because that person is forced to submit to an act of the most intimate nature").

We emphasize as well that what is now referred to as "acquaintance rape" is not a new phenomenon. Nor was it a "futuristic" concept in 1978 when the sexual assault law was enacted. Current concern over the prevalence of forced sexual intercourse between persons who know one another reflects both greater awareness of the extent of such behavior and a growing appreciation of its gravity. Notwithstanding the stereotype of rape as a violent attack by a stranger, the vast majority of sexual assaults are perpetrated by someone known to the victim. One respected study indicates that more than half of all rapes are committed by male relatives, current or former husbands, boyfriends or lovers. Diana Russell, *The Prevalence and Incidence of Forcible Rape and Attempted Rape of Females*, 7 *Victimology* 81 (1982). Similarly, contrary to common myths, perpetrators generally do not use guns or knives and victims generally do not suffer external bruises or cuts. Although this more realistic and accurate view of rape only recently has achieved widespread public circulation, it was a central concern of the proponents of reform in the 1970s.

The insight into rape as an assaultive crime is consistent with our evolving understanding of the wrong inherent in forced sexual intimacy. It is one that was appreciated by the Legislature when it reformed the rape laws, reflecting an emerging awareness that the definition of rape should correspond fully with the experiences and perspectives of rape victims. Although reformers focused primarily on the problems associated with convicting defendants accused of violent rape, the recognition that forced sexual intercourse often takes place between persons who know each other and often involves little or no violence comports with the understanding of the sexual assault law that was embraced by the Legislature. Any other interpretation of the law, particularly one that defined force in relation to the resistance or protest of the victim, would directly undermine the goals sought to be achieved by its reform.

IV

In a case such as this one, in which the State does not allege violence or force extrinsic to the act of penetration, the factfinder must decide whether the defendant's act of penetration was undertaken in circumstances that led the defendant reasonably to believe that the alleged victim had freely given affirmative permission to the specific act of sexual penetration. Such permission can be indicated either through words or through actions that, when viewed in the light of all the surrounding circumstances, would demonstrate to a reasonable person affirmative and freely-given authorization for the specific act of sexual penetration.

In applying that standard to the facts in these cases, the focus of attention must be on the nature of the defendant's actions. The role of the factfinder is not to decide whether reasonable people may engage in acts of penetration without the permission of others. The Legislature answered that question when it enacted the reformed sexual assault statute: reasonable people do not engage in acts of penetration without permission, and it is unlawful to do so. The role of the factfinder is to decide not whether engaging in an act of penetration without permission of another person is reasonable, but only whether the defendant's belief that the alleged victim had freely given affirmative permission was reasonable.

In these cases neither the alleged victim's subjective state of mind nor the reasonableness of the alleged victim's actions can be deemed relevant to the offense. The alleged victim may be questioned about what he or she did or said only to determine whether the defendant was reasonable in believing that affirmative permission had been freely given. To repeat, the law places no burden on the alleged victim to have expressed non-consent or to have denied permission, and no inquiry is made into what he or she thought or desired or why he or she did not resist or protest.

In short, in order to convict under the sexual assault statute in cases such as these, the State must prove beyond a reasonable doubt that there was sexual penetration and that it was accomplished without the affirmative and freely-given permission of the alleged victim. As we have indicated, such proof can be based on evidence of conduct or words in light of surrounding circumstances and must demonstrate beyond a reasonable doubt that a reasonable person would not have believed that there was affirmative and freely-given permission. If there is evidence to suggest that the defendant reasonably believed that such permission had been given, the State must demonstrate either that defendant did not actually believe that affirmative permission had been freely-given or that such a belief was unreasonable under all of the circumstances. Thus, the State bears the burden of proof throughout the case.

In the context of a sexual penetration not involving unusual or added "physical force," the inclusion of "permission" as an aspect of "physical force" effectively subsumes and obviates any defense based on consent. *See N.J.S.A.* 2C:2–10c(3). The definition of "permission" serves to define the "consent" that otherwise might allow a defendant to avoid criminal liability. Because "physical force" as an element of sexual assault in this context requires the *absence* of affirmative and freely-given permission, the "consent"

necessary to negate such "physical force" under a defense based on consent would require the *presence* of such affirmative and freely-given permission. Any lesser form of consent would render the sexual penetration unlawful and cannot constitute a defense.

In this case, the Appellate Division concluded that non-consensual penetration accomplished with no additional physical force or coercion is not criminalized under the sexual assault statute. It acknowledged that its conclusion was "anomalous" because it recognized that "a woman has every right to end [physically intimate] activity without sexual penetration." Thus, it added to its holding that "[e]ven the force of penetration might … be sufficient if it is shown to be employed to overcome the victim's unequivocal expressed desire to limit the encounter."

The Appellate Division was correct in recognizing that a woman's right to end intimate activity without penetration is a protectable right the violation of which can be a criminal offense. However, it misperceived the purpose of the statute in believing that the only way that right can be protected is by the woman's unequivocally expressed desire to end the activity. The effect of that requirement would be to import into the sexual assault statute the notion that an assault occurs only if the victim's will is overcome, and thus to reintroduce the requirement of non-consent and victim-resistance as a constituent material element of the crime. Under the reformed statute, a person's failure to protest or resist cannot be considered or used as justification for bodily invasion.

We acknowledge that cases such as this are inherently fact sensitive and depend on the reasoned judgment and common sense of judges and juries. The trial court concluded that the victim had not expressed consent to the act of intercourse, either through her words or actions. We conclude that the record provides reasonable support for the trial court's disposition.

Accordingly, we reverse the judgment of the Appellate Division and reinstate the disposition of juvenile delinquency for the commission of second-degree sexual assault.

Notes and questions on *M.T.S.*

1. *M.T.S.* is a useful case because it both describes the traditional common law of rape and identifies the concerns that led advocates to push for statutory reform. Why was the common law definition of rape—"carnal knowledge of a woman, forcibly and against her will"—inadequate? Was the problem with the wording of the legal definition (the criminalization decision), or with the way that definition was used by prosecutors (the enforcement decision), or with the way that definition was applied by juries and trial courts (the adjudication decision)?
2. The New Jersey Supreme Court speaks sometimes of consent, sometimes of permission. And of course, the traditional common law definition spoke of neither, but did specify that the intercourse be "against [the] will" of the complainant. Is there any meaningful difference between consent, permission, or will? Consider whether criminal law should care about the actual mental state of the person who alleges rape, or instead about what that person communicates regarding sex. Does a concern for the victim's actual mental state invite courts to "put the victim on trial"? How does the New Jersey Supreme Court attempt to avoid that result?
3. Consider the different roles of factfinders and appellate courts. In principle, facts are to be found at the trial court level, and appellate courts should answer only questions of law. Given that distinction, think about the detailed account of the factual evidence in Part I of the New Jersey Supreme Court's opinion. Was it necessary to include the precise details of the encounter, as told both by C.G. and M.T.S.? Imagine that Part I included only one paragraph – the last paragraph that you see immediately before Part II, describing the trial court's findings and the subsequent appeals. Would readers react differently to this case? Why do you think the New Jersey Supreme Court included the detailed chronology of the encounter?
4. In *M.T.S.*, the New Jersey Supreme Court introduced an "affirmative consent" standard long before the concept of affirmative consent became widely embraced. Although you are likely to have encountered the term "affirmative consent" before reading this case, especially if you attended any training or received any materials as a college student about appropriate sexual contacts, affirmative consent is still largely unknown to criminal definitions of rape or sexual assault. That is, even though many universities and colleges (and some high schools) seek to instill in their students the idea that sex without affirmative consent is objectionable, most U.S. jurisdictions define rape (or sexual assault) in terms of force or non-consent without an explicit requirement of affirmative consent.
5. Is rape exceptional? Should the law view rape as "just like other violent crimes," to quote the New Jersey Supreme Court (which was itself quoting advocates for the New Jersey statute)? Should we think of the crime as "sexual assault," unwanted physical contact akin to the ordinary assaults studied at the outset of this chapter, but with a specific attendant circumstance: contact with sexual organs rather than other body parts? Or does "unwanted touching" take on a different character when sexual

organs are involved? Are there features of sexual activity that make it categorically different from other types of physical contact, so that rape law should be categorically different from assault law? Professor Aya Gruber addresses these questions in *Sex Exceptionalism in Criminal Law* (Stanford Law Review, forthcoming 2023).

6. Rape and race: Sexual offenses are another area of criminal law for which patterns of racial disparity have been extensively documented. First, as for homicide, "the racial composition of the defendant-victim dyad," or the respective racial identities of the defendant and victim, has a significant influence on enforcement and adjudication decisions: black men accused of raping white women are more likely to be charged with severe offenses and subjected to severe penalties. See, e.g., I. Bennett Capers, *The Unintentional Rapist*, 87 Wash. U. L. Rev. 1345, 1360-1364 (2010). The death penalty is no longer available as a penalty for the crime of rape, but one of the considerations that led the Supreme Court to prohibit the imposition of capital punishment for rape was the fact that this penalty was reserved almost exclusively for black men convicted of assaulting white women. Beyond these sentencing patterns, Professor Capers writes of a more general "white letter law of rape" that exists alongside the "black letter" law.

   Most of the time … a type of unwritten law of race, what I have termed "white letter law"—suggesting near invisibility, something akin to laws "inscribed in white ink on white paper"—dictated whether the elements of the crime of rape had been satisfied; indeed, whether the elements were even capable of being satisfied. Even under Blackstone's definition that rape was "carnal knowledge of a woman forcibly and against her will," jurisdictions in this country applied a type of white letter law exemption. It was understood, for example, that the definition of rape did not prohibit the rape of black slaves, or, for that matter, slave children.

   The unwritten white letter law of rape held particular sway following ratification of the Reconstruction Amendments, when explicit distinctions based on race in criminal statutes risked invalidation under the Fourteenth Amendment's Equal Protection Clause. Evidence of this can be seen in the black letter law's initial requirement of proof that the victim resisted to the utmost before a conviction of rape would be sustained. Though the "utmost resistance" requirement was clear, what it meant in practice —in terms of which victims were believed, which men were prosecuted, and which defendants were found guilty—turned on what was often unsaid, i.e., the white letter law. As Susan Estrict aptly observed … resistance itself was color-dependent: "white women [were] not required to resist black men…."

   In short, though the black letter law was, at least on the books, "color-blind," the white letter law provided caveats and exceptions that were color-coded.

Capers, *The Unintentional Rapist*, 1357-1358.

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1. [Fn. 2 by the Court:] The victim's primary care physician testified at trial that the victim's condition would have gradually deteriorated over time and that the disease would have shortened her life. He opined that, based on the severity of her disease, the victim could have expected to enjoy only three to six more years of "good quality" life. ↵
2. [Fn. 4 by the Court:] Conviction under G.L. c. 90, § 24G(b), requires proof by the Commonwealth beyond a reasonable doubt that (1) the defendant operated a motor vehicle, (2) on a public way, (3) in a negligent manner to endanger lives and public safety, (4) thereby causing the death of another person. The focus at trial was on whether the defendant was negligent and whether her negligence caused the victim's death. Only the latter element is at issue in this appeal. ↵
3. [Fn. 6 by the Court:] The defendant's attempt to assign blame to the victim for her own death, because she "made the deliberate choice to ... engage in irrational and self-destructive behavior" is not persuasive. There is no contributory negligence in the law of motor vehicle homicide. We also reject the defendant's attempt to apply the tort doctrine of "avoidable consequences" to this criminal matter. ↵
4. [Fn. 8 by the Court:] "If the defendant's actions would not have brought about the death all by themselves without the intervention of some other person or event, the defendant is still held responsible as the cause of death if two conditions are met. First, the defendant's actions directly and substantially set in motion a natural, continuous sequence of events to cause the death. And second, a reasonable person in the defendant's position would have foreseen that her actions could easily result in serious injury or death to someone like the victim." ↵

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1.7: Dangerous Objects and Substances

Introduction

Many crimes are defined with reference to some prohibited (or highly regulated) object or substance. The two most familiar examples, and the focus of this chapter, are drug offenses and gun offenses. The simplest form of a prohibited-object offense is possession—possession of cocaine, for example—but the concept of possession is sometimes complicated, as explored in this chapter. Another common form of prohibited-object offenses combines possession with the intent to distribute. Other statutes criminalize the actual distribution, or the manufacture, transportation, or storage of prohibited substances or objects. Criminal regulations of drugs and guns generate an enormous number of cases on criminal court dockets. Indeed, more Americans are arrested for drug crimes than for any other general category of crimes, such as violent offenses or property crimes. Gun crimes do not generate nearly as large a share of the criminal court docket as drug offenses do, but they are a significant source of both criminal convictions and eventual prison sentences. And gun enhancements—an increase in the penalty for some other criminal conduct based on the defendant's possession of a gun—are an important contributing factor to the size of America's prisoner population.

The rationale for the criminalization of guns or drugs may seem self-evident: possession of the object is thought to be dangerous, and therefore the government wishes to deter possession. But note that this category of criminal law imposes punishment for the creation of a risk, rather than for the actual materialization of some harm. No one needs to experience adverse effects of drug use, or even to use drugs at all, for prosecutors to establish an offense of drug possession or distribution. Similarly, the weapons offenses addressed in this chapter typically involve guns that don't go off, but are seen as sufficiently risky that mere possession is criminalized. If a gun does go off – if it is used to shoot someone – criminal law typically addresses that actual harm through assault or homicide law. Thus, this chapter gives us the opportunity to think about the decision to criminalize risky conduct without requiring proof of an actual injury. How should policymakers determine that a given object or substance is dangerous enough to criminalize? What kinds of factors – such as empirical evidence, moral judgments, or political considerations – actually do influence these criminalization decisions?

Another distinctive feature of the crimes addressed in this chapter is that they typically involve consensual conduct. That is, the person who possesses drugs or a gun has often obtained the contraband by choice, from a willing seller; the person who distributes the prohibited object is usually doing so to a willing purchaser. The crimes addressed in this chapter are often called "victimless" crimes, in the sense that there is usually not a specific person who is directly injured by the prohibited activity and likely to complain to law enforcement about it. To be sure, many would argue that drug use and distribution, or widespread gun possession, do have indirect victims in that these practices destabilize communities and contribute to higher levels of violence. This chapter offers some background data on the connections between drugs and violence, and between guns and violence.

The notion that some objects are dangerous enough to be criminally regulated is an old idea. Various forms of weapons and liquor offenses have existed in state law since the earliest days of the American republic. But the experiment with nationwide alcohol prohibition early in the twentieth century proved very important to the later trajectory of American criminal law. Some scholars argue that we cannot fully understand the "War on Drugs" or the broader "War on Crime" without appreciating the ways those massive criminalization and enforcement initiatives were made possible by "the War on Alcohol." See Lisa McGirr, *The War on Alcohol: Prohibition and the Rise of the American State* (2016). The Eighteenth Amendment, which was ratified in 1919 and took effect in 1920, provided that "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited." Again, many state and local laws had regulated or outright prohibited alcohol before 1919, but Prohibition was a nationwide ban, and it was understood to be such a novel use of federal authority that it required a constitutional amendment. President Herbert Hoover famously called Prohibition a "noble experiment," but by most accounts, the experiment was a failure. Consumption of alcohol decreased initially, then resumed and even increased. The criminalization of alcohol production and distribution created black markets and encouraged the development of organized crime. Liquor laws were selectively enforced, often along racial lines. The inconsistent enforcement of these laws was one of the major themes of critiques of Prohibition that led to the abandonment of the "noble experiment" and the repeal of the Eighteenth Amendment in 1933.

But as one historian puts it, "Prohibition is often described as a dead letter, but it was an extremely lively corpse." Lawrence Friedman, *Crime and Punishment in American History* 266 (1993). During Prohibition, extensive resources were devoted to the expansion of federal law enforcement capacities and, to a lesser degree, state law enforcement. Many of the institutions that are necessary for mass incarceration—the policing and surveillance capacities, the prosecuting agencies, the prisons—originated or were greatly expanded during Prohibition. Historian Lisa McGirr argues that Prohibition created both the institutional capacity and a moral precedent for the War on Drugs: "[In] today's colossal penal state, the most consequential harvest of the war on alcohol was the uniquely American cross-breeding of prohibitionary and punitive approaches toward illicit recreational narcotic substances…. The war against drugs was a smaller but longer-lived effort birthed simultaneously." McGirr, *The War on Alcohol*, at 250.

One feature of alcohol prohibition is also characteristic of contemporary drug and gun criminalization: the underlying conduct is fairly common, so common that law enforcement could not hope to detect and apprehend all who engage in it. At the same time, these prohibited-object offenses are usually relatively easy to prosecute. Once law enforcement seizes the prohibited object from a defendant, it is not difficult to obtain a conviction. The seized contraband, along with police testimony about how they obtained it, will usually be sufficient to establish the elements of the offense. Together, the frequency of violation and ease of prosecution for crimes of prohibition create expansive enforcement discretion: which drug users or sellers, or which gun carriers, will be subject to criminal interventions? Recall *United States v. Armstrong* in Chapter Three, in which the Supreme Court considered but ultimately rejected a claim that federal prosecutors were enforcing drug laws selectively on the basis of race. Moreover, since these "victimless" crimes are often detected through sting operations or other undercover efforts, enforcement officials play a significant role in shaping factual details that affect a defendant's criminal liability: what quantity of drugs does the undercover officer seek to buy? How many transactions with an undercover agent are staged before an arrest, and where do those transactions take place?

Patterns of racial disparity can be found in the enforcement of all the categories of crimes discussed in this book, but the patterns are particularly striking, and very extensively documented, with regard to drug offenses. Some scholars point to drug offenses as the most important source of racial disparities in mass incarceration. See, e.g., Michelle Alexander, *The New Jim Crow: Mass Incarceration in an Age of Colorblindness* (2010). Others have questioned whether the War on Drugs is the central factor driving mass incarceration, noting that more people are imprisoned for "violent" offenses than for drug offenses. See, e.g., John Pfaff, *Locked In: The True Causes of Mass Incarceration—and How to Achieve Real Reform* (2017). The issue is complicated: we cannot fully measure the impact of drug criminalization by looking at prison sentences for drug offenses. The majority of drug offense convictions lead to a sentence other than prison time, such as probation or community supervision, but the fact of a prior conviction (even one not punished with prison time) can make it more likely that a given person will be sentenced to prison for a subsequent offense. That is, stark racial disparities in one area of criminal law can generate racial disparities in another area. We seem to see this with regard to gun possession offenses, where there is considerable evidence that "people of color bear the brunt of enforcement." Benjamin Levin, *Guns and Drugs*, 84 Fordham L. Rev. 2173, 2194 (2016). Unlike drug laws, which often categorically prohibit possession of a given substance by any member of the general public, a typical gun prohibition identifies certain categories of persons—such as those with felony convictions—who are barred from possessing guns. If persons of color are overrepresented among all persons with felony convictions, in part because of racial bias in enforcement of drug laws, then we should not be surprised to see persons of color overrepresented among those arrested for and convicted of weapons offenses. Still further disparity may be produced by enforcement choices with regard to gun laws, as this chapter will explore. The last section of this chapter looks in more detail at the role of drug and gun offenses in producing mass incarceration.

By the end of this chapter, you should understand the basic concepts used to criminalize dangerous objects and substances. You will learn legal definitions of possession and constructive possession, and the way that the legal concept of possession interacts with mental state requirements. In that regard, the cases in this chapter will help you further expand your understanding of mens rea analysis in criminal law. You will also see examples of ways that distribution and transportation (in the drug context) or various forms of "use" (in the gun context) are criminalized.

This chapter, like the rest of the book, uses appellate judicial opinions to teach key points of law. Earlier chapters have already discussed ways in which appellate caselaw can be misleading, and here it's especially important to keep that point in mind. The vast majority of drug and gun prosecutions are resolved with a guilty plea and never lead to appellate review. Even among the tiny fraction of drug and gun cases that do eventually gain appellate review, the issue on appeal is much more likely to concern specific enforcement actions, as when a defendant claims that the police discovered the contraband through an unconstitutional search or

seizure, than a question about the statutory definition of the offense. The judicial scrutiny of defendants' mental states that you see in the cases in this chapter is a useful teaching tool, but it is atypical in most areas of criminal law, and it is especially atypical within the world of gun and drug prosecutions. As always, read judicial opinions carefully but put them in context; be sure to read the surrounding notes carefully to gain a more complete understanding of drug and gun law in practice.

Drug Offenses: The Meaning of "Possession"

Louisiana Revised Statutes § 40:966(C). Possession [of narcotics].

It is unlawful for any person knowingly or intentionally to possess a controlled dangerous substance classified in Schedule I unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner [or as otherwise authorized…]

STATE of Louisiana

v.

Walter BOOTH

Court of Appeal of Louisiana, Fourth Circuit
745 So.2d 737

Oct. 20, 1999

MURRAY, Judge.

… Defendant Walter Booth, Jr., was charged by bill of information with possession of heroin, to which he pled not guilty. A twelve-person jury found him guilty as charged on February 19, 1998 [and] he was sentenced to five years at hard labor….

New Orleans Police Officer Travis McCabe testified that on October 20, 1997, he conducted an investigation of 2309 Sixth Street, Apartment 2, after he and Sergeant Steven Gaudet received information from a confidential informant. The officers later applied for and received a search warrant for the premises. He and Sgt. Gaudet, along with two other officers and a dog trained to search for drugs, executed the warrant [early in the morning on October 21, 1997]. [Mr. Booth and Gail Varnado were both at the apartment at the time it was searched.] Officer McCabe described the apartment as small, consisting of one bedroom, one bathroom, a living room, and a kitchen. The search dog located narcotics inside a wall-mounted heater. Officer McCabe opened the vent on the bottom and found a plastic package containing approximately twenty-seven aluminum foil packages of heroin. The officers also discovered on top of a curio cabinet, a large felt hat containing a syringe, a long piece of rubber, and a small plastic bag containing five additional small foil packages of heroin. Officer McCabe also recovered an Entergy electric bill in Mr. Booth's name, and a letter from a religious organization addressed to both him and Ms. Varnado, both of which were addressed to 2309 Sixth Street, Apartment "D." At that point, Mr. Booth and Ms. Varnado were advised of their rights and arrested.

On cross-examination, Officer McCabe admitted that none of the drugs was in plain view, and that initially the focus of the police investigation was Ms. Varnado. He said he had occasion to watch the apartment from a distance, and witnessed an informant make a purchase from Ms. Varnado with a marked twenty-dollar bill, although this marked twenty-dollar bill was not found during the search of the apartment….

Sergeant Steve Gaudet explained that he remained in the area of the apartment complex while Officer McCabe went to obtain the search warrant. He detained Ms. Varnado outside of the apartment as she was leaving, and took her inside, where Mr. Booth was seated in the front room, clad only in a pair of boxer shorts. He said the wall-mounted heater where the drugs were found was next to the sofa where Mr. Booth was seated. …

Mr. Booth testified in his own behalf, and stated that on October 20 and 21, 1997, he was living at the Sixth Street address, but Ms. Varnado, whom he stated was his fiancée, was not living there. In fact, Mr. Booth had no idea where Ms. Varnado was living at that time. He had agreed only that Ms. Varnado could stay at his apartment that particular night, in the front room. Mr. Booth claimed that when police found him he was sleeping in the bedroom, and they awakened him and asked where Ms. Varnado was. He denied knowledge of any drugs in the heater or in the hat.

On cross-examination, Mr. Booth again stated that Ms. Varnado was his fiancée, but said he and she "had a legal separation…" He again denied being awake sitting in the living room when police entered the apartment. Mr. Booth said the letter addressed to Ms. Varnado found in his apartment was brought with her from her jail cell. He explained that she recently had been paroled, and was

going to live with him, but they had an altercation and he put her out. He said she asked to stay in the front room for a couple of days, and that was how the letter got there. Mr. Booth admitted to a 1995 conviction for "having a gun," a conviction for possession of marijuana, a 1975 conviction for being a convicted felon in possession of a firearm, and a conviction for armed robbery. He denied or could not recall [other] prior convictions….

… Mr. Booth claims that the evidence is insufficient to sustain his conviction.

… "In evaluating whether evidence is constitutionally sufficient to support a conviction, an appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of act could have found the defendant guilty beyond a reasonable doubt…. If rational triers of fact could disagree as to the interpretation of the evidence, the rational trier's view of all the evidence most favorable to the prosecution must be adopted…."

La.Rev.Stat. 40:966(C) makes it unlawful for any person to knowingly or intentionally possess heroin, a controlled dangerous substance classified in Schedule I. In *State v. Brady* (1999), this Court stated:

To support a conviction for possession of narcotics, the State must prove that a defendant knowingly possessed narcotics. The State need not prove that the defendant was in actual possession of the narcotics found; constructive possession is sufficient to support conviction. The mere presence of a defendant in the area where the narcotics were found is insufficient to prove constructive possession.

A person not in physical possession of narcotics may have constructive possession when the drugs are under that person's dominion and control. A person may be deemed to be in joint possession of a drug which is in the physical possession of a companion if he willfully and knowingly shares with the other the right to control it. Determination of whether a defendant had constructive possession depends on the circumstances of each case. Among the factors to consider in determining whether the defendant exercised dominion and control sufficient to constitute constructive possession are whether the defendant knew that illegal drugs were present in the area, the defendant's relationship to the person in actual possession of the drugs, whether there is evidence of recent drug use, the defendant's proximity to the drugs, and any evidence that the area is frequented by drug users.

Brady, 727 So.2d at 1268 [internal citations omitted].

In the instant case, police observed Ms. Varnado sell narcotics to an informant out of Mr. Booth's apartment. She was detained and taken inside of the apartment, where she admittedly was staying. Mr. Booth admitted that Ms. Varnado was his fiancée. Accepting the testimony of Officer McCabe, Mr. Booth was in the front room when police entered. Heroin was found in a wall-mounted heater next to where Mr. Booth was seated, and more heroin and drug paraphernalia was found in a curio cabinet in the living room. A letter found in the apartment was addressed to Mr. Booth and Ms. Varnado, at the apartment in question.

Mr. Booth's testimony conflicted with that of police officers in that he said he was sleeping in his bedroom when police entered the apartment and asked him where Ms. Varnado was. He disputed that the police took Ms. Varnado into custody outside, and brought her into the apartment when they entered. Mr. Booth denied any knowledge of the drugs in his apartment, and said his fiancée was only staying at his apartment temporarily. The jury knew that Mr. Booth had prior convictions for armed robbery, possession of marijuana, and being a convicted felon in possession of a firearm. The jury obviously did not believe that Mr. Booth was not aware of the heroin found in two locations in his apartment. The trier of fact's determination of credibility should not to be disturbed on appeal absent an abuse of discretion.

In *State v. Maresco* (La.1987), police served a search warrant on an apartment where Lori Wermuth and her fiancé, Gary Weaver, resided. Wermuth was at work when the warrant was served, but Weaver and Steven Maresco were in the apartment. Police found seven pounds of marijuana packaged in large and small plastic bags in the kitchen and on the dining room table, and a vinyl bag inside of a closed trunk in the bedroom containing over six thousand Valium pills. A scale was also recovered, along with mail addressed to Wermuth. In affirming Wermuth's conviction for possession with intent to distribute marijuana, this Court stated: "Although Lori Wermuth was not home when the warrant was executed, the marijuana was seized in her apartment…. The jury was satisfied that the State proved Wermuth … exercised sufficient control over the marijuana. Their conclusion was reasonable and there is no basis to hold otherwise."

In the instant case, viewing all of the evidence in a light most favorable to the prosecution, any rational trier of fact could have found that Mr. Booth knowingly exercised dominion and control over the heroin found in his apartment, and that all of the essential elements of the offense of possession of heroin were proven beyond a reasonable doubt….

For the foregoing reasons, we affirm Mr. Booth's conviction….

Notes and questions on *State v. Booth*

1. Consider the actus reus of possession offenses. Is possession an act? Do possession offenses violate the general requirement, discussed in Chapter Two, that criminal liability requires a voluntary act? (See *State v. Alvarado* and accompanying notes.) The acquisition of drugs or some other object is more easily identified as an act, but most jurisdictions don't criminalize "buying drugs" or "acquiring drugs" as a separate offense. Instead, mere possession is the basic offense, and then there are more serious offenses such as distribution (which includes selling), manufacture, and transportation of the prohibited substance. Did Walter Booth possess drugs simply by being near them? And if so, was his conviction based on a voluntary act?
2. Now consider the mens rea of possession offenses. Most jurisdictions address the above questions by linking possession to a specific mental state. If a defendant knowingly acquires or receives a controlled substance, or knows that a controlled substance in his control, he can be convicted of possession. This approach is reflected in the Model Penal Code's Section 2.01, which states, "Possession is an act … 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." Here, it may be helpful to remember that criminal liability can be based on an omission, or a failure to act, in some circumstances. If there is a specific legal duty to act and a defendant fails to fulfill that duty, he or she may be criminally liable. (Omission liability is discussed briefly in Chapter Two and in more detail in Chapter Six.) One could (and courts do) characterize possession as either a knowing act or a knowing omission: either the defendant knowingly acquired the drugs (an act), or the defendant failed to "terminate his possession" even after becoming aware that he was in possession of a controlled substance.
3. Again, the usual view is that a possession statute both prohibits knowing acquisition and creates a duty to dispossess oneself of the prohibited object if one becomes aware that the object is in one's control. The concept of possession thus combines both act and mental state elements. Until 2021, the state of Washington was an outlier on this issue. Its courts had interpreted the state's possession of controlled substances statute as a strict liability offense, holding that the prosecution need not prove that the defendant knew that drugs were in his possession. Thus, a commercial truck driver who entered the state with marijuana hidden in pallets on his truck could be convicted, even in the absence of any evidence that he knew the marijuana was there. But the Washington Supreme Court found the strict liability statute unconstitutional in 2021, holding that the law impermissibly criminalized "wholly innocent nonconduct" when applied to a defendant who had no knowledge of possession. *State v. Blake*, 481 P.3d 521 (Wash. 2021).
4. A further wrinkle: what if a defendant is aware that she possesses a given object, but is mistaken about what the object is? What if she find a plastic bag left in the kitchen and believes that it holds baking powder, but the substance inside is really cocaine? The usual account of possession as knowing possession would require knowledge that the substance is a prohibited one. Of course, depending on the circumstances, a defendant may not be able to convince a factfinder that he or she was mistaken about the nature of the object possessed. And specific statutes may criminalize even some forms of mistaken possession. For more details, see *United States v. Jewell* and *State v. Freeman* in this chapter, and the accompanying notes for each case.
5. Notwithstanding the formal definition of possession as knowing possession in most jurisdictions, practitioners and commentators occasionally refer to possession offenses somewhat imprecisely as strict liability offenses. The strict liability characterization arises in part because the evidence that suffices to "prove" knowledge is often minimal, so that a possession offense operates like a strict liability offense. Once contraband is found on or near your person, that evidence is itself likely to be sufficient for a criminal conviction even if as a formal matter the statute requires proof of knowledge.
6. The *Booth* court refers to "actual possession," "physical possession," and "constructive possession." The terms actual possession or physical possession are often used interchangeably. In one typical jury instruction, "Actual possession means a) the object is in the hand of or on the person, or b) the object is in a container in the hand or on the person, or c) the object is so close as to be within ready reach and is under the control of the person." Fla. Std. Jury Instr. (Crim.) 10.15 (2017). For a similar instruction, see footnote 3 in *State v. Donaldson* in Chapter Five. As the *Donaldson* instruction makes clear, an object can be possessed by more than one person at a time. Thus, in the case you've just read, Walter Booth and Gail Varnado can each be convicted of possessing the same heroin.
7. What factors does the Booth court identify as relevant to establishing constructive possession? Could there ever be a case in which the resident of a home was not in constructive possession of any drugs found within that home? Most of the time, the homeowner or tenant is likely to be found in constructive possession, as suggested by the *Booth* court's discussion of *State v. Maresco*. [exclusive control v shared control] But there are occasional exceptions. In *State v. Cantabrana*, 921 P.2d 572 (Ct.

App. Wa. 1996), a state court found that it was error to instruct a jury that constructive possession could be established simply by the defendant's control over the premises, without showing control over the drugs themselves. In *State v. Hodge*, 781 So.2d 575 (Ct. App. La. 2001), a husband and wife were both prosecuted for drug offenses after their home was searched. During the search, police discovered marijuana in the husband's pockets, in the bag of another woman present at the house, and in the pockets of a men's jacket in a rear room. An additional bag of marijuana was found wrapped in a sweatshirt and inside a dryer in the backyard. The appellate court reversed the wife's conviction, finding that while a rational trier of fact could have concluded that Allison Hodge knew that her husband was selling marijuana from the residence, there was insufficient evidence that Mrs. Hodge herself "exercised dominion and control" over any of the marijuana.

8. Walter Booth had prior convictions for at least one drug offense, at least one weapon offense, and armed robbery. Are these convictions relevant to the adjudication of this heroin possession charge? What do they show? Why does the appellate court emphasize that the jury was aware of Booth's prior convictions?
9. There is a very close association of drugs with violence in public discourse and policy discussions. But what, precisely, is the connection? Does drug use tend to make people violent? Does drug addiction tend to make people willing to use violence to obtain drugs? Does the drug trade involve acts of violence to defend territory or avoid law enforcement? One comprehensive study has concluded that there is little evidence "to support the assumption that drugs cause violence." Shima Baradaran, *Drugs and Violence*, 88 S. Cal. L. Rev. 227, 233 (2015). "[C]ourts and scholars assume that drug crime may lead to at least two forms of violence: (1) violence associated with substance intoxication, and (2) violence arising from the transportation and sale of drugs. Violence arising from the transportation and sale of drugs is significantly more common, though still less common than assumed." Id. at 289. Defendants charged with drug offenses are less likely to commit crimes of violence than defendants charged with other categories of crime, Professor Baradaran reports. Among those in the drug trade, "drug violence is exaggerated and may be attributable to drug law enforcement and prohibition rather than drug use or the nature of the industry." Id. at 290.
10. How do police typically discover drug possession? In *Booth*, the police conducted surveillance on a home after receiving a tip from an informant. They witnessed conduct (by Gail Varnado) that led them to apply for a warrant to search the home. Most of the time, police discover drugs without needing to obtain a search warrant. Searches of individual persons and vehicles do not usually require a warrant, so long as police can identify some grounds of "reasonable suspicion," as discussed in Chapter Three. Recall also *Copenhaver* in Chapter One, where a traffic stop for an expired registration led the police to investigate the driver for intoxication, and then to search the vehicle and discover contraband.
11. Notice the court's description of Booth's sentence for the heroin possession offense: "five years at hard labor." Was Booth headed off to a chain gang or other forced labor setting? "At hard labor" is partly, but only partly, a matter of terminology. In Louisiana, which is the U.S. state with the highest incarceration rate, "imprisonment at hard labor" is the standard terminology used to describe any prison sentence. (A defendant sentenced to serve "without hard labor" will be sent to a parish jail rather than a state prison.) State law does allow prisons to require prisoners to work—and some jail detainees are also required to work, which is why the "at hard labor" language is partly just a matter of legal terminology. One Louisiana sheriff made the news in 2017 when he objected to new parole laws on the grounds that the state was releasing "the ones you can work." He explained, "In addition to the bad ones — in addition to them — they are releasing some good ones that we use every day to wash cars, to change the oil in our cars, to cook in the kitchen — to do all that where we save money." Many other states also use the labor of prisoners; for example, California's use of prisoners to fight forest fires has received substantial news coverage in recent years. Prisoners are typically paid some small amount for their labor, but the rates are often far below minimum wage; some jobs are paid at $0.20 / hour in Louisiana. These practices have so far survived constitutional challenges. The Thirteenth Amendment to the federal constitution declares, "*Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States…" (emphasis added).* For a recent overview of compelled and underpaid labor among American prisoners, see Michelle Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 Cornell L. Rev. 899 (2019).

Check Your Understanding (7-1)

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* * * * *

21 U.S.C. § 841. Prohibited acts.

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally–

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

UNITED STATES of America

v.

Charles Demore JEWELL

United States Court of Appeals, Ninth Circuit
532 F.2d 697

Feb. 27, 1976

BROWNING, Circuit Judge:

We took this case in banc to perform a simple but necessary "housekeeping" chore. The opinion in *United States v. Davis* (9th Cir. 1974), refers to possession of a controlled substance, prohibited by 21 U.S.C. s 841(a)(1), as a "general intent" crime. If this means that the mental state required for conviction under section 841(a)(1) is only that the accused intend to do the act the statute prohibits, the characterization is incorrect. The statute is violated only if possession is accompanied both by knowledge of the nature of the act and also by the intent "to manufacture, distribute, or dispense." The jury was so instructed in this case. We are unanimously of the view that this instruction reflects the only possible interpretation of the statute. The contrary language in *Davis* is disapproved.

This does not mean that we disapprove the holding in *Davis*. On the contrary, we are unanimously of the view that the panel in *Davis* properly held that "The government is not required to prove that the defendant actually knew the exact nature of the substance with which he was dealing." We restrict *Davis* to the principle that a defendant who has knowledge that he possesses a controlled substance may have the state of mind necessary for conviction even if he does not know which controlled substance he possesses.

In the course of in banc consideration of this case, we have encountered another problem that divides us….

It is undisputed that appellant entered the United States driving an automobile in which 110 pounds of marijuana worth $6,250 had been concealed in a secret compartment between the trunk and rear seat. Appellant testified that he did not know the marijuana was present. There was circumstantial evidence from which the jury could infer that appellant had positive knowledge of the presence of the marihuana, and that his contrary testimony was false. [In a footnote, the court explained that the appellant had testified that while he was visiting Mexico, a stranger had offered to sell him marijuana, then asked him to drive a car back into the United States. Appellant agreed to drive the car back for payment of $100.]

On the other hand there was evidence from which the jury could conclude that … although appellant knew of the presence of the secret compartment and had knowledge of facts indicating that it contained marijuana, he deliberately avoided positive knowledge of the presence of the contraband to avoid responsibility in the event of discovery. [From the court's footnote: The Drug Enforcement Administration agent testified that appellant stated "he thought there was probably something wrong and something illegal in the vehicle, but that he checked it over. He looked in the glove box and under the front seat and in the trunk, prior to driving it. He didn't find anything, and, therefore, he assumed that the people at the border wouldn't find anything either" (emphasis added). Appellant was asked at trial whether he had seen the special compartment when he opened the trunk. He responded, "Well, you know, I saw a void there, but I didn't know what it was." He testified that he did not investigate further….]

If the jury concluded the latter [possibility] was indeed the situation, and if positive knowledge is required to convict, the jury would have no choice consistent with its oath but to find appellant not guilty even though he deliberately contrived his lack of

positive knowledge. Appellant urges this view. The trial court rejected the premise that only positive knowledge would suffice, and properly so.

Appellant tendered an instruction that to return a guilty verdict the jury must find that the defendant knew he was in possession of marijuana. The trial judge rejected the instruction because it suggested that "absolutely, positively, he has to know that it's there." The court said, "I think, in this case, it's not too sound an instruction because we have evidence that if the jury believes it, they'd be justified in finding he actually didn't know what it was he didn't because he didn't want to find it."

[Instead,] the court told the jury that the government must prove beyond a reasonable doubt that the defendant "knowingly" brought the marihuana into the United States and that he "knowingly" possessed the marihuana… The court continued:

The Government can complete their burden of proof by proving, beyond a reasonable doubt, that if the defendant was not actually aware that there was marijuana in the vehicle he was driving when he entered the United States his ignorance in that regard was solely and entirely a result of his having made a conscious purpose to disregard the nature of that which was in the vehicle, with a conscious purpose to avoid learning the truth.

The legal premise of these instructions is firmly supported by leading commentators here and in England. Professor Rollin M. Perkins writes, "One with a deliberate antisocial purpose in mind . . . may deliberately 'shut his eyes' to avoid knowing what would otherwise be obvious to view. In such cases, so far as criminal law is concerned, the person acts at his peril in this regard, and is treated as having 'knowledge' of the facts as they are ultimately discovered to be." … Professor Glanville Williams states, on the basis both English and American authorities, "To the requirement of actual knowledge there is one strictly limited exception. . . . (T)he rule is that if a party has his suspicion aroused but then deliberately omits to make further enquiries, because he wishes to remain in ignorance, he is deemed to have knowledge."

The substantive justification for the rule is that deliberate ignorance and positive knowledge are equally culpable. The textual justification is that in common understanding one "knows" facts of which he is less than absolutely certain. To act "knowingly," therefore, is not necessarily to act only with positive knowledge, but also to act with an awareness of the high probability of the existence of the fact in question. When such awareness is present, "positive" knowledge is not required.

This is the analysis adopted in the Model Penal Code. Section 2.02(7) states: "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." …

…There is no reason to reach a different result under the statute involved in this case. Doing so would put this court in direct conflict with Courts of Appeals in two other circuits that have approved "deliberate ignorance" instructions in prosecutions under 21 U.S.C. s 841(a)… Nothing is cited from the legislative history of the Drug Control Act indicating that Congress used the term "knowingly" in a sense at odds with prior authority. Rather, Congress is presumed to have known and adopted the "cluster of ideas" attached to such a familiar term of art. *Morissette v. United States* (1952)….

Appellant's narrow interpretation of "knowingly" is inconsistent with the Drug Control Act's general purpose to deal more effectively "with the growing menace of drug abuse in the United States." Holding that this term introduces a requirement of positive knowledge would make deliberate ignorance a defense. It cannot be doubted that those who traffic in drugs would make the most of it. This is evident from the number of appellate decisions reflecting conscious avoidance of positive knowledge of the presence of contraband in the car driven by the defendant or in which he is a passenger, in the suitcase or package he carries, in the parcel concealed in his clothing….

It is no answer to say that in such cases the fact finder may infer positive knowledge. It is probable that many who performed the transportation function, essential to the drug traffic, can truthfully testify that they have no positive knowledge of the load they carry. Under appellant's interpretation of the statute, such persons will be convicted only if the fact finder errs in evaluating the credibility of the witness or deliberately disregards the law.

It begs the question to assert that a "deliberate ignorance" instruction permits the jury to convict without finding that the accused possessed the knowledge required by the statute. Such an assertion assumes that the statute requires positive knowledge. But the question is the meaning of the term "knowingly" in the statute. If it means positive knowledge, then, of course, nothing less will do. But if "knowingly" includes a mental state in which the defendant is aware that the fact in question is highly probable but consciously avoids enlightenment, the statute is satisfied by such proof.

It is worth emphasizing that the required state of mind differs from positive knowledge only so far as necessary to encompass a calculated effort to avoid the sanctions of the statute while violating its substance. "A court can properly find wilful blindness only where it can almost be said that the defendant actually knew." [G. Williams, supra.] In the language of the instruction in this case, the government must prove, "beyond a reasonable doubt, that if the defendant was not actually aware . . . his ignorance in that regard was solely and entirely a result of . . . a conscious purpose to avoid learning the truth."

… The conviction is affirmed.

ANTHONY M. KENNEDY, Circuit Judge, with whom ELY, HUFSTEDLER and WALLACE, Circuit Judges, join (dissenting).

…At the outset, it is arguable that the "conscious purpose to avoid learning the truth" instruction is inherently inconsistent with the additional mens rea required for [841(a), intent to distribute]. It is difficult to explain that a defendant can specifically intend to distribute a substance unless he knows that he possesses it. In any event, we would not approve the conscious purpose instruction in this case, because it falls short of the scienter independently required under both counts.

… The approach adopted in section 2.02(7) of the Model Penal Code clarifies, and, in important ways restricts, the English doctrine:

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.

This provision requires an awareness of a high probability that a fact exists, not merely a reckless disregard, or a suspicion followed by a failure to make further inquiry. It also establishes knowledge as a matter of subjective belief, an important safeguard against diluting the guilty state of mind required for conviction. It is important to note that section 2.02(7) is a definition of knowledge, not a substitute for it; as such, it has been cited with approval by the Supreme Court.

In light of the Model Penal Code's definition, the "conscious purpose" jury instruction is defective in three respects. First, it fails to mention the requirement that Jewell have been aware of a high probability that a controlled substance was in the car. It is not culpable to form "a conscious purpose to avoid learning the truth" unless one is aware of facts indicating a high probability of that truth. To illustrate, a child given a gift-wrapped package by his mother while on vacation in Mexico may form a conscious purpose to take it home without learning what is inside; yet his state of mind is totally innocent unless he is aware of a high probability that the package contains a controlled substance. Thus, a conscious purpose instruction is only proper when coupled with a requirement that one be aware of a high probability of the truth.

The second defect in the instruction as given is that it did not alert the jury that Jewell could not be convicted if he "actually believed" there was no controlled substance in the car. The failure to emphasize, as does the Model Penal Code, that subjective belief is the determinative factor, may allow a jury to convict on an objective theory of knowledge that a reasonable man should have inspected the car and would have discovered what was hidden inside….

Third, the jury instruction clearly states that Jewell could have been convicted even if found ignorant or "not actually aware" that the car contained a controlled substance. This is unacceptable because true ignorance, no matter how unreasonable, cannot provide a basis for criminal liability when the statute requires knowledge. A proper jury instruction based on the Model Penal Code would be presented as a way of defining knowledge, and not as an alternative to it….

Notes and questions on *United States v. Jewell*

1. Notice that the first two paragraphs of *Jewell* address one issue – the "housekeeping chore" – and the rest of the opinion addresses a different question. (Let this remind you to resist the temptation to reduce each case to a single issue or "takeaway.") What is the "housekeeping" issue? Use the first paragraph to refresh or refine your understanding of the term "general intent" crime. In what sense is the federal controlled substance statute here a "specific intent" crime rather than a general intent one?
2. Notice also that the majority distinguishes between knowledge that one possesses a controlled substance and knowledge of the particular type of controlled substance that one possesses. What if a defendant is in possession of one illegal drug, but mistakenly believes that he has a different illegal drug? That is a question about a mistake of fact, and as you have seen in other contexts, whether a mistake of fact matters to liability depends on the mens rea requirements of the relevant statute. Which mental state does 841(a) require? Look carefully at the second paragraph of the *Jewell* majority opinion. (The next section of this chapter further explores the relevance of drug type and quantity.)

3. Across jurisdictions, drug laws distinguish between "simple possession" (the offense charged in *Booth*, the first case in this chapter) and a more serious crime of possession with intent to distribute. Charles Jewell was charged with a federal "possession with intent to distribute" offense, but notice that this appellate opinion does not address the question whether Jewell did in fact intend to distribute marijuana. Why not? Is it possible to intend to distribute drugs without being certain that you have the drugs?
4. When courts do consider whether evidence is sufficient to prove intent to distribute, they often focus on the quantity of drugs involved, the way the drugs were packaged, and any other items in the defendant's possession that may suggest drug trafficking, such as a scale or a large amount of cash. If police seize a large quantity of drugs, it will be difficult for the defendant to avoid a distribution charge. But even when the total quantity of drugs is relatively small, prosecutors sometimes pursue and obtain distribution convictions. See, e.g., *Cotton v. State*, 686 S.E.2d 805 (Ct. App. Ga. 2009) (finding evidence sufficient to support conviction for possession with intent to distribute when police found four "nickel" bags of marijuana, with a total weight of 2.7 grams, and $60 in cash in defendant's car).
5. Consider carefully the distinctions between the actual jury instruction given in *Jewell* and the Model Penal Code instruction that the dissent would require. Would the evidence in this case have supported a conviction even under the MPC approach?
6. The *Jewell* majority uses legislative purpose to argue for a broader reading of the statute, referring to "the Drug Control Act's general purpose to deal more effectively 'with the growing menace of drug abuse in the United States.'" Should the general concern to address the "menace of drug abuse" always lead to the broadest interpretations of drug laws? Such an interpretive principle would be the inverse of a rule of lenity – a rule of severity with regard to drug offenses.

Drug Offenses: The Relevance of Type and Quantity

Iowa Code Ann. 204.401(2) [recodified; update reference]

[I]t is unlawful for a person to create, deliver, or possess with intent to deliver … a simulated controlled substance….

STATE of Iowa, Appellee

v.

Robert Eric FREEMAN, Appellant

Supreme Court of Iowa
450 N.W.2d 826

Jan. 24, 1990

McGIVERIN, Chief Justice.

The facts of this case are not disputed. The defendant, Robert Eric Freeman, agreed to sell a controlled substance, cocaine, to Keith Hatcher. Unfortunately for Freeman, Hatcher was cooperating with the government. Hatcher gave Freeman $200, and Freeman gave Hatcher approximately two grams of what was supposed to be cocaine. To everyone's surprise, the "cocaine" turned out to be acetaminophen. Acetaminophen is not a controlled substance.

Freeman was convicted at a bench trial of delivering a simulated controlled substance with respect to a substance represented to be cocaine, in violation of Iowa Code section 204.401(2)(a). The sole question presented by Freeman's appeal is whether he can be convicted of delivering a simulated controlled substance when, in fact, he believed he was delivering and intended to deliver cocaine….

I. *The statutory framework.* Iowa Code section 204.401(2) provides, in relevant part:

[I]t is unlawful for a person to create, deliver, or possess with intent to deliver … a simulated controlled substance….

The term "simulated controlled substance" is defined by Iowa Code section 204.101(27):

"*Simulated controlled substance* " means a substance *which is not a controlled substance but which is expressly represented to be a controlled substance, or* a substance which is not a controlled substance but which is *impliedly represented to be a controlled substance* and which because of its nature, packaging, or appearance would lead a reasonable person to believe it to be a controlled substance.

(Emphasis added.) Violation of section 204.401(2) with respect to a simulated controlled substance represented to be cocaine is a class "C" felony. Iowa Code § 204.401(2)(a).

II. *Scienter and the offense of delivery of a simulated controlled substance.* Our cases indicate that knowledge of the nature of the substance delivered is an imputed element of section 204.401(1) offenses. *See, e.g., State v. Osmundson* (Iowa 1976) (knowledge an imputed element of offense of delivery of a controlled substance); *Cf. State v. Duncan* (Iowa 1987) (knowledge an imputed element of delivery of an imitation controlled substance under Iowa Code chapter 204A). Proof of such knowledge has been required to separate those persons who innocently commit the overt acts of the offense from those persons who commit the overt acts of the offense with scienter, or criminal intent.

The Iowa Code prohibits delivery of [actual] controlled substances and imitation controlled substances, as well as delivery of counterfeit substances, in language nearly identical to that prohibiting delivery of simulated controlled substances [emphasis added]…. Seizing upon the similarity of the statutory prohibitions, Freeman argues that he cannot be convicted of delivering a simulated controlled substance because he mistakenly believed he was delivering and intended to deliver an actual controlled substance.

We disagree. Freeman's construction of section 204.401(2) would convert the offense of delivery of a simulated controlled substance into one requiring *knowing misrepresentation* of the nature of the substance delivered. The statute clearly does not require knowing misrepresentation of the nature of the substance delivered.

Reading sections 204.401(2) and 204.101(27) together shows that the gist of this offense is *knowing representation* of a substance to be a controlled substance and delivery of a noncontrolled substance, rather than *knowing misrepresentation* and delivery. As one court explained under similar circumstances, statutes like section 204.401(2) are designed "to discourage anyone from engaging or appearing to engage in the narcotics traffic rather than to define the contractual rights of the pusher and his victim…." *People v. Ernst* (Cal. 1975)…

Freeman's mistaken belief regarding the substance he delivered cannot save him from conviction. Mistake of fact is a defense to a crime of scienter or criminal intent only where the mistake precludes the existence of the mental state necessary to commit the crime. *See* Model Penal Code § 2.04(2) (1962) ("Although ignorance or mistake would otherwise afford a defense to the offense charged, the defense is not available if the defendant would be guilty of another offense had the situation been as he supposed."). In this case, Freeman would not be innocent of wrongdoing had the situation been as he supposed; rather, he would be guilty of delivering a controlled substance. His mistake is no defense. The scienter required to hold him criminally responsible for committing the overt acts of the charged offense is present regardless of the mistake. Freeman knowingly represented to Hatcher that the substance he delivered was cocaine.

In conclusion, we hold that a person who delivers a substance that is not a controlled substance, *but who knowingly represents the substance to be a controlled substance*, commits the offense of delivery of a simulated controlled substance regardless of whether the person believed that the substance was controlled or not controlled.

Delivery of a simulated controlled substance is not a consumer fraud offense. Freeman attempted and intended to sell cocaine. The fact that Freeman was fooled as much as his customer is no defense to the charge in this case.

Notes and questions on *State v. Freeman*

1. Do defendants convicted of drug offenses need to know which specific drug they have? As noted above in the discussion of *Jewell*, drug offenses typically require the defendant to know that he possesses "a controlled substance," but the defendant need not know which particular controlled substance he possesses. Thus, a defendant who believes he possesses heroin, but actually possesses a substance that turns out to be cocaine, can be convicted of possession of cocaine even if the penalties for cocaine possession are more severe. See, e.g., *United States v. Barbosa*, 271 F.3d 438, 450-451 (3rd Cir. 2001). For further review of mistakes of fact, you could look back at *United States v. Coffman* in Chapter Five. As noted there, whether a mistake of fact is relevant to criminal liability depends on the mens rea requirement of the particular crime that is charged.
2. *State v. Freeman* raises a slightly different issue from the confusion of cocaine and heroin: here the defendant thought that he possessed cocaine, but actually possessed something that was not a controlled substance at all. In many jurisdictions, this situation would lead to a charge of attempted possession of cocaine. (We consider attempt doctrine, including its application to

drug offenses, in more detail in the next chapter.) In Iowa, though, the simulated controlled substance law makes it unnecessary to rely on attempt doctrine.

3. The *Freeman* court refers to contract law claims, and to consumer fraud, to distinguish the Iowa simulated controlled substance offense from either of those areas of law. How do the underlying purposes of the simulated controlled substance law differ from those other types of law?
4. The sentences for different types and amounts of controlled substances can vary widely. How do legislatures and other policymakers decide how to punish different types of narcotics? One of the most controversial criminalization choices of American drug law concerned different penalties for crack cocaine and powder cocaine, discussed in Chapter Three in relation to *United States v. Armstrong*. Until 2010, federal sentencing law used a 100:1 ratio under which a defendant would need 100 times as much powder cocaine to receive the same mandatory minimum sentence that was imposed for crack cocaine. Because crack cocaine use and distribution was more prevalent among Black Americans, while powder cocaine had higher portions of white users and distributors, this stark difference in sentences had a significant impact on the racial composition of the U.S. prison population. Defenders of the 100:1 ratio argued that crack was more dangerous than powder cocaine, but the evidence of greater danger was contested, and in any case it is unclear how anyone could establish that crack is 100 times more dangerous. In 2010, Congress adjusted the ratio but did not entirely eliminate the more severe penalties for crack. The current crack-powder ratio is about 18:1.
5. Just as the *Freeman* court finds that the defendant need not know the exact nature of the substance he possessed, many courts find that defendants need not know the exact quantity of drugs to be convicted of possessing that amount. This approach is controversial, though, because sentences for drug crimes are typically linked to the quantity involved. In *Whitaker v. People*, 48 P.3d 555 (Co. 2002), the defendant was charged with possession of over 1000 grams of methamphetamine. Police had approached David Whitaker on a Greyhound bus in Colorado and asked to search a black bag near him. Whitaker denied ownership of the bag, but allowed police to search it. It contained 8.8 pounds of methamphetamine. Whitaker was convicted and sentenced to 20 years imprisonment based on the quantity of drugs. On appeal to the Colorado Supreme Court, he argued that the prosecution had failed to prove that he knew the quantity of drugs in the bag. The Colorado Supreme Court held that drug quantity was a sentencing factor, not an element of the offense. That distinction is important, because the prosecution's burden of proof as outlined in *Winship* generally extends only to elements of the offense and not to sentencing factors. (There are caveats and exceptions, about which you can learn more in a sentencing or advanced criminal procedure course.) As a result, in Colorado a possession conviction does not require the defendant to know the quantity of drugs possessed. "Any amount of drugs, even less than a usable quantity, can support a conviction" under the state's possession statute, the *Whitaker* court stated.
6. Measuring drug quantity may seem like a scientific, empirical question, but this aspect of drug law has produced some noteworthy disputes. In *Chapman v. United States*, 500 U.S. 353 (1991), the Supreme Court considered a federal statute that imposed a five-year mandatory minimum sentence on a person convicted of possessing one gram or more of "a mixture or substance containing" LSD. Pure LSD doesn't weigh very much, but the drug is typically sold mixed into a "carrier medium" such as blotter paper or sugar cubes. In *Chapman*, the defendants possessed only about 50 milligrams of LSD, but it was integrated into blotter paper that weighed about 5.7 grams. The defendants argued that their sentence should be based on the weight of the actual drug, not the drug plus the medium. The weights of different carriers vary widely, and to include the carrier could meant that those who possess large quantities of the pure substance are punished less than those who possess very small quantities of the substance in a carrier medium. The Court rejected this argument and held that the combined weight of the LSD and the carrier could be used to trigger the mandatory minimum.
7. The quantity of drugs involved in an offense can also depend on enforcement choices. For example, law enforcement officials working undercover can ask to purchase, or offer to sell, a given amount of drugs in order to trigger particular sentencing consequences. Or undercover agents may stage multiple "controlled buys" in order to charge multiple counts rather than a single charge.

Check Your Understanding (7-2)

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Gun Offenses

Gun possession offenses sometimes involve categorical bans of a particular type of weapon. For example, “assault weapons,” or certain semi-automatic weapons, were banned under a 1994 federal law. That law had a ten-year time limit, and Congress allowed it to lapse in 2004. But more frequently, gun laws do not involve categorical bans; instead, they specify certain categories of people who are not allowed to possess weapons. Persons with prior criminal convictions (or specified types of convictions) are frequently prohibited from weapons possession; other restricted categories include children and persons with identified mental health issues. Another fairly standard regulatory approach is to require a license for weapon possession, and to impose criminal sanctions on persons who possess guns without the requisite license or permit. The first case below involves a statute structured as a general ban on (unlicensed) weapons possession, but with exceptions for various categories of person, including correctional officers. Penal codes can be complicated, as this case illustrates: at least four different statutes are relevant to the resolution of this case.

N.Y. Penal Law §265.02 [as of 1983; now revised]

A person is guilty of criminal possession of a weapon in the third degree when …

(4) [h]e possesses any loaded firearm….

N.Y. Penal Law § 265 .20 Exemptions

[Section 265.02 and other sections] shall not apply to:

- Possession of any of the weapons, instruments, appliances, or substances specified by…
- (c) peace officers as defined by … the criminal procedure law.

N.Y. Crim. Pro. Ch. 966, §1.20(33) [as of 1970; repealed 1980]

[A peace officer includes]

… [a]n attendant, or an official, or guard of any state prison or any penal correctional institution….

(A fourth statute relevant to the next case is included within the judicial opinion.)

People of the State of New York

v.

Julio MARRERO

Court of Appeals of New York
507 N.E.2d 1068

April 2, 1987

BELLACOSA, J.

The defense of mistake of law is not available to a Federal corrections officer arrested in a Manhattan social club for possession of a loaded .38 caliber automatic pistol who claimed he mistakenly believed he was entitled … to carry a handgun without a permit as a peace officer.

…Defendant was a Federal corrections officer in Danbury, Connecticut, and asserted that status at the time of his arrest in 1977. He claimed at trial that there were various interpretations of fellow officers and teachers, as well as the peace officer statute itself, upon which he relied for his mistaken belief that he could carry a weapon with legal impunity.

The starting point for our analysis is the New York mistake statute as an outgrowth of the dogmatic common-law maxim that ignorance of the law is no excuse. The central issue is whether defendant’s personal misreading or misunderstanding of a statute may excuse criminal conduct in the circumstances of this case.

… The revisors of New York’s Penal Law intended no fundamental departure from this common-law rule in Penal Law § 15.20, which provides in pertinent part:

“§ 15.20. *Effect of ignoranceor mistake upon liability.*

*** * ***

"2. A person is not relieved of criminal liability for conduct because he engages in such conduct under a mistaken belief that it does not, as a matter of law, constitute an offense, unless such mistaken belief is founded upon an official statement of the law contained in (a) a statute or other enactment * * * (d) an interpretation of the statute or law relating to the offense, officially made or issued by a public servant, agency, or body legally charged or empowered with the responsibility or privilege of administering, enforcing or interpreting such statute or law."

This section was added to the Penal Law … in 1965… When this provision was first proposed, commentators viewed the new language as codifying "the established common law maxim on mistake of law, while at the same time recognizing a defense when the erroneous belief is founded upon an 'official statement of the law.' " (Note, *Proposed Penal Law of New York,* 64 Colum L Rev 1469, 1486 [1964]).

The defendant claims as a first prong of his defense that he is entitled to raise the defense of mistake of law under section 15.20 (2) (a) because his mistaken belief that his conduct was legal was founded upon an official statement of the law contained in the statute itself. Defendant argues that his mistaken interpretation of the statute was reasonable in view of the alleged ambiguous wording of the peace officer exemption statute, and that his "reasonable" interpretation of an "official statement" is enough to satisfy the requirements of subdivision (2) (a)….

The prosecution … counters defendant's argument by asserting that one cannot claim the protection of mistake of law under section 15.20 (2) (a) simply by misconstruing the meaning of a statute but must instead establish that the statute relied on actually permitted the conduct in question and was only later found to be erroneous. To buttress that argument, the People analogize New York's official statement defense to the approach taken by the Model Penal Code (MPC). Section 2.04 of the MPC provides:

"Section 2.04. *Ignorance or Mistake.*

*** * ***

"(3) A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when * * * (b) he acts in reasonable reliance upon an official statement of the law, *afterward determined to be invalid or erroneous*, contained in (i) a statute or other enactment" (emphasis added).

Although the drafters of the New York statute did not adopt the precise language of the Model Penal Code provision with the emphasized clause, it is evident and has long been believed that the Legislature intended the New York statute to be similarly construed. In fact, the legislative history of section 15.20 is replete with references to the influence of the Model Penal Code provision… New York's drafters may even have concluded that the extra clause in the MPC was mere surplusage in view of the clear exceptionability of the mistake authorization in the first instance….

It was early recognized that the "official statement" mistake of law defense was a statutory protection against prosecution based on reliance of a statute that did *in fact* authorize certain conduct. "It seems obvious that society must rely on some statement of the law, and that conduct which *is in fact* 'authorized' … should not be subsequently condemned. The threat of punishment under these circumstances can have no deterrent effect unless the actor doubts the validity of the official pronouncement–*a questioning of authority that is itself undesirable"* (Note, 64 Colum. L. Rev. at 1486 (emphasis added). While providing a narrow escape hatch, the idea was simultaneously to encourage the public to read and rely on official statements of the law, not to have individuals conveniently and personally question the validity and interpretation of the law and act on that basis. If later the statute was invalidated, one who mistakenly acted in reliance on the authorizing statute would be relieved of criminal liability. That makes sense and is fair. To go further does not make sense and would create a legal chaos based on individual selectivity.

In the case before us, the underlying statute never *in fact authorized* the defendant's conduct; the defendant only thought that the statutory exemptions permitted his conduct when, in fact, the primary statute clearly forbade his conduct. …[E]ven the exemption statute did not permit this defendant to possess the weapon. It would be ironic at best and an odd perversion at worst for this court now to declare that the same defendant is nevertheless free of criminal responsibility.

The "official statement" component in the mistake of law defense in both paragraphs (a) and (d) adds yet another element of support for our interpretation and holding. Defendant tried to establish a defense under Penal Law § 15.20 (2) (d) as a second prong. But the interpretation of the statute relied upon must be "officially made or issued by a public servant, agency or body legally charged or empowered with the responsibility or privilege of administering, enforcing or interpreting such statute or law." …[N]one of the interpretations which defendant proffered meets the requirements of the statute….

It must also be emphasized that, while our construction of Penal Law § 15.20 provides for narrow application of the mistake of law defense, it does not, as the dissenters contend, "rule out *any* defense based on mistake of law." To the contrary, mistake of law is a viable exemption in those instances where an individual demonstrates an effort to learn what the law is, relies on the validity of that law and, later, it is determined that there was a *mistake in the law itself.*

The modern availability of this defense is based on the theory that where the government has affirmatively, albeit unintentionally, misled an individual as to what may or may not be legally permissible conduct, the individual should not be punished as a result. This is salutary and enlightened and should be firmly supported in appropriate cases. However, it also follows that where, as here, the government is not responsible for the error (for there is none except in the defendant's own mind), mistake of law should not be available as an excuse….

We recognize that some legal scholars urge that the mistake of law defense should be available more broadly where a defendant misinterprets a potentially ambiguous statute not previously clarified by judicial decision and reasonably believes in good faith that the acts were legal…. In this case, the forbidden act of possessing a weapon is clear and unambiguous, and only by the interplay of a double exemption does defendant seek to escape criminal responsibility, i.e., the peace officer statute and the mistake statute.

We conclude that the better and correctly construed view is that the defense should not be recognized, except where specific intent is an element of the offense or where the misrelied-upon law has later been properly adjudicated as wrong. Any broader view fosters lawlessness. It has been said in support of our preferred view in relation to other available procedural protections: "A statute … which is so indefinite that it 'either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law' and is unconstitutional. If the court feels that a statute is sufficiently definite to meet this test, it is hard to see why a defense of mistake of law is needed…." (Hall and Seligman, *Mistake of Law and Mens Rea*, 8 U Chi L Rev 641, 667 [1941]).

Strong public policy reasons underlie the legislative mandate and intent which we perceive in rejecting defendant's construction of New York's mistake of law defense statute. If defendant's argument were accepted, the exception would swallow the rule. Mistakes about the law would be encouraged, rather than respect for and adherence to law. There would be an infinite number of mistake of law defenses which could be devised from a good-faith, perhaps reasonable but mistaken, interpretation of criminal statutes, many of which are concededly complex. Even more troublesome are the opportunities for wrongminded individuals to contrive in bad faith solely to get an exculpatory notion before the jury…. Our holding comports with a statutory scheme which was not designed to allow false and diversionary stratagems to be provided for many more cases than the statutes contemplated. This would not serve the ends of justice but rather would serve game playing and evasion from properly imposed criminal responsibility.

Accordingly, the order of the Appellate Division should be affirmed.

HANCOCK, Jr., J., dissenting.

…The basic difference which divides the court may be simply put. Suppose the case of a man who has committed an act which is criminal not because it is inherently wrong or immoral but solely because it violates a criminal statute. He has committed the act in complete good faith under the mistaken but entirely reasonable assumption that the act does not constitute an offense because it is permitted by the wording of the statute. Does the law require that this man be punished? The majority says that it does and holds that (1) Penal Law § 15.20(2)(a) must be construed so that the man is precluded from offering a defense based on his mistake of law and (2) such construction is compelled by prevailing considerations of public policy and criminal jurisprudence. We take issue with the majority on both propositions.

There can be no question that under the view that the purpose of the criminal justice system is to punish blameworthiness or "choosing freely to do wrong", our supposed man who has acted innocently and without any intent to do wrong should not be punished… Since he has not knowingly committed a wrong there can be no reason for society to exact retribution. Because the man is law-abiding and would not have acted but for his mistaken assumption as to the law, there is no need for punishment to deter him from further unlawful conduct. Traditionally, however, under the ancient rule of Anglo-American common law that ignorance or mistake of law is no excuse, our supposed man would be punished.

The maxim "*ignorantia legis neminem excusat*" finds its roots in Medieval law when the "actor's intent was irrelevant since the law punished the *act itself.*" …Although the common law has gradually evolved from its origins in Anglo-Germanic tribal law (adding the element of intent *[mens rea]* and recognizing defenses based on the actor's mental state…) the dogmatic rule that

ignorance or mistake of law is no excuse has remained unaltered. Various justifications have been offered for the rule, but all are frankly pragmatic and utilitarian–preferring the interests of society (e.g., in deterring criminal conduct, fostering orderly judicial administration, and preserving the primacy of the rule of law) to the interest of the individual in being free from punishment except for intentionally engaging in conduct which he knows is criminal…

Today there is widespread criticism of the common-law rule mandating categorical preclusion of the mistake of law defense… The utilitarian arguments for retaining the rule have been drawn into serious question … but the fundamental objection is that it is simply wrong to punish someone who, in good-faith reliance on the wording of a statute, believed that what he was doing was lawful. …This basic objection to the maxim *"ignorantia legis neminem excusat"* may have had less force in ancient times when most crimes consisted of acts which by their very nature were recognized as evil *(malum in se)*. In modern times, however, with the profusion of legislation making otherwise lawful conduct criminal *(malum prohibitum)*, the "common law fiction that every man is presumed to know the law has become indefensible in fact or logic."…

With this background we proceed to a discussion of our disagreement with the majority's construction of Penal Law § 15.20(2)(a)….

It is difficult to imagine a case more squarely within the wording of Penal Law § 15.20 (2) (a) or one more fitted to what appears clearly to be the intended purpose of the statute than the one before us. For this reason it is helpful to discuss the statute and its apparent intended effect in the light of what defendant contends was his mistaken belief founded on an official statement of the law contained in a statute.

Defendant stands convicted after a jury trial of criminal possession of a weapon in the third degree for carrying a loaded firearm without a license. He concedes that he possessed the unlicensed weapon but maintains that he did so under the mistaken assumption that his conduct was permitted by law. Although at the time of his arrest he protested that he was a Federal corrections officer and exempt from prosecution under the statute, defendant was charged with criminal possession of a weapon in the third degree. On defendant's motion before trial the court dismissed the indictment, holding that he was a peace officer as defined [by state law] and, therefore, exempted … from prosecution… [The dissent explained in a footnote that state law defined "peace officers" to include "correction officers of any state correction facility or of any penal correctional institution."] The … Appellate Division reversed and reinstated the indictment, [holding that only State correction officers were exempted from prosecution under 265.02]…. [Defendant] was convicted and the Appellate Division has affirmed.

Defendant's mistaken belief that, as a Federal corrections officer, he could legally carry a loaded weapon without a license was based on the express exemption [for] "peace officers" … and on his reading of the statutory definition for "peace officer" … as meaning a correction officer "of *any* penal correctional institution" (emphasis added), including an institution not operated by New York State. Thus, he concluded erroneously that, as a corrections officer in a Federal prison, he was a "peace officer"… This mistaken belief, based in good faith … is, defendant contends, the precise sort of "mistaken belief … founded upon an official statement of the law contained in … a statute or other enactment" which gives rise to a mistake of law defense under Penal Law § 15.20(2)(a). He points out, of course, that when he acted in reliance on his belief he had no way of foreseeing that a court would eventually resolve the question of the statute's meaning against him….

The majority, however, has accepted the People's argument that to have a defense under Penal Law § 15.20 (2) (a) "a defendant must show that the statute *permitted his conduct*, not merely that he believed it did" (respondent's brief, at 26 [emphasis added]). Here, of course, defendant cannot show that the statute permitted his conduct. To the contrary, the question has now been decided by the Appellate Division and it is settled that defendant was not exempt under Penal Law § 265.20 (a) (1) (a). Therefore, the argument goes, defendant can have no mistake of law defense. While conceding that reliance on a statutory provision which is later found to be invalid would constitute a mistake of law defense *(see*, Model Penal Code § 2.04 [3] [b] [i]), the People's flat position is that "one's mistaken reading of a statute, no matter how reasonable or well intentioned, is not a defense" ….

[That view] leads to an anomaly: only a defendant who is *not mistaken* about the law when he acts has a mistake of law defense. In other words, a defendant can assert a defense under Penal Law § 15.20(2)(a) only when his reading of the statute is *correct–not mistaken*. such construction is obviously illogical; it strips the statute of the very effect intended by the Legislature in adopting the mistake of law defense. The statute is of no benefit to a defendant who has proceeded in good faith on an erroneous but concededly reasonable interpretation of a statute, as defendant presumably has. An interpretation of a statute which produces an unreasonable or incongruous result and one which defeats the obvious purpose of the legislation and renders it ineffective should be rejected…

Finally, the majority's disregard of the natural and obvious meaning of Penal Law § 15.20(2)(a) … amounts, we submit, to a rejection of the obvious legislative purposes and policies favoring jurisprudential reform underlying the statute's enactment. It is self-evident that in enacting Penal Law § 15.20(2) … the Legislature intended to effect a needed reform by abolishing what had long been considered the unjust archaic common-law rule totally prohibiting mistake of law as a defense. Had it not so intended it would simply have left the common-law rule intact. In place of the abandoned "*ignorantia legis*" common-law maxim the Legislature enacted a rule which permits *no defense for ignorance of law* but *allows a mistake of law defense* in specific instances, including the one presented here: when the defendant's erroneous belief is founded on an "official statement of the law" ….

The majority construes the statute, however, so as to rule out *any* defense based on mistake of law. In so doing, it defeats the only possible purpose for the statute's enactment and resurrects the very rule which the Legislature rejected….

Instead, the majority bases its decision on an analogous provision in the Model Penal Code and concludes that despite its totally different wording and meaning Penal Law § 15.20(2)(a) should be read as if it were Model Penal Code § 2.04 (3)(b)(i). But New York in revising the Penal Law did not adopt the Model Penal Code. As in New Jersey, which generally adopted the Model Penal Code but added one section which is substantially more liberal, New York followed parts of the Model Penal Code provisions and rejected others….

…In respect to the defense based upon an actor's reliance on an official statement of law contained in a statute the Model Penal Code and the New York statute are totally dissimilar…. The Model Penal Code *does not* permit a defense for someone who acts in good faith upon a *mistaken belief* that a specific statute authorizes his conduct. The defense is limited to an act in reliance on an official statement of law in a statute "afterward determined to be *invalid or erroneous.*" The New York statute, in contrast, specifically *permits* the defense when the actor proceeds under "a *mistaken belief*" that his conduct does not "constitute an offense" when that "*mistaken belief* is founded upon an official statement of the law contained in … a statute" ….

Thus, the precise phrase in the Model Penal Code limiting the defense … to reliance on a statute "afterward determined to be invalid or erroneous" … is omitted from Penal Law § 15.20(2)(a). How the Legislature can be assumed to have enacted the very language which it has specifically rejected is not explained….

As an alternate interpretation of Penal Law § 15.20(2)(a) the majority suggests that the Legislature intended that the statute should afford a defense only in cases involving acts *mala in se* … "where specific intent is an element of the offense"… Again such construction is at odds with the plain wording of Penal Law § 15.20(2)(a) and finds no support in the statutory history or the literature. There are, moreover, other fundamental objections to such construction which, we believe, rule out any possibility that the Legislature could have intended it. The essential quality of evil or immorality inherent in crimes *mala in se* (murder, robbery, kidnapping, etc.) is incompatible with the notion that the actor could have been operating "under a mistaken belief that [his conduct] [did] not, as a matter of law, constitute an offense." There are no policy or jurisprudential reasons for the Legislature to recognize a mistake of law defense to such crimes. On the contrary, it is not with such inherently evil crimes but with crimes which are *mala prohibita*–i.e., "the vast network of regulatory offenses which make up a large part of today's criminal law"–where reasons of policy and fairness call for a relaxation of the strict "*ignorantia legis*" maxim to permit a limited mistake of law defense.

…Any fair reading of the majority opinion, we submit, demonstrates that the decision to reject a mistake of law defense is based on considerations of public policy and on the conviction that such a defense would be bad, rather than on an analysis of CPL 15.20 (2) (a) under the usual principles of statutory construction….

We believe that the concerns expressed by the majority are matters which properly should be and have been addressed by the Legislature. We note only our conviction that a statute which recognizes a defense based on a man's good-faith mistaken belief founded on a well-grounded interpretation of an official statement of the law contained in a statute is a just law. The law embodies the ideal of contemporary criminal jurisprudence "that punishment should be conditioned on a showing of subjective moral blameworthiness"….

…We do not believe that permitting a defense in this case will produce the grievous consequences the majority predicts. The unusual facts of this case seem unlikely to be repeated. …

But these questions are now beside the point, for the Legislature has given its answer by providing that someone in defendant's circumstances should have a mistake of law defense. Because this decision deprives defendant of what, we submit, the Legislature

intended that he should have, we dissent.

Notes and questions on *Marrero*

1. *Marrero* is a complicated case! Don't worry if it takes some time to make sense of it. Part of the difficulty is that there are multiple statutes at stake: a New York law that bans weapons possession without a special license, a different state law that exempts "peace officers" from the general ban on unlicensed weapons possession, still another state law that defines the term "peace officers," and finally, a state statute that provides an affirmative defense for those who mistakenly believe that their conduct is not illegal, if the mistaken belief is "founded upon an official statement of law." The first three statutes just listed are representative of one major aspect of American gun regulation: gun laws tend to identify categories of people who may, or (more often) may not, possess guns. In contrast to prohibitions of controlled substances, which are usually generally applicable to all persons, prohibitions of guns are often directed to specific groups, such as persons with felony convictions or persons with mental illness.
2. The mistake of law arguments are where things get much more complicated. Julio Marrero mistakenly believed that he was a "peace officer" under New York law and thus permitted to carry a gun. But was his mistake "founded upon an official statement of law"? Under the majority's approach, could any misunderstanding of a statute count as a belief "founded upon an official statement of law"? Under the dissent's approach, is every misunderstanding of a statute "founded upon an official statement of law"?
3. The dissent in *Marrero* noted in passing that the New Jersey had adopted a mistake of law defense "more liberal" than the Model Penal Code. In a footnote, the dissent elaborated: "In addition to permitting defenses based on ignorance of the law and reasonable reliance on official statements afterward determined to be invalid or erroneous, the New Jersey statute provides a defense, under the following broad provision, when: '(3) The actor otherwise diligently pursues all means available to ascertain the meaning and application of the offense to his conduct and honestly and in good faith concludes his conduct is not an offense in circumstances in which a law-abiding and prudent person would also so conclude.'" Would Marrero have been able to avoid conviction for weapons possession if the New Jersey mistake of law defense applied to him?
4. The dissenting opinion refers to the "unusual facts of this case." You can learn more of those unusual facts in a detailed student note published shortly after the decision: David De Gregorio, People v. Marrero *and Mistake of Law*, 54 Brook. L. Rev. 229 (1988). Julio Marrero was at a nightclub with his girlfriend when police arrived in response to a report of a man at the club carrying a pistol. One officer reportedly noticed a bulge under Marrero's jacket and approached him with his own weapon drawn. (Marrero testified that he first became aware of the officers when he saw not one but three guns pointed at him; there were apparently only two arresting officers, and it is unclear whether there really were three guns aimed at Marrero.) Marrero moved toward the officers, possibly reaching for his own gun, and the officers then arrested him and seized his pistol. They found a second gun in Marrero's girlfriend's purse, and an imitation weapon in the possession of a friend of Marrero who was also present. Marrero testified that he regularly carried a gun because he feared for his life after being threatened by prisoners or former prisoners. He had taken several criminal justice courses at Hostos College in the Bronx, and had concluded that as a federal corrections officer he qualified as a "peace officer" under New York state law.

   Which of these facts, if any, do you think the dissent found "unusual"? Do any of the above facts make a difference to the way this case should have turned out, in your view?

5. As noted in the introduction to this chapter, there is evidence that criminal regulations of guns have a disproportionate impact on persons of color. Disparities in other areas of law have contributed to an overrepresentation of persons of color among those who have criminal convictions, and this group is frequently banned from weapons possession. Moreover, police may simply be more likely to discover a weapon when it is possessed by a Black or brown person, since these groups are disproportionately targeted for police investigative activity. When a New York gun restriction was challenged before the Supreme Court recently, a group of Black defense lawyers filed an amicus brief, urging the Court to overturn the New York law due to its racially disproportionate impact. See Brief of the Black Attorneys of Legal Aid, et al, in *New York State Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111 (2022).
6. In other cases involving Second Amendment challenges to gun regulations, the Court has alluded to southern states' selective disarmament of Black Americans after the Civil War as a reason to treat gun control laws with suspicion. *McDonald v. City of Chicago*, 561 U.S. 724 (2010). At the same time, the Court has made clear that the Second Amendment right to bear arms does not extend to persons with felony convictions. Under existing constitutional doctrine, a state could not directly prohibit gun

possession only among a given racial group, but a felon-in-possession ban is acceptable even if it disproportionately impacts persons of color, so long as there is no proof of an intent to discriminate by race.

Check Your Understanding (7-3)

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26 U.S.C. § 5861 . Prohibited acts

It shall be unlawful for any person—

… d) to receive or possess a firearm which is not registered to him in the National Firearms and Transfer Record….

26 U.S.C. § 5845. Definitions

(a) Firearm.—The term "firearm" means (1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; (3) a rifle having a barrel or barrels of less than 16 inches in length; (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (5) any other weapon, as defined in subsection (e); (6) a machinegun …

(b) Machinegun.–The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

Harold E. STAPLES, III, Petitioner

v.

UNITED STATES

Supreme Court of the United States
511 U.S. 600

Decided May 23, 1994

Justice THOMAS delivered the opinion of the Court.

…

I

The National Firearms Act (Act) imposes strict registration requirements on statutorily defined "firearms." The Act includes within the term "firearm" a machinegun, and further defines a machinegun as "any weapon which shoots, … or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." Thus, any fully automatic weapon is a "firearm" within the meaning of the Act.[1] Under the Act, all firearms must be registered in the National Firearms Registration and Transfer Record maintained by the Secretary of the Treasury. Section 5861(d) makes it a crime, punishable by up to 10 years in prison, for any person to possess a firearm that is not properly registered.

Upon executing a search warrant at petitioner's home, local police and agents of the Bureau of Alcohol, Tobacco and Firearms (BATF) recovered, among other things, an AR–15 rifle. The AR–15 is the civilian version of the military's M–16 rifle, and is, unless modified, a semiautomatic weapon. The M–16, in contrast, is a selective fire rifle that allows the operator, by rotating a selector switch, to choose semiautomatic or automatic fire. Many M–16 parts are interchangeable with those in the AR–15 and can be used to convert the AR–15 into an automatic weapon. No doubt to inhibit such conversions, the AR–15 is manufactured with a metal stop on its receiver that will prevent an M–16 selector switch, if installed, from rotating to the fully automatic position. The metal stop on petitioner's rifle, however, had been filed away, and the rifle had been assembled with an M–16 selector switch and several other M–16 internal parts, including a hammer, disconnector, and trigger. Suspecting that the AR–15 had been modified to

be capable of fully automatic fire, BATF agents seized the weapon. Petitioner subsequently was indicted for unlawful possession of an unregistered machinegun in violation of § 5861(d).

At trial, BATF agents testified that when the AR–15 was tested, it fired more than one shot with a single pull of the trigger. It was undisputed that the weapon was not registered… Petitioner testified that the rifle had never fired automatically when it was in his possession. He insisted that the AR–15 had operated only semiautomatically, and even then imperfectly, often requiring manual ejection of the spent casing and chambering of the next round. According to petitioner, his alleged ignorance of any automatic firing capability should have shielded him from criminal liability for his failure to register the weapon. He requested the District Court to instruct the jury that, to establish a violation of § 5861(d), the Government must prove beyond a reasonable doubt that the defendant "knew that the gun would fire fully automatically."

The District Court rejected petitioner's proposed instruction and instead charged the jury as follows:

"The Government need not prove the defendant knows he's dealing with a weapon possessing every last characteristic [which subjects it] to the regulation. It would be enough to prove he knows that he is dealing with a dangerous device of a type as would alert one to the likelihood of regulation." Tr. 465.

Petitioner was convicted and sentenced to five years' probation and a $5,000 fine….

II

Whether or not § 5861(d) requires proof that a defendant knew of the characteristics of his weapon that made it a "firearm" under the Act is a question of statutory construction. As we observed in *Liparota v. United States* (1985), "[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." Thus, we have long recognized that determining the mental state required for commission of a federal crime requires "construction of the statute and … inference of the intent of Congress." *United States v. Balint* (1922).

The language of the statute, the starting place in our inquiry, provides little explicit guidance in this case. Section 5861(d) is silent concerning the *mens rea* required for a violation. It states simply that "[i]t shall be unlawful for any person … to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record." Nevertheless, silence on this point by itself does not necessarily suggest that Congress intended to dispense with a conventional *mens rea* element, which would require that the defendant know the facts that make his conduct illegal. See *Balint*, *supra*. On the contrary, we must construe the statute in light of the background rules of the common law, in which the requirement of some *mens rea* for a crime is firmly embedded. As we have observed, "[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo–American criminal jurisprudence." …[W]e have suggested that some indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime.

According to the Government, however, the nature and purpose of the Act suggest that the presumption favoring *mens rea* does not apply to this case. The Government argues that Congress intended the Act to regulate and restrict the circulation of dangerous weapons. Consequently, in the Government's view, this case fits in a line of precedent concerning what we have termed "public welfare" or "regulatory" offenses, in which we have understood Congress to impose a form of strict criminal liability through statutes that do not require the defendant to know the facts that make his conduct illegal. In construing such statutes, we have inferred from silence that Congress did not intend to require proof of *mens rea* to establish an offense.

For example, in *Balint*, we concluded that the Narcotic Act of 1914, which was intended in part to minimize the spread of addictive drugs by criminalizing undocumented sales of certain narcotics, required proof only that the defendant knew that he was selling drugs, not that he knew the specific items he had sold were "narcotics" within the ambit of the statute. … As we [later] explained…, *Balint* dealt with "a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing."

Such public welfare offenses have been created by Congress, and recognized by this Court, in "limited circumstances." Typically, our cases recognizing such offenses involve statutes that regulate potentially harmful or injurious items. In such situations, we have reasoned that as long as a defendant knows that he is dealing with a dangerous device of a character that places him "in responsible relation to a public danger," he should be alerted to the probability of strict regulation, and we have assumed that in such cases Congress intended to place the burden on the defendant to "ascertain at his peril whether [his conduct] comes within the inhibition of the statute." Thus, we essentially have relied on the nature of the statute and the particular character of the items regulated to

determine whether congressional silence concerning the mental element of the offense should be interpreted as dispensing with conventional *mens rea* requirements.

The Government argues that … all guns, whether or not they are statutory "firearms," are dangerous devices that put gun owners on notice that they must determine at their hazard whether their weapons come within the scope of the Act. On this understanding, the District Court's instruction in this case was correct, because a conviction can rest simply on proof that a defendant knew he possessed a "firearm" in the ordinary sense of the term.

The Government seeks support for its position from our decision in *United States v. Freed* (1971), which involved a prosecution for possession of unregistered grenades under § 5861(d). [A grenade is a type of "firearm" under the Act.] The defendant knew that the items in his possession were grenades, and we concluded that § 5861(d) did not require the Government to prove the defendant also knew that the grenades were unregistered. …[W]e suggested that the Act "is a regulatory measure in the interest of the public safety, which may well be premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act." Grenades, we explained, "are highly dangerous offensive weapons, no less dangerous than the narcotics involved in *United States v. Balint.*" But that reasoning provides little support for dispensing with *mens rea* in this case.

As the Government concedes, *Freed* did not address the issue presented here. In *Freed*, we decided only that § 5861(d) does not require proof of knowledge that a firearm is *unregistered.* The question presented by a defendant who possesses a weapon that is a "firearm" for purposes of the Act, but who knows only that he has a "firearm" in the general sense of the term, was not raised or considered. And our determination that a defendant need not know that his weapon is unregistered suggests no conclusion concerning whether § 5861(d) requires the defendant to know of the features that make his weapon a statutory "firearm"; different elements of the same offense can require different mental states. Moreover, our analysis in *Freed* likening the Act to the public welfare statute in *Balint* rested entirely on the assumption that the defendant *knew* that he was dealing with hand grenades—that is, that he knew he possessed a particularly dangerous type of weapon (one within the statutory definition of a "firearm"), possession of which was not entirely "innocent" in and of itself. The predicate for that analysis is eliminated when, as in this case, the very question to be decided is *whether* the defendant must know of the particular characteristics that make his weapon a statutory firearm.

…In glossing over the distinction between grenades and guns, the Government ignores the particular care we have taken to avoid construing a statute to dispense with *mens rea* where doing so would "criminalize a broad range of apparently innocent conduct." In *Liparota*, we considered a statute that made unlawful the unauthorized acquisition or possession of food stamps. We determined that the statute required proof that the defendant knew his possession of food stamps was unauthorized, largely because dispensing with such a *mens rea* requirement would have resulted in reading the statute to outlaw a number of apparently innocent acts. Our conclusion that the statute should not be treated as defining a public welfare offense rested on the commonsense distinction that a "food stamp can hardly be compared to a hand grenade."

Neither, in our view, can all guns be compared to hand grenades. Although the contrast is certainly not as stark as that presented in *Liparota*, the fact remains that there is a long tradition of widespread lawful gun ownership by private individuals in this country. Such a tradition did not apply to the possession of hand grenades in *Freed* or to the selling of dangerous drugs that we considered in *Balint.* In fact, in *Freed* we construed § 5861(d) under the assumption that "one would hardly be surprised to learn that possession of hand grenades is not an innocent act." Here, the Government essentially suggests that we should interpret the section under the altogether different assumption that "one would hardly be surprised to learn that owning a gun is not an innocent act." That proposition is simply not supported by common experience. Guns in general are not "deleterious devices or products or obnoxious waste materials," that put their owners on notice that they stand "in responsible relation to a public danger."

The Government protests that guns, unlike food stamps, but like grenades and narcotics, are potentially harmful devices…. But that an item is "dangerous," in some general sense, does not necessarily suggest, as the Government seems to assume, that it is not also entirely innocent. Even dangerous items can, in some cases, be so commonplace and generally available that we would not consider them to alert individuals to the likelihood of strict regulation. As suggested above, despite their potential for harm, guns generally can be owned in perfect innocence. Of course, we might surely classify certain categories of guns—no doubt including the machineguns, sawed-off shotguns, and artillery pieces that Congress has subjected to regulation—as items the ownership of which would have the same quasi-suspect character we attributed to owning hand grenades…. But precisely because guns falling outside those categories traditionally have been widely accepted as lawful possessions, their destructive potential, while perhaps even greater than that of some items we would classify along with narcotics and hand grenades, cannot be said to put gun owners

sufficiently on notice of the likelihood of regulation to justify interpreting § 5861(d) as not requiring proof of knowledge of a weapon's characteristics.

On a slightly different tack, the Government suggests that guns are subject to an array of regulations at the federal, state, and local levels that put gun owners on notice that they must determine the characteristics of their weapons and comply with all legal requirements. But regulation in itself is not sufficient to place gun ownership in the category of the sale of narcotics in *Balint.* The food stamps at issue in *Liparota* were subject to comprehensive regulations, yet we did not understand the statute there to dispense with a *mens rea* requirement. Moreover, despite the overlay of legal restrictions on gun ownership, we question whether regulations on guns are sufficiently intrusive that they impinge upon the common experience that owning a gun is usually licit and blameless conduct. Roughly 50 percent of American homes contain at least one firearm of some sort, and in the vast majority of States, buying a shotgun or rifle is a simple transaction that would not alert a person to regulation any more than would buying a car.

If we were to accept as a general rule the Government's suggestion that dangerous and regulated items place their owners under an obligation to inquire at their peril into compliance with regulations, we would undoubtedly reach some untoward results. Automobiles, for example, might also be termed "dangerous" devices and are highly regulated at both the state and federal levels. Congress might see fit to criminalize the violation of certain regulations concerning automobiles, and thus might make it a crime to operate a vehicle without a properly functioning emission control system. But we probably would hesitate to conclude on the basis of silence that Congress intended a prison term to apply to a car owner whose vehicle's emissions levels, wholly unbeknownst to him, began to exceed legal limits between regular inspection dates.

Here, there can be little doubt that, as in *Liparota*, the Government's construction of the statute potentially would impose criminal sanctions on a class of persons whose mental state—ignorance of the characteristics of weapons in their possession—makes their actions entirely innocent. …[I]n the Government's view, any person who has purchased what he believes to be a semiautomatic rifle or handgun, or who simply has inherited a gun from a relative and left it untouched in an attic or basement, can be subject to imprisonment, despite absolute ignorance of the gun's firing capabilities, if the gun turns out to be an automatic.

We concur in the Fifth Circuit's conclusion on this point: "It is unthinkable to us that Congress intended to subject such law-abiding, well-intentioned citizens to a possible ten-year term of imprisonment if … what they genuinely and reasonably believed was a conventional semi-automatic [weapon] turns out to have worn down into or been secretly modified to be a fully automatic weapon." As we noted in *Morissette*, the "purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction." We are reluctant to impute that purpose to Congress where, as here, it would mean easing the path to convicting persons whose conduct would not even alert them to the probability of strict regulation….

The potentially harsh penalty attached to violation of § 5861(d)—up to 10 years' imprisonment—confirms our reading of the Act. Historically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with *mens rea*. Certainly, the cases that first defined the concept of the public welfare offense almost uniformly involved statutes that provided for only light penalties such as fines or short jail sentences, not imprisonment in the state penitentiary. …

Our characterization of the public welfare offense … hardly seems apt … for a crime that is a felony, as is violation of § 5861(d). After all, "felony" is, as we noted in distinguishing certain common-law crimes from public welfare offenses, "as bad a word as you can give to man or thing." Close adherence to the early cases described above might suggest that punishing a violation as a felony is simply incompatible with the theory of the public welfare offense. In this view, absent a clear statement from Congress that *mens rea* is not required, we should not apply the public welfare offense rationale to interpret any statute defining a felony offense as dispensing with *mens rea.*

We need not adopt such a definitive rule of construction to decide this case, however. Instead, we note only that where, as here, dispensing with *mens rea* would require the defendant to have knowledge only of traditionally lawful conduct, a severe penalty is a further factor tending to suggest that Congress did not intend to eliminate a *mens rea* requirement. In such a case, the usual presumption that a defendant must know the facts that make his conduct illegal should apply.

III

…We emphasize that our holding is a narrow one. As in our prior cases, our reasoning depends upon a commonsense evaluation of the nature of the particular device or substance Congress has subjected to regulation and the expectations that individuals may

legitimately have in dealing with the regulated items…. As we noted in *Morissette:* "Neither this Court nor, so far as we are aware, any other has undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not." We attempt no definition here, either. We note only that our holding depends critically on our view that if Congress had intended to make outlaws of gun owners who were wholly ignorant of the offending characteristics of their weapons, and to subject them to lengthy prison terms, it would have spoken more clearly to that effect.

Justice GINSBURG, with whom Justice O'CONNOR joins, concurring in the judgment.

…The question before us is not *whether* knowledge of possession is required, but what level of knowledge suffices: (1) knowledge simply of possession of the object; (2) knowledge, in addition, that the object is a dangerous weapon; (3) knowledge, beyond dangerousness, of the characteristics that render the object subject to regulation, for example, awareness that the weapon is a machinegun.

…The Nation's legislators chose to place under a registration requirement only a very limited class of firearms, those they considered especially dangerous…. Only the third reading, then, suits the purpose of the *mens rea* requirement—to shield people against punishment for apparently innocent activity….

Justice STEVENS, with whom Justice BLACKMUN joins, dissenting.

To avoid a slight possibility of injustice to unsophisticated owners of machineguns and sawed-off shotguns, the Court has substituted its views of sound policy for the judgment Congress made when it enacted the National Firearms Act (or Act). Because the Court's addition to the text of 26 U.S.C. § 5861(d) is foreclosed by both the statute and our precedent, I respectfully dissent.

The Court is preoccupied with guns that "generally can be owned in perfect innocence." This case, however, involves a semiautomatic weapon that was readily convertible into a machinegun—a weapon that the jury found to be "a dangerous device of a type as would alert one to the likelihood of regulation." These are not guns "of some sort" that can be found in almost "50 percent of American homes." [Only about 15 percent of all the guns in the United States are semiautomatic.] They are particularly dangerous—indeed, a substantial percentage of the unregistered machineguns now in circulation are converted semiautomatic weapons.

The question presented is whether the National Firearms Act imposed on the Government the burden of proving beyond a reasonable doubt not only that the defendant knew he possessed a dangerous device sufficient to alert him to regulation, but also that he knew it had all the characteristics of a "firearm" as defined in the statute….

The National Firearms Act unquestionably is a public welfare statute. *United States v. Freed* (1971) (holding that this statute "is a regulatory measure in the interest of the public safety"). Congress fashioned a legislative scheme to regulate the commerce and possession of certain types of dangerous devices, including specific kinds of weapons, to protect the health and welfare of the citizenry. To enforce this scheme, Congress created criminal penalties for certain acts and omissions. The text of some of these offenses—including the one at issue here—contains no knowledge requirement.

…[E]ven assuming that the Court is correct that the mere possession of an ordinary rifle or pistol does not entail sufficient danger to alert one to the possibility of regulation, that conclusion does not resolve this case. Petitioner knowingly possessed a semiautomatic weapon that was readily convertible into a machinegun. The "character and nature" of such a weapon is sufficiently hazardous to place the possessor on notice of the possibility of regulation. No significant difference exists between imposing upon the possessor a duty to determine whether such a weapon is registered, *Freed*, and imposing a duty to determine whether that weapon has been converted into a machinegun. …

The enforcement of public welfare offenses always entails some possibility of injustice. Congress nevertheless has repeatedly decided that an overriding public interest in health or safety may outweigh that risk when a person is dealing with products that are sufficiently dangerous or deleterious to make it reasonable to presume that he either knows, or should know, whether those products conform to special regulatory requirements. The dangerous character of the product is reasonably presumed to provide sufficient notice of the probability of regulation to justify strict enforcement against those who are merely guilty of negligent, rather than willful, misconduct. …

This case presents no dispute about the dangerous character of machineguns and sawed-off shotguns. Anyone in possession of such a weapon is "standing in responsible relation to a public danger." In the National Firearms Act, Congress determined that the serious threat to health and safety posed by the private ownership of such firearms warranted the imposition of a duty on the

owners of dangerous weapons to determine whether their possession is lawful. Semiautomatic weapons that are readily convertible into machineguns are sufficiently dangerous to alert persons who knowingly possess them to the probability of stringent public regulation. The jury's finding that petitioner knowingly possessed "a dangerous device of a type as would alert one to the likelihood of regulation" adequately supports the conviction.

Accordingly, I would affirm the judgment of the Court of Appeals.

Notes and questions on *Staples*

1. The *Staples* Court starts its analysis with a reiteration of a preference for mens rea requirements over strict liability: the Court says that the fact that the statute does not specifically mention a mens rea standard should not be taken to indicate that Congress intended to dispense with a mens rea requirement. But did the government's interpretation of the statute, or the interpretation used by the trial court, dispense with a mens rea requirement? In other words, did the trial court treat this federal offense as a "strict liability" offense?
2. To answer the previous question, it may help to think in more detail about this one: what counts as a "strict liability" offense? Think about the mens rea question in *Staples* in relation to the mens rea issues discussed in the drug cases above. Drug possession statutes typically require "knowing possession," but what specific knowledge is required? As you have seen, courts typically find the mental state aspect of drug possession to be satisfied if the defendant has knowledge of possession of a controlled substance; the defendant need not know which particular controlled substance he or she possesses. Thus drug possession is not technically a strict liability offense, though it is sometimes characterized as such because the requisite knowledge (knowledge of possession of a controlled substance) is usually inferred from the circumstances of possession.

   Now consider Mr. Staples. He knew that he had a weapon. On his account, he did not know that the specific type of weapon – he did not know that it was an automatic weapon rather than a semiautomatic weapon. If the federal statute required knowledge that one possesses a weapon, but not knowledge of the specific type of weapon, would it be correct to call it a "strict liability offense"? In many situations, it may be more precise to speak of strict liability elements rather than strict liability offenses. One element of the federal crime is the fact that the gun involved is an automatic weapon. If this element is a strict liability element, then the defendant need not be aware of this fact in order to commit the offense. Even then, the overall offense may still involve some mens rea requirement, such as awareness that one possesses a gun of some type. A broader lesson here is that you should do mens rea analysis with respect to individual elements. For each act or attendant circumstance that is an element of the offense, ask, is there a given mental state that the defendant must hold with regard to this particular element?
3. How does the Supreme Court distinguish *United States v. Freed* ? What is the critical distinction between guns and grenades, in the Court's analysis?
4. The *Staples* majority opinion says that "guns generally can be owned in perfect innocence," and also that "owning a gun is usually licit and blameless conduct." Of course, whether one may own a gun (or more narrowly, a "firearm") innocently or blamelessly is within Congress's power to decide, if Congress has the power to criminalize gun possession or firearm possession. When *Staples* was decided in 1994, the prevailing interpretation of the Second Amendment was that it protected a right to bear arms as part of a state militia, but not an individual right to bear arms. Fourteen years after *Staples*, the Court declared for the first time that the Second Amendment protected an individual right to bear arms. See *District of Columba v. Heller*, 554 U.S. 570 (2008). Justice Thomas, the author of the majority opinion in *Staples*, was one member of the five-Justice majority in *Heller*. To what degree does the analysis in Staples depend on an underlying assumption that gun ownership is constitutionally protected conduct?
5. Harold E. Staples III, the defendant in *Staples*, appeared often in the local news in Oklahoma – and in the courts. He served as "the key prosecution witness" in a 1989 federal prosecution of a man accused of illegal wiretapping. He gained further local notoriety when he allowed the Ku Klux Klan to hold rallies on the land where he lived, telling a local newspaper that he wouldn't send his children away for the rally, and stating, "These are absolutely nice people… [T]hey won't hear anything offensive coming from these people." Almost twenty years after the Supreme Court issued the decision you've just read, Staples was charged again, this time with conspiracy to distribute methamphetamine. He died while those charges were still pending. See David Harper, *Newsmaker in Local Courtrooms Dies*, Tulsa World, June 12, 2013, page A14.

Check Your Understanding (7-4)

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Guns, Drugs, and Mass Incarceration

As noted in the introduction to this chapter, experts have debated the role of drug and gun offenses in producing mass incarceration. Of course, to determine what has caused mass incarceration, we need to know what that term means. Sometimes "mass incarceration" is used to describe the very high incarceration rates that have existed in the United States for several decades now. In other instances, "mass incarceration" or a related term such as "hyper-incarceration" is used to signify the racial impact of more severe sentences. Whether we are thinking of the overall increase in American prisoners or the racial patterns in that increase, penalties for drug and gun offenses seem to be an important part of the explanation. Drug and gun crimes offer an opportunity to reflect on the interaction of criminalization, enforcement, and adjudication decisions, and to add to this picture a closer look at the importance of sentencing decisions.

After criminalization, enforcement, and adjudication decisions have been made – for example, marijuana possession has been defined as criminal, police have identified and arrested a particular person for this offense, and the person has pled guilty – there often remains the question of punishment: how (much) should the defendant be punished? Depending on the jurisdiction, the appropriate sentence could be a question within the discretion of the trial court, or it could be defined by "sentencing guidelines" or by statute. When a statute sets a required sentence and does not leave judges the authority to impose a different sentence, the sentence is said to be "mandatory." Some of the most severe "mandatory minimum" sentences arise in the context of drug offenses, gun offenses, or the potent combination of drugs and guns. The next case involves a challenge to one of the most significant federal "mandatory minimums."

18 U.S.C. § 924(c) [as of 1994; later amended]

(1)(A) Whoever, during and in relation to any crime of violence or drug trafficking crime … for which he may be prosecuted in a court of the United States, uses or carries a firearm… shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, [be sentenced to imprisonment for five years]. …

(1)(C) In the case of a second or subsequent conviction under this subsection, the person shall … be sentenced to a term of imprisonment of not less than 25 years…

UNITED STATES of America, Plaintiff

v.

Weldon ANGELOS, Defendant

United States District Court, D. Utah, Central Division
345 F. Supp. 2d 1227

Nov. 16, 2004

CASSELL, District Judge.

Defendant Weldon Angelos stands now before the court for sentencing. He is a twenty-four–year-old first offender who is a successful music executive with two young children. Because he was convicted of dealing marijuana and related offenses, both the government and the defense agree that Mr. Angelos should serve about six to eight years in prison. But there are three additional firearms offenses for which the court must also impose sentence. Two of those offenses occurred when Mr. Angelos carried a handgun to two $350 marijuana deals; the third when police found several additional handguns at his home when they executed a search warrant. For these three acts of possessing (not using or even displaying) these guns, the government insists that Mr. Angelos should essentially spend the rest of his life in prison. Specifically, the government urges the court to sentence Mr. Angelos to a prison term of no less than 61 ½ years—six years and a half (or more) for drug dealing followed by 55 years for three counts of possessing a firearm in connection with a drug offense. In support of its position, the government relies on a statute—18 U.S.C. § 924(c)—which requires the court to impose a sentence of five years in prison the first time a drug dealer carries a gun and twenty-five years for each subsequent time. Under § 924(c), the three counts produce 55 years of additional punishment for carrying a firearm.

The court believes that to sentence Mr. Angelos to prison for the rest of his life is unjust, cruel, and even irrational. Adding 55 years on top of a sentence for drug dealing is far beyond the roughly two-year sentence that the congressionally-created expert agency (the United States Sentencing Commission) believes is appropriate for possessing firearms under the same circumstances. The 55–year sentence substantially exceeds what the jury recommended to the court. It is also far in excess of the sentence imposed for such serious crimes as aircraft hijacking, second degree murder, espionage, kidnapping, aggravated assault, and rape. It exceeds what recidivist criminals will likely serve under the federal "three strikes" provision. At the same time, however, this 55–year additional sentence is decreed by § 924(c).

The court's role in evaluating § 924(c) is quite limited. The court can set aside the statute only if it is irrational punishment without any conceivable justification or is so excessive as to constitute cruel and unusual punishment in violation of the Eighth Amendment. After careful deliberation, the court reluctantly concludes that it has no choice but to impose the 55-year sentence. While the sentence appears to be cruel, unjust, and irrational, in our system of separated powers Congress makes the final decisions as to appropriate criminal penalties. Under the controlling case law, the court must find either that a statute has no conceivable justification or is so grossly disproportionate to the crime that no reasonable argument can be made its behalf. If the court is to fairly apply these precedents in this case, it must reject Mr. Angelos' constitutional challenges. Accordingly, the court sentences Mr. Angelos to a prison term of 55 years and one day, the minimum that the law allows.

To correct what appears to be an unjust sentence, the court also calls on the President—in whom our Constitution reposes the power to correct unduly harsh sentences—to commute Mr. Angelos' sentence to something that is more in accord with just and rational punishment. In particular, the court recommends that the President commute Mr. Angelos' sentence to no more than 18 years in prison, the average sentence that the jurors in this case recommended. In addition, the court also calls on Congress to modify § 924(c) so that its harsh provisions for 25–year multiple sentences apply only to true recidivist drug offenders—those who have been sent to prison and failed to learn their lesson. Because of the complexity of these conclusions, the court will set out their basis at some length.

I. Factual Background

Weldon Angelos is twenty-four years old. He was born on July 16, 1979, in Salt Lake City, Utah. He was raised in the Salt Lake City area by his father … with only minimal contact with his mother. Mr. Angelos has two young children … six–year-old Anthony and five-year-old Jessie. Before his arrest Mr. Angelos had achieved some success in the music industry. He started Extravagant Records, a label that produces rap and hip hop music. He had worked with prominent hip hop musicians, including Snoop Dogg, on the "beats" to various songs and was preparing to record his own album.

The critical events in this case are three "controlled buys" of marijuana by a government informant from Mr. Angelos. On May 10, 2002, Mr. Angelos met with the informant, Ronnie Lazalde, and arranged a sale of marijuana. On May 21, 2002, Mr. Angelos completed a sale of [eight ounces] of marijuana to Lazalde for $350. Lazalde observed Mr. Angelos' Glock pistol by the center console of his car. This drug deal formed the basis for the first § 924(c) count.

During a second controlled buy with Lazalde, on June 4, 2002, Mr. Angelos lifted his pant leg to show him the Glock in an ankle holster. Lazalde again purchased approximately eight ounces of marijuana for $350. This deal formed the basis for the second § 924(c) count.

A third controlled buy occurred on June 18, 2002, with Mr. Angelos again selling Lazalde eight ounces of marijuana for $350. There was no direct evidence of a gun at this transaction….

On November 15, 2003, police officers arrested Mr. Angelos at his apartment pursuant to a warrant. Mr. Angelos consented to a search. The search revealed a briefcase which contained $18,040, a handgun, and two opiate suckers. [Police also found] approximately three pounds of marijuana [and] two other guns in a locked safe…. Searches at other locations, including the apartment of Mr. Angelos' girlfriend, turned up several duffle bags with marijuana residue, two more guns, and additional cash.

The original indictment issued against Mr. Angelos contained three counts of distribution of marijuana, one § 924(c) count for the firearm at the first controlled buy, and two other lesser charges. Plea negotiations began between the government and Mr. Angelos. On January 20, 2003, the government told Mr. Angelos, through counsel, that if he pled guilty to the drug distribution count and the § 924(c) count, the government would agree to drop all other charges, not supersede the indictment with additional counts, and recommend a prison sentence of 15 years. The government made clear to Mr. Angelos that if he rejected the offer, the government

would obtain a new superseding indictment adding several § 924(c) counts that could lead to Mr. Angelos facing more than 100 years of mandatory prison time. In short, Mr. Angelos faced the choice of accepting 15 years in prison or insisting on a trial by jury at the risk of a life sentence. Ultimately, Mr. Angelos rejected the offer and decided to go to trial. The government then obtained two superseding indictments, eventually charging twenty total counts, including five § 924(c) counts which alone carried a potential minimum mandatory sentence of 105 years. The five § 924(c) counts consisted of two counts for the Glock seen at the two controlled buys, one count for three handguns found at his home, and two more counts for the two guns found at the home of Mr. Angelos' girlfriend.

Perhaps recognizing the gravity of the situation, Mr. Angelos tried to reopen plea negotiations…. The government refused his offer, and the case proceeded to trial. The jury found Mr. Angelos guilty on sixteen counts, including three § 924(c) counts: two counts for the Glock seen at the two controlled buys and a third count for the … handguns at Mr. Angelos' home. The jury found him not guilty on three counts—including the two additional § 924(c) counts….

Mr. Angelos' sentence is presumptively governed by the Federal Sentencing Guidelines…. The prescribed Guidelines' sentence for Mr. Angelos for everything but the § 924(c) counts is 78 to 97 months. After the Guideline sentence is imposed, however, the court must then add the § 924(c) counts. Section 924(c) prescribes a five-year mandatory minimum for a first conviction, and 25 years for each subsequent conviction…. In addition, § 924(c) mandates that these 55 years run consecutively to any other time imposed. As a consequence, the minimum sentence that the court can impose on Mr. Angelos is 61 ½ years—6 ½ years (78 months) for the 13 counts under the Guidelines and 55 consecutive years for the three § 924 convictions. The federal system does not provide the possibility of parole, but instead provides only a modest "good behavior" credit of approximately 15 percent of the sentence. Assuming good behavior, Mr. Angelos' sentence will be reduced to "only" 55 years, meaning he could be released when he is 78 years old.

Mr. Angelos [argues] that § 924(c) is unconstitutional as applied to him, either because the additional 55–year sentence is irrational punishment that violates equal protection principles or is cruel and unusual punishment that violates the Cruel and Unusual Punishment Clause….

II. Legislative History and Judicial Interpretation of § 924(c)

Before turning to Mr. Angelos' specific challenges to § 924(c), it is helpful to understand the history of the statute. [The original statute] was proposed and enacted in a single day as an amendment to the Gun Control Act of 1968 enacted following the assassinations of Martin Luther King, Jr. and Robert F. Kennedy. Congress intended the Act to address the "increasing rate of crime and lawlessness and the growing use of firearms in violent crime." Because § 924(c) was offered as a floor amendment, there are no congressional hearings or committee reports regarding its original purpose….

As originally enacted, § 924(c) gave judges considerable discretion in sentencing and was not nearly as harsh as it has become. … In the 36 years since its passage, the penalties attached to § 924(c) have been made continually harsher either by judicial interpretation or congressional action.… [I]f the original version of § 924(c) governed Mr. Angelos' sentencing, the court could impose three separate one-year enhancements, adding a total of three years to his sentence. However, after 36 years of judicial interpretation and congressional modifications, the court is now left with a version of § 924(c) that requires a sentence of 55 years on top of a tough Guidelines sentence for drug dealing.

III. Mr. Angelos ' Equal Protection Challenge to the Statute

Mr. Angelos first contends that 18 U.S.C. § 924(c) makes arbitrary classifications and irrationally treats him far more harshly than criminals guilty of other much more serious crimes. He raises this claim as an equal protection challenge. …Under equal protection principles, the court's review is quite limited. …[U]nless a law infringes upon a fundamental right or classifies along suspect lines such as race, the court's review is limited to determining whether there is a rational basis for the law.

… Before turning to the merits … it is important to understand the length of the sentence that the government is asking the court to impose. [Because Angelos is 24 and] [t]he average life expectancy for males in the United States is about 74 years of age[,] … if the court imposes the sentence sought by the government, Mr. Angelos will effectively receive a sentence of life.

… [Section] 924(c) imposes punishment in this case far beyond that called for by the congressionally-created expert agency on sentencing, by the jurors who heard the evidence, by the Utah state system, or by any of the other state systems. If the court is to take seriously the directive that it should impose "just punishment" with its sentences, then it should impose sentences that are

viewed as appropriate by the citizens of this state and of this country. The court concludes that placing Mr. Angelos in prison for 61 ½ years is not "just punishment" for his crimes. This factor suggests the irrationality of § 924(c).

… Mr. Angelos [also] contends that his § 924(c) sentence is not only unjust but also irrational when compared to the punishment imposed for other more serious federal crimes. … In evaluating [these claims], the court starts from the premise that Mr. Angelos committed serious crimes. Trafficking in illegal drugs runs the risk of ruining lives through addiction and the violence that the drug trade spawns. As the government properly argued, when a defendant engages in a drug-trafficking operation and "carries and possesses firearms to aid in that venture, as was the case here, the actual threat of violence always exists, even it if does not actually occur."[83] But do any of these general rationales provide a rational basis for punishing the *potential* violence which § 924(c) is meant to deter more harshly than *actual* violence that harms a victim in its wake? In other words, is it rational to punish a person who *might* shoot someone with a gun he carried far more harshly than the person who actually *does* shoot or harm someone?

As applied in this case, the classifications created by § 924(c) are simply irrational. Section 924(c) imposes on Mr. Angelos a sentence 55 years or 660 months. Added to the minimum 78–month Guidelines sentence for a total sentence of 738 months, Mr. Angelos is facing a prison term which more than doubles the sentence of, for example, an aircraft hijacker (293 months), a terrorist who detonates a bomb in a public place (235 months), a racist who attacks a minority with the intent to kill and inflicts permanent or life-threatening injuries (210 months), a second-degree murderer, or a rapist….

… Amazingly, Mr. Angelos' sentence under § 924(c) is still far more severe than criminals who committed, for example, three aircraft hijackings, three second-degree murders, three kidnappings, or three rapes…. Mr. Angelos will receive a longer sentence than any three-time criminal, with the sole exception of a marijuana dealer who shoots three people. The irrationality of these differences is manifest and can be objectively proven. In the Eighth Amendment context, the Supreme Court has instructed that "[c]omparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender." In contrast to the serious violent felonies listed [above], the crimes committed by Mr. Angelos had the *potential* for violence, but no *actual* violence occurred. This is not to say that trafficking in illegal drugs is somehow a non-violent offense. Indeed, in *Harmelin*, Justice Kennedy quite properly called such an assertion "false to the point of absurdity." *Harmelin* involved the potential distribution of approximately 32,500 doses of cocaine, a highly addictive drug that was linked to many of the homicides in Detroit. Justice Kennedy's concurrence equated the crime in *Harmelin* with "felony murder without specific intent to kill."

In this case, however, Mr. Angelos will be completely punished for his marijuana trafficking by the 78–97 month Guidelines sentence he receives… Section 924(c) punishes Angelos more harshly for crimes that threaten potential violence than for crimes that conclude in actual violence to victims (e.g., aircraft hijacking, second-degree murder, racist assaults, kidnapping, and rape). This factor, therefore, also suggests the irrationality of § 924(c).

Mr. Angelos also argues that § 924(c) is irrational in failing to distinguish between the recidivist and the first-time offender. Section 924(c) increases penalties for a "second or subsequent conviction under this subsection." This language can be interpreted in two different ways. One construction would be that an offender who is convicted of a § 924(c) violation, serves his time, and then commits a subsequent violation is subject to an enhanced penalty. This was the construction that the Tenth Circuit (among other courts) originally gave to the statute.

…. In 1993 in *Deal v. United States*, the Supreme Court adopted [a more expansive] construction, [allowing] the "second or subsequent" language in § 924(c) to apply … to [a] defendant who is convicted of multiple § 924(c) counts in the same proceeding stemming from a single indictment. The Court concluded (over the dissents of three Justices) that the unambiguous phrase "subsequent conviction" in the statute permitted no distinction between the time at which the convictions took place. In addition, all time imposed for each § 924(c) count must run consecutively to any other sentence. This is what is known as "count stacking."

When multiple § 924(c) counts are stacked on top of each other, they produce lengthy sentences that fail to distinguish between first offenders (like Mr. Angelos) and recidivist offenders. … Other true recidivist statutes do not operate this way. Instead, they graduate punishment (albeit only roughly) between first offenders and subsequent offenders….

For the reasons outlined in the previous section, § 924(c) imposes unjust punishment and creates irrational classifications between different offenses and different offenders. To some, this may seem like a law professor's argument—one that may have some validity in the classroom but little salience in the real world. After all, the only issue in this case is the extent of punishment for a man justly convicted of serious drug trafficking offenses. So what, some may say, if he spends more years in prison than might be theoretically justified? It is common wisdom that "if you can't do the time, don't do the crime."

The problem with this simplistic position is that it overlooks other interests that are inevitably involved in the imposition of a criminal sentence. For example, crime victims expect that the penalties the court imposes will fairly reflect the harms that they have suffered. When the sentence for actual violence inflicted on a victim is dwarfed by a sentence for carrying guns to several drug deals, the implicit message to victims is that their pain and suffering counts for less than some abstract "war on drugs."

… Another reason for concern is that the unjust penalties imposed by § 924(c) can be expected to attract public notice…. Perhaps in the short term, no ill effects will come from the difference between public expectations and actual sentences. But in the longer term, the federal criminal justice system will suffer. Most seriously, jurors may stop voting to convict drug dealers in federal criminal prosecutions if they are aware that unjust punishment may follow. It only takes a single juror who is worried about unjust sentencing to "hang" a jury and prevent a conviction. …

Justifications for § 924(c)

Given these many problems with § 924(c) as applied to this case—its imposition of unjust punishment, its irrational classifications between offenses and offenders, and its demeaning of victims of actual criminal violence—what can be said on behalf of the statute? The Sentencing Commission has catalogued the six rationales that are said to undergird mandatory sentencing schemes….

(1) Assuring "just" (i.e. appropriately severe) punishment, (2) elimination of sentence disparities, (3) judicial economies resulting from increased pressure on defendants to plead guilty, (4) stronger inducements for knowledgeable offenders to cooperate in the investigation of others, (5) more effective deterrence, and (6) more effective incapacitation of the serious offender.

…[In this case, the government has not relied on the first or second rationale identified above.] The government has also not advanced the third rationale—judicial economies resulting from increased pressure on defendants to plead guilty. Here again, it is possible to understand the government's reluctance. While it is constitutionally permissible for the government to threaten to file enhanced charges against a defendant who fails to plead guilty, there is always the nagging suspicion that the practice is unseemly. In this case, for example, the government initially offered Mr. Angelos a plea bargain in which he would receive a fifteen-year-sentence under one § 924(c) count. When he had the temerity to decline, the government filed superseding indictments adding four additional § 924(c) counts. So far as the court can determine, the superseding indictment rested not on any newly-discovered evidenced but rather solely on the defendant's unwillingness to plead guilty. …[I]t is understandable that the government would not want to publicly defend § 924(c) with the plea-inducing argument, even though given the realities of overworked prosecutors this may provide a true justification for the statute. Nor has the government argued that § 924(c) is needed to provide incentives for drug traffickers to inform on others in their organization. Instead, the rationale advanced by government is deterrence and incapacitation: the draconian provisions of § 924(c) are necessary to deter drug dealers from committing crimes with those firearms and to prevent Mr. Angelos from doing so in the future.

The deterrence argument rests on a strong intuitive logic. Sending a message to drug dealers that they will serve additional time in prison if they are caught with firearms may lead some to avoid firearms entirely and others to leave their firearms at home…. Generally criminologists believe that an increase in prison populations will reduce crime through both a deterrent and incapacitative effect. The consensus view appears to be that each 10% increase in the prison population produces about a 1% to 3% decrease in serious crimes. … While offenders "substituted" into less harmful property crimes, the overall reduction in crime was significant. While no specific study has examined § 924(c), it is reasonable to assume—and Congress is entitled to assume—that it has prevented some serious drug and firearms offenses.

The problem with the deterrence argument, however, is that it proves too much. A statute that provides mandatory life sentences for jaywalking or petty theft would, no doubt, deter those offenses. But it would be hard to view such hypothetical statutes as resting on rational premises. Moreover, a mandatory life sentence for petty theft, for example, would raise the question of why such penalties were not in place for aircraft hijacking, second-degree murder, rape, and other serious crimes. Finally, deterrence comes at a price. Given that holding a person in federal prison costs about $23,000 per year, the 61–year–sentence the court is being asked to impose in this case will cost the taxpayers (even assuming Mr. Angelos receives good time credit and serves "only" 55–years) about $1,265,000. Spending more than a million dollars to incarcerate Mr. Angelos will prevent future crimes by him and may well deter some others from being involved with drugs and guns. But that money could also be spent on other law enforcement or social programs that in all likelihood would produce greater reductions in crime and victimization.

If the court were to evaluate these competing tradeoffs, it would conclude that stacking § 924(c) counts on top of each other for first-time drug offenders who have merely possessed firearms is not a cost-effective way of obtaining deterrence. It is not enough to

simply be “tough” on crime. Given limited resources in our society, we also have to be “smart” in the way we allocate our resources. But these tradeoffs are the subject of reasonable debate. It is not the proper business of the court to second-guess the congressional judgment that § 924(c) is a wise investment of resources. Instead, in conducting rational basis review of the statute, the court is only to determine whether “any ground can be conceived to justify [the statutory scheme] as rationally related to a legitimate government interest.” “Where there are ‘plausible reasons’ for Congress’ action, [the court’s] inquiry is at an end.” …

Accordingly, the court reluctantly concludes that § 924(c) survives rational basis scrutiny. While it imposes unjust punishment and creates irrational classifications, there is a “plausible reason” for Congress’ action. As a result, this court’s obligation is to follow the law and to reject Mr. Angelos’ equal protection challenge to the statute.

IV. Cruel and Unusual Punishment

In addition to raising an equal protection argument, Mr. Angelos also argues that his 55–year sentence under § 924(c) violates the Eighth Amendment’s prohibition of cruel and unusual punishment. In this argument, he is joined in an *amicus* brief filed by a distinguished group of 29 former United States District Judges, United States Circuit Court Judges, and United States Attorneys, who draw on their expertise in federal criminal law and federal sentencing issues to urge that the sentence is unconstitutional as disproportionate to the offenses at hand.

Mr. Angelos and his supporting *amici* are correct in urging that controlling Eighth Amendment case law places an outer limit on punishments that can be imposed for criminal offenses, forbidding penalties that are grossly disproportionate to any offense. … [In] the … fractured 1991 decision in *Harmelin v. Michigan*, … the Court held that imposition of a life sentence without possibility of parole for possession of 650 grams of cocaine did not violate the Eighth Amendment. Then, last year, the Supreme Court confirmed that the gross disproportionality principle—“the precise contours of which are unclear”—is applicable to sentences for terms of years; that there was a “lack of clarity” in its precedents; that it had “not established a clear or consistent path for courts to follow;” and that the proportionality principles from Justice Kennedy’s *Harmelin* concurrence “guide our application of the Eighth Amendment.” …

In light of these controlling holdings, the court must engage in a proportionality analysis guided by factors outlined in Justice Kennedy’s *Harmelin* concurrence. In particular, the court must examine (1) the nature of the crime and its relation to the punishment imposed, (2) the punishment for other offenses in this jurisdiction, and (3) the punishment for similar offenses in other jurisdictions.

Before turning to these *Harmelin* factors, it is important to emphasize that the criminal conduct at issue is solely that covered by the three § 924(c) counts. Mr. Angelos will be fully and appropriately punished for all other criminal conduct from the sentence on these other counts. Thus, the proportionality question … boils down to whether the 55–year sentence is disproportionate to the offense of carrying or possessing firearms three times in connection with dealing marijuana.

A. Mr. Angelos ’ Offenses and the Contemplated Penalty

The first *Harmelin* factor requires the court to compare the seriousness of the three § 924(c) offenses to the harshness of the contemplated penalty to determine if the penalty would be grossly disproportionate to such offenses. In weighing the gravity of the offenses, the court should consider the offenses of conviction and the defendant’s criminal history, as well as “the harm caused or threatened to the victim or society, and the culpability of the offender.” Simply put, “[d]isproportionality analysis measures the relationship between the nature and number of offenses committed and the severity of the punishment inflicted upon the offender.”

The criminal history in this case is easy to describe. Mr. Angelos has no prior adult criminal convictions and is treated as a first-time offender under the Sentencing Guidelines.

The sentence-triggering criminal conduct in this case is also modest. Here, on two occasions while selling small amounts of marijuana, Mr. Angelos possessed a handgun under his clothing, but he never brandished or used the handgun. … Mr. Angelos did not engage in force or violence, or threats of force or violence, in furtherance of or in connection with the offenses for which he has been convicted. No offense involved injury to any person or the threat of injury to any person. It is well-established that crimes marked by violence or threat of violence are more serious and that the absence of direct violence affects the strength of society’s interest in punishing a particular criminal.

… Comparing a recommended sentence of two years to the 55–year enhancement the court must impose strongly suggests not merely disproportionality, but gross disproportionality.

B. Comparison to Penalties for Other Offenses

The next *Harmelin* factor requires comparing Mr. Angelos' sentence with the sentences imposed on other criminals in the federal system. Generally, "[i]f more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive." This factor points strongly in favor of finding that the sentence in this case is excessive. As shown … earlier in this opinion, Mr. Angelos will receive a far longer sentence than those imposed in the federal system for such major crimes as aircraft hijacking, second-degree murder, racial beating inflicting life-threatening injuries, kidnapping, and rape. Indeed, Mr. Angelos will receive a far longer sentence than those imposed for three aircraft hijackings, three second-degree murders, three racial beatings inflicting life-threatening injuries, three kidnappings, and three rapes….

C. Comparison to Other Jurisdictions

The final *Harmelin* factor requires the court to examine "sentences imposed for the same crime in other jurisdictions." Evaluating this factor is also straightforward. Mr. Angelos sentence is longer than he would receive in any of the fifty states. The government commendably concedes this point in its brief, pointing out that in Washington State Mr. Angelos would serve about nine years and in Utah would serve about five to seven years. Accordingly, the court finds that the third factor is satisfied.

D. Application of the *Harmelin* Factors in Light of *Davis*

Having analyzed the three *Harmelin* factors, the court believes that they lead to the conclusion that Mr. Angelos' sentence violates the Eighth Amendment. But before the court declares the sentence unconstitutional, there is one last obstacle to overcome. The court is keenly aware of its obligation to follow precedent from superior courts—specifically the Tenth Circuit and, of course, the Supreme Court. The Supreme Court has considered one case that might be regarded as quite similar to this one. In *Hutto v. Davis* (1982), the Supreme Court held that two consecutive twenty-year sentences—totaling forty years—for possession of nine ounces of marijuana said to be worth $200 did not violate the Eighth Amendment. If *Davis* remains good law, it is hard see how the sentence in this case violates the Eighth Amendment. Here, Mr. Angelos was involved in at least two marijuana deals involving $700 and approximately sixteen ounces (one pound) of marijuana. Perhaps currency inflation could equate $700 today with $200 in the 1980's. But as a simple matter of arithmetic, if 40 years in prison for possessing nine ounces marijuana does not violate the Eighth Amendment, it is hard to see how 61 years for distributing sixteen ounces (or more) would do so.

… [T]he Court apparently continues to view *Davis* as part of the fabric of the law. … In light of these continued references to *Davis*, the court believes it is it obligated to follow its holding here. …. Under *Davis*, Mr. Angelos' sentence is not cruel and unusual punishment. Therefore, his Eighth Amendment challenge must be rejected.

V. Calculating the Sentence

With Mr. Angelos' constitutional challenges to the 55–year sentence on § 924(c) counts resolved, the remaining issue before the court is the sentence to be imposed on the other counts…. If the sentence on these thirteen counts was the only sentence that Mr. Angelos would serve, a sentence of about 78–97 months might well be appropriate. But the court cannot ignore the reality that Mr. Angelos will also be sentenced to 55 years on the § 924(c) counts, far in excess of what is just punishment for all of his crimes. In light of this 55–year sentence, and having considered all of the relevant factors listed in the Sentencing Reform Act, the court will impose a sentence of one day in prison for all offenses other than the § 924(c) counts. Lest anyone think that this is a "soft" sentence, in combination with the § 924(c) counts, the result is that Mr. Angelos will not walk outside of prison until after he reaches the age of 70….

VI. Recommendations to Other Branches of Government

Having disposed of the legal arguments in this case, it seems appropriate to make some concluding, personal observations. I have been on the bench for nearly two-and-half years now. During that time, I have sentenced several hundred offenders under the Sentencing Guidelines and federal mandatory minimum statutes. By and large, the sentences I have been required to impose have been tough but fair. In a few cases, to be sure, I have felt that either the Guidelines or the mandatory minimums produced excessive punishment. But even in those cases, the sentences seemed to be within the realm of reason.

This case is different. It involves a first offender who will receive a life sentence for crimes far less serious than those committed by many other offenders—including violent offenders and even a murderer—who have been before me. For the reasons explained in my opinion, I am legally obligated to impose this sentence. But I feel ethically obligated to bring this injustice to the attention of those who are in a position to do something about it.

CONCLUSION

The 55–year sentence mandated by § 924(c) in this case appears to be unjust, cruel, and irrational. But our constitutional system of government requires the court to follow the law, not its own personal views about what the law ought to be. Perhaps the court has overlooked some legal point, and that the appellate courts will find Mr. Angelos' sentence invalid. But applying the law as the court understands it, the court sentences Mr. Angelos to serve a term of imprisonment of 55 years and one day. The court recommends that the President commute this unjust sentence and that the Congress modify the laws that produced it. The Clerk's Office is directed to forward a copy of this opinion with its commutation recommendation to the Office of Pardon Attorney and to the Chair and Ranking Member of the House and Senate Judiciary Committees.

Notes and questions on *Angelos*

1. Judge Paul Cassell, the author of the opinion you've just read, argued that a 55-year sentence for this offender was unjust, cruel, and irrational. But Judge Cassell imposed that sentence anyway. Why? A simple answer might be, the judge believed that the law required him to impose the sentence. If so, which law? Consider the different laws involved in this case. There is a federal statute, 18 U.S.C. § 924(c). There is also the federal constitution, which prohibits states from denying "equal protection" of law, and also prohibits "cruel and unusual punishments." Why doesn't the federal constitution prohibit the mandatory minimum sentence in this case, according to Judge Cassell?
2. This case gives you a chance to think about the roles of different official decisionmakers in expanding America's prison population. If Weldon Angelos were to spend his life in prison for a marijuana offense, which institutions or officials bear responsibility for that decision?
3. Note the many contrasts that the court draws between "actual violence" and the offense for which Weldon Angelos is punished. For example, Judge Cassell writes, "When the sentence for actual violence inflicted on a victim is dwarfed by a sentence for carrying guns to several drug deals, the implicit message to victims is that their pain and suffering counts for less than some abstract 'war on drugs.'" Just a few years after this decision, Judge Cassell resigned from the bench and returned to law school teaching. He said that he wanted to engage in more advocacy than a judicial post allowed, and that the Angelos case was one factor in his decision. However, Cassell's post-bench advocacy has focused primarily on victims' rights, including the ability of victims to advocate for longer sentences. But notice also that some argue for severe penalties for gun crimes, or drug crimes, or drugs + gun crimes, precisely because they associate drugs and guns with violence. (Judge Cassell also concedes, "This is not to say that trafficking in illegal drugs is somehow a non-violent offense.") This case invites us to think about what counts as "violence," and the way that ideas about violence have shaped official decisions about what and who to punish, and how much punishment to impose.
4. As it turned out, Weldon Angelos did not spend the rest of his life in prison. His case drew attention even at the trial stage; Judge Cassell's opinion notes that 29 former federal prosecutors and judges filed a brief arguing that the mandatory sentence was unconstitutional. Celebrities (including Snoop Dogg) and others continued to advocate on behalf of Angelos even after he entered prison. After Angelos had served about 12 years, President Obama commuted his sentence, and Angelos was released in 2016. A commutation can shorten a sentence, but it does not reverse the underlying conviction. In December 2020, President Trump pardoned Angelos, suggesting that the injustice of his conviction and sentence are a rare point of bipartisan agreement in highly polarized times. Since his release, Angelos has worked as an advocate for clemency and criminal law reform. So many defendants, including defendants of color, have been imprisoned for long terms under § 924(c) that it is worth asking what made Angelos a distinctively sympathetic prisoner. Was it the lack of prior convictions? The image of Angelos as a family man, a devoted father of young children? Snoop Dogg?
5. Weldon Angelos was eventually released, and Congress did eventually amend § 924(c). The statute still imposes lengthy mandatory minimums, but as of June 2022, the 25-year penalty for a "second or subsequent" violation applies only to a defendant whose first § 924(c) conviction became final before the subsequent violation took place. In other words, the amended law would not allow the "count stacking" that was used against Angelos, but it does enable prosecutors to threaten very severe sentences against anyone with a prior § 924(c) conviction. The new statutory text is reproduced below.

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18 U.S.C. § 924 (as amended by First Step Act, effective June 25, 2022)

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime … for which the person may be

prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime–

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

…

(C) In the case of a violation of this subsection that occurs after a prior conviction under this subsection has become final, the person shall–

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

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1. [Fn. 1 by the Court:] As used here, the terms “automatic” and “fully automatic” refer to a weapon that fires repeatedly with a single pull of the trigger. That is, once its trigger is depressed, the weapon will automatically continue to fire until its trigger is released or the ammunition is exhausted. Such weapons are “machineguns” within the meaning of the Act. We use the term “semiautomatic” to designate a weapon that fires only one shot with each pull of the trigger, and which requires no manual manipulation by the operator to place another round in the chamber after each round is fired. ↵

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1.8: Inchoate Offenses

Introduction

The previous three chapters have focused on different types of crime, but they share the same basic model of criminal liability: a statute defines conduct as criminal, and liability requires proof of (or the defendant's admission to) all elements of the crime. This chapter and the next examine an array of doctrines that expand criminal liability to reach persons who plan, begin, encourage, or assist criminal activity without necessarily completing all elements of the target crime. These doctrines of expansion can be roughly divided into two categories, but there is some overlap between the two. First, the term *inchoate offenses* is often applied to crimes of beginning-but-not-finishing: persons who begin conduct designed to complete a crime, but then fail to complete all elements of the target crime, might be liable for an inchoate offense such as attempt [to commit x offense] or solicitation [to commit x offense]. For example, if I plan a bank robbery and drive to the bank with masks and guns, but then I am prevented from entering the building by savvy security guards, I may be liable for attempted bank robbery. Second, doctrines of *group criminality*, such as accomplice liability, allow persons to be convicted and punished based in part on the actions of other persons. If I provide support and encouragement to someone who commits bank robbery, accomplice liability could allow me to be convicted of the crime of bank robbery, even if I never set foot in a bank or took any money.

Again, there is some overlap between doctrines of inchoate offenses and doctrines of group criminality, and neither category is crisply defined. The term "conspiracy" can be especially confusing, since it is used to describe both an inchoate offense (e.g., conspiracy to distribute narcotics) and a doctrine of group criminality that allows one member of a conspiracy to be punished for offenses committed by another member of the conspiracy. This chapter focuses on the inchoate offenses of attempt and solicitation. Conspiracy in both senses just described will be addressed along with accomplice liability in the following chapter.

Like several of the offenses we have already studied, such as assault, murder, or burglary, the concept of a criminal attempt originated in common law courts but is today usually defined by statute. We will see two different kinds of attempt statutes in this chapter. Some attempt statutes refer to a specific type of criminal conduct. For example, the first case in this chapter concerns a prosecution under a statute that makes it a crime to attempt to commit a federal drug offense. But most American jurisdictions also have a general attempt statute that does not refer to any specific offense or category of offenses. A general attempt statute makes it a crime to attempt to commit any act designated as criminal elsewhere in the law. If a defendant is prosecuted under a general attempt statute, the prosecution will also need to identify which other offense—sometimes called "the target offense"—the defendant was attempting to commit. After the first case of this chapter, all the other cases involve prosecutions under general attempt statutes (in conjunction with the statutes that define the relevant target offense).

Attempt doctrine is thus usually "trans-substantive," in that the general definition of an attempt can be paired with any type of criminal conduct. This chapter and the next do include several more cases on drug crimes, however, since inchoate offenses (and group criminality) are widely used in that context. But it is important to remember that a general attempt statute can be paired with almost any kind of offense. This chapter also includes one case involving attempted murder charges and one involving attempted distribution of pornography.

We have seen often the claim that a criminal conviction requires proof of all elements of an offense. Do inchoate offenses subvert that principle by allowing conviction for defendants who satisfy some but not all elements of the underlying offense? One recurring concern about inchoate crimes is the worry that this category of offenses are more or less "thought crimes"—the defendant is punished for intending to engage in some criminal act, even though he did not in fact engage in the specified conduct. In an effort to avoid punishing people for thoughts alone (and assuming we can discern and "prove" those thoughts), courts have struggled at length to define the kind of conduct that is sufficient to prove an attempt. How a jurisdiction defines a criminal attempt can depend upon why it is choosing to define attempts as criminal; this chapter will explore some possible rationales for punishing attempts and other inchoate offenses. As you consider those questions, it is also important to consider ways in which expansions of criminal liability increase the discretion of state officials. With discretion comes the possibility of discrimination. The role of inchoate offenses in producing racial disparities in convictions and imprisonment is an important but neglected topic for which there is relatively little empirical data available. But in this chapter and the next, look for ways in which efforts to expand criminal liability and enforcement authority have created opportunities for racialized enforcement.

This chapter should give you a basic understanding of the concept of a criminal attempt, both as that term was defined at common law and as it is now typically defined in contemporary statutes. The chapter also explores the separate inchoate offense of solicitation, which is basically the crime of asking someone else to commit a crime. You should also learn two principles that are invoked occasionally as limitations on attempt liability – impossibility and renunciation. Finally, attempt doctrine will give you a chance to revisit the interactions among criminalization choices, enforcement choices, and adjudication choices. The last section of this chapter offers a case study to help you apply attempt doctrine and review earlier material. This concluding section also offers a chance to explore further the questions raised in the previous paragraph: how are inchoate offenses and related expansions of criminal law connected to patterns of racial disparity in the American criminal legal system?

A. Preparation, Solicitation, Attempt

21 U.S.C. § 846. Attempt and conspiracy.

Any person who attempts or conspires to commit any offense defined in this subchapter [drug offenses] shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

UNITED STATES of America, Plaintiff-Appellee

v.

Roy MANDUJANO, Defendant-Appellant

United States Court of Appeals, Fifth Circuit
499 F.2d 370

Aug. 19, 1974

RIVES, Circuit Judge:

Mandujano appeals from the judgment of conviction and fifteen-year sentence imposed by the district court, based upon the jury's verdict finding him guilty of attempted distribution of heroin in violation of 21 U.S.C. § 846. We affirm.

I.

The government's case rested almost entirely upon the testimony of Alfonso H. Cavalier, Jr., a San Antonio police officer assigned to the Office of Drug Abuse Law Enforcement. Agent Cavalier testified that, at the time the case arose, he was working in an undercover capacity and represented himself as a narcotics trafficker. At about 1:30 P.M. on the afternoon of March 29, 1973, pursuant to information Cavalier had received, he and a government informer went to the Tally-Ho Lounge, a bar located … in San Antonio. Once inside the bar, the informant introduced Cavalier to Roy Mandujano. …Mandujano asked the informant if he was looking for 'stuff.' Cavalier said, 'Yes.' Mandujano then questioned Cavalier about his involvement in narcotics. Cavalier answered Mandujano's questions, and told Mandujano he was looking for an ounce sample of heroin to determine the quality of the material. Mandujano replied that he had good brown Mexican heroin for $650.00 an ounce, but that if Cavalier wanted any of it he would have to wait until later in the afternoon when the regular man made his deliveries. Cavalier said that he was from out of town and did not want to wait that long. Mandujano offered to locate another source, and made four telephone calls in an apparent effort to do so. The phone calls appeared to be unsuccessful, for Mandujano told Cavalier he wasn't having any luck contacting anybody. Cavalier stated that he could not wait any longer. Then Mandujano said he had a good contact, a man who kept narcotics around his home, but that if he went to see this man, he would need the money 'out front.' To reassure Cavalier that he would not simply abscond with the money, Mandujano stated, 'You are in my place of business. My wife is here. You can sit with my wife. I am not going to jeopardize her or my business for $650.00.' Cavalier counted out $650.00 to Mandujano, and Mandujano left the premises of the Tally-Ho Lounge at about 3:30 P.M. About an hour later, he returned and explained that he had been unable to locate his contact. He gave back the $650.00 and told Cavalier he could still wait until the regular man came around. Cavalier [left], but arranged to call back at 6:00 P.M. When Cavalier called at 6:00 and again at 6:30, he was told that Mandujano was not available. Cavalier testified that he did not later attempt to contact Mandujano, because, 'Based on the information that I had received, it would be unsafe for either my informant or myself to return to this area.'

II.

Section 846 of Title 21, entitled 'Attempt and conspiracy,' provides that,

"Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

The theory of the government in this case is straightforward: Mandujano's acts constituted an attempt to distribute heroin; actual distribution of heroin would violate 21 U.S.C. § 841(a)(1); therefore, Mandujano's attempt to distribute heroin comes within the terms of § 846 as an attempt to commit an offense defined in the subchapter.

Footnote by the court: [Section 841(a)(1) provides:] '(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally-

'(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.'

Under subsection 802(11) the term 'distribute' means 'to deliver (other than by administering or dispensing) a controlled substance.' Subsection 802(8) defines the terms 'deliver' or 'delivery' to mean 'the actual, constructive or attempted transfer of a controlled substance, whether or not there exists an agency relationship.'

Mandujano urges that his conduct as described by agent Cavalier did not rise to the level of an attempt to distribute heroin…. He claims that at most he was attempting to acquire a controlled substance, not to distribute it; that it is impossible for a person to attempt to distribute heroin which he does not possess or control; that his acts were only preparation, as distinguished from an attempt; and that the evidence was insufficient to support the jury's verdict. [There was a stipulation that no heroin had exchanged hands in this case.]

Apparently there is no legislative history indicating exactly what Congress meant when it used the word 'attempt' in § 846. There are two reported federal cases which discuss the question of what constitutes an attempt under this section. In *United States v. Noreikis* (7th Cir. 1973) … the court commented that,

'While it seems to be well settled that mere preparation is not sufficient to constitute an attempt to commit a crime, it seems equally clear that the semantical distinction between preparation and attempt is one incapable of being formulated in a hard and fast rule. The procuring of the instrument of the crime might be preparation in one factual situation and not in another. The matter is sometimes equated with the commission of an overt act, the 'doing something directly moving toward, and bringing him nearer, the crime he intends to commit.'

In *United States v. Heng Awkak Roman* (S.D.N.Y. 1973), where the defendants' actions would have constituted possession of heroin with intent to distribute in violation of § 841 if federal agents had not substituted soap powder for the heroin involved in the case, the court held that the defendants' acts were an attempt to possess with intent to distribute. The district court in its opinion acknowledged that … "there is no comprehensive statutory definition of attempt in federal law." The court concluded, however, that it was not necessary in the circumstances of the case to deal with the "complex question of when conduct crosses the line between 'mere preparation' and 'attempt.'"

The courts in many jurisdictions have tried to elaborate on the distinction between mere preparation and attempt….[1] In cases involving statutes other than § 846, the federal courts have confronted this issue on a number of occasions.

… *United States v. De Bolt* (S.D. Ohio 1918) involved an apparent attempt to sabotage the manufacture of war materials in violation of federal law. With regard to the elements of an attempt, the court in this case quoted Bishop's New Crim. Law (1892) vol. 1, §§ 728, 729: "An attempt is an intent to do a particular criminal thing, with an act toward it falling short of the thing intended. Hence, the two elements of an evil intent and a simultaneous resulting act constitute, and yet only in combination, an indictable offense, the same as in any other crime."

Gregg v. United States (8th Cir. 1940) involved in part a conviction for an attempt to import intoxicating liquor into Kansas. The court [noted] with apparent approval the definition of attempt urged by [the defendant]: "[A]n attempt is an endeavor to do an act carried beyond mere preparation, but falling short of execution, and that it must be a step in the direct movement towards the commission of the crime after preparations have been made. The act must 'carry the project forward within dangerous proximity to the criminal end to be attained.'" The court held, however, that Gregg's conduct went beyond 'mere preparation': "The transportation of goods into a state is essentially a continuing act not confined in its scope to the single instant of passage across a territorial boundary. In our view the appellant advanced beyond the stage of mere preparation when he loaded the liquor into his car

and began his journey toward Kansas. From that moment he was engaged in an attempt to transport liquor into Kansas within the clear intent of the statute."

…[In] *United States v. Coplon* (2nd Cir. 1950), where the defendant was arrested before passing to a citizen of a foreign nation classified government documents contained in [her] purse, Judge Learned Hand surveyed the law and addressed the issue of what would constitute an attempt:

"Because the arrest in this way interrupted the consummation of the crime one point upon the appeal is that her conduct still remained in the zone of 'preparation,' and that the evidence did not prove an 'attempt.' This argument it will be most convenient to answer at the outset. A neat doctrine by which to test when a person, intending to commit a crime which he fails to carry out, has 'attempted' to commit it, would be that he has done all that it is within his power to do, but has been prevented by intervention from outside; in short, that he has passed beyond any locus poenitentiae. Apparently that was the original notion, and may still be law in England; but it is certainly not now generally the law in the United States, for there are many decisions which hold that the accused has passed beyond 'preparation,' although he has been interrupted before he has taken the last of his intended steps. The decisions are too numerous to cite, and would not help much anyway, for there is, and obviously can be, no definite line; … There can be no doubt in the case at bar that 'preparation' had become 'attempt.' The jury were free to find that the packet was to be delivered that night, as soon as they both thought it safe to do so. To divide 'attempt' from 'preparation' by the very instant of consummation would be to revert to the old doctrine."

… Although the foregoing cases give somewhat varying verbal formulations, careful examination reveals fundamental agreement about what conduct will constitute a criminal attempt. First, the defendant must have been acting with the kind of culpability otherwise required for the commission of the crime which he is charged with attempting. *United States v. Quincy*, 31 U.S. 445 (1832) ("The offenses consists principally in the intention with which the preparations were made…")….

Second, the defendant must have engaged in conduct which constitutes a substantial step toward commission of the crime. A substantial step must be conduct strongly corroborative of the firmness of the defendant's criminal intent. … The use of the word 'conduct' indicates that omission or possession, as well as positive acts, may in certain cases provide a basis for liability. The phrase 'substantial step,' rather than 'overt act,' is suggested by *Gregg v. United States*, supra ('a step in the direct movement toward the commission of the crime'); *United States v. Coplon*, supra ('before he has taken the last of his intended steps') and [other cases] and indicates that the conduct must be more than remote preparation. The requirement that the conduct be strongly corroborative of the firmness of the defendant's criminal intent also relates to the requirement that the conduct be more than 'mere preparation,' and is suggested by the Supreme Court's emphasis upon ascertaining the intent of the defendant, *United States v. Quincy*, supra, and by the approach taken in *United States v. Coplon*, supra ('. . . some preparation may amount to an attempt. It is a question of degree').[2]

III.

The district court charged the jury in relevant part as follows:

[T]he essential elements required in order to prove or to establish the offense charged in the indictment, which is, again, that the defendant knowingly and intentionally attempted to distribute a controlled substance, must first be a specific intent to commit the crime, and next that the accused wilfully made the attempt, and that a direct but ineffectual overt act was done toward its commission, and that such overt act was knowingly and intentionally done in furtherance of the attempt.

'* * * In determining whether or not such an act was done, it is necessary to distinguish between mere preparation on the one hand and the actual commencement of the doing of the criminal deed on the other. Mere preparation, which may consist of planning the offense or of devising, obtaining or arranging a means for its commission, is not sufficient to constitute an attempt, but the acts of a person who intends to commit a crime will constitute an attempt where they, themselves, clearly indicate a certain unambiguous intent to wilfully commit that specific crime and in themselves are an immediate step in the present execution of the criminal design, the progress of which would be completed unless interrupted by some circumstances not intended in the original design.

(Tr. Jury Trial Proc., pp. 138-139.) These instructions, to which the defendant did not object, are compatible with our view of what constitutes an attempt under § 846.

After the jury brought in a verdict of guilty, the trial court propounded a series of four questions to the jury:

‘(1) Do you find beyond a reasonable doubt that on the 29th day of March, 1973, Roy Mandujano, the defendant herein, knowingly, wilfully and intentionally placed several telephone calls in order to obtain a source of heroin in accordance with his negotiations with Officer Cavalier which were to result in the distribution of approximately one ounce of heroin from the defendant Roy Mandujano to Officer Cavalier?’

‘(2) Do you find beyond a reasonable doubt that the telephone calls inquired about in question no. (1) constituted overt acts in furtherance of the offense alleged in the indictment?’

‘(3) Do you find beyond a reasonable doubt that on the 29th day of March, 1973, Roy Mandujano, the defendant herein, knowingly, wilfully and intentionally requested and received prior payment in the amount of $650.00 for approximately one ounce of heroin that was to be distributed by the defendant Roy Mandujano to Officer Cavalier?’

‘(4) Do you find beyond a reasonable doubt that the request and receipt of a prior payment inquired about in question no. (3) constituted an overt act in furtherance of the offense alleged in the indictment?’

Neither the government nor the defendant objected to this novel procedure. After deliberating, the jury answered ‘No’ to question (1) and ‘Yes’ to questions (3) and (4). The jury’s answers indicate that its thinking was consistent with the charge of the trial court.

The evidence was sufficient to support a verdict of guilty… [T]he jury could have found that Mandujano was acting knowingly and intentionally and that he engaged in conduct—the request for and the receipt of the $650.00—which in fact constituted a substantial step toward distribution of heroin. From interrogatory (4), it is clear that the jury considered Mandujano’s request and receipt of the prior payment a substantial step toward the commission of the offense. Certainly, in the circumstances of this case, the jury could have found the transfer of money strongly corroborative of the firmness of Mandujano’s intent to complete the crime. Of course, proof that Mandujano’s ‘good contact’ actually existed, and had heroin for sale, would have further strengthened the government’s case; however, such proof was not essential.

Check Your Understanding (8-1)

The original version of this chapter contained H5P content. You may want to remove or replace this element.

Notes and questions on *Mandujano*

1. What was Roy Mandujano’s sentence for the crime of attempted distribution of heroin? Look at the first sentence of the court’s opinion, and then at the penalty provisions of 21 U.S.C. § 846, the federal attempt statute. Though an attempted offense may seem “lesser” than a completed offense, many attempt statutes provide that an attempt can be punished with the same range of penalties available for the underlying offense. (See also note 1 after *People v. Acosta* later in this chapter.)
2. Look again at 21 U.S.C. § 846, the federal attempt statute. It’s short! Notice that it uses the terms attempt and conspiracy, but does not define either term. This state was first enacted as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970. The first two federal opinions to interpret section 846, both quoted in *Mandujano*, both noted that there was no precise definition of the term attempt in the statute, but each of these opinions also declined to provide a precise definition. Why might a court think that it is not necessary or desirable to define attempt, given the many different possible definitions listed in footnote 5?
3. As the *Mandujano* court explains, at common law courts often emphasized that there was a difference between “mere preparation” to commit a crime, on one hand, and a legally punishable attempt, on the other hand. But judges struggled to explain what the difference was, and it’s not clear that there ever was a single common law definition of attempt. Instead, common law courts developed several different tests, the most important of which are listed in footnote 5 of the court’s opinion. Note that each definition refers to “the crime” or “the completed crime.” An attempt conviction is always based upon some other offense that is defined as criminal. That is, a defendant is not convicted of “attempt” in the abstract, but attempted murder, attempted theft, attempted distribution of heroin, and so on. Note also that the common law tests in footnote 5, and the discussions of attempt in earlier federal cases, define a general doctrine of attempt that is applicable to any offense. One recurring question is whether attempt can be meaningfully defined in this “transsubstantive” way—in other words, is the definition of attempt the same whether the target crime is murder or littering? Should it be the same? Or is the struggle to define attempt caused by the fact that courts want to define it differently depending on the underlying offense?
4. Are there key differences between the various tests listed in footnote 5 of the Fifth Circuit opinion, or do these tests all amount to pretty much the same thing, as the court suggests? Would Roy Mandujano be guilty of attempted distribution of heroin under

each common law definition of attempt?

5. Ultimately, the Fifth Circuit adopts an understanding of attempt that follows the language of the Model Penal Code: the defendant must act "with the kind of culpability otherwise required for the commission of the crime," and must also engage in conduct that constitutes a "substantial step" toward commission of the crime. Look closely at MPC § 5.01, quoted in footnote 6 of the court's opinion and reprinted below. Notice that the "substantial step" is actually just one of three ways to commit an attempt. What are the other two?
6. The Fifth Circuit did not quote the full text of MPC § 5.01, which offers several specific examples of the kind of conduct that can constitute a "substantial step." The full text of MPC § 5.01 is reprinted below; it may be useful as we encounter other nuances of attempt law later in this chapter.

Model Penal Code § 5.01

(1) **Definition of Attempt.** A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:

(a) purposely engages in conduct that would constitute the crime if the attendant circumstances were as he believes them to be; or

(b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or

(c) purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

(2) **Conduct That May Be Held Substantial Step Under Subsection (1)(c).** Conduct shall not be held to constitute a substantial step under Subsection (1)(c) of this Section unless it is strongly corroborative of the actor's criminal purpose. Without negativing the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law:

(a) lying in wait, searching for or following the contemplated victim of the crime;

(b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;

(c) reconnoitering the place contemplated for the commission of the crime;

(d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;

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

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

(g) soliciting an innocent agent to engage in conduct constituting an element of the crime.

(3) **Conduct Designed to Aid Another in Commission of a Crime.** A person who engages in conduct designed to aid another to commit a crime that would establish his complicity under Section 2.06 if the crime were committed by such other person, is guilty of an attempt to commit the crime, although the crime is not committed or attempted by such other person.

(4) **Renunciation of Criminal Purpose.** When the actor's conduct would otherwise constitute an attempt under Subsection (1)(b) or (1)(c) of this Section, it is an affirmative defense that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose. The establishment of such defense does not, however, affect the liability of an accomplice who did not join in such abandonment or prevention.

Within the meaning of this Article, renunciation of criminal purpose is not voluntary if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, that increase the probability of detection or apprehension or that make more difficult the accomplishment of the criminal purpose. Renunciation is not complete if it is

motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim.

7. MPC § 5.01(1)(a) describes what are sometimes called "completed attempts," or situations in which the defendant has the mental state required by the underlying crime and engages in all the conduct elements, but cannot be punished for the underlying crime itself because some attendant circumstance element cannot be established. For example, consider the facts of *Heng Awkak Ranan*, discussed in the *Mandujano* opinion.
8. MPC § 5.01(1)(b) is similar to another common law explanation of attempt, the "last act" test. Under this test, a defendant was guilty of attempt if he had completed the "last act" or "last proximate act" necessary to accomplish the targeted crime. Most courts held that evidence of the last proximate act was sufficient but not necessary to prove attempt.
9. What mental state must be "proven" (or admitted) in order to establish liability for attempt? The jury instructions used in *Mandujano*, quoted in the Fifth Circuit's opinion, state that "a specific intent to commit the crime" is an element of attempt. This claim is somewhat at odds with the court's reliance on the Model Penal Code, which avoided the common law terms "specific intent" and "general intent." Those terms are notoriously ambiguous, as discussed in prior chapters. The claim that attempt requires specific intent is usually a claim that the defendant must have the purpose of accomplishing the underlying offense. Does the Model Penal Code require this particular mental state, or does it allow attempt liability even when the defendant does not think, "I want to commit x crime"? Look again at MPC § 5.01(1), above.
10. These notes focus heavily on the Model Penal Code's definition of attempt because Section 5.01 is one of the more influential portions of the MPC. A majority of U.S. jurisdictions now use the concept of a "substantial step" to define attempt, rather than one of the older common law tests. Whether this change in the words used to define attempt makes a difference, or what difference it makes, is a difficult question. Again, the *Mandujano* court treated all common law definitions of attempt as more or less equivalent, and treated "substantial step" as roughly equivalent to the common law. In *People v. Acosta*, presented later in this chapter, a New York court characterizes its common law dangerous proximity test as "apparently more stringent" than the substantial step test. But the dissent in *Acosta* observes that at the defendant's trial, the jury was mistakenly instructed on the substantial step test rather than the dangerous proximity test—and no one objected!
11. If redefining attempt along MPC lines does make a difference, how can we ascertain that difference? As noted in the next case in this chapter, the drafters of the MPC made clear that they intended the "substantial step" test to broaden the definition of attempt, making it possible to punish a greater range of preparatory actions. It is not clear whether lay jurors do or would actually interpret the language as the MPC drafters intended. One experimental study found that laypersons interpreted "substantial step" language more narrowly, not more broadly, than common law language such as "dangerous proximity." Avani Mehta Sood, *Attempted Justice: Misunderstandings and Bias in Psychological Constructions of Criminal Attempt*, 71 Stan. L. Rev. 593 (2019). Sood's study relied on experiments in which participants were asked to pretend to be jurors, not actual data from real prosecutions and convictions. In a world of guilty pleas, most convictions for attempted crimes are not based on jury deliberations at all. If legal professionals, including prosecutors and judges, believe that "substantial step" definitions of attempt reach more broadly than the common law tests, that belief could affect these professionals' willingness to bring attempt charges or uphold attempt convictions.
12. Professor Sood's article also investigates ways in which decisionmakers' cognitive biases might operate through attempt doctrine. Her experimental studies asked participants to evaluate the criminal responsibility of a Muslim defendant and a Christian defendant, each charged with an attempted offense. Participants were likely to judge the hypothetical Muslim defendant more harshly even when the fact scenario was written to suggest this defendant's innocence. Professor Sood suggests that "lay constructions of criminal intent may inadvertently operate as a vehicle for discriminatory decisionmaking." 71 Stan. L. Rev. at 654. Because we cannot "know" another person's thoughts in the same sense that we can know (of) their actions, we inevitably rely on conjecture and guesswork when we attribute intentions to someone. In that process of attribution, cognitive biases appear to play a role. For this reason, several commentators have suggested that as criminal liability becomes more heavily based on judgments about intent, the more likely it is that racial bias will shape impositions of criminal liability. See, e.g., Luis Chiesa, *The Model Penal Code, Mass Incarceration, and the Racialization of American Criminal Law*, 25 Geo. Mason L. Rev. 605, 609 (2018) (critiquing the Model Penal Code's definition of attempt for its emphasis on intention, and suggesting that the MPC has "made it easier for racial bigotry to slip through the seams of criminal law doctrine").

Check Your Understanding (8-2)

The original version of this chapter contained H5P content. You may want to remove or replace this element.

South Dakota Codified Laws § 22-4-1. Attempt

Unless specific provision is made by law, any person who attempts to commit a crime and, in the attempt, does any act toward the commission of the crime, but fails or is prevented or intercepted in the perpetration of that crime, is punishable for such attempt at maximum sentence of one-half of the penalty prescribed for the underlying crime…

South Dakota Codified Laws § 22-16-4. Homicide as murder in the first degree

Homicide is murder in the first degree:

(1) If perpetrated without authority of law and with a premeditated design to effect the death of the person killed or of any other human being, including an unborn child; or

(2) If committed by a person engaged in the perpetration of, or attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, or unlawful throwing, placing, or discharging of a destructive device or explosive.

STATE of South Dakota, Plaintiff and Appellee

v.

Rocco William DISANTO, Defendant and Appellant

Supreme Court of South Dakota
688 N.W.2d 201

Decided Oct. 6, 2004

KONENKAMP, Justice.

… Defendant, Rocco William "Billy" Disanto, and Linda Olson lived together for two years and were engaged for a short time. But their turbulent relationship ended in January 2002. Olson soon began a new friendship with Denny Egemo, and in the next month, they moved in together. Obsessed with his loss, defendant began making threatening telephone calls to Olson and Egemo. He told them and others that he was going to kill them. He also sued Olson claiming that she was responsible for the disappearance of over $15,000 in a joint restaurant venture.

On February 17, 2002, while gambling and drinking at [a hotel], defendant told a woman that he intended "to shoot his ex-girlfriend, to kill her, to shoot her new lover in the balls so that he would have to live with the guilt, and then he was going to kill himself." As if to confirm his intention, defendant grabbed the woman's hand and placed it on a pistol in his jacket. The woman contacted a hotel security officer who in turn called the police. Defendant was arrested and a loaded .25 caliber pistol was taken from him.

In a plea bargain, defendant pleaded guilty to possession of a concealed pistol without a permit and admitted to a probation violation… While in the penitentiary [for these offenses], defendant met Stephen Rynders. He told Rynders of his intention to murder Olson and her boyfriend. Rynders gave this information to law enforcement and an investigation began. In June 2002, defendant was released from prison. Upon defendant's release, Rynders, acting under law enforcement direction, picked defendant up and offered him a ride… At the suggestion of the investigators, Rynders told defendant that he should hire a contract killer who Rynders knew in Denver.

On the afternoon of June 11, 2002, Rynders and Dale McCabe, a law enforcement officer posing as a killer for hire from Denver, met twice with defendant. Much of their conversation was secretly recorded. Defendant showed McCabe several photos of Olson and gave him one, pointed out her vehicle, led him to the location of her home, and even pointed Olson out to him as she was leaving her home. In between his meetings with McCabe that afternoon, by chance, defendant ran into Olson on the street. Olson exclaimed, "I suppose you're going to kill me." "Like a dog," defendant replied.

Shortly afterwards in their second meeting, defendant told McCabe, "I want her and him dead." "Two shots in the head." With only one shot, he said, "something can go wrong." If Olson's teenage daughter happened to be present, then defendant wanted her killed too: "If you gotta, you gotta, you know what I mean." He wanted no witnesses. He suggested that the murders should appear to have happened during a robbery. Because defendant had no money to pay for the murders, he suggested that jewelry and other

valuables in the home might be used as partial compensation. He told McCabe that the boyfriend, Egemo, was known to have a lot of cash. Defendant also agreed to pay for the killings with some methamphetamine he would later obtain.

At 3:00 p.m., defendant and McCabe appeared to close their agreement with the following exchange:

McCabe: So hey, just to make sure, no second thoughts or….
Defendant: No, none.
McCabe: You sure, man?
Defendant: None.
McCabe: Okay.
Defendant: None.
McCabe: The deal's done, man.
Defendant: It's a go.
McCabe: OK. Later. I'll call you tonight.
Defendant: Huh?
McCabe: I'll call you tonight.
Defendant: Thank you.

McCabe would later testify that as he understood their transaction, "the deal was sealed at that point" and the killings could be accomplished "from that time on until whenever I decided to complete the task."

Less than three hours later, however, defendant, seeking to have a message given to McCabe, called Rynders telling him falsely that a "cop stopped by here" and that Olson had spotted McCabe's car with its Colorado plates, that Olson had "called the cops," that defendant was under intense supervision, and that now the police were alerted because of defendant's threat against Olson on the street. All of this was untrue. Defendant's alarm about police involvement was an apparent ruse to explain why he did not want to go through with the killings.

Defendant: So, I suggest we halt this. Let it cool down a little bit….
Rynders: Okay.

* * *

Defendant: So I don't know if that house (Olson's) is being watched, do you know what I'm saying?
Rynders: Okay.

* * *

Defendant: And, ah, the time is not right right now. I'm just telling you, I, I don't feel it. I feel, you know what I mean. I'm not backing out of it, you know what I'm saying.
Rynders: Um hm.
Defendant: But, ah, the timing. You know what I mean. I just got out of prison, right?

* * *

Defendant: So, ah, I'm just telling you right now, put it on hold.
Rynders: Okay.
Defendant: And that's the final word for the simple reason, ah, I don't want nothing to happen to [McCabe], you know what I mean?

* * *

Defendant: Let it cool down. Plus let's let 'em make an offer …. [referring to defendant's lawsuit against Olson]
Rynders: Well, I have no clue where [McCabe is] at right now.
Defendant: Oh, God. You got a cell number?

* * *

Defendant: Get it….
Defendant: I just don't feel good about it to be honest and I'll tell 'ya, I've got great intuition.

Rynders: Okay.

* * *

Defendant: So, I mean, just let him [McCabe] know. Alright buddy?
Rynders: Okay.
Defendant: Get to him. He's gonna call me at 11 tonight.

Despite this telephone call, the next day, McCabe, still posing as a contract killer, came to defendant at his place of employment with Olson's diamond ring to verify that the murders had been accomplished. McCabe drove up to defendant and beckoned him to his car.

McCabe: Hey, man. Come here. Come here. Come here. Jump in, man. Jump in, dude.
Defendant: You sure?
McCabe: Jump in.
Defendant: I can't, I can't leave the bakery. I ain't got the key.
McCabe: Fuck, I gotta get the fuck out of here, dude. It's done, man. Fuckin' done, dude.
Defendant: Okay. I don't wanna know nothin' about it.
McCabe: All right. Check this out, man. [Showing him Olson's diamond ring.]
Defendant: No.
McCabe: Here.
Defendant: I don't wanna see nothin'.
McCabe: I got that shit.
Defendant: Good.

*** * ***

McCabe: Hey. You still owe me some shit, man.
Defendant: Guaranteed.

Defendant was arrested and charged with three counts of attempted murder. He was also charged with one count of simple assault for the threat he made against Olson on the street….

A jury convicted defendant of all charges. He was sentenced to three concurrent thirty-year terms of imprisonment in the South Dakota State Penitentiary. In addition, he received a concurrent 365 days in jail. He was fifty-nine years old at the time. These sentences were consecutive to the unfinished two-year term defendant was to serve for his prior felony conviction. …

Defendant argues that the trial court erred in denying his motion for judgment of acquittal because the State failed to offer sufficient evidence to sustain a conviction on the three counts of attempted murder. …

In defining the crime of attempt, we begin with our statute, [which] states that "Any person who attempts to commit a crime and in the attempt does any act toward the commission of the crime, but fails or is prevented or intercepted in the perpetration thereof, is punishable" as therein provided. To prove an attempt, therefore, the prosecution must show that defendant (1) had the specific intent to commit the crime, (2) committed a direct act toward the commission of the intended crime, and (3) failed or was prevented or intercepted in the perpetration of the crime.

We need not linger on the question of intent. Plainly, the evidence established that defendant repeatedly expressed an intention to kill Olson and Egemo, as well as Olson's daughter, if necessary. As McCabe told the jury, defendant "was a man on a mission to have three individuals murdered."

Defendant does not claim error in any of the court's instructions to the jury. The jury was instructed in part that

Mere preparation, which may consist of planning the offense or of devising, obtaining or arranging the means for its commission, is not sufficient to constitute an attempt; but acts of a person who intends to commit a crime will constitute an attempt when they themselves clearly indicate a certain, unambiguous intent to commit that specific crime, and in themselves are an immediate step in the present commission of the criminal design, the progress of which would be completed unless interrupted by some circumstances not intended in the original design. The attempt is the direct movement toward commission of the crime after the preparations are made.

Once a person has committed acts which constitute an attempt to commit a crime, that person cannot avoid responsibility by not proceeding further with the intent to commit the crime, either by reason of voluntarily abandoning the purpose or because of a fact which prevented or interfered with completing the crime.

However, if a person intends to commit a crime but before the commission [of] any act toward the ultimate commission of the crime, that person freely and voluntarily abandons the original intent and makes no effort to accomplish it, the crime of attempt has not been committed.

Defendant contends that he abandoned any attempt to murder when he telephoned Rynders to "halt" the killings. The State argued to the jury that defendant committed an act toward the commission of first degree murder by giving the "hit-man" a final order to kill, thus making the crime of attempt complete. If he went beyond planning to the actual commission of an act, the State asserted, then a later abandonment would not extricate him from responsibility for the crime of attempted murder. On the other hand, if he only wanted to postpone the crime, then, the State contended, his attempt was merely delayed, not abandoned.

On the question of abandonment, it is usually for the jury to decide whether an accused has already committed an act toward the commission of the murders. Once the requisite act has been committed, whether a defendant later wanted to abandon or delay the plan is irrelevant. As Justice Mosk of the California Supreme Court wrote,

It is obviously impossible to be certain that a person will not lose his resolve to commit the crime until he completes the last act necessary for its accomplishment. But the law of attempts would be largely without function if it could not be invoked until the trigger was pulled, the blow struck, or the money seized. If it is not clear from a suspect's acts what he intends to do, an observer cannot reasonably conclude that a crime will be committed; but when the acts are such that any rational person would believe a crime is about to be consummated absent an intervening force, the attempt is under way, and a last-minute change of heart by the perpetrator should not be permitted to exonerate him.

People v. Dillon (Cal. 1983).

The more perplexing question here is whether there was evidence that, in fulfilling his murderous intent, defendant committed an "act" toward the commission of first degree murder. Defendant contends that he never went beyond mere preparation. In *State v. Martinez*, this Court declared that the boundary between preparation and attempt lies at the point where an act "unequivocally demonstrate[s] that a crime is about to be committed." Thus, the term "act" "presupposes some direct act or movement in execution of the design, as distinguished from mere preparation, which leaves the intended assailant only in the condition to commence the first direct act toward consummation of his design." The unequivocal act toward the commission of the offense must demonstrate that a crime is about to be committed unless frustrated by intervening circumstances. However, this act need not be the last possible act before actual accomplishment of the crime to constitute an attempt.

We have no decisions on point in South Dakota; therefore, we will examine similar cases in other jurisdictions. In murder for hire cases, the courts are divided on how to characterize the offense: is it a solicitation to murder or an act toward the commission of murder? Most courts "take the view that the mere act of solicitation does not constitute an attempt to commit the crime solicited…" …

A majority of courts reason that a solicitation to murder is not attempted murder because the completion of the crime requires an act by the one solicited. … In *State v. Otto*, 629 P.2d 646 (1981), the defendant hired an undercover police officer to kill another police officer investigating the disappearance of the defendant's wife. A divided Idaho Supreme Court reversed the attempted first-degree murder conviction, ruling that the act of soliciting the agent to commit the actual crime, coupled with the payment of $250 and a promise of a larger sum after the crime had been completed, amounted to solicitation to murder rather than attempted murder. The court in *Otto* held that "[t]he solicit[ation] of another, assuming neither solicitor nor solicitee proximately acts toward the crime's commission, cannot be held for an attempt. He does not by his incitement of another to criminal activity commit a dangerously proximate act of perpetration. The extension of attempt liability back to the solicitor destroys the distinction between preparation and perpetration." In sum, "[n]either [the defendant in *Otto*] nor the agent ever took any steps of perpetration in dangerous proximity to the commission of the offense planned."

Requisite to understanding the general rule "is the recognition that solicitation is in the nature of the incitement or encouragement of another to commit a crime in the future [and so] it is essentially preparatory to the commission of the targeted offense." The Idaho Supreme Court made the rather pointed observation that "…jurisdictions faced with a general attempt statute and no means

of severely punishing a solicitation to commit a felony might resort to the device of transforming the solicitor's urgings into [an attempt,] but doing so violates the very essence of the requirement that a sufficient actus reus be proven before criminal liability will attach."[3]

Cases like *Davis* [and] *Otto* … are helpful to our analysis because, at the time they were decided, the statutes or case law in those jurisdictions defined attempt in a way identical to our attempt statute. Under this formulation, there must be specific intent to commit the crime and also a direct act done towards its commission….

To understand the opposite point of view, we will examine cases following the minority rule. But before we begin, we must first consider the definition of attempt under the Model Penal Code, and distinguish cases decided under its formula. In response to court decisions that hiring another to commit murder did not constitute attempted murder, many jurisdictions created, sometimes at the urging of the courts, the offense of solicitation of murder. As an alternative, another widespread response was to adopt the definition of attempt under the Model Penal Code. This is because the Model Penal Code includes in criminal attempt much that was held to be preparation under former decisions. This is clear from the comments accompanying the definition of criminal attempt in Tentative Draft No. 10 (1960) of the American Law Institute's Model Penal Code, Article 5 § 5.01. The intent was to extend the criminality of attempts by drawing the line further away from the final act, so as to make the crime essentially one of criminal purpose implemented by a substantial step highly corroborative of such purpose. … The Model Penal Code treats the solicitation of "an innocent agent to engage in conduct constituting an element of the crime," if strongly corroborative of the actor's criminal purpose, as sufficient satisfaction of the substantial step requirement to support a conviction for criminal attempt.

… *State v. Molasky* (Mo. 1989) … is instructive. There, a conviction for attempted murder was reversed, but only because the conduct consisted solely of conversation, unaccompanied by affirmative acts. … [T]he court reasoned, "a substantial step is evidenced by actions, indicative of purpose, not mere conversation standing alone." Acts evincing a defendant's seriousness of purpose to commit murder, the *Molasky* Court suggested, might be money exchanging hands, concrete arrangements for payment, delivering a photograph of the intended victim, providing the address of the intended victim, furnishing a weapon, visiting the crime scene, waiting for the victim, or showing the hit man the victim's expected route of travel. Therefore, under the relaxed standards of the Model Penal Code, evidence of an act in furtherance of the crime could include what defendant did here, provide a photograph of the intended victim and point out her home to the feigned killer. *Molasky* crystallizes our sense that without the expansive Model Penal Code definition of attempt, acts such as the ones defendant performed here are not sufficient under our definition to constitute attempt.

Knowing that the Model Penal Code relaxes the distinction between preparation and perpetration, we exclude from our analysis those murder for hire cases using some form of the Code's definition of attempt. Obviously, we cannot engraft a piece of the Model Penal Code onto our statutory definition of attempt, for to do so would amount to a judicial rewriting of our statute. Nonetheless, there are several courts taking the minority position that solicitation of murder can constitute attempted murder, without reference to the Model Penal Code definition….

The minority view … is epitomized in the dissenting opinion in *Otto*, where it was noted that efforts to distinguish between "acts of preparation and acts of perpetration" are "highly artificial, since all acts leading up to the ultimate consummation of a crime are by their very nature preparatory." For these courts, preparation and perpetration are seen merely as degrees on a continuum, and thus the distinction between preparation and perpetration becomes blurred.

In interpreting our law, all "criminal and penal provisions and all penal statutes are to be construed according to the fair import of their terms, with a view to effect their objects and promote justice." SDCL 22-1-1. Under our longstanding jurisprudence, preparation and perpetration are distinct concepts. Neither defendant nor the feigned "hit man" committed an act "which would end in accomplishment, but for … circumstances occurring … independent of[] the will of the defendant."

We cannot convert solicitation into attempt because to do so is obviously contrary to what the Legislature had in mind when it set up the distinct categories of solicitation and attempt. Indeed, the Legislature has criminalized other types of solicitations. *See* SDCL 22-43-2 (soliciting commercial bribe); SDCL 22-23-8 (pimping as felony); … SDCL 22-22-24.5 (solicitation of minor for sex); SDCL 16-18-7 (solicitation by disbarred or suspended attorney).

Beyond any doubt, defendant's behavior here was immoral and malevolent. But the question is whether his evil intent went beyond preparation into acts of perpetration. Acts of mere preparation in setting the groundwork for a crime do not amount to an attempt. Under South Dakota's definition of attempt, solicitation alone cannot constitute an attempt to commit a crime. Attempt and

solicitation are distinct offenses. To call solicitation an attempt is to do away with the necessary element of an overt act. Worse, to succumb to the understandable but misguided temptation to merge solicitation and attempt only muddles the two concepts and perverts the normal and beneficial development of the criminal law through incremental legislative corrections and improvements. It is for the Legislature to remedy this problem, and not for us through judicial expansion to uphold a conviction where no crime under South Dakota law was committed.

Reversed.

SABERS, Justice (concurring).

I agree because the evidence indicates that this blundering, broke, inept 59 year-old felon, just out of prison, was inadequate to pursue or execute this crime without the motivating encouragement of his "friend from prison" and law enforcement officers. On his own, it would have been no more than a thought.

GILBERTSON, Chief Justice (dissenting).

… [Defendant's acts were] far more than mere verbal solicitation of a hit man to accomplish the murders….

… Defendant argues that the evidence clearly demonstrates that Defendant's actions in June 2002 did not go beyond mere preparation. Defendant cites the police's failure to arrest Defendant after the June 11, 2002 meeting as proof of this proposition. Defendant also notes that his phone call to Rynders "clearly shows the Defendant put a halt to the attempted commission of the crime … but chose to do so by remaining friendly and cooperative with the hitman."

Two distinct theories can be drawn from Defendant's telephone conversation. The first, posited by Defendant, is that Defendant wished to extricate himself from an agreed upon murder, but leave the "hit man" with the *perception* that the deal remained in place. However, there is a second equally plausible theory which was presented by the State. That is, Defendant merely wanted to delay the previously planned murder, but leave the "hit man" with the *knowledge* that the deal remained in place.

Both theories were thoroughly argued to the jury. However, the jury chose to believe the State's theory. Therefore, the jury could have properly concluded Defendant's actions were "done toward the commission of the crime … the progress of which would be completed unless interrupted by some circumstances not intended in the original design" and not simply mere preparation.

… The Court today enters a lengthy analysis whether the acts constituted preparation or acts in the attempt to commit murder. … Minute examination between majority and minority views and "preparation" and "perpetration" conflict with the command of SDCL 22-1-1:

The rule of the common law that penal statutes are to be strictly construed has no application to this title. All its criminal and penal provisions and all penal statutes are to be construed according to the fair import of their terms, with a view to effect their objects and promote justice.

Here there was evidence that all that was left was to pull the trigger. As the Court acknowledges "the law of attempts would be largely without function if it could not be invoked until the trigger was pulled." … Thus, I respectfully dissent.

ZINTER, Justice (dissenting).

I join the Court's legal analysis concerning the distinction between solicitations and attempts to commit murder [and I join the Court's analysis of abandonment]. Therefore, I agree that Disanto's solicitation of McCabe, in and of itself, was legally insufficient to constitute an attempt to commit murder… However, I respectfully disagree with the Court's analysis of the facts, which leads it to find as a matter of law that Disanto "committed [no] act toward the commission of the offense[]." …[E]ven setting aside Disanto's solicitation, he still engaged in sufficient other "acts" toward the commission of the murder such that reasonable jurors could have found that he proceeded "so far that they would result in the accomplishment of the crime unless frustrated by extraneous circumstances." The intended victims were clearly in more danger then than they were when Disanto first expressed his desire to kill them.

Specifically, Disanto physically provided McCabe with a photograph of the victim, he pointed out her vehicle, and he took McCabe to the victim's home and pointed her out as she was leaving. None of these acts were acts of solicitation. Rather, they were physical "act[s going] toward the commission" of the murder.

Although it is acknowledged that the cases discussed by the Court have found that one or more of the foregoing acts can be part of a solicitation, Disanto's case has one significant distinguishing feature. After his solicitation was completed, after the details were arranged, and after Disanto completed the physical acts described above, he then went even further and executed a command to implement the killing. In fact, this Court itself describes this act as the "final command" to execute the murder. Disanto issued the order: "It's a go." This act is not present in the solicitation cases that invalidate attempted murder convictions because they proceeded no further than preparation.

Therefore, when Disanto's final command to execute the plan is combined with his history and other acts, this is the type of case that proceeded further than the mere solicitations and plans found insufficient in the case law. This combination of physical acts would have resulted in accomplishment of the crime absent the intervention of the law enforcement officer. Clearly, the victim was in substantially greater danger after the final command than when Disanto first expressed his desire to kill her. Consequently, there was sufficient evidence to support an attempt conviction.[4]

It bears repeating that none of the various "tests" used by courts in this area of the law can possibly distinguish all preparations from attempts. Therefore, a defendant's entire course of conduct should be evaluated in light of his intent and his prior history in order to determine whether there was substantial evidence from which a reasonable trier of fact could have sustained a finding of an attempt. In making that determination, it is universally recognized that the acts of solicitation and attempt are a continuum between planning and perpetration of the offense…

…[I]t is generally the jury's function to determine whether those acts have proceeded beyond mere planning. As this Court itself has noted, where design is shown, "courts should not destroy the practical and common sense administration of the law with subtleties as to what constitutes [the] preparation" to commit a crime as distinguished from acts done towards the commission of a crime. …We leave this question to the jury because "[t]he line between preparation and attempt is drawn at that point where the accused's acts *no longer strike the jury* as being equivocal but unequivocally demonstrate that a crime is about to be committed."

I would follow that admonition and affirm the judgment of this jury. Disanto's design, solicitation, physical acts toward commission of the crime and his final command to execute the murder, when considered together, unequivocally demonstrated that a crime was about to be committed. This was sufficient evidence from which the jury could have reasonably found that an attempt had been committed.

Notes and questions on *State v. Disanto*

1. This case introduces two new concepts important to the study of inchoate offenses: *solicitation*, discussed in this note and the next few notes, and *abandonment*, discussed below. "Solicitation" is, roughly, the crime of trying to get someone else to commit a crime. When solicitation began to be treated as a crime by common law courts in the nineteenth century, it was typically defined as the act of asking, inducing, advising, ordering, or otherwise encouraging someone else to commit a crime. No separate mental state requirement was typically identified, and some modern solicitation statutes also omit an explicit reference to mental states. However, courts typically interpret solicitation to require intent that the other person (the solicitee) commit the target crime. At the time *Disanto* was decided, South Dakota did not have a general solicitation statute. (That would soon change, as explained below.) Instead, separate statutes imposed criminal liability for certain types of offenses; it was a crime to solicit a bribe, for example, and a crime to solicit prostitution. But at the time that Mr. Disanto asked McCabe to kill Linda Olson, no statute made it criminal to solicit murder. Thus, the question before the state supreme court in this case was whether Disanto could be properly charged and convicted of attempted murder. Courts have divided on the question whether a solicitation—again, a request to someone else that they commit a crime—is itself sufficient to support attempt liability. What are the arguments for and against treating a solicitation as a form of attempt? There are a few different possible approaches that might be adopted by a jurisdiction: 1) all solicitations are attempts, making a separate crime of solicitation unnecessary; 2) some but not all solicitations are attempts; 3) solicitations are never attempts, but at least some solicitations should be separately criminalized; 4) solicitations are never attempts, and they should not be subject to criminal liability at all. Which position does the majority take? What about Justice Gilbertson? Justice Zinter?
2. One year after this case was decided, South Dakota adopted the following general solicitation statute:

Any person who, with the intent to promote or facilitate the commission of a crime, commands, hires, requests, or solicits another person to engage in specific conduct which would constitute the commission of such offense or an attempt to commit such offense, is guilty of criminal solicitation.

2005 South Dakota Laws Ch. 120, § 438, codified at SDCL § 22-4A-1. In 2021, the South Dakota Supreme Court, in an opinion by Justice Gilbertson (who dissented in *Disanto*), upheld a conviction under this statute for "solicitation to aid and abet a murder." *State v. Thoman*, 955 N.W.2d 759 (2021). The defendant, William Thoman, had asked a friend "if he knew anyone that could do away with somebody," and also asked the same friend to help him get a gun. Thoman expressed a desire to kill Dr. Mustafa Sahin, a doctor who had treated Thoman's wife until her death from cancer. The friend, Kenneth Jones, later reported the conversation to law enforcement, who had Jones make a recorded phone call to Thoman.

[I]n the recorded conversation, Jones expressed concern for Thoman. He told Thoman that he was unable to come up with a gun. Jones encouraged Thoman to get help, but Thoman told Jones that talking to him was enough. Jones asked if Thoman was still hellbent on "smoking" the doctor; to which Thoman responded, "One way or another he'll get taken care of, is the way I look at it; and if I can help that process along, by God I will." Thoman later said, "As far as literally shooting the guy that's what I would rather do, but he comes up to maybe my rib cage in height and I could just twist his head off. You know it would be just about as easy." Thoman later told Jones a story about going into the chemotherapy department to discuss a bill. While there, he saw Dr. Sahin and said, "There's that son of a bitch I'd like to get." Thoman explained that he has been thinking about killing Dr. Sahin since the December or January before Kathy died. He commented that if you are going to have a plan you ought to have a good plan. Jones asked if he could have Thoman's guns, to which Thoman responded that his guns are under lock and key, and he did not want to use his guns to kill Dr. Sahin because they have sentimental value. He further commented that shooting Dr. Sahin would be like "shooting a dog." Thoman went on to say that he looked at the doors in the hospital's chemotherapy department and noted that they are just wide enough to drive his truck through, but he did not act because he did not want to hurt other people besides the doctor. Thoman later stated that, if Jones had given him a gun, he would have needed the plan to come closer to fruition before acting, but he liked the option of personally killing Dr. Sahin. Then he said that right now it is just an option, and he would call Jones before he did anything.

Thoman, 955 N.W.2d at 764. Thoman was convicted of solicitation to murder under the new South Dakota statute. Should he have been convicted of attempted murder instead?

3. *The Disanto* majority states, "[p]lainly, the evidence established that defendant repeatedly expressed an intention to kill Olson and Egemo, as well as Olson's daughter, if necessary. As McCabe told the jury, defendant 'was a man on a mission to have three individuals murdered.'" Contrast the majority's characterization of the defendant's mental state to the concurring opinion, which finds that "the evidence indicates that this blundering, broke, inept 59-year-old felon … was inadequate to pursue or execute this crime without the motivating encouragement of his 'friend from prison' and law enforcement officers. On his own, it would have been no more than a thought." Are these two characterizations of McCabe's intentions (and actions) consistent? If not, which seems more accurate to you?
4. *Disanto* can help you refine your understanding of common law attempt terminology, including concepts discussed in *Mandujano* and the subsequent notes. The *Disanto* court distinguishes between "an unequivocal act [that] demonstrate[s] a crime is about to be committed unless frustrated by intervening circumstances" and "the last possible act before actual accomplishment of the crime." Which of these two types of act is required to establish attempt liability in South Dakota?
5. Notice that South Dakota has repealed by statute the common law principle of strict construction of criminal statutes. Both the majority opinion and Chief Justice Gilbertson's dissent quote Section 22-1-1, but the majority opinion leaves out the first sentence of the statute. Check Justice Gilbertson's dissent for the longer quotation. Does the extra sentence make a difference to the way you read the rest of the statute? In legal writing, lawyers often think carefully about what to quote and which sources to use. Professional norms generally require lawyers to avoid deliberate misrepresentation of a source. It is important to remember that judicial opinions are also advocacy documents in a certain sense: the judge who authors an opinion wants his or her readers to view the result as the only or best outcome, even if there were multiple possible interpretations of the underlying texts.
6. Disanto argued that he "abandoned" any attempt to murder Olson. The majority suggests that "abandonment" is irrelevant if Disanto had already engaged in the "actus reus" of attempted murder—if he had taken sufficient action, along with his criminal intent, to become guilty of the crime of attempted murder. In some jurisdictions, however, a claim of "abandonment" can function as an affirmative defense to an attempted offense: even if the defendant has completed the necessary elements to be guilty of an attempted crime, his or her subsequent abandonment of the planned crime is relevant to criminal liability. For more on abandonment (sometimes called renunciation) as an affirmative defense, see *People v. Acosta* later in this chapter.

Check Your Understanding (8-3)

The original version of this chapter contained H5P content. You may want to remove or replace this element.

Michigan C.L.A. 750.92. Attempt to commit crime

Any person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act towards the commission of such offense, but shall fail in the perpetration, or shall be intercepted or prevented in the execution of the same, when no express provision is made by law for the punishment of such attempt, shall be punished as follows:

1. If the offense attempted to be committed is such as is punishable with death, the person convicted of such attempt shall be guilty of a felony, punishable by imprisonment in the state prison not more than 10 years;

2. If the offense so attempted to be committed is punishable by imprisonment in the state prison for life, or for 5 years or more, the person convicted of such attempt shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or in the county jail not more than 1 year;

3. If the offense so attempted to be committed is punishable by imprisonment in the state prison for a term less than 5 years, or imprisonment in the county jail or by fine, the offender convicted of such attempt shall be guilty of a misdemeanor, punishable by imprisonment in the state prison or reformatory not more than 2 years or in any county jail not more than 1 year or by a fine not to exceed 1,000 dollars; but in no case shall the imprisonment exceed ½ of the greatest punishment which might have been inflicted if the offense so attempted had been committed.

Michigan C.L.A. 750.157b. Solicitation to commit murder or other felony; affirmative defense

(1) For purposes of this section, “solicit” means to offer to give, promise to give, or give any money, services, or anything of value, or to forgive or promise to forgive a debt or obligation.

(2) A person who solicits another person to commit murder, or who solicits another person to do or omit to do an act which if completed would constitute murder, is guilty of a felony punishable by imprisonment for life or any term of years.

(3) Except as provided in subsection (2), a person who solicits another person to commit a felony, or who solicits another person to do or omit to do an act which if completed would constitute a felony, is punishable as follows:

(a) If the offense solicited is a felony punishable by imprisonment for life, or for 5 years or more, the person is guilty of a felony punishable by imprisonment for not more than 5 years or by a fine not to exceed $5,000.00, or both.

(b) If the offense solicited is a felony punishable by imprisonment for a term less than 5 years or by a fine, the person is guilty of a misdemeanor punishable by imprisonment for not more than 2 years or by a fine not to exceed $1,000.00, or both, except that a term of imprisonment shall not exceed ½ of the maximum imprisonment which can be imposed if the offense solicited is committed.

(4) It is an affirmative defense to a prosecution under this section that, under circumstances manifesting a voluntary and complete renunciation of his or her criminal purpose, the actor notified the person solicited of his or her renunciation and either gave timely warning and cooperation to appropriate law enforcement authorities or otherwise made a substantial effort to prevent the performance of the criminal conduct commanded or solicited, provided that conduct does not occur. The defendant shall establish by a preponderance of the evidence the affirmative defense under this subsection.

Michigan C.L.A. 722.675. Dissemination of sexually explicit material to minors

(1) A person is guilty of distributing obscene matter to a minor if that person does either of the following:

(a) Knowingly disseminates to a minor sexually explicit visual or verbal material that is harmful to minors.

* * *

(2) A person knowingly disseminates sexually explicit matter to a minor when the person knows both the nature of the matter and the status of the minor to whom the matter is disseminated.

(3) A person knows the nature of matter if the person either is aware of the character and content of the matter or recklessly disregards circumstances suggesting the character and content of the matter.

(4) A person knows the status of a minor if the person either is aware that the person to whom the dissemination is made is under 18 years of age or recklessly disregards a substantial risk that the person to whom the dissemination is made is under 18 years of

age.

PEOPLE of the State of Michigan, Plaintiff–Appellant

v.

Christopher THOUSAND, Defendant–Appellee

Supreme Court of Michigan
631 N.W.2d 694

Decided July 27, 2001

YOUNG, J.

We granted leave in this case to consider whether the doctrine of "impossibility" provides a defense to a charge of attempt to commit an offense prohibited by law under M.C.L. § 750.92, or to a charge of solicitation to commit a felony under M.C.L. § 750.157b….

[Because this case has not yet been tried, our statement of facts is derived from preliminary hearings and documentation in the lower court record.] Deputy William Liczbinski was assigned by the Wayne County Sheriff's Department to conduct an undercover investigation for the department's Internet Crimes Bureau. Liczbinski was instructed to pose as a minor and log onto "chat rooms" on the Internet for the purpose of identifying persons using the Internet as a means for engaging in criminal activity.

On December 8, 1998, while using the screen name "Bekka," Liczbinski was approached by defendant, who was using the screen name "Mr. Auto–Mag," in an Internet chat room. Defendant described himself as a twenty-three-year-old male from Warren, and Bekka described herself as a fourteen-year-old female from Detroit. Bekka indicated that her name was Becky Fellins, and defendant revealed that his name was Chris Thousand. During this initial conversation, defendant sent Bekka, via the Internet, a photograph of his face.

From December 9 through 16, 1998, Liczbinski, still using the screen name "Bekka," engaged in chat room conversation with defendant. During these exchanges, the conversation became sexually explicit. Defendant made repeated lewd invitations to Bekka to engage in various sexual acts, despite various indications of her young age.

During one of his online conversations with Bekka, after asking her whether anyone was "around there," watching her, defendant indicated that he was sending her a picture of himself. Within seconds, Liczbinski received over the Internet a photograph of male genitalia. Defendant asked Bekka whether she liked and wanted it and whether she was getting "hot" yet, and described in a graphic manner the type of sexual acts he wished to perform with her. Defendant invited Bekka to come see him at his house for the purpose of engaging in sexual activity. Bekka replied that she wanted to do so, and defendant cautioned her that they had to be careful, because he could "go to jail." Defendant asked whether Bekka looked "over sixteen," so that if his roommates were home he could lie.

The two then planned to meet at an area McDonald's restaurant at 5:00 p.m. on the following Thursday. Defendant indicated that they could go to his house, and that he would tell his brother that Bekka was seventeen. Defendant instructed Bekka to wear a "nice sexy skirt," something that he could "get [his] head into." Defendant indicated that he would be dressed in black pants and shirt and a brown suede coat, and that he would be driving a green Duster. Bekka asked defendant to bring her a present, and indicated that she liked white teddy bears.

On Thursday, December 17, 1998, Liczbinski and other deputy sheriffs were present at the … restaurant when they saw defendant inside a vehicle matching the description given to Bekka by defendant. Defendant … entered the restaurant. Liczbinski recognized defendant's face from the photograph that had been sent to Bekka. Defendant looked around for approximately thirty seconds before leaving the restaurant. Defendant was then taken into custody [and his vehicle and home were searched].

Following a preliminary examination, defendant was bound over for trial on charges of solicitation to commit third-degree criminal sexual conduct, attempted distribution of obscene material to a minor, and child sexually abusive activity…

Defendant brought a motion to quash the information, arguing that, because the existence of a child victim was an element of each of the charged offenses, the evidence was legally insufficient to support the charges. The circuit court agreed and dismissed the

case, holding that it was legally impossible for defendant to have committed the charged offenses. The Court of Appeals affirmed the dismissal of the charges of solicitation and attempted distribution of obscene material to a minor….

The doctrine of "impossibility" as it has been discussed in the context of inchoate crimes represents the conceptual dilemma that arises when, because of the defendant's mistake of fact or law, his actions could not possibly have resulted in the commission of the substantive crime underlying an attempt charge. Classic illustrations of the concept of impossibility include: (1) the defendant is prosecuted for attempted larceny after he tries to "pick" the victim's empty pocket; (2) the defendant is prosecuted for attempted rape after he tries to have nonconsensual intercourse, but is unsuccessful because he is impotent; (3) the defendant is prosecuted for attempting to receive stolen property where the property he received was not, in fact, stolen; and (4) the defendant is prosecuted for attempting to hunt deer out of season after he shoots at a stuffed decoy deer. In each of these examples, despite evidence of the defendant's criminal intent, he cannot be prosecuted for the *completed* offense of larceny, rape, receiving stolen property, or hunting deer out of season, because proof of at least one element of each offense cannot be derived from his objective actions. The question, then, becomes whether the defendant can be prosecuted for the *attempted* offense, and the answer is dependent upon whether he may raise the defense of "impossibility."

Courts and legal scholars have drawn a distinction between two categories of impossibility: "factual impossibility" and "legal impossibility." It has been said that, at common law, legal impossibility is a defense to a charge of attempt, but factual impossibility is not. See American Law Institute, Model Penal Code and Commentaries (1985), comment to § 5.01; Dressler, Understanding Criminal Law… However, courts and scholars alike have struggled unsuccessfully over the years to articulate an accurate rule for distinguishing between the categories of "impossibility."

"Factual impossibility," which has apparently never been recognized in any American jurisdiction as a defense to a charge of attempt, "exists when [the defendant's] intended end constitutes a crime but she fails to consummate it because of a factual circumstance unknown to her or beyond her control." An example of a "factual impossibility" scenario is where the defendant is prosecuted for attempted murder after pointing an unloaded gun at someone and pulling the trigger, where the defendant believed the gun was loaded.

… "*Pure legal impossibility* exists if the criminal law does not prohibit *D*'s conduct or the result that she has sought to achieve." In other words, the concept of pure legal impossibility applies when an actor engages in conduct that he believes is criminal, but is not actually prohibited by law: "There can be no conviction of criminal attempt based upon D's erroneous notion that he was committing a crime." As an example, consider the case of a man who believes that the legal age of consent is sixteen years old, and who [correctly] believes that a girl with whom he had consensual sexual intercourse is fifteen years old. If the law actually fixed the age of consent at fifteen, this man would not be guilty of attempted statutory rape, despite his mistaken belief that the law prohibited his conduct.

[Separately,]

Courts have recognized a defense of legal impossibility or have stated that it would exist if D receives unstolen property believing it was stolen;… offers a bribe to a "juror" who is not a juror; tries to hunt deer out of season by shooting a stuffed animal; shoots a corpse believing that it is alive; or shoots at a tree stump believing that it is a human.

Notice that each of the mistakes in these cases affected the legal status of some aspect of the defendant's conduct. The status of property as "stolen" is necessary to commit the crime of "receiving stolen property with knowledge it is stolen"—i.e., a person legally is incapable of committing this offense if the property is not stolen. The status of a person as a "juror" is legally necessary to commit the offense of bribing a juror. The status of a victim as a "human being" (rather than as a corpse, tree stump, or statue) legally is necessary to commit the crime of murder or to "take and carry away the personal property *of another.*" Finally, putting a bullet into a stuffed deer can never constitute the crime of hunting out of season.

Dressler, supra.

… It is notable that "the great majority of jurisdictions have now recognized that legal and factual impossibility are 'logically indistinguishable' … and have abolished impossibility as a defense." … In other jurisdictions, courts have considered the "impossibility" defense under attempt statutes that did not include language explicitly abolishing the defense. Several of these courts have simply declined to participate in the sterile academic exercise of categorizing a particular set of facts as representing "factual" or "legal" impossibility, and have instead examined solely the words of the applicable attempt statute.

The Court of Appeals panel in this case … concluded that it was legally impossible for defendant to have committed the charged offense of attempted distribution of obscene material to a minor. The panel held that, because "Bekka" was, in fact, an adult, an essential requirement of the underlying substantive offense was not met (dissemination to a minor), and therefore it was legally impossible for defendant to have committed the crime.

We begin by noting that the concept of "impossibility," in either its "factual" or "legal" variant, has never been recognized by this Court as a valid defense to a charge of attempt. …

Finding no recognition of impossibility in our common law, we turn now to the terms of the statute. MCL 750.92 provides, in relevant part:

Any person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act towards the commission of such offense, but shall fail in the perpetration, or shall be intercepted or prevented in the execution of the same, when no express provision is made by law for the punishment of such attempt, shall be punished as follows…

… We are unable to discern from the words of the attempt statute any legislative intent that the concept of "impossibility" provide any impediment to charging a defendant with, or convicting him of, an attempted crime, notwithstanding any factual mistake—regarding either the attendant circumstances or the legal status of some factor relevant thereto—that he may harbor. The attempt statute carves out no exception for those who, possessing the requisite criminal intent to commit an offense prohibited by law and taking action toward the commission of that offense, have acted under an extrinsic misconception.

Defendant in this case is not charged with the substantive crime of distributing obscene material to a minor. It is unquestioned that defendant could not be convicted of that crime, because defendant allegedly distributed obscene material not to "a minor," but to an adult man. Instead, defendant is charged with the distinct offense of attempt, which requires only that the prosecution prove intention to commit an offense prohibited by law, coupled with conduct toward the commission of that offense. The notion that it would be "impossible" for the defendant to have committed the *completed* offense is simply irrelevant to the analysis. Rather, in deciding guilt on a charge of attempt, the trier of fact must examine the unique circumstances of the particular case and determine whether the prosecution has proven that the defendant possessed the requisite specific intent and that he engaged in some act "towards the commission" of the intended offense.

Because the nonexistence of a minor victim does not give rise to a viable defense to the attempt charge in this case, the circuit court erred in dismissing this charge on the basis of "legal impossibility."

Defendant was additionally charged, on the basis of his Internet conversations with "Bekka," with solicitation to commit third-degree criminal sexual conduct. [The applicable underlying statute provides that "[a] person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and … (a) [t]hat other person is at least 13 years of age and under 16 years of age."] Defendant maintains that it was "legally impossible" for him to have committed this crime, because the underlying felony requires the existence of a child under the age of sixteen. The Court of Appeals panel agreed…

The Court of Appeals erred to the extent that it relied on the doctrine of "impossibility" as a ground for affirming the … dismissal of the solicitation charge. As we have explained, Michigan has never adopted the doctrine of impossibility as a defense in its traditional *attempt* context, much less in the context of *solicitation* crimes. Moreover, we are unable to locate any authority, and defendant has provided none, for the proposition that "impossibility" is a recognized defense to a charge of solicitation in other jurisdictions.

Nevertheless, the solicitation charge was properly dismissed for the reason that there is no evidence that defendant in our case solicited anyone "to commit a felony" or "to do or omit to do an act which if completed would constitute a felony"… Pursuant to the plain statutory language, the prosecution was required to present evidence that defendant requested that *another person* perform a criminal act. The evidence here shows only that defendant requested that "Bekka" engage in sexual acts with him. While the requested acts might well have constituted a crime on defendant's part, "Bekka" (or Liczbinski) would not have committed third-degree criminal sexual conduct had she (or he) done as defendant suggested. As the Court of Appeals properly concluded:

What is lacking here is defendant's request to another person to commit a crime. "Bekka," the fourteen-year-old online persona of Deputy Liczbinski, was not asked to commit a crime. That is, while it would be a crime for defendant to engage in sexual intercourse with a fourteen-year-old girl, a fourteen-year-old girl is not committing a criminal offense (or at least not CSC–III) by engaging in sexual intercourse with an adult. Thus, whether we look at this case as defendant asking fourteen-year-old "Bekka" to

engage in sexual intercourse with him or as defendant asking Deputy Liczbinski to engage in sexual intercourse with him, he did not ask another person to commit CSC–III…. For the above reasons we conclude that the trial court properly dismissed the charge of solicitation to commit criminal sexual conduct.

Accordingly, while the concept of "impossibility" has no role in the analysis of this issue, we agree with the panel's conclusion that an element of the statutory offense is missing and that the solicitation charge was therefore properly dismissed….

MARILYN J. KELLY, J., (concurring in part and dissenting in part).

The majority errs in concluding that "legal impossibility" has never been adopted in Michigan…

People v. Tinskey (1975) held that the defendants could not be guilty of conspiracy to commit abortion because the woman who was to be aborted was not pregnant. The Court reasoned that the Legislature, in enacting the statute, purposely required that conspiracy to abort involve a pregnant woman. It thereby rejected prosecutions where the woman was not pregnant. It concluded that the defendants in *Tinskey* could not be prosecuted for conspiracy to commit abortion because one of the elements of the crime, a pregnant woman, could not be established.

Significantly, the *Tinskey* Court stated that "[t]he Legislature has not, as to most other offenses, so similarly indicated that impossibility is not a defense." By this language, *Tinskey* expressly recognized the existence of the "legal impossibility" defense in the common law of this state. Even though the reference to "legal impossibility" regarding the crime of attempt may be dictum, the later statement regarding the "impossibility" defense was part of the reasoning and conclusion in *Tinskey.* This Court recognized the defense, even if it did not do so expressly concerning charges for attempt or solicitation.

… Even if "legal impossibility" were not part of Michigan's common law, I would disagree with the majority's interpretation of the attempt statute. It does not follow from the fact that the statute does not expressly incorporate the concept of impossibility that the defense is inapplicable.

Examination of the language of the attempt statute leads to a reasonable inference that the Legislature did not intend to punish conduct that a mistake of legal fact renders unprohibited. The attempt statute makes illegal an "… attempt to *commit an offense prohibited by law* …." It does not make illegal an action not prohibited by law. Hence, one may conclude, the impossibility of completing the underlying crime can provide a defense to attempt.

This reasoning is supported by the fact that the attempt statute codified the common-law rule regarding the elements of attempt. At common law, "legal impossibility" is a defense to attempt….

This state's attempt statute, unlike the Model Penal Code and various state statutes that follow it, does not contain language allowing for consideration of a defendant's beliefs regarding "attendant circumstances." Rather, it takes an "objective" view of criminality, focusing on whether the defendant actually came close to completing the prohibited act. The impossibility of completing the offense is relevant to this objective approach because impossibility obviates the state's "concern that the actor may cause or come close to causing the harm or evil that the offense seeks to prevent."

The majority's conclusion, that it is irrelevant whether it would be impossible to have committed the completed offense, contradicts the language used in the attempt statute. If an element of the offense cannot be established, an accused cannot be found guilty of the prohibited act. The underlying offense in this case, disseminating or exhibiting sexual material to a minor, requires a minor recipient. Because the dissemination was not to a minor, it is legally impossible for defendant to have committed the prohibited act.

…As judges, we often decide cases involving disturbing facts. However repugnant we personally find the criminal conduct charged, we must decide the issues on the basis of the law. I certainly do not wish to have child predators loose in society. However, I believe that neither the law nor society is served by allowing the end of removing them from society to excuse unjust means to accomplish it. In this case, defendant raised a legal impossibility argument that is supported by Michigan case law. The majority, in determining that legal impossibility is not a viable defense in this state, ignores that law….

Notes and questions on *People v. Thousand*

1. The prosecution initially charged Thousand with a completed offense of 722.675, distribution of explicit material to a minor. That statute is reprinted just before the case. The prosecution later moved to withdraw that charge and replace it with an attempted distribution charge. Why did the prosecution make this change?

2. This court rejects "impossibility" as a limitation on attempt liability. But what does it mean to say that an attempt is impossible? Sometimes, the term is used to describe a defendant who tries to engage in conduct that is not actually criminal; that is "pure legal impossibility" in the words of this court. In that case, it is impossible to commit the underlying crime because there is no underlying crime. Aside from this situation, the label "impossibility" is contested. If a person decides to hunt deer out of season and shoots an animal that turns out to be a decoy rather than a real deer, has this person engaged in an "impossible" attempt? For information on Indiana's Robo-Deer enforcement program, see https://indianapublicmedia.org/news/dnr-sting-op-stifel-road-hunting.php.
3. Review the Model Penal Code's definition of attempt (reprinted in the notes after *Mandujano*). The MPC makes the issue of impossibility mostly irrelevant by defining attempt to include acts that would constitute a crime, or a substantial step toward a crime, "if the attendant circumstances were as [the defendant] believes them to be." So a person who tries to bribe a "juror," though mistaken about whether his bribe is going to someone who really is a juror, is as guilty as a person who tries to bribe an actual juror.
4. In the dissenting opinion in *Thousand*, the question whether "impossibility" should limit attempt liability requires us to consider the underlying rationale for punishing attempt at all. Judge Kelly writes, "impossibility obviates the state's concern that the actor may cause or come close to causing the harm or evil that the offense seeks to prevent." Does it seem correct to you that attempt doctrine is based on a worry about risks of harm? Should a defendant's liability for an attempted offense depend on the defendant's likelihood of success? What other rationales might explain the choice to criminalize attempts?
5. Note that Michigan has both a general attempt statute and a general solicitation statute, both reprinted before this case. Christopher Thousand was charged with solicitation to commit third-degree sexual conduct, but attempted distribution of obscene material to a minor. The solicitation charge and the attempt charge were paired with two different underlying offenses. But could Thousand have been charged, or convicted, with solicitation and attempt with regard to the same underlying crime? That is, could he have been charged with solicitation to commit third-degree sexual conduct and attempted third-degree sexual conduct? Many courts hold that solicitation "merges" with attempt so that a defendant can be convicted of either solicitation or attempt for a given act, but not both of these inchoate crimes.
6. Why did the Michigan Supreme Court conclude that Thousand's solicitation charge (but not the attempt charge) was properly dismissed? The court rejected the language of impossibility, but is this a case of what the court earlier called "pure legal impossibility"?

Check Your Understanding (8-4)

The original version of this chapter contained H5P content. You may want to remove or replace this element.

Renunciation or Abandonment

N.Y. Penal Law § 110.00. Attempt to commit a crime

A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime.

N.Y. Penal Law § 40.10(3)

In any prosecution pursuant to section 110.00 for an attempt to commit a crime, it is an affirmative defense that, under circumstances manifesting a voluntary and complete renunciation of his criminal purpose, the defendant avoided the commission of the crime attempted by abandoning his criminal effort and, if mere abandonment was insufficient to accomplish such avoidance, by taking further and affirmative steps which prevented the commission thereof.

Penal Law § 220.21 [as amended in 2004]

A person is guilty of criminal possession of a controlled substance in the first degree when he or she knowingly and unlawfully possesses:

1. one or more preparations, compounds, mixtures or substances containing a narcotic drug and said preparations, compounds, mixtures or substances are of an aggregate weight of eight ounces or more; or

2. methadone and said methadone weighs five thousand seven hundred sixty milligrams or more.

The PEOPLE of the State of New York, Appellant

v.

Andre ACOSTA, Respondent

Court of Appeals of New York
80 N.Y.2d 665

Feb. 16, 1993

KAYE, Judge.

A person who, with intent to possess cocaine, orders from a supplier, admits a courier into his or her home, examines the drugs and ultimately rejects them because of perceived defects in quality, has attempted to possess cocaine within the meaning of the Penal Law. As the evidence was legally sufficient to establish this sequence of events, we reinstate defendant's conviction of attempted criminal possession of a controlled substance in the first degree.

I.

By jury verdict, defendant was convicted of conspiracy and attempted possession of cocaine. The latter charge—the only one at issue on this appeal—centers on the events of March 21, 1988.

Evidence at trial revealed that, commencing in November 1986, officers of the Manhattan North Narcotics Division began investigating the activities of defendant, his brother Miguel and others. Their investigation techniques included the use of an undercover officer to infiltrate the organization, stakeouts and court-authorized wiretaps. In July 1987 the undercover met with Miguel at a Manhattan apartment and purchased cocaine. At that time, Miguel introduced defendant to the officer, telling her that they "work together."

A wiretap on defendant's telephone at his Bronx apartment revealed that for several days prior to March 21, 1988, he was negotiating with Luis Rojas to purchase kilogram quantities of cocaine. [These conversations were routinely conducted in code words such as "tickets" or "tires" which the prosecution expert testified represented kilos of cocaine.] On March 21, at 11:37 a.m., Rojas called defendant and asked, "are you ready?" Defendant replied "come by here" and Rojas responded, "I'm going over." At 11:42, defendant called "Frank," an associate, and told him that he "spoke to the man" who would be "coming over here…. Right now."

About a half hour later, around 12:15 p.m., officers staking out defendant's six-floor apartment building saw a man pull up in a car, remove a black and white plastic bag from the trunk, and enter the building. The bag's handles were stretched, indicating that the contents were heavy. At 12:30, the man emerged from the building, carrying the same plastic bag which still appeared to be heavy. He placed the bag back in the trunk and drove off.

Minutes later, at 12:37 p.m., defendant called Frank, stating that he "saw the man" but "those tickets … were no good; they weren't good for the game man." Frank wondered whether "they got more expensive, the seats" and defendant explained that they were the "same price and all" but they were "not the same seats … some seats real bad, very bad, very bad." Defendant elaborated: "two pass tickets together on the outside stuck together, like a thing, like a ticket falsified. Then I told him to take it away, no, I don't want any problems and anything you see." Frank asked if defendant was told when the tickets would arrive, and defendant responded "No because who came was someone, somebody else, the guy, the messenger." Defendant acknowledged that he "want[s] to participate in the game but if you can't see it, you're going to come out upset."

At 12:50 p.m., Rojas called defendant and said something inaudible about "my friend." Defendant responded, "Oh yes, but he left because (inaudible) it doesn't fit me…. You told me it was the same thing, same ticket." Rojas rejoined, "No. We'll see each other at six."

Finally, at 1:26 p.m., defendant telephoned Hector Vargas, who wanted to know "what happened?" Defendant said, "Nothing. I saw something there, what you wanted, but I returned it because it was a shit there." Hector wanted to know, "like how?" but defendant simply responded, "No, no, a weird shit there." Vargas suggested that he might be able to obtain something "white and good."

The following day, defendant again called Vargas to discuss "the thing you told me about, you know what I'm referring to". Defendant recommended that Vargas "go talk to him, talk to him personally and check it out." Defendant thought that "it would be

better if you took the tickets, at least one or whatever."

At trial, in motions before and after the verdict, defendant argued that the foregoing evidence was insufficient to establish that he attempted to possess cocaine on March 21. The trial court rejected those arguments and sentenced defendant, upon the jury's guilty verdict, to a prison term of 25 years to life, the maximum permitted by law. On appeal, a sharply divided Appellate Division reversed and vacated the attempted possession conviction, the majority concluding that "[e]ven were we to accept [the] attenuated inference that the visitor actually reached defendant's apartment and offered his contraband to him, the remaining evidence shows defendant's flat rejection of that offer, and thus total abandonment of the criminal enterprise with respect to this particular quantity of cocaine." One of the dissenting Justices granted the People leave to appeal, and we now reverse.

II.

A person knowingly and unlawfully possessing a substance weighing at least four ounces and containing a narcotic drug is guilty of criminal possession of a controlled substance in the first degree (Penal Law § 220.21[1]). Under the Penal Law, "[a] person is guilty of an attempt to commit a crime when, with intent to commit a crime, he [or she] engages in conduct which tends to effect the commission of such crime." (Penal Law § 110.00.) While the statutory formulation of attempt would seem to cover a broad range of conduct—anything "tend[ing] to effect" a crime—case law requires a closer nexus between defendant's acts and the completed crime.

In *People v. Rizzo* (NY 1927), we observed that in demarcating punishable attempts from mere preparation to commit a crime, a "line has been drawn between those acts which are remote and those which are proximate and near to the consummation." In *Rizzo*, this Court drew that line at acts "very near to the accomplishment of the intended crime." Though apparently more stringent than the Model Penal Code "substantial step" test—a test adopted by some Federal courts—in this State we have adhered to *Rizzo's* "very near" or "dangerously near" requirement, despite the later enactment of Penal Law § 110.00. [But the statute interpreted in *Rizzo*, former Penal Law § 2, is similar to Penal Law §110.00.]

A person who orders illegal narcotics from a supplier, admits a courier into his or her home and examines the quality of the goods has unquestionably passed beyond mere preparation and come "very near" to possessing those drugs. Indeed, the only remaining step between the attempt and the completed crime is the person's acceptance of the proffered merchandise, an act entirely within his or her control.

Our decision in *People v. Warren* (NY 1985) is thus readily distinguishable…. In that case, an informant and an undercover officer posing as a cocaine seller met defendants in a hotel room and reached an agreement for the sale of about half a pound. The actual exchange, however, was to occur hours later, in another part of town, after repackaging and testing. Moreover, when defendants were arrested at that meeting, the sellers had insufficient cocaine on hand and defendants had insufficient funds. We concluded that since "several contingencies stood between the agreement in the hotel room and the contemplated purchase," defendants did not come "very near" to accomplishment of the intended crime. The same cannot be said here.

Significantly, neither the Appellate Division nor the dissent in this Court disputes the proposition that a person who arranges for the delivery of drugs and actually examines them has come sufficiently close to the completed crime to qualify as an attempt. Rather, the Appellate Division relies on two other grounds for reversal: (i) the evidence was insufficient to establish that defendant in fact met with a drug courier and examined his wares; and (ii) in any event, defendant's ultimate rejection of the drugs constituted an abandonment of the criminal enterprise, vitiating the attempt. (The dissent in this Court is limited to the first ground.) Neither ground is persuasive.

Sufficiency of the Evidence

A jury, of course, concluded from the evidence presented that defendant attempted to possess cocaine on March 21, 1988. In examining the record for legal sufficiency, "the evidence must be viewed in a light most favorable to the People … to determine whether there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt" …

[W]e conclude that the evidence was legally sufficient to support the jury's finding that defendant met with a drug courier in his home on March 21. About a half-hour after defendant's supplier, Rojas, told defendant that he would be coming over, the police saw a man enter the apartment building with a weighted-down plastic bag and emerge 15 minutes later with the same heavy bag. Contemporaneously with the unidentified man's departure, defendant reported to an associate that he met with a messenger but that

he rejected the offer because the "seats" were "very bad" and the "tickets" looked "falsified." When Rojas immediately called defendant asking about his "friend," defendant explained that "he left" and complained that Rojas misrepresented that the "same ticket" would be brought. And shortly thereafter, defendant called Vargas and told him that he "saw something there, what you wanted, but I returned it because it was a shit there."

On the evidence presented, a rational jury could have found beyond a reasonable doubt that defendant, with the intent to possess more than four ounces of a controlled substance, met with Rojas' courier and examined cocaine, but rejected it because he was dissatisfied with the quality.

The dissent's contrary conclusion is reachable only by arbitrarily fragmenting the evidence. …[T]he dissent claims that the "sole basis" for defendant's guilt was a wiretapped conversation in which he told an individual that he had just rejected tickets.

The law, however, did not oblige the jury to take such an artificial view of the evidence. Rather, the jury function was to evaluate the trial evidence as a whole, to consider how the individualized bits of evidence fit together, including inferences from the evidence that rational individuals were entitled to draw. As background, the jury knew from defendant's many earlier conversations about "tickets" and his meeting with the undercover that he was involved with drugs. Further, the jury knew that in the days immediately preceding March 21 defendant was negotiating with Rojas to buy kilos of cocaine and that on March 21 Rojas said that he was coming over. The unidentified man's visit to the apartment building with the parcel—coinciding to the minute with defendant's conversations—was fully consistent with defendant's several later admissions that he had met with a courier but rejected his merchandise. While the dissent would ignore the totality of this evidence, the jury most assuredly was not required to do so.

Rejection as Abandonment

… Penal Law § 40.10(3) provides an affirmative defense to an attempt charge "under circumstances manifesting a voluntary and complete renunciation of [the] criminal purpose". To qualify for this defense, "the abandonment must be permanent, not temporary or contingent, not simply a decision to postpone the criminal conduct until another time" …

An abandonment theory is inapposite here. First, abandonment is an affirmative defense, meaning that defendant has the burden of establishing it by a preponderance of the evidence. At trial, however, defendant never sought to present a renunciation defense. Second, and even more fundamentally, the evidence revealed that even after rejecting the March 21 offer, defendant continued making efforts to obtain cocaine. Thus, while it may be true that there was an abandonment "with respect to [that] particular quantity of cocaine," this is immaterial for purposes of the statutory renunciation defense. Rather, there must be an abandonment of over-all criminal enterprise, which on this record plainly was not the case.

III.

… Accordingly, the order of the Appellate Division should be reversed, the conviction for attempted criminal possession of a controlled substance in the first degree reinstated, and the case remitted to that court for consideration of the facts….

SMITH, Judge (dissenting).

To uphold defendant's conviction of an attempt, it must be shown beyond a reasonable doubt that his acts came "dangerously close" to committing the substantive crime. That someone got out of a car carrying a bag and entered the apartment building adds nothing to the proof of the attempted crime. There was no proof of who this man was, what was in the bag, where the man went inside the building or who owned the car. Any connection of this proof with defendant would necessarily be based on pure speculation. The critical question, then, is whether defendant's wiretapped phone calls, standing alone, or even in conjunction with the evidence of a man and his bag, could constitute sufficient evidence for a finding of guilt. Without more, these phone conversations, and other evidence submitted, were insufficient to show that defendant came "dangerously close" to possessing drugs. I, therefore, dissent.

…A police officer assigned to stakeout defendant's apartment building testified at trial that shortly after noon on March 21, 1988, he observed … a male Hispanic exit [a white] car, remove a black and white plastic bag with long, completely stretched handles from the trunk, and enter the courtyard leading to the building. No one followed the person into the building to ascertain where he went. The officer testified further that the same man left the building 15 minutes later with the same bag with similarly stretched handles…. The officer testified that he never stopped the driver of the white vehicle or ascertained what was in the bag. This

incident, along with overheard conversations of defendant that he had rejected "tickets" (allegedly cocaine), presented the sole basis for convicting defendant of attempted possession of a controlled substance in the first degree.

Defendant was convicted, after a jury trial, of attempted criminal possession of a controlled substance in the first degree and conspiracy to possess a controlled substance in the second degree. [Footnote by the dissent: It should be noted that although no objection to it was made by either party, the court erroneously charged the Federal standard on attempt in that a "substantial step" is required for the completion rather than the New York standard of a requirement that conduct come "very near" or "dangerously near" to completion.]

…[T]he evidence adduced at trial does not establish that defendant came very near to the accomplishment of the crime of possession of a controlled substance in the first degree. According to the wiretap information, defendant had been anticipating a delivery of "tickets" from his suppliers for resale to a customer. The police observed an Hispanic male enter and leave the courtyard of the apartment building in which defendant lived carrying a heavy-laden shopping bag. The People assert that the unidentified male brought a supply of cocaine to defendant's apartment and defendant rejected the supply. However, the stakeout police officer did not stop and question the Hispanic male or ascertain what was in the shopping bag, nor did he observe the male approach or enter defendant's apartment. …[T]he testimony that an unidentified man entered and exited defendant's apartment building amounts to no material evidence at all.

The sole basis for defendant's guilt was the wiretap conversations in which defendant told another individual that he had just rejected a delivery of "tickets" as unacceptable because it was "no good" and "stuck together." The evidence adduced simply does not establish beyond a reasonable doubt the attempted possession of cocaine by the defendant.

Check Your Understanding (8-5)

The original version of this chapter contained H5P content. You may want to remove or replace this element.

Notes and questions on *People v. Acosta*

1. Weights and measures: in New York, first degree possession of a controlled substance requires possession of a compound or substance that contains narcotics and has "an aggregate weight of eight ounces or more." (At the time of *Acosta*, the minimum weight was only four ounces, as noted in the first sentence of Part II of the majority opinion.) Recall from Chapter Seven that the precise quantity of drugs possessed can be a significant determinant of the scope of criminal liability. When actual narcotics are seized by the police, the drugs (or a mixed substance containing the drugs) can be measured by law enforcement. In this case, no drugs were ever seized or otherwise handled by law enforcement. What evidence does the state use to prove the quantity of the drugs involved here?
2. In a footnote that is omitted here, the *Acosta* majority observed that New York law used to punish an attempted crime less severely than the completed underlying offense: someone convicted of attempted murder would be subject to a less severe sentence than someone convicted of murder itself. Subsequently, New York changed the penalty provisions to make an attempted offense punishable by the same range of penalties that apply to the completed offense. Thus, Andre Acosta could be given the same sentence that he might have received if he had actually possessed a controlled substance. This approach to grading attempt—that is, making it subject to the same penalties as those available for the underlying offense—is recommended in the Model Penal Code and adopted by many U.S. jurisdictions. There is considerable variation on this question, though; other states authorize lower maximum sentences for attempts than for the underlying offenses.
3. Given the penalty details just described, Andre Acosta, who refused to buy this cocaine, is subject to exactly the same criminal punishment to which he would have been subject had he purchased these drugs. Does that make sense? What rationale for attempt law best explains why Acosta should be punished, if indeed he should?
4. Why did the court reject Acosta's claim of abandonment? The easier, and less interesting, answer is that Acosta did not make the claim in time. Because abandonment (or renunciation) is an affirmative defense in New York, it was up to the defendant to raise this argument at trial and present evidence to support it. Acosta did not do that. But the court identifies a second and "more fundamental" reason that the abandonment defense is not available to Acosta. What is that more fundamental argument?
5. New York is not unusual in offering only a minimal statutory definition of attempt: "A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime." But as the court notes, case law provides additional guidance. The court cites *People v. Rizzo* (1927), a classic case that is often used

to demonstrate the common law "dangerous proximity" test of attempt. Here is the *Rizzo* court's description of the facts of that case:

Charles Rizzo, the defendant, appellant, with three others, Anthony J. Dorio, Thomas Milo and John Thomasello, on January 14th planned to rob one Charles Rao of a payroll valued at about $1,200 which he was to carry from the bank for the United Lathing Company. These defendants, two of whom had firearms, started out in an automobile, looking for Rao or the man who had the payroll on that day. Rizzo claimed to be able to identify the man and was to point him out to the others who were to do the actual holding up. The four rode about in their car looking for Rao. They went to the bank from which he was supposed to get the money and to various buildings being constructed by the United Lathing Company. At last they came to One Hundred and Eightieth street and Morris Park avenue. By this time they were watched and followed by two police officers. As Rizzo jumped out of the car and ran into the building all four were arrested. The defendant was taken out from the building in which he was hiding. Neither Rao nor a man named Previti, who was also supposed to carry a payroll, were at the place at the time of the arrest. The defendants had not found or seen the man they intended to rob; no person with a payroll was at any of the places where they had stopped and no one had been pointed out or identified by Rizzo. The four men intended to rob the payroll man, whoever he was; they were looking for him, but they had not seen or discovered him up to the time they were arrested.

People v. Rizzo, 246 N.E. 334, 336 (1927). The *Rizzo* court found that the defendants were not guilty of attempted robbery, since robbery requires a specific victim and these defendants never located their intended victim.

In a word, these defendants had planned to commit a crime and were looking around the city for an opportunity to commit it, but the opportunity fortunately never came. Men would not be guilty of an attempt at burglary if they had planned to break into a building and were arrested while they were hunting about the streets for the building not knowing where it was. Neither would a man be guilty of an attempt to commit murder if he armed himself and started out to find the person whom he had planned to kill but could not find him. So here these defendants were not guilty of an attempt to commit robbery in the first degree when they had not found or reached the presence of the person they intended to rob.

Id. at 338. The court thus reversed Rizzo's conviction—but not those of his co-defendants, because they had neglected to appeal!

A very strange situation has arisen in this case. …[The four defendants] were all tried together upon the same evidence, and jointly convicted, and all sentenced to State's prison for varying terms. Rizzo was the only one of the four to appeal to the Appellate Division and to this court. …[W]e have now held that he was not guilty of the crime charged. If he were not guilty, neither were the other three. As the others, however, did not appeal, there is no remedy for them through the court; their judgments stand, and they must serve their sentences. This of course is a situation which must in all fairness be met in some way. Two of these men were guilty of the crime of carrying weapons, pistols, contrary to law, for which they could be convicted. Two of them, John Thomasello and Thomas Milo, had also been previously convicted, which may have had something to do with their neglect to appeal. However, the law would fail in its function and its purpose if it permitted these three men whoever or whatever they are to serve a sentence for a crime which the courts subsequently found and declared had not been committed. We, therefore, suggest to the district attorney of Bronx county that he bring the cases of these three men to the attention of the Governor to be dealt with as to him seems proper in the light of this opinion.

Id. at 339-340. As we have discussed many times, the vast majority of criminal convictions do not lead to an appeal.

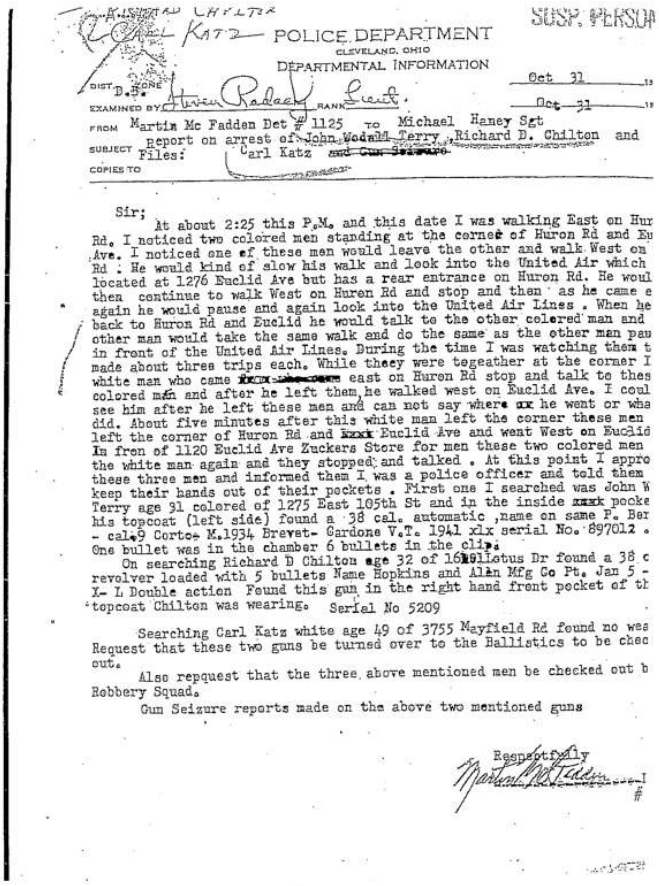
6. One last note about *People v. Rizzo*: the New York court opened its opinion with praise for the police who arrested Rizzo and his codefendants: "The police of the city of New York did excellent work in this case by preventing the commission of a serious crime. It is a great satisfaction to realize that we have such wide-awake guardians of our peace. Whether or not the steps which the defendant had taken up to the time of his arrest amounted to the commission of a crime, as defined by our law, is, however, another matter." *Id*. at 335. In the court's view, Rizzo was properly arrested but not properly convicted. This distinction invites us to think again about the interaction of criminalization, enforcement, and adjudication decisions; the next section examines that interaction.

Enforcement Powers, Enforcement Choices

One possible rationale for the law of attempt is suggested by the *Rizzo* court's praise for the New York police as "wide-awake guardians": attempt doctrine exists to enable enforcement officials to intervene at an earlier stage. This function of attempt law is

not often emphasized in contemporary discussions, in part because the powers of enforcement officials have been expanded in other ways that make attempt doctrine less important as a source of power for police. In this final section of the chapter, we consider inchoate offenses in the broader context of preventive intervention. One particularly important expansion of enforcement authority has been the Supreme Court's endorsement of the idea that a police officer can stop, question, and frisk an individual as soon as the officer has "reasonable suspicion" that "criminal activity is afoot." What does it mean for "criminal activity" to be "afoot"? Does it mean that a person is preparing to commit a crime, or already committing one? Does it allow intervention at "mere preparation," before that preparation has crossed the line into an "attempt"? And what does it mean for a police officer to have "reasonable suspicion" that these things have occurred?

To consider these questions, please read the arrest report below. It is the report generated after the arrest that eventually led to *Terry v. Ohio*, the famous Supreme Court decision that establishes "stop-and-frisk" authority as constitutional. Thinking about *Terry* can help you review inchoate offenses, and it can also help you review the relationships among criminalization, enforcement, and adjudication decisions. Some questions for reflection follow the arrest report.



KATZ POLICE DEPARTMENT
CLEVELAND, OHIO
DEPARTMENTAL INFORMATION

SUSP. PERSON

DIST. D-5 ZONE
EXAMINED BY Huren Radaay RANK Lieut. Oct 31 19
FROM Martin Mc Fadden Det # 1125 TO Michael Haney Sgt Oct 31 19
SUBJECT Report on arrest of John Wodall Terry, Richard D. Chilton and Carl Katz and Gun Seizure
COPIES TO Files:

Sir;

At about 2:25 this P.M. and this date I was walking East on Hur Rd. I noticed two colored men standing at the corner of Huron Rd and Eu Ave. I noticed one of these men would leave the other and walk West on Rd : He would kind of slow his walk and look into the United Air which located at 1276 Euclid Ave but has a rear entrance on Huron Rd. He woul then continue to walk West on Huren Rd and stop and then as he came e again he would pause and again look into the United Air Lines . When he back to Huron Rd and Euclid he would talk to the other colored man and other man would take the same walk and do the same as the other man pau in front of the United Air Lines. During the time I was watching them t made about three trips each. While theey were tegeather at the corner I white man who came [redacted] east on Huron Rd stop and talk to thes colored man and after he left them he walked west on Euclid Ave. I coul see him after he left these men and can not say where ax he went or wha did. About five minutes after this white man left the corner these men left the corner of Huron Rd and [redacted] Euclid Ave and went West on Euclid In fron of 1120 Euclid Ave Zuckers Store for men these two colored men the white man again and they stopped and talked . At this point I appro these three men and informed them I was a police officer and told them keep their hands out of their pockets . First one I searched was John W Terry age 31 colored of 1275 East 105th St and in the inside [redacted] pocke his topcoat (left side) found a 38 cal. automatic ,name on same P. Ber - cal.9 Corto- M.1934 Brevst- Cardone V.T. 1941 xlx serial No. 897012 . One bullet was in the chamber 6 bullets in the clip.

On searching Richard D Chilton age 32 of 16[illegible]Lotus Dr found a 38 c revolver loaded with 5 bullets Name Hopkins and Alan Mfg Co Pt. Jan 5 - X- L Double action Found this gun in the right hand front pocket of th topcoat Chilton was wearing. Serial No 5209

Searching Carl Katz white age 49 of 3755 Mayfield Rd found no wea Request that these two guns be turnsd over to the Ballistics to be chec out.

Also repquest that the three above mentioned men be checked out b Robbery Squad.

Gun Seizure reports made on the above two mentioned guns

Respectfully
Martin McFadden #

1. Notice that Officer McFadden's arrest report requests that the defendants "be checked out by the Robbery Squad." In later testimony before John Terry's trial, McFadden explained that he thought Terry and his co-defendants might have been "casing a job, a stick-up." Assume that at the time of John Terry's arrest, the elements of robbery in Ohio were:
   1) The taking of anything of value
   2) From the person of another
   3) By force or violence or by putting in fear
   4) With intent to steal such property.

See *State v. Carlisle*, 181 N.E.2d 517 (Ohio 1961).

And assume that at the time of Terry's arrest, a criminal attempt was defined under Ohio law "as consisting of three essentials":

1) An intent to perpetrate a criminal act,
2) The performance of some overt act toward its commission,
3) The failure to consummate its commission.

See *State v. Branch*, 26 Ohio Law Abs. 261, 262 (Ohio 1937).

Given these Ohio definitions, and based on the evidence recited in the arrest report, do you think the prosecution would be able to prove beyond a reasonable doubt that Terry committed the crime of attempted robbery? What evidence establishes Terry's intent? What is the overt act?

2. The arrest report states that Terry and his companions were looking repeatedly into the window of a United Airlines ticket office. Later, at trial, Officer McFadden testified that he wasn't sure which window the men were looking into. Still later, after this case became famous, some commentators started to claim that Terry was looking into the window of a jewelry store, although there is no reference to a jewelry store in the arrest report. This idea might have arisen from the fact that one of the stores in the area, mentioned in testimony at a pretrial hearing, was called The Diamond Store. Apparently, it was not actually a jewelry store but a men's clothing store owned by a family with the last name of Diamond. **Does the kind of business make a difference to the attempt analysis?Does it make any difference to know that even in 1963, when McFadden arrested Terry, airline tickets were rarely purchased in cash?**
3. Now, imagine that John Terry is arrested in New York instead of Ohio. Compare Terry's actions to those of the defendants in *People v. Rizzo*, discussed in the notes after *People v. Acosta*. **If the New York doctrinal test for attempt used in *Rizzo*were applied to Terry, would Terry be found guilty of attempted robbery? Do the facts of *Rizzo*better support an attempted robbery conviction, or the facts of *Terry*? Or is the evidentiary support for attempted robbery about the same in both cases?**
4. The previous questions are questions about conviction decisions—the finding that a particular defendant is in fact guilty and subject to punishment. Now, consider the enforcement decisions in these cases—the decision to arrest Rizzo and his acquaintances, and the decision to stop and frisk Terry (which, after the frisk revealed a gun, led to a decision to arrest Terry). Enforcement decisions do not require proof beyond a reasonable doubt or anything close to that level of confidence. Instead, an arrest requires "probable cause" to believe that a crime has been or is being committed by the person being arrested. Courts have struggled to define probable cause, but some typical explanations of the concept describe it as "a reasonable ground for belief of guilt" or "facts sufficient to warrant a reasonable person in the belief that the suspect has committed a crime." The Supreme Court has emphasized that probable cause is a much lower standard – easier to satisfy – than proof beyond a reasonable doubt. "The term probable cause … means less than evidence which would justify condemnation. … It imports a seizure made under circumstances which warrant suspicion." *Locke v. United States* (1813).
5. Given that probable cause is a kind of suspicion rather than a standard of proof, and that probable cause is a much lower standard to fulfill than "beyond a reasonable doubt," it makes sense that the *Rizzo* court could see the police decision to arrest as praiseworthy, but nonetheless conclude that Rizzo was not properly convicted. In other words, the enforcement decision was justified, in the court's view, but the conviction decision (or adjudication decision) was not supported by adequate evidence.
6. Consider again Officer McFadden's observations and his enforcement decisions. If McFadden's observations were sufficient to give him "a reasonable ground for belief" that Terry and Chilton were guilty of an offense, he would have "probable cause" to arrest them for that offense. Again, this "reasonable ground for belief" need not be confidence as strong as that required by the "beyond a reasonable doubt" standard. All the same, when Terry was prosecuted for weapons possession, the trial court held that "it 'would be stretching the facts beyond reasonable comprehension' to find that Officer McFadden had had probable cause to arrest the men before he patted them down for weapons." *Terry v. Ohio*, 392 U.S. 1, 7-8 (1968) (quoting the trial court). Terry could not have been arrested for attempted robbery, on the Court's analysis, and indeed he was never charged with that offense. Instead, as noted above, Terry was charged with weapons possession on the basis of the gun that Officer McFadden discovered during the frisk, and he was convicted of that offense. Terry appealed, arguing that the frisk had violated his constitutional right to be free from unreasonable searches and seizures, and thus the gun should have been excluded from evidence.

In the landmark Supreme Court case that eventually endorsed Officer McFadden's enforcement decision, the Supreme Court accepted the trial court's finding that McFadden did not have probable cause to arrest Terry for attempted robbery or some similar offense. But the Court held that McFadden acted lawfully when he approached Terry and his companions, ordered them to take

hands out of their pockets, and searched their clothing for weapons—even though the men had left the scene of the suspected would-be robbery by the time McFadden stopped them:

He had observed Terry, together with Chilton and another man, acting in a manner he took to be preface to a 'stick-up.' We think on the facts and circumstances Officer McFadden detailed before the trial judge a reasonably prudent man would have been warranted in believing petitioner was armed and thus presented a threat to the officer's safety while he was investigating his suspicious behavior. The actions of Terry and Chilton were consistent with McFadden's hypothesis that these men were contemplating a daylight robbery—which, it is reasonable to assume, would be likely to involve the use of weapons—and nothing in their conduct from the time he first noticed them until the time he confronted them and identified himself as a police officer gave him sufficient reason to negate that hypothesis. Although the trio had departed the original scene, there was nothing to indicate abandonment of an intent to commit a robbery at some point.

Id. at 28. *Terry v. Ohio* thus became the Supreme Court's official green-light for the police practice known as stop-and-frisk. A *Terry* stop is not itself an official arrest; it is a brief detention during which the officer can ask the suspect a few questions. If the officer suspects that the person stopped is "armed and dangerous," the officer may "frisk" the person, patting down their clothing to look for weapons. Again, the Supreme Court did not require the officer to have probable cause to believe the suspect had committed any crime, or even probable cause to believe the suspect was armed, before stopping and frisking someone. Instead, the Court said, the officer could take these actions on the basis of a lower level of suspicion that has come to be called "reasonable suspicion." As stated by the *Terry* Court,

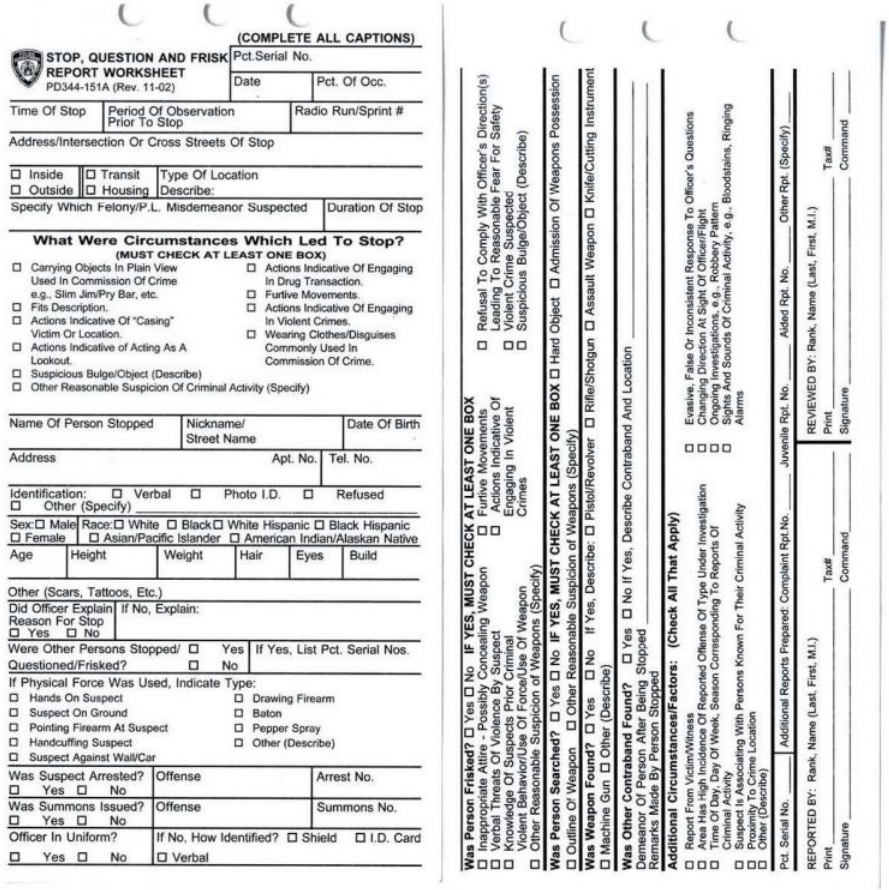
where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the [Constitution], and any weapons seized may properly be introduced in evidence against the person from whom they were taken.

Id. at 30-31. The practice of stop-and-frisk is very important to the enforcement of drug and gun offenses; a frisk often allows the police to locate drugs or guns that would otherwise remain hidden from view. If an officer feels an object likely to be a gun—or drugs—he is permitted to remove it and, if he confirms that it appears to be contraband, he can seize it and arrest the individual who possessed it.

Thus, *Terry v. Ohio* illustrates well the interaction of criminalization, enforcement, and adjudication decisions. At one time, jurisdictions may have seen the criminalization of attempt as a necessary way to enable earlier enforcement intervention. As the powers of enforcement officials have expanded through constitutional doctrine, attempt law becomes less important in this way (though it is still important for other reasons). And the broad enforcement powers granted by *Terry v. Ohio* make conviction decisions much easier in some areas of law: stop-and-frisk enables police to locate contraband items that would otherwise remain hidden. As you saw in Chapter Seven, once police have found contraband on a person, it is relatively difficult for that person to avoid a possession conviction. Again, we can put these observations in terms of criminalization, enforcement, and adjudication decisions. The criminalization of drug and gun possession would not necessarily, by itself, lead to many actual convictions unless police had ways to determine who had drugs or guns in their possession. But the expansion of enforcement powers to include a broad authority to stop and frisk on the basis of an "hypothesis" that "criminal activity is afoot" enables police to detect the guns and drugs that then make adjudication decisions easy in possession cases.

7. Who are the police likely to find to be suspicious, and on what grounds? Minority communities have long complained that police use their broad discretion to stop and frisk in racially biased ways. Indeed, that very concern was noted by the Supreme Court in *Terry*, though the Court sustained stop-and-frisk authority regardless. In 2013, a federal court found that the New York Police Department had engaged in unconstitutional racial discrimination by stopping and frisking Black and Latino New Yorkers at disproportionate rates. See *Floyd v. City of New York*, 959 F. Supp.2d 540 (S.D.N.Y. 2013). Some of the evidence in *Floyd* came from a statistical analysis of thousands of UF-250 forms—the paperwork that NYPD officers are asked to complete when they stop a suspect. A blank UF-250 form was included in Chapter Three, and included here.

APPENDIX B
Blank UF-250 Form



(COMPLETE ALL CAPTIONS)

STOP, QUESTION AND FRISK REPORT WORKSHEET
PD344-151A (Rev. 11-02)

Pct.Serial No. | Date | Pct. Of Occ.

Time Of Stop | Period Of Observation Prior To Stop | Radio Run/Sprint #

Address/Intersection Or Cross Streets Of Stop

☐ Inside ☐ Outside | ☐ Transit ☐ Housing | Type Of Location Describe:

Specify Which Felony/P.L. Misdemeanor Suspected | Duration Of Stop

What Were Circumstances Which Led To Stop?
(MUST CHECK AT LEAST ONE BOX)

- ☐ Carrying Objects In Plain View Used In Commission Of Crime e.g., Slim Jim/Pry Bar, etc.
- ☐ Fits Description.
- ☐ Actions Indicative Of "Casing" Victim Or Location.
- ☐ Actions Indicative of Acting As A Lookout.
- ☐ Suspicious Bulge/Object (Describe)
- ☐ Other Reasonable Suspicion Of Criminal Activity (Specify)
- ☐ Actions Indicative Of Engaging In Drug Transaction.
- ☐ Furtive Movements.
- ☐ Actions Indicative Of Engaging In Violent Crimes.
- ☐ Wearing Clothes/Disguises Commonly Used In Commission Of Crime.

Name Of Person Stopped | Nickname/ Street Name | Date Of Birth

Address | Apt. No. | Tel. No.

Identification: ☐ Verbal ☐ Photo I.D. ☐ Refused ☐ Other (Specify)

Sex: ☐ Male ☐ Female | Race: ☐ White ☐ Black ☐ White Hispanic ☐ Black Hispanic ☐ Asian/Pacific Islander ☐ American Indian/Alaskan Native

Age | Height | Weight | Hair | Eyes | Build

Other (Scars, Tattoos, Etc.)

Did Officer Explain Reason For Stop ☐ Yes ☐ No | If No, Explain:

Were Other Persons Stopped/ Questioned/Frisked? ☐ Yes ☐ No | If Yes, List Pct. Serial Nos.

If Physical Force Was Used, Indicate Type:

- ☐ Hands On Suspect
- ☐ Suspect On Ground
- ☐ Pointing Firearm At Suspect
- ☐ Handcuffing Suspect
- ☐ Suspect Against Wall/Car
- ☐ Drawing Firearm
- ☐ Baton
- ☐ Pepper Spray
- ☐ Other (Describe)

Was Suspect Arrested? ☐ Yes ☐ No | Offense | Arrest No.

Was Summons Issued? ☐ Yes ☐ No | Offense | Summons No.

Officer In Uniform? ☐ Yes ☐ No | If No, How Identified? ☐ Shield ☐ I.D. Card ☐ Verbal

Was Person Frisked? ☐ Yes ☐ No **IF YES, MUST CHECK AT LEAST ONE BOX**
☐ Inappropriate Attire - Possibly Concealing Weapon ☐ Furtive Movements ☐ Refusal To Comply With Officer's Direction(s)
☐ Verbal Threats Of Violence By Suspect ☐ Actions Indicative Of Engaging In Violent Crimes ☐ Leading To Reasonable Fear For Safety
☐ Knowledge Of Suspects Prior Criminal Violent Behavior/Use Of Force/Use Of Weapon ☐ Violent Crime Suspected
☐ Other Reasonable Suspicion of Weapons (Specify) ☐ Suspicious Bulge/Object (Describe)

Was Person Searched? ☐ Yes ☐ No **IF YES, MUST CHECK AT LEAST ONE BOX** ☐ Hard Object ☐ Admission Of Weapons Possession
☐ Outline Of Weapon ☐ Other Reasonable Suspicion of Weapons (Specify)

Was Weapon Found? ☐ Yes ☐ No If Yes, Describe: ☐ Pistol/Revolver ☐ Rifle/Shotgun ☐ Assault Weapon ☐ Knife/Cutting Instrument
☐ Machine Gun ☐ Other (Describe)

Was Other Contraband Found? ☐ Yes ☐ No If Yes, Describe Contraband And Location
Demeanor Of Person After Being Stopped
Remarks Made By Person Stopped

Additional Circumstances/Factors: (Check All That Apply)
☐ Report From Victim/Witness Of Reported Offense Of Type Under Investigation
☐ Area Has High Incidence Of Time Of Day, Day Of Week, Season Corresponding To Reports Of Criminal Activity
☐ Suspect Is Associating With Persons Known For Their Criminal Activity
☐ Proximity To Crime Location
☐ Other (Describe)
☐ Evasive, False Or Inconsistent Response To Officer's Questions
☐ Changes Direction At Sight Of Officer/Flight
☐ Ongoing Investigations, e.g., Robbery Pattern
☐ Sights And Sounds Of Criminal Activity, e.g., Bloodstains, Ringing Alarms

Pct. Serial No. | Additional Reports Prepared: Complaint Rpt. No. | Juvenile Rpt. No. | Aided Rpt. No. | Other Rpt. (Specify)

REPORTED BY: Rank, Name (Last, First, M.I.) | Tax# | Command
Print
Signature

REVIEWED BY: Rank, Name (Last, First, M.I.) | Tax# | Command
Print
Signature

This form asks police to record many details of a *Terry* stop, including the race of the person stopped and the officer's stated reasons for making the stop. The statistical analysis of NYPD stops showed that officers stopped and frisked Black and Latino men disproportionately often, usually citing no basis for the officer's suspicion other than the fact that the encounter occurred in a "high crime area" and/or the person made "furtive movements." The overwhelming majority of these stops and frisks of persons of color led to no arrest and no discovery of contraband. Indeed, police were somewhat more likely to find contraband or make an arrest when they stopped white people, perhaps because police were more selective and looked for more reliable evidence of criminal activity before stopping white persons.

8. A final question: what exactly does it mean for an offense to be "inchoate"? This chapter has focused on attempt and solicitation, and the next chapter will discuss conspiracy as a criminal offense. Attempt, solicitation, and conspiracy are all doctrines that can apply transsubstantively – or across different types of crimes – to expand criminal liability so it reaches people who have taken some steps toward a specific crime but have not necessarily completed that crime. A person who has thought about committing a robbery but has not actually robbed might nonetheless be convicted (depending on the circumstances) of attempted robbery, solicitation to commit robbery, or conspiracy to commit robbery.

   Sometimes, however, the term "inchoate offense" is used more broadly, to describe any offense that punishes conduct on the theory that the conduct represents a threat of some future harmful act. For example, some courts have characterized burglary as

an inchoate offense: recall from Chapter Five that burglary is typically defined as the unlawful entry into a given place with the intent to commit a crime therein. One might view the unlawful entry as a wrong or harm in itself, and indeed, many jurisdictions do have independent offenses of trespass, "breaking and entering," or "unlawful entry" that are separate from burglary and do not require proof of intent to commit some further offense. (See *State v. Begaye* in Chapter Five.) Burglary usually carries a more severe penalty than these other offenses, on the theory that a burglary conviction punishes the distinctive threat of the entry with the intent to do further wrong inside the designated location.

Now consider possession offenses, which were discussed at length in the previous chapter. Does a person who possesses drugs but does nothing with the drugs – does not consume or inject them, or distribute them to others – commit any harm worthy of legal intervention? Many courts and commentators have characterized possession offenses as inchoate offenses, reasoning that the underlying concern with possession is a worry that the possessor will take some further dangerous or harmful action.

Under this view, inchoate offenses are part of a preventive regime in which criminal law intervenes to stop harms before they occur. By necessity and by design, inchoate offenses will impose criminal liability on people who have not caused the tangible harm that motivates the law, but who are believed to pose a threat of causing that harm. In part because there is no need to show any evidence of tangible harm, enforcement officials and adjudicators will have broad discretion as they decide whom to investigate, arrest, prosecutor, or convict of inchoate offenses.

Many commentators have linked the preventive regime described above, in which both inchoate offenses and constitutional criminal procedure give enforcers the authority to intervene when they suspect that a person poses a threat of future harm, to patterns of racial disparity in American criminal law. Racial identity may influence official decisions about who is dangerous enough to warrant intervention. As noted earlier in this chapter, Professor Luis Chiesa has argued that the Model Penal Code's expansion of inchoate offenses has contributed to the "racialization" of American criminal law. Luis Chiesa, *The Model Penal Code, Mass Incarceration, and the Racialization of American Criminal Law*, 25 Geo. Mason L. Rev. 605, 609 (2018). As an illustration of the MPC's expansion, think again of John Terry: the MPC "substantial step" approach to attempt would have empowered police to arrest John Terry for attempted robbery, even though Ohio's common law definition of attempt did not permit such an arrest. Robert L. Misner, *The New Attempt Laws: Unsuspected Threat to the Fourth Amendment*, 33 Stan. L. Rev. 201, 216 (1981). Possession offenses are another important component of this preventive regime, leading Professor Markus Dirk Dubber to characterize possession as "the new vagrancy."

> [P]ossession offenses do the crime war's dirty work. Possession has replaced vagrancy has the most convenient gateway into the criminal justice system. Possession shares the central advantages of vagrancy as policing tool: flexibility and convenience. Yet … it is in the end a far more formidable weapon in the war on crime: it expands the scope of policing into the home, it results in far harsher penalties and therefore has a far greater incapacitative potention, and it is far less vulnerable to legal challenges.
>
> Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. Criminal Law & Criminology 829, 856 (2001). Chapter Three discussed the use of vagrancy statutes after the Civil War to enforce the continued subordination of Black Americans and, in some instances, compel them to supply the free labor that Southern states had lost when slavery was abolished. Although criminal convictions are not used to supply labor in the same way today, they are still a device of social and political subordination.

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1. [Fn. 5 by the court:] [Commentary] to the Model Penal Code catalogues a number of formulations which have been adopted or suggested, including the following: (a) The physical proximity doctrine- the overt act required for an attempt must be proximate to the completed crime, or directly tending toward the completion of the crime, or must amount to the commencement of the consummation. (b) The dangerous proximity doctrine- a test given impetus by Mr. Justice Holmes whereby the greater the gravity and probability of the offense, and the nearer the act to the crime, the stronger is the case for calling the act an attempt. (c) The indispensable element test- a variation of the proximity tests which emphasizes any indispensable aspect of the criminal endeavor over which the actor has not yet acquired control. (d) The probable desistance test- the conduct constitutes an attempt

if, in the ordinary and natural course of events, without interruption from an outside source, it will result in the crime intended. (e) The abnormal step approach- an attempt is a step toward crime which goes beyond the point where the normal citizen would think better of his conduct and desist. (f) The res ipsa loquitur or unequivocality test- an attempt is committed when the actor's conduct manifests an intent to commit a crime. ↵

2. [Fn. 6 by the court:] Our definition is generally consistent with and our language is in fact close to the definitions proposed by the National Commission on Reform of Federal Criminal Laws and the American Law Institute's Model Penal Code…. ↵
3. [Fn. 3 by the court:] This is precisely how the dissenters proceed here. They compare the crime of attempt with the crime of conspiracy and they convert the final solicitation itself into an "act." An attempt to commit a crime is a distinct offense. Defendant was not charged with conspiracy. And a solicitation is still a solicitation even when it comes in the form of a final command for another to proceed. In the end, neither defendant nor McCabe took any "act" toward the perpetration of a crime. ↵
4. [Fn. 11 by the dissent:] Contrary to the Court's suggestion at n3, supra, the foregoing analysis is not premised upon concepts of conspiracy jurisprudence. However, having said that, it is interesting to note that the purpose of distinguishing between preparations and attempts is the same as the purpose of requiring an overt act in a conspiracy case. "The purpose of the overt act is to afford a locus poenitentiae, when either or all the conspirators may abandon the unlawful purpose." ↵

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1.9: Group Criminality

Introduction

In many respects, criminal law is individualistic: it focuses on one defendant at a time, and it purports to assign responsibility for illegal conduct on the basis of the individual defendant's own thoughts and actions. In some contrast to that individualistic perspective, this chapter examines important doctrines that assign criminal liability on the basis of an individual's interactions with other persons. The doctrines of group criminality discussed here, accomplice liability and conspiracy, impose criminal liability on a person who participates in or encourages another person's criminal activity in some way. Like the inchoate offenses discussed in the last chapter, these doctrines of group criminality may be seen as expansions of criminal liability, since they will often allow a defendant to be convicted and punished even in the absence of proof that the defendant himself or herself has in fact committed the conduct specified in the underlying statute.

Doctrines of complicity and conspiracy share another feature with the law of inchoate offenses discussed in the previous chapter: this area of law contains many abstractions and is often quite confusing to newcomers. For that reason, it may be useful to begin with a concrete example. Suppose Huey knows that Louie is preparing to rob a bank, and Huey offers Louie a gun. Louie takes the gun, robs the bank, and is convicted of robbery, defined as taking the property of another by force. Huey could be charged with robbery also, even though Huey did not himself enter the bank, take any property, or use any force. Louie would be "the principal" in traditional terminology, and Huey would be charged as an "accomplice," sometimes also described as an aider and abettor. But notice: Huey would be charged with robbery as an accomplice; he is not charged with a separate offense called "complicity." Huey-the-accomplice can be found guilty of the same offense (here, robbery) and subject to the same range of punishments as Louie-the principal. That's one of the most important features of accomplice liability as it is usually defined: the accomplice can be convicted of the same offense, and punishable to the same degree, as the principal. Accomplice liability is derivative liability rather than direct liability, in that accomplice liability is derived from someone else's actions.

Now assume that the prosecution can show that Huey and Louie agreed ahead of time to commit the bank robbery together (even if the plan was that only Louie would actually enter the bank and take money). Most jurisdictions treat that prior agreement as itself an independent crime: a conspiracy to commit robbery. In most jurisdictions, Huey and Louie could each be charged and convicted of two separate offenses: conspiracy to commit robbery, and robbery itself. In other jurisdictions, Huey and Louie could be convicted of either robbery or conspiracy to commit robbery. But whether or not a conspiracy charge "merges" with the completed offense, conspiracy exists in criminal codes as a separate offense. Accomplice liability, in contrast, is simply a way for the prosecution to establish that a defendant is guilty of some other offense (robbery, in the example above) even when the defendant did not commit all relevant elements himself.

Although conspiracy is a separate offense, it is an inchoate offense like attempt or solicitation. Like those offenses, a conspiracy charge should specify the underlying crime that was the aim of the conspiracy. Recall that a defendant is never convicted of attempt, period; instead, a defendant is convicted of attempt to commit murder, attempted distribution of narcotics, attempted robbery, and so on. Similarly, a defendant is not convicted of conspiracy, period; instead, the conviction will be for conspiracy to commit murder, conspiracy to distribute narcotics, conspiracy to commit robbery, and so forth.

The basic description offered thus far distinguishes between conspiracy as an independent (but inchoate) offense and complicity (or accomplice liability) as a theory of derivative liability. Unfortunately, it gets even more complicated: some jurisdictions have developed an additional theory of derivative liability based on participation in a conspiracy. Consider Huey and Louie one more time. Suppose they have formed a conspiracy to rob a bank, with the plan that Louie will enter the bank alone, take property by force, and leave as quickly as possible. And suppose that while inside the bank, Louie commits some other offense, such as the destruction of property. Under a doctrine of derivative liability known as *Pinkerton* liability, after *Pinkerton v. United States* (1946), some jurisdictions will allow Huey to be convicted of the crime of destruction of property, even if that crime was not part of the specific plan that Huey and Louie made together. This area of law is complex, but the cases and notes in this chapter will illustrate the key concepts.

Like the inchoate offenses discussed in the last chapter, doctrines of complicity and conspiracy originated in common law courts, but both are usually codified in statutes today. As we will see, however, these statutes often fail to offer precise definitions of the concepts of complicity or conspiracy, so courts often turn to common law principles, or the Model Penal Code, for more guidance.

The Model Penal Code expanded common law principles of complicity and conspiracy in some respects, with the explicit aim of making convictions easier to obtain. Those expansions may help explain the increased scale of convictions and imprisonment in the United States. Although it is difficult to gather data, it appears that convictions on theories of accomplice liability and convictions for conspiracy have both increased substantially over the past 50 to 60 years. Conspiracy charges are particularly important in the context of drug crimes, as discussed at the end of this chapter.

Complicity

18 U.S.C. § 2

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 924(c)(1)(a)

Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime–

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

Justus C. ROSEMOND, Petitioner

v.

UNITED STATES

Supreme Court of the United States
572 U.S. 65

Decided March 5, 2014

Justice KAGAN delivered the opinion of the Court.

This case arises from a drug deal gone bad. Vashti Perez arranged to sell a pound of marijuana to Ricardo Gonzales and Coby Painter. She drove to a local park to make the exchange, accompanied by two confederates, Ronald Joseph and petitioner Justus Rosemond. One of those men apparently took the front passenger seat and the other sat in the back, but witnesses dispute who was where. At the designated meeting place, Gonzales climbed into the car's backseat while Painter waited outside. The backseat passenger allowed Gonzales to inspect the marijuana. But rather than handing over money, Gonzales punched that man in the face and fled with the drugs. As Gonzales and Painter ran away, one of the male passengers—but again, which one is contested—exited the car and fired several shots from a semiautomatic handgun. The shooter then re-entered the vehicle, and all three would-be drug dealers gave chase after the buyers-turned-robbers. But before the three could catch their quarry, a police officer, responding to a dispatcher's alert, pulled their car over. This federal prosecution of Rosemond followed. [The Government agreed not to bring charges against the other four participants in the narcotics deal in exchange for their giving truthful testimony against Rosemond.]

The Government charged Rosemond with, *inter alia*, violating § 924(c) by using a gun in connection with a drug trafficking crime, or aiding and abetting that offense under [18 U.S.C. § 2]. Section 924(c) provides that "any person who, during and in relation to any crime of violence or drug trafficking crime[,] … uses or carries a firearm," shall receive a five-year mandatory-minimum sentence, with seven- and ten-year minimums applicable, respectively, if the firearm is also brandished or discharged. 18 U.S.C. § 924(c)(1)(A). Section 2, for its part, is the federal aiding and abetting statute: It provides that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal."

Consistent with the indictment, the Government prosecuted the § 924(c) charge on two alternative theories. The Government's primary contention was that Rosemond himself used the firearm during the aborted drug transaction. But recognizing that the identity of the shooter was disputed, the Government also offered a back-up argument: Even if it was Joseph who fired the gun as the drug deal fell apart, Rosemond aided and abetted the § 924(c) violation.

The District Judge accordingly instructed the jury on aiding and abetting law. He first explained, in a way challenged by neither party, the rudiments of § 2. Under that statute, the judge stated, "[a] person who aids or abets another to commit an offense is just as guilty of that offense as if he committed it himself." And in order to aid or abet, the defendant must "willfully and knowingly associate[ ] himself in some way with the crime, and … seek[ ] by some act to help make the crime succeed." The judge then turned to applying those general principles to § 924 (c)—and there, he deviated from an instruction Rosemond had proposed. According to Rosemond, a defendant could be found guilty of aiding or abetting a § 924(c) violation only if he "intentionally took some action to facilitate or encourage the use of the firearm," as opposed to the predicate drug offense. But the District Judge disagreed, instead telling the jury that it could convict if "(1) the defendant knew his cohort used a firearm in the drug trafficking crime, and (2) the defendant knowingly and actively participated in the drug trafficking crime." In closing argument, the prosecutor contended that Rosemond easily satisfied that standard, so that even if he had not "fired the gun, he's still guilty of the crime." After all, the prosecutor stated, Rosemond "certainly knew [of] and actively participated in" the drug transaction. "And with regards to the other element," the prosecutor urged, "the fact is a person cannot be present and active at a drug deal when shots are fired and not know their cohort is using a gun. You simply can't do it."

The jury convicted Rosemond of violating § 924(c) (as well as all other offenses charged). The verdict form was general: It did not reveal whether the jury found that Rosemond himself had used the gun or instead had aided and abetted a confederate's use during the marijuana deal. As required by § 924(c), the trial court imposed a consecutive sentence of 120 months of imprisonment for the statute's violation.

The Tenth Circuit affirmed… We granted certiorari….

II

The federal aiding and abetting statute, 18 U.S.C. § 2, states that a person who furthers—more specifically, who "aids, abets, counsels, commands, induces or procures"—the commission of a federal offense "is punishable as a principal." That provision derives from (though simplifies) common-law standards for accomplice liability. And in so doing, § 2 reflects a centuries-old view of culpability: that a person may be responsible for a crime he has not personally carried out if he helps another to complete its commission. See J. Hawley & M. McGregor, Criminal Law 81 (1899).

We have previously held that under § 2 "those who provide knowing aid to persons committing federal crimes, with the intent to facilitate the crime, are themselves committing a crime." Both parties here embrace that formulation, and agree as well that it has two components. As at common law, a person is liable under § 2 for aiding and abetting a crime if (and only if) he (1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission.

The questions that the parties dispute … concern how those two requirements—affirmative act and intent—apply in a prosecution for aiding and abetting a § 924(c) offense. Those questions arise from the compound nature of that provision. Recall that § 924(c) forbids "us[ing] or carr[ying] a firearm" when engaged in a "crime of violence or drug trafficking crime." The prosecutor must show the use or carriage of a gun; so too he must prove the commission of a predicate (violent or drug trafficking) offense. For purposes of ascertaining aiding and abetting liability, we therefore must consider: When does a person act to further this double-barreled crime? And when does he intend to facilitate its commission? We address each issue in turn.

A

Consider first Rosemond's account of his conduct (divorced from any issues of intent). Rosemond actively participated in a drug transaction, accompanying two others to a site where money was to be exchanged for a pound of marijuana. But as he tells it, he took no action with respect to any firearm. He did not buy or borrow a gun to facilitate the narcotics deal; he did not carry a gun to the scene; he did not use a gun during the subsequent events constituting this criminal misadventure. His acts thus advanced one part (the drug part) of a two-part incident—or to speak a bit more technically, one element (the drug element) of a two-element crime. Is that enough to satisfy the conduct requirement of this aiding and abetting charge, or must Rosemond, as he claims, have taken some act to assist the commission of the other (firearm) component of § 924(c)?

The common law imposed aiding and abetting liability on a person (possessing the requisite intent) who facilitated any part—even though not every part—of a criminal venture…. And so "[w]here several acts constitute[d] together one crime, if each [was] separately performed by a different individual[,] … all [were] principals as to the whole." Indeed … a person's involvement in the crime could be not merely partial but minimal too: "The quantity [of assistance was] immaterial," so long as the accomplice did "*something*" to aid the crime. After all, the common law maintained, every little bit helps—and a contribution to some part of a crime aids the whole.

That principle continues to govern aiding and abetting law under § 2: As almost every court of appeals has held, "[a] defendant can be convicted as an aider and abettor without proof that he participated in each and every element of the offense." *United States v. Sigalow* (2nd Cir. 1987). In proscribing aiding and abetting, Congress used language that "comprehends all assistance rendered by words, acts, encouragement, support, or presence"—even if that aid relates to only one (or some) of a crime's phases or elements. So, for example, in upholding convictions for abetting a tax evasion scheme, this Court found "irrelevant" the defendants' "non-participation" in filing a false return; we thought they had amply facilitated the illegal scheme by helping a confederate conceal his assets. *United States v. Johnson* (1943). "[A]ll who shared in [the overall crime's] execution," we explained, "have equal responsibility before the law, whatever may have been [their] different roles." And similarly, we approved a conviction for abetting mail fraud even though the defendant had played no part in mailing the fraudulent documents; it was enough to satisfy the law's conduct requirement that he had in other ways aided the deception. The division of labor between two (or more) confederates thus has no significance: A strategy of "you take that element, I'll take this one" would free neither party from liability.

Under that established approach, Rosemond's participation in the drug deal here satisfies the affirmative-act requirement for aiding and abetting a § 924(c) violation. As we have previously described, the commission of a drug trafficking (or violent) crime is—no less than the use of a firearm—an "essential conduct element of the § 924(c) offense." In enacting the statute, "Congress proscribed both the use of the firearm *and* the commission of acts that constitute" a drug trafficking crime. Rosemond therefore could assist in § 924(c)'s violation by facilitating either the drug transaction or the firearm use (or of course both). In helping to bring about one part of the offense (whether trafficking drugs or using a gun), he necessarily helped to complete the whole. And that ends the analysis as to his conduct….

…[But,] as we will describe, an aiding and abetting conviction requires not just an act facilitating one or another element, but also a state of mind extending to the entire crime. And under that rule, a defendant may be convicted of abetting a § 924(c) violation only if his intent reaches beyond a simple drug sale, to an armed one. Aiding and abetting law's intent component—to which we now turn—thus preserves the distinction between assisting the predicate drug trafficking crime and assisting the broader § 924(c) offense.

B

… As previously explained, a person aids and abets a crime when (in addition to taking the requisite act) he intends to facilitate that offense's commission. An intent to advance some different or lesser offense is not, or at least not usually, sufficient: Instead, the intent must go to the specific and entire crime charged—so here, to the full scope (predicate crime plus gun use) of § 924(c). [1] And the canonical formulation of that needed state of mind—later appropriated by this Court and oft-quoted in both parties' briefs—is Judge Learned Hand's: To aid and abet a crime, a defendant must not just "in some sort associate himself with the venture," but also "participate in it as in something that he wishes to bring about" and "seek by his action to make it succeed." *Nye & Nissen v. United States* (1949) (quoting *United States v. Peoni* (2nd Cir. 1938).

We have previously found that intent requirement satisfied when a person actively participates in a criminal venture with full knowledge of the circumstances constituting the charged offense. … [S]everal Courts of Appeals have similarly held—addressing a fact pattern much like this one—that the unarmed driver of a getaway car had the requisite intent to aid and abet armed bank robbery if he "knew" that his confederates would use weapons in carrying out the crime. So for purposes of aiding and abetting law, a person who actively participates in a criminal scheme knowing its extent and character intends that scheme's commission. [2]

The same principle holds here: An active participant in a drug transaction has the intent needed to aid and abet a § 924(c) violation when he knows that one of his confederates will carry a gun. In such a case, the accomplice has decided to join in the criminal venture, and share in its benefits, with full awareness of its scope—that the plan calls not just for a drug sale, but for an armed one. In so doing, he has chosen … to align himself with the illegal scheme in its entirety—including its use of a firearm…. He thus becomes responsible, in the typical way of aiders and abettors, for the conduct of others. He may not have brought the gun to the

drug deal himself, but because he took part in that deal knowing a confederate would do so, he intended the commission of a § 924(c) offense—*i.e.*, an armed drug sale.

For all that to be true, though, the § 924(c) defendant's knowledge of a firearm must be advance knowledge—or otherwise said, knowledge that enables him to make the relevant legal (and indeed, moral) choice. When an accomplice knows beforehand of a confederate's design to carry a gun, he can attempt to alter that plan or, if unsuccessful, withdraw from the enterprise; it is deciding instead to go ahead with his role in the venture that shows his intent to aid an *armed* offense. But when an accomplice knows nothing of a gun until it appears at the scene, he may already have completed his acts of assistance; or even if not, he may at that late point have no realistic opportunity to quit the crime. And when that is so, the defendant has not shown the requisite intent to assist a crime involving a gun. As even the Government concedes, an unarmed accomplice cannot aid and abet a § 924(c) violation unless he has "foreknowledge that his confederate will commit the offense with a firearm." Brief for United States 38. For the reasons just given, we think that means knowledge at a time the accomplice can do something with it—most notably, opt to walk away.[3]

…A final, metaphorical way of making the point: By virtue of § 924(c), using a firearm at a drug deal ups the ante. A would-be accomplice might decide to play at those perilous stakes. Or he might grasp that the better course is to fold his hand. What he should not expect is the capacity to hedge his bets, joining in a dangerous criminal scheme but evading its penalties by leaving use of the gun to someone else. Aiding and abetting law prevents that outcome, so long as the player knew the heightened stakes when he decided to stay in the game.

The Government, for its part, thinks we take too strict a view of when a defendant charged with abetting a § 924(c) violation must acquire that knowledge. As noted above, the Government recognizes that the accused accomplice must have "foreknowledge" of a gun's presence. But the Government views that standard as met whenever the accomplice, having learned of the firearm, continues any act of assisting the drug transaction. According to the Government, the jury should convict such a defendant even if he became aware of the gun only after he realistically could have opted out of the crime.

But that approach, we think, would diminish too far the requirement that a defendant in a § 924(c) prosecution must intend to further an *armed* drug deal. Assume, for example, that an accomplice agrees to participate in a drug sale on the express condition that no one brings a gun to the place of exchange. But just as the parties are making the trade, the accomplice notices that one of his confederates has a (poorly) concealed firearm in his jacket. The Government would convict the accomplice of aiding and abetting a § 924(c) offense if he assists in completing the deal without incident, rather than running away or otherwise aborting the sale. But behaving as the Government suggests might increase the risk of gun violence—to the accomplice himself, other participants, or bystanders; and conversely, finishing the sale might be the best or only way to avoid that danger. In such a circumstance, a jury is entitled to find that the defendant intended only a drug sale—that he never intended to facilitate, and so does not bear responsibility for, a drug deal carried out with a gun. A defendant manifests that greater intent, and incurs the greater liability of § 924(c), when he chooses to participate in a drug transaction knowing it will involve a firearm; but he makes no such choice when that knowledge comes too late for him to be reasonably able to act upon it.[4]

III

Under these principles, the District Court erred in instructing the jury…. As we have explained, active participation in a drug sale is sufficient for § 924(c) liability (even if the conduct does not extend to the firearm), so long as the defendant had prior knowledge of the gun's involvement. The problem with the [District Court's] instruction came in its description of that knowledge requirement. In telling the jury to consider merely whether Rosemond "knew his cohort used a firearm," the court did not direct the jury to determine *when* Rosemond obtained the requisite knowledge. so, for example, the jury could have convicted even if Rosemond first learned of the gun when it was fired and he took no further action to advance the crime…

… As earlier described, the prosecutor asserted in closing argument that the court's test was easily satisfied because "a person cannot be present and active at a drug deal when shots are fired and not know their cohort is using a gun." The prosecutor thus invited the jury to convict Rosemond even if he first learned of the gun as it was discharged, and no matter what he did afterward. Once again, then, the message to the jury was that it need not find advance knowledge—exactly what we (and for that matter the Government) have said is required.

We send this case back to the Tenth Circuit to consider the appropriate consequence, if any, of the District Court's error…. Accordingly, we vacate the judgment below and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice ALITO, with whom Justice THOMAS joins, concurring in part and dissenting in part.

…I reject the Court's conclusion that a conviction for aiding and abetting a violation of 18 U.S.C. § 924(c) demands proof that the alleged aider and abettor had what the Court terms "a realistic opportunity" to refrain from engaging in the conduct at issue. This rule represents an important and, as far as I am aware, unprecedented alteration of the law of aiding and abetting and of the law of intentionality generally.

…The Court imagines the following situation:

"[A]n accomplice agrees to participate in a drug sale on the express condition that no one brings a gun to the place of exchange. But just as the parties are making the trade, the accomplice notices that one of his confederates has a (poorly) concealed firearm in his jacket."

If the accomplice, despite spotting the gun, continues to assist in the completion of the drug sale, has the accomplice aided and abetted the commission of a violation of § 924(c)?

The Court's answer is "it depends." Walking away, the Court observes, "might increase the risk of gun violence—to the accomplice himself, other participants, or bystanders; and conversely, finishing the sale might be the best or only way to avoid the danger." Moreover—and this is where the seriously misguided step occurs—the Court says that if the risk of walking away exceeds (by some unspecified degree) the risk created by completing the sale and if the alleged aider and abettor chooses to continue for that reason, the alleged aider and abettor lacks the *mens rea* required for conviction.

What the Court has done is to convert what has up to now been an affirmative defense into a part of the required *mens rea*, and this step has very important conceptual and practical consequences. It fundamentally alters the prior understanding of mental states that form the foundation of substantive criminal law, and it places a strange and difficult burden on the prosecution.

That the Court has taken a radical step can be seen by comparing what the Court now holds with the traditional defense of necessity. That defense excuses a violation of law if "the harm which will result from compliance with the law is greater than that which will result from violation of it." This is almost exactly the balance-of-risks calculus adopted by the Court, but under the traditional approach necessity is an affirmative defense. Necessity and the closely related defense of duress are affirmative defenses because they almost invariably do not negate the *mens rea* necessary to incur criminal liability.

This Court has made clear that, except in narrow circumstances, necessity and duress do not negate the *mens rea* required for conviction….

The Court confuses two fundamentally distinct concepts: intent and motive. It seems to assume that, if a defendant's *motive* in aiding a criminal venture is to avoid some greater evil, he does not have the *intent* that the venture succeed. But the intent to undertake some act is of course perfectly consistent with the motive of avoiding adverse consequences which would otherwise occur. We can all testify to this from our daily experience. People wake up, go to work, balance their checkbooks, shop for groceries—and yes, commit crimes—because they believe something bad will happen if they do not do these things, not because the deepest desire of their heart is to do them. A person may only go to work in the morning to keep his or her family from destitution; that does not mean he or she does not intend to put in a full days work. In the same way, the fact that a defendant carries out a crime because he feels he must do so on pain of terrible consequences does not mean he does not intend to carry out the crime. When Jean Valjean stole a loaf of bread to feed his starving family, he certainly intended to commit theft; the fact that, had he been living in America today, he may have pleaded necessity as a defense does not change that fact. See V. Hugo, Les Misérables 54 (Fall River Press ed. 2012).

… Unsurprisingly, our cases have recognized that a lawful motive (such as necessity, duress, or self-defense) is consistent with the *mens rea* necessary to satisfy a requirement of intent…. Thus, it seems inarguable to me that the existence of the purpose or intent to carry out a crime is perfectly compatible with facts giving rise to a necessity or duress defense. Once that proposition is established, the Court's error is readily apparent. The Court requires the Government to prove that a defendant in Rosemond's situation could have walked away without risking harm greater than he would cause by continuing with the crime—circumstances that traditionally would support a necessity or duress defense. It imposes this requirement on the Government despite the fact that such dangerous circumstances simply do not bear on whether the defendant intends the § 924(c) offense to succeed, as (on the Court's reading) is required for aiding and abetting liability.

The usual rule that a defendant bears the burden of proving affirmative defenses is justified by a compelling, commonsense intuition: "[W]here the facts with regard to an issue lie peculiarly in the knowledge of a party, that party is best situated to bear the burden of proof." *Smith v. United States* (2013). By abandoning that rule in cases involving aiding and abetting of § 924(c) offenses, the Court creates a perverse arrangement whereby the prosecution must prove something that is peculiarly within the knowledge of the defendant. Imagine that A aids B in committing a § 924(c) offense and claims that he only learned of the gun once the crime had begun. If A had the burden of proof, he might testify that B was a hothead who had previously shot others who had crossed him. But under the Court's rule, the prosecution, in order to show the intent needed to convict A as an aider and abettor, presumably has the burden of proving that B was not such a person and that A did not believe him to be. How is the prosecution to do this? By offering testimony by B's friends and associates regarding his peaceful and easygoing nature? By introducing entries from A's diary in which he reflects on the sense of safety he feels when carrying out criminal enterprises in B's company? Furthermore, even if B were a hothead and A knew him to be such, A would presumably only be entitled to escape liability if he continued with the offense *because of* his fear of B's reaction if he walked away. Under the Court's rule, it is up to the Government to prove that A's continued participation was not on account of his fear of B—but how? By introducing footage of a convenient security camera demonstrating that A's eyes were not wide with fear, nor his breathing rapid?

The Court's rule breaks with the common-law tradition and our case law. It also makes no sense. I respectfully dissent from that portion of the Court's opinion which places on the Government the burden of proving that the alleged aider and abettor of a § 924(c) offense had what the Court terms "a realistic opportunity" to refrain from engaging in the conduct at issue.

Notes and questions on *Rosemond*

1. As you have seen throughout this course, crimes are often defined in terms of a combination of mental state elements and conduct elements. Accomplice liability is not itself an independent crime, but a theory of liability. However, courts sometimes speak of "the elements" of accomplice liability as a way of delineating the things the prosecution must show in order to obtain a conviction on an accomplice liability theory. And the "element" of accomplice liability are often separated into intent and conduct, like the definitions to many crimes. What is the mental state that must be shown in order to prove that Rosemond is an accomplice to § 924(c)? What conduct, if any, must Rosemond have engaged in to be guilty of § 924(c) as an accomplice?
2. When one person is charged as an accomplice, the person who actually carries out the conduct elements of the underlying criminal offense is often described as "the principal." For one person to be an accomplice, another person must be the principal – that is, someone must actually carry out the offense. In *Rosemond*, the prosecution apparently believed that Justus Rosemond was in fact the principal for the § 924(c) offense. The government's first line of argument was that Rosemond did, in fact, fire the gun after the drug sale went awry. And the prosecution agreed not to prosecute the other participants in the planned sale in exchange for their testimony against Rosemond. Why, then, did the prosecution make an argument based on accomplice liability? Why not charge Rosemond as a principal and leave it at that?
3. Judge Learned Hand's 1938 opinion in *United States v. Peoni* is often quoted by courts seeking to explain the requirements of accomplice liability. In *Peoni*, Judge Hand emphasized that complicity required purpose to promote the principal's criminal conduct. The facts of *Peoni* are simple enough: Joseph Peoni sold counterfeit bills to a man named Regno; Regno later sold those bills to a man named Dorsey. After Dorsey was eventually arrested for possession of the counterfeit bills, the government sought to prosecute Peoni as an accomplice to Dorsey's possession of counterfeit bills. After a review of several accounts of accomplice liability, Judge Hand emphasized that the accounts "have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct; and that they all demand that he in some sort associate himself with the venture, that he participate in it as in something he wishes to bring about, that he seek by his action to make it succeed. All the words used—even the most colorless 'abet'—carry an implication of purposive attitude toward it." *Peoni*, 100 F.2d at 402. Judge Hand concluded that Peoni could not be convicted as an accomplice to Dorsey, since there was no evidence that Peoni specifically wanted Dorsey to possess the bills (or even knew of Dorsey's existence).
4. Consider again the question raised in the first note above: what are the "elements" of accomplice liability? The *Peoni* opinion is often quoted as a formulation of the mental state required for accomplice liability – intent to promote or facilitate the commission of the offense. But *Peoni* can also help us think about other ingredients of complicity, including the "actus reus" of accomplice liability, or the conduct required to be an accomplice. Judge Hand's language does suggest that some action is required; the accomplice must "participate" in the crime and "seek *by his action* to make it succeed" (emphasis added). Similarly, *Rosemond* says the accomplice must take "an affirmative act in furtherance of [the] offense." The question has often

arisen whether causation is an element of complicity: must the alleged accomplice's actions have any identifiable effect on the principal's crime? (Look again at the federal complicity statute reprinted before *Rosemond*. Subsection (b) mentions causation directly; subsection (a) does not.) In *Peoni*, Judge Hand thought it obvious that Joseph Peoni's initial sale of counterfeit bills was "a step in the causal chain" that culminated in Dorsey's offense. But according to Hand, this causal contribution was not itself sufficient to make Peoni an accomplice, given the absence of proof that Peoni intended to promote Dorsey's crime. Indeed, Hand suggested that causation may simply be irrelevant: he reported that classic accounts of complicity have "nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct." In general, courts require some evidence of "aid" to the principal, but they do not usually require proof that the accomplice's aid actually had an effect on the principal's conduct. For an overview and critique of complicity doctrine's indifference to causation, see Joshua Dressler, *Reforming Complicity Law: Trivial Assistance as a Lesser Offense*, 5 Ohio St. J. Crim. L. 427 (2008).

5. The *Rosemond* Court quotes Judge Hand's *Peoni* opinion approvingly, calling it "canonical," but does *Rosemond* actually adopt Hand's view of accomplice liability? Hand suggested that accomplice liability required "purposive attitude." But the Supreme Court says that the intent requirement is "satisfied when a person actively participates in a criminal venture with full knowledge of the circumstances constituting the charged offense." Is this difference between purpose (or intent) to promote the underlying crime and mere knowledge that it is taking place a meaningful difference that will change outcomes? Some jurisdictions do emphasize a difference between "knowing facilitation" of a crime, which may be codified as a separate, less severe offense, and actual accomplice liability, which requires purpose to promote the crime. See, e.g., *Skinner v. Kentucky*, 864 S.W.2d 290 (1993). Many other jurisdictions take the approach of the *Rosemond* Court and allow participation in a crime, plus knowledge that it is taking place, to suffice for accomplice liability.
6. Other states set the threshold for accomplice liability even lower, allowing convictions on the basis of complicity even in the absence of evidence that the defendant knew the crime in question was taking place. The "natural and probable consequences" doctrine, mentioned but neither endorsed nor condemned by the *Rosemond* Court in its footnote 7, holds that when a defendant is an accomplice to one offense, he may also be convicted as an accomplice to additional crimes if the additional crimes are "natural and probable consequences" of the crime that the defendant actually intended to promote. In one well-known case applying the doctrine, the defendant, Thomas Luparello, had recruited two men to track down his former girlfriend, Terri Cesak. Without Luparello present, the two men went to the home of Mark Martin, a friend of Terri and her husband, to ask him about Terri's whereabouts. Instead of questioning Martin, the men shot and killed him. Luparello was convicted of first-degree murder even though there was no evidence that he had intended for Martin to be killed. The court held that the killing was a "natural and probable consequence" of a planned assault on Martin, and Luparello had intended to encourage the assault. *People v. Luparello*, 231 Cal. Rptr. 832 (1986). The natural and probable consequences doctrine is controversial, and the *Rosemond* Court purports not to take a position on it.
7. The statutory provision discussed in *Rosemond*, 18 U.S.C. § 924(c), is an important and frequently used federal law. It was examined at the end of Chapter Seven, but a few reminders may be helpful here. Section 924(c) is a "gun enhancement," or a law that increases the penalties for some other offense if a gun is used in the underlying offense. The current version of § 924(c) imposes a mandatory minimum sentence of 5, 7, or 10 years depending on whether the gun is merely "used" or "carried" (5 years), "brandished" (7 years), or actually discharged (10 years). The extra years of prison imposed by § 924(c) really are extra, in that they run consecutively to whatever other sentence is imposed for the underlying drug offense. As you saw in *Angelos* in Chapter Seven, the prosecution can often increase a federal sentence dramatically by charging multiple counts of § 924(c). Critics of gun enhancement charges point out that they appear to be used disproportionately often against Black defendants and other defendants of color, helping to create and maintain racial disparities in the U.S. prison population. "[D]efining a crime is a political act, [and so] is the decision about whether, how, and against whom to charge a crime, and as a practical matter, it is likely a more significant one. And the racially disparate federal charging decisions in gun cases … have been pursued by Attorneys General and U.S. Attorneys from both ends of the political spectrum." David E. Patton, *Criminal Justice Reform and Guns: The Irresistible Movement Meets the Immovable Object*, 69 Emory L.J. 1011, 1025 (2020).
8. Most jurisdictions define complicity in general terms that apply across all different types of offenses. In other words, complicity principles are trans-substantive, like the attempt and solicitation doctrines examined in the previous chapter. But consider whether some offenses are less appropriately punished through accomplice liability than others. The fact that § 924(c) mandates different sentencing depending on whether a gun is "used," "brandished," or "discharged" suggests that Congress wanted to allocate punishment based on the specific way the defendant used the gun. Once we allow accomplice liability for § 924(c), aren't Congress's allocations disrupted? If courts do recognize accomplice liability for § 924(c), should they be more

demanding about the required mental state? Given that the § 924(c) charges in this case alleged not simply the use or brandishment but the discharge of the gun, should the *Rosemond* Court have required knowledge that a gun would be discharged, not merely knowledge that one participant would carry a gun?

9. Justice Alito's dissent relies on two distinctions that you should understand: a distinction between an affirmative defense and a failure-of-proof argument, and a distinction between intent and motive. A failure of proof argument is a defense claim that the prosecution has not established the necessary elements of the offense beyond a reasonable doubt. Affirmative defenses, which you will study in more detail in the next chapter, do not contest the elements of the offense, but rather identify some independent consideration as a reason not to convict the defendant. If a defendant participates in an armed drug transaction out of fear for his own safety, he could potentially benefit from the affirmative defenses of duress or necessity. But, Justice Alito would argue, such a person can still be an accomplice to a drug trafficking crime. Another way that Justice Alito might put the point: accomplice liability requires intent to promote the principal's criminal conduct, or at least knowledge that the conduct will occur; it does not ask us to inquire why the defendant intends the conduct to occur.

Check Your Understanding (9-1)

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The original version of this chapter contained H5P content. You may want to remove or replace this element.

N.Y. Penal Law § 125.25. Murder in the second degree

A person is guilty of murder in the second degree when:

1. With intent to cause the death of another person, he causes the death of such person or of a third person…
2. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person…

N.Y. Penal Law § 20.00. Criminal liability for the conduct of another

When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct.

The PEOPLE of the State of New York, Respondent

v.

Jermaine RUSSELL, Appellant

The PEOPLE of the State of New York, Respondent

v.

Khary BEKKA, Appellant

The PEOPLE of the State of New York, Respondent

v.

Shamel BURROUGHS, Appellant

Court of Appeals of New York
91 N.Y.2d 280

Feb. 11, 1998

KAYE, Chief Judge.

Shortly before noon on December 17, 1992, Shamel Burroughs engaged in a gun battle with Jermaine Russell and Khary Bekka on Centre Mall of the Red Hook Housing Project in Brooklyn. During the course of the battle, Patrick Daly, a public school principal looking for a child who had left school, was fatally wounded by a single stray nine millimeter bullet that struck him in the chest. Burroughs, Bekka and Russell—defendants on this appeal—were all charged with second degree murder.

Two separate juries, one for Burroughs and another for Russell and Bekka, were impaneled contemporaneously and heard the evidence presented at trial. Although ballistics tests were inconclusive in determining which defendant actually fired the bullet that killed Daly, the theory of the prosecution was that each of them acted with the mental culpability required for commission of the crime, and that each "intentionally aided" the defendant who fired the fatal shot (Penal Law § 20.00). Both juries convicted defendants of second degree, depraved indifference murder (Penal Law § 125.25[2]).

On appeal, each defendant challenges the sufficiency of the evidence. Because the evidence, viewed in the light most favorable to the prosecution, could have led a rational trier of fact to find, beyond a reasonable doubt, that each defendant was guilty of depraved indifference murder as charged, we affirm the order of the Appellate Division sustaining all three convictions.

A depraved indifference murder conviction requires proof that defendant, under circumstances evincing a depraved indifference to human life, recklessly engaged in conduct creating a grave risk of death to another person, and thereby caused the death of another person. Reckless conduct requires awareness and conscious disregard of a substantial and unjustifiable risk that such result will occur or that such circumstance exists. "The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation." To constitute "depraved indifference," conduct must be "so wanton, so deficient in a moral sense of concern, so devoid of regard of the life or lives of others, and so blameworthy as to warrant the same criminal liability as that which the law imposes upon a person who intentionally causes the death of another."

Although defendants underscore that only one bullet killed Patrick Daly and it is uncertain which of them fired that bullet, the prosecution was not required to prove which defendant fired the fatal shot when the evidence was sufficient to establish that each defendant acted with the mental culpability required for the commission of depraved indifference murder, and each defendant "intentionally aided" the defendant who fired the fatal shot. Defendants urge, however, that the evidence adduced at trial did not support a finding that they—as adversaries in a deadly gun battle—shared the "community of purpose" necessary for accomplice liability. We disagree. The fact that defendants set out to injure or kill one another does not rationally preclude a finding that they intentionally aided each other to engage in the mutual combat that caused Daly's death.

People v. Abbott (N.Y. 1981), provides an apt illustration. That case involved two defendants—Abbott and Moon—who were engaged in a "drag race" on a residential street when Abbott lost control and smashed into another automobile, killing the driver and two passengers. Both defendants were convicted of criminally negligent homicide, but Moon asserted that he was not responsible for Abbott's actions and that his conviction should be set aside. Rejecting this argument, the court found that, although Moon did not strike the victim's car and was Abbott's adversary in a competitive race, he intentionally participated with Abbott in an inherently dangerous and unlawful activity and therefore shared Abbott's culpability. Moon's "conduct made the race possible" in the first place, as there would not have been a race had Moon not "accepted Abbott's challenge" …

In the present case, the jurors were instructed:

"If you find that the People have proven beyond a reasonable doubt that [defendants] *took up each other's challenge*, shared in the venture and unjustifiably, voluntarily and jointly created a zone of danger, then each is responsible for his own acts and the acts of the others * * * [and] it makes no difference whether it was a bullet from Mr. Bekka's gun, Mr. Russell's gun or Mr. Burrough's gun that penetrated Mr. Daly and caused his death" (emphasis added).

The trial evidence was sufficient to support each jury's findings in accordance with this charge. Although Burroughs was shooting at Russell and Bekka, and Russell and Bekka were shooting at Burroughs, there was adequate proof to justify the finding that the three defendants tacitly agreed to engage in the gun battle that placed the life of any innocent bystander at grave risk and ultimately killed Daly. Indeed, unlike an unanticipated ambush or spontaneous attack that might have taken defendants by surprise, the gunfight in this case only began after defendants acknowledged and accepted each others' challenge to engage in a deadly battle on a public concourse.

As defendants approached one another on Centre Mall, a grassy open area that serves as a thoroughfare for the 7,000 residents of the 28-building housing complex, it was evident that an encounter between them would be violent and would endanger others. There was trial evidence that when Burroughs first saw Bekka and Russell walking toward him, he immediately recognized the danger, instructing the two female friends accompanying him, one of them pregnant, to "run" or "go." They too plainly sensed the danger because, without hesitation, they turned and ran.

Despite the palpable threat, Burroughs, armed with a nine millimeter Glock, did not flee with his friends. Rather, he continued toward Russell and Bekka, tacitly accepting their invitation and issuing one of his own. In turn, Russell and Bekka, also armed with automatic weapons, continued walking toward Burroughs, challenging him and accepting his challenge. As they drew nearer, defendants each began firing their high-powered guns, capable of shooting bullets at an average rate of 1,100 feet per second, across the pedestrian thoroughfare. The dozen or more people in the area, as well as those with windows overlooking the Mall, were put at grave risk as defendants unleashed a hail of bullets. Witnesses testified that the battle sounded "like a war" and that anywhere from nine to 20 shots were fired.

Although Centre Mall is surrounded by buildings affording refuge, defendants chose instead to run through the area aggressively pursuing one another. Indeed, even after exchanging an initial volley of shots, they continued to wage their private war, issuing taunts and ducking back and forth behind buildings and trees, seeking tactical advantage. As a result of defendants' deadly gun battle, Patrick Daly was shot in the chest and killed almost instantly.

At trial, all three defendants sought to exonerate themselves by arguing self-defense—each claiming that their opponent shot first and they were justified in firing back. Under New York law, however, a person who reasonably believes that another is about to use deadly physical force is not free to reciprocate with "deadly physical force if he knows that he can with complete safety as to himself and others avoid the necessity of so doing by retreating"… Here, there was evidence that defendants did not avail themselves of opportunities for safe retreat, choosing instead to use deadly force against each other. As such, there was adequate support for each jury's rejection of defendants' justification defense.

The evidence adduced at trial was also sufficient for the jury to determine that all three defendants acted with the mental culpability required for depraved indifference murder, and that they intentionally aided and encouraged each other to create the lethal crossfire that caused the death of Patrick Daly.

To the extent defendants' remaining arguments are preserved, we conclude that they are without merit.

Accordingly, in each case the order of the Appellate Division should be affirmed.

Notes and questions on *People v. Russell*

1. No one argued that any of three defendants intended to kill Patrick Daly. That wouldn't matter for a second-degree murder charge under New York law, since a person can be guilty of second-degree murder by engaging in reckless conduct that causes death. But does the lack of intent to kill this victim matter to an accomplice liability argument? Why or why not?
2. In this case, accomplice liability is used to address an evidentiary difficulty related to causation: the prosecution could not prove that any specific one of the three defendants caused Patrick Daly's death. For each defendant, the prosecution argued that either the defendant actually caused Daly's death (by firing the fatal bullet) or the defendant was an accomplice to the person who caused Daly's death. Notice that the previous case also involved the use of accomplice liability to get around a deficiency in the evidence – the prosecution there believed, but could not adequately prove, that Rosemond himself had discharged the gun. To get around this difficulty, the prosecution offered two alternative theories: either Rosemond fired the weapon himself, or he was an accomplice to the person who did fire the weapon.
3. Look again at the text of New York's complicity statute, reprinted just before the *Russell* opinion. Do the New York state law requirements for complicity differ from the federal standards (themselves supposedly derived from common law) discussed in *Rosemond*? In particular, does accomplice liability in New York have the same mental state requirements as accomplice liability in the federal system?
4. In thinking about the previous question, you should have noticed that New York does not follow the requirement of "true purpose" to facilitate the crime that has been endorsed by federal courts. Instead, New York Penal Law 20.00 can be understood as following, and extending still further, an expansion of accomplice liability that began with the Model Penal Code. Here is key language from the Model Penal Code:

Model Penal Code § 2.06

(1) A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both.

(2) A person is legally accountable for the conduct of another person when:

(a) acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct; or

(b) he is made accountable for the conduct of such other person by the Code or by the law defining the offense; or

(c) he is an accomplice of such other person in the commission of the offense.

(3) A person is an accomplice of another person in the commission of an offense if:

(a) with the purpose of promoting or facilitating the commission of the offense, he

(i) solicits such other person to commit it, or

(ii) aids or agrees or attempts to aid such other person in planning or committing it, or

(iii) having a legal duty to prevent the commission of the offense, fails to make proper effort so to do; or

(b) his conduct is expressly declared by law to establish his complicity.

(4) When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.

(5) A person who is legally incapable of committing a particular offense himself may be guilty thereof if it is committed by the conduct of another person for which he is legally accountable, unless such liability is inconsistent with the purpose of the provision establishing his incapacity.

5. In at least some circumstances (offenses involving a result element), the Model Penal Code dispenses with the traditional common law requirement that the accomplice must intend to promote the specific crime that the principal commits. Instead, the MPC allows accomplice liability if the accomplice intends to promote the principal's *conduct* and has "the kind of culpability, if any, with respect to [the] *result* that is sufficient for the commission of the offense" (emphasis added). To make this concrete, consider a set of facts similar to those you see in *Russell*: one person encourages another to shoot in a crowded area, and someone is hit by a bullet. The person who fired the gun did not intend to kill anyone, but he acted recklessly, and may be guilty of reckless homicide. Is the person who encouraged the reckless shooting also guilty of reckless homicide, as an accomplice? The MPC would allow accomplice liability in this situation, even though the accomplice did not intend to promote a homicide. The New York statute expands accomplice liability even more broadly than the Model Penal Code, since it dispenses with a "true purpose" requirement for all crimes and not merely those that involve a result element.
6. What about the conduct required of an accomplice under New York law? As we have seen in other contexts, conduct requirements and mental state requirements are closely intertwined in this statute. Penal Law § 20.00 imposes accomplice liability on one who "solicits, requests, commands, importunes, or intentionally aids" a principal to engage in criminal conduct. The prosecution in *Russell* argued that the defendants had "intentionally aided" one another in reckless conduct. The claim was not that any of the defendants had intended to kill the victim, Patrick Daly, but they had intended to aid one another in engaging in "mutual combat."
7. The terms "accomplice" and "complicity" come from Latin roots that mean "folded together" or "allied." Accomplice liability is often said to require "action in concert" or a "community of purpose." From that perspective, *People v. Russell* is an unusual use of accomplice liability: Shamel Burroughs was shooting at, and presumably trying to kill, Jermaine Russell and Khary Bekka, and Russell and Bekka were shooting at Burroughs. The prosecution argued, successfully, that all three men were accomplices to one another. What is the argument for treating enemies as accomplices here? Suppose the deadly bullet had struck Russell, not an uninvolved bystander, and Russell was hurt but not killed. Suppose then Burroughs were charged with attempted murder (of Russell). Should Russell also be charged with attempting to murder *himself*, on the theory that he was an

accomplice to Burroughs? Consider again the precise mental state and conduct requirements of the New York complicity statute.

8. Patrick Daly, the high school principal who was shot, was a beloved community figure, and the teenage defendants were his former students. Daly's death shocked, and then galvanized, the Red Hook neighborhood in Brooklyn. For an account of the shooting and immediate aftermath, see Robert D. McFadden, *Brooklyn Principal Shot to Death While Looking for Missing Pupil*, N.Y. Times (Dec. 18, 1992). For details on how the incident "indelibly transformed" Red Hook and helped lead to the development of the Red Hook Community Justice Center, see Alan Neuhauser, *Days After Newtown, City Also Remembers Principal Killed 20 Years Ago*, dnainfo.com (Dec. 17, 2012).
9. Russell and Bekka were apparently mortal enemies of Burroughs, and vice versa. All three defendants were young Black men. Might this fact have made it easier to see the three defendants as accomplices of one another? For one defendant's reflections on the case, and his own later work as a Quaker advocate for restorative justice, see https://www.afsc.org/blogs/acting-in...ve-khary-bekka.
10. As the court notes near the end of its opinion, the defendants tried unsuccessfully to raise claims of self-defense. We'll discuss self-defense doctrine, and retreat requirements, in more detail in Chapter Ten, and will reconsider the facts of this case at that point.

Conspiracy

18 U.S.C. § 371. Conspiracy to commit offense or to defraud the United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

49 U.S.C. § 32703. Preventing tampering

A person may not–

(1) advertise for sale, sell, use, install, or have installed, a device that makes an odometer of a motor vehicle register a mileage different from the mileage the vehicle was driven, as registered by the odometer within the designed tolerance of the manufacturer of the odometer;

(2) disconnect, reset, alter, or have disconnected, reset, or altered, an odometer of a motor vehicle intending to change the mileage registered by the odometer;

(3) with intent to defraud, operate a motor vehicle on a street, road, or highway if the person knows that the odometer of the vehicle is disconnected or not operating; or

(4) conspire to violate this section…

18 U.S.C. § 1341. Frauds and swindles [Mail fraud]

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service [or any private or commercial interstate carrier], or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.

UNITED STATES of America, Plaintiff–Appellee

v.

Michael David HUBBARD, Defendant–Appellant

UNITED STATES of America, Plaintiff–Appellee

v.

James Ray LYON, Defendant–Appellant

U.S. Court of Appeals, Ninth Circuit
96 F.3d 1223

Decided Sept. 23, 1996

TROTT, Circuit Judge:

Michael Hubbard and James Lyon were convicted of conspiracy to commit mail fraud related to an elaborate scheme of odometer tampering. They appeal the district court's denial of their Motion for Judgment of Acquittal, arguing … that there was insufficient evidence to support a charge of conspiracy…. We reject Appellants' arguments and affirm the convictions.

Michael Hubbard, conducting business as Discount Rent–A–Car (Discount) and as AAA Rent A Car, was in the business of purchasing and selling used motor vehicles. He purchased vehicles that had previously been rental cars, and when he purchased them they generally had between 50,000 and 80,000 miles on them. On some of the vehicles Hubbard purchased, he rolled back the odometers. Then, Hubbard applied to the Departments of Motor Vehicles in California and Texas for duplicate titles, claiming that the original titles to the purchased rental cars had been lost. The duplicate titles came back with a blank mileage figure, and the rolled-back, low-mileage figure was inserted on the duplicate title. The cars that are the subject of this case were then sold by Hubbard and his employee James Lyon to Arizona Checker Sales, which converted the used cars into taxicabs. Hubbard and Lyon represented to Arizona Checker Sales that the low-mileage figures on the odometers were accurate. Once Arizona Checker Sales had possession of the vehicles and their titles, they had to obtain new Arizona titles. The State of Arizona mailed the new titles back to Arizona Checker Sales.

In February 1995, Hubbard and Lyon were tried for conspiracy to engage in odometer tampering and mail fraud. At the conclusion of the Government's case, Hubbard and Lyon moved for judgment of acquittal. The district court denied the motion as to the conspiracy to commit mail fraud, but granted the motion as to the charge of conspiracy to engage in odometer tampering. The court found that the evidence did not show conspiracy to spin odometers, reasoning that the odometer tampering crime was completed once the odometer was altered, and there was no evidence that Lyon had actually altered an odometer. The court, however, found that Lyon's role in keeping records and negotiating with purchasers could support the charge of conspiracy to commit mail fraud.

After eight days of trial, a jury convicted Hubbard and Lyon on the count of conspiracy to commit mail fraud…

To prove a conspiracy, the Government must show an agreement between two or more persons to accomplish an illegal objective, coupled with one or more overt acts in furtherance of the illegal purpose. "[I]nferences of the existence of such an agreement may be drawn 'if there be concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose.'" *United States v. Melchor–Lopez* (9th Cir.1980). "The agreement need not be explicit, but may be inferred from circumstantial evidence." Once evidence of a conspiracy is established, only a slight connection between the defendant and the conspiracy is necessary to convict the defendant of knowing participation in the conspiracy. However, mere association with members of a conspiracy or knowledge of the conspiracy, "without an intention and agreement to accomplish a specific illegal objective, is not sufficient to make one a conspirator." Appellants do not attack the existence of fraudulent behavior. Instead, they argue that there is no evidence that Hubbard and Lyon had an *agreement* to act fraudulently.

We find, however, that the evidence presented at trial shows otherwise. Hubbard's role in the fraud is supported by the fact that he was running the company, negotiating the purchase and sale of vehicles, and picking up and delivering vehicles. One witness, a former employee of Discount, testified that she specifically saw him inside of one vehicle with the dashboard panel removed, adjusting the odometer with a screw driver. Also, Hubbard signed several documents related to the purchases and sales of the vehicles. For example, he applied for the duplicate titles, claiming that the originals were lost. During the execution of a search warrant at Discount, the titles purportedly lost were found on Hubbard's desk. Further evidence of Hubbard's intent and knowledge of the crime came from his prior conviction in June, 1990, when he pleaded guilty to two felony counts for odometer-fraud related crimes.

Appellants argue that even if there was evidence that Hubbard defrauded purchasers, the evidence does not show that Lyon knew that the mileage he represented to buyers was not accurate. However, there is sufficient evidence supporting Lyon's knowledge of and participation in the fraudulent scheme. Lyon spoke to purchasers of Discount's vehicles regarding the cost and mileage of the vehicles. For example, John Holshouser, a representative from Arizona Checker Sales, testified that he had spoken to Lyon 15–20 times over the phone about the cars that were for sale. Lyon also faxed to Holshouser documents listing vehicle prices and mileage. Holshouser specifically testified that Lyon had represented to him that the mileage figures were actual mileage figures. Holshouser also testified that he relied on mileage figures in deciding on the price he would pay for the car.

Lyon handled paperwork associated with both the purchase and sale of used cars. He personally maintained an inventory of the vehicles on a computer, inputting data about the mileage of the vehicles. Reports with vehicle information containing both high and low mileage figures for five vehicles were printed from the computer data kept by Lyon. A handwriting expert testified that Lyon had written at least some of the mileage figures on vehicle documents. For example, in relation to one vehicle, the expert testified that Lyon had written both: 1) a high mileage figure of 79,530 miles on a Dealer Jacket when Discount purchased the vehicle, and 2) the low mileage figure of 51,784 miles on the duplicate Texas Certificate of Title, which Discount provided to Arizona Checker Sales and which Arizona Checker Sales provided to the Arizona Department of Transportation. Also, in a fax to Holshouser, Lyon represented that the mileage on another vehicle was 30,100 miles, whereas the Dealer Jacket for the same vehicle states in Lyon's writing that the car has 70,550 miles.

Viewing the evidence in the light most favorable to the Government, the evidence shows that Hubbard purchased the vehicles with high mileage, rolled back the odometers, and then Hubbard and Lyon offered them for sale at a lower mileage. Lyon represented to Holshouser that the low mileage figures were accurate, and certified those low-mileage figures on title documents. Lyon input vehicle information into the company computer, and was in charge of maintaining the vehicle inventory. Hubbard and Lyon had to coordinate the new, rolled-back mileage figures to be consistent on vehicle price lists, on the duplicate titles, and on odometer disclosure statements. This scheme required their interaction and cooperation. Thus, a rational jury could have found a "concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose," which is sufficient to establish evidence of an agreement.

Accordingly, we conclude that a rational jury could have found that Appellants had an agreement to engage in this fraudulent scheme, and sufficient evidence supports the convictions for conspiracy….

… Defendants [also] argue that the district court's grant of the motion for judgment of acquittal for the charge of conspiracy to engage in odometer tampering and the denial of the motion for the charge of conspiracy to engage in mail fraud were inconsistent. In other words, they contend that they could not have conspired to commit mail fraud without conspiring to roll-back odometers.

This argument has no merit. The district court interpreted the conspiracy charge related to odometer tampering in a narrow sense, finding that the crime of odometer tampering ended as soon as the odometers were rolled-back. The court found that there was insufficient evidence to support a finding that Lyon had tampered with the odometers. This was distinct from the charge of mail fraud. As explained above, there was sufficient evidence to support a finding that Hubbard and Lyon engaged in a fraudulent scheme to sell cars with the rolled-back odometers to Arizona Checker Sales at inflated prices. Both Hubbard and Lyon performed integral parts of this scheme by signing the relevant documents, inputting the rolled-back odometer figures on new titles, and representing the low-mileage figures as actual mileage to Arizona Checker Sales.

Therefore, although there may not have been evidence that Lyon himself altered the odometers, the conspiracy charge for mail fraud included acts beyond the actual alteration of the odometer. This additional fraudulent behavior—i.e., misrepresenting mileage figures and selling vehicles to purchasers who would have to acquire new titles—provided the basis for the charge of conspiracy to commit mail fraud. Thus, there was nothing inconsistent in the district court's partial judgment of acquittal.

Notes and questions on *U.S. v. Hubbard*

1. This case introduces you to a new inchoate offense: conspiracy. Like the inchoate offenses discussed in the previous chapter, attempt and solicitation, a conspiracy charge should specify the underlying offense that the alleged co-conspirators agreed to commit. (A defendant is not charged with attempt or solicitation alone, remember, but with "attempted robbery" or "solicitation to murder" and so forth.) Here, Hubbard and Lyon were charged with two different conspiracies: a conspiracy to engage in odometer tampering, and separately, a conspiracy to commit mail fraud. After the trial, the district court granted a motion for

judgment of acquittal with respect to the conspiracy to commit odometer tampering fraud. What evidence was missing to support the charge of conspiracy to commit odometer tampering? It may help to ask, what are the elements of a conspiracy to commit odometer tampering? The next note can help you identify those elements.

2. The federal conspiracy statute used in this case, 18 U.S.C. § 371, is like many of the attempt statutes we saw in Chapter Eight: it uses the term "conspire," as those statutes used the term "attempt," without defining it. To define the term more precisely, the Ninth Circuit draws from caselaw, noting that a conspiracy charge requires the prosecution to show "an agreement between two or more persons to accomplish an illegal objective, coupled with one or more overt acts in furtherance of the illegal purpose." Are there separate mental state and conduct elements here, or does the concept of an agreement collapse mental state and action?
3. In its requirement of an agreement "between two or more persons," the federal statute takes what is often called the bilateral view of conspiracy: a conspiracy requires at least two participants. A bilateral definition of conspiracy can create obstacles in cases in which one of the supposed conspirators is not really agreeing to the crime—perhaps because he is an undercover agent working a sting operation, for example. Some jurisdictions adopt instead a "unilateral" view of conspiracy, in which true agreement between two guilty parties is not necessary. Here's one court's explanation of the distinction:

Under a unilateral formulation, the crime of conspiracy is committed *when a person agrees* to proceed in a prohibited manner; under a bilateral formulation, the crime of conspiracy is committed *when two or more persons agree* to proceed in such manner. Under either approach, the agreement is all-important to conspiracy. Under the unilateral approach, as distinguished from the bilateral approach, the trier-of-fact assesses the subjective individual behavior of a defendant, rendering irrelevant in determining criminal liability the conviction, acquittal, irresponsibility, or immunity of other co-conspirators. Under the traditional bilateral approach, there must be at least two 'guilty' persons, two persons who have agreed."

State v. Kihnel, 488 So.2d 1288 (La. 1986). Again, the federal statute used to prosecute Hubbard is a bilateral statute. For an example of unilateral language, see the Model Penal Code definition of conspiracy, discussed after the next case in this chapter.

4. As emphasized in the court's excerpt above, "the agreement is all-important" to a conspiracy charge whether the jurisdiction adopts a bilateral or unilateral approach. Many courts describe the agreement as the "actus reus" of conspiracy, but is an agreement an act? Persons can formalize an agreement through conduct—the signing of a contract, for example—but conspirators rarely put anything in writing or otherwise take action to make their agreement explicit. Conspiratorial agreements are often "inferred from circumstantial evidence" rather than proven by direct evidence. Just as attempt doctrine struggles to distinguish "mere preparation" from actual "perpetration" of an attempt, conspiracy doctrine often struggles to distinguish "mere association" from an actual agreement.
5. Which pieces of evidence establish an agreement in this case? What, precisely, did Hubbard and Lyon agree to do? Or put differently, what crime did they conspire to commit? Again, the district court entered a judgment of acquittal on one conspiracy charge, but not the other. What explains the different outcomes?
6. *Why punish conspiracy, Part One*. In a legal system that includes liability for criminal attempts, as discussed in the previous chapter, and liability for accomplices, as discussed in the first part of this chapter, what does conspiracy doctrine add? One commonly stated justification for conspiracy offenses is the claim that group efforts to commit crimes are especially dangerous and socially harmful, so much so that the very agreement to commit a crime is worthy of punishment even in the absence of the kind of preparatory activity that may be required by attempt doctrine. For one recent statement of this view, consider *People v. Martin*, 26 Cal. App. 5th 825 (Ct. App. Ca. 2018). Amaya Monique Martin and two other women had been apprehended after shoplifting cosmetics from a Walmart and a grocery store. Martin was convicted of conspiracy to commit petty theft, based in part on her own statement that she had been "recruited" to steal cosmetics for someone who planned to send them to Latin America. California law classifies shoplifting as a misdemeanor, but conspiracy to commit shoplifting (or conspiracy to commit petty theft) is a felony. Martin sought to have her felony conviction reduced to a misdemeanor shoplifting conviction. The court refused, emphasizing the unique dangers of a conspiracy:

The courts have long recognized the enhanced dangers of a conspiracy. Almost a hundred years ago, [this court] remarked: "[A] group of evil minds planning and giving support to the commission of crime is more likely to be a menace to society than where one individual alone sets out to violate the law." "The theory … is that collaborative criminal activities pose a greater potential threat to the public than individual acts. 'Criminal liability for conspiracy, separate from and in addition to that imposed for the substantive offense which the conspirators agree to commit, has been justified by a "group danger" rationale. The division of labor

inherent in group association is seen to encourage the selection of more elaborate and ambitious goals and to increase the likelihood that the scheme will be successful. Moreover, the moral support of the group is seen as strengthening the perseverance of each member of the conspiracy, thereby acting to discourage any reevaluation of the decision to commit the offense which a single offender might undertake. And even if a single conspirator reconsiders and contemplates stopping the wheels which have been set in motion to attain the object of the conspiracy, a return to the status quo will be much more difficult since it will entail persuasion of the other conspirators. [Citations.]' [Citations.]"

The instant case aptly demonstrates the enhanced dangers of a conspiracy. Respondent was not stealing cosmetics for her personal use. She was acting as part of an international conspiracy to steal cosmetics and transport them to Latin America, where they would be sold. There were no limits on her incentive to steal. The more cosmetics she stole, the more money she was guaranteed to receive. When she entered the Walmart and Albertson's stores, she was accompanied by two coconspirators. They could steal considerably more than a single person acting alone. The presence of three coconspirators supporting each other decreased the chance that one of them would get "cold feet" and not go through with the theft. Moreover, one of them could act as a lookout to avoid detection by security personnel, thus increasing the likelihood that their criminal scheme would succeed.

Martin, 26 Cal. App. 5th 825, 836-37. One recent article challenges the claim that conspiracies are uniquely dangerous, suggesting that in some cases, expanding the number of people involved in planned criminal activity make the planned crime less likely to actually occur. The article thus proposes that legal definitions of conspiracy should be revised to require prosecutors to show proof of actual dangerousness. See Steven R. Morrison, *Requiring Proof of Conspiratorial Dangerousness*, 88 Tul. L. Rev. 483 (2014).

7. *Why conspiracy, Part Two.* Leaving aside principled arguments about whether conspiratorial agreements are particularly dangerous, one can identify some concrete practical implications of conspiracy law that can make conspiracy charges especially attractive to prosecutors. In some jurisdictions, including the federal system, conspiracy is different from other inchoate offenses in that it does not "merge" into the completed offense. Attempt does merge, in this sense: if a defendant attempts to manufacture a controlled substance, and then is eventually successful, the defendant can't be convicted of both attempted manufacture and manufacture itself. The attempted manufacture is said to "merge" into the completed offense. But a conspiracy charge doesn't merge, under federal law. A defendant who conspires to manufacture a controlled substance, and then actually does manufacture that substance, can be convicted of both conspiracy to manufacture and manufacture itself. Thus, conspiracy charges often add to a defendant's overall criminal liability.

   Additionally, federal conspiracy law embraces a concept known as *Pinkerton* liability, named after *Pinkerton v. United States*, 328 U.S. 640 (1946), and many states have adopted similar doctrines. *Pinkerton* liability is a form of derivative liability, like accomplice liability; it is a way to hold one defendant liable for the conduct of someone else. The case that gave the doctrine its name involved Walter and Daniel Pinkerton, brothers who transported and sold liquor in a bootlegging business that violated existing state regulations. At some point, Daniel was convicted and jailed for liquor-related offenses. While Daniel was in jail, Walter continued to run the bootlegging business, and (unsurprisingly) did not report his illegal profits as taxable income. Federal authorities later prosecuted both Walter and Daniel for conspiracy to commit tax evasion and for the underlying tax evasion offenses. Some of the tax evasion counts were based on Walter's conduct during the time that Daniel was in jail. Daniel argued that he couldn't be punished for acts that Walter committed while he (Daniel) was in jail. But the Supreme Court held that conspiracy was a continuing offense, and each conspirator could be held liable for any and all substantive crimes committed by any member of the conspiracy, so long as the crime was committed "in furtherance of the conspiracy." If the brothers had a conspiratorial agreement to violate liquor laws, and if each act of tax evasion was done in furtherance of the overall conspiracy, then each brother could be held liable for the other's crimes.

   Pinkerton liability thus expands the number of people who can be held liable for any one crime committed "in furtherance" of a conspiracy, and it expands the number of crimes that can be charged against each member of a conspiracy. In a large and complex conspiracy, the prospect of *Pinkerton* liability can create a strong incentive for individual members of the conspiracy to cooperate with the government in the hopes of avoiding punishment for all substantive crimes committed by any of the co-conspirators. *Pinkerton* liability was widely criticized, and not widely used, until the 1970s, when federal prosecutors embraced it as a weapon in the war on drugs.

Check Your Understanding (9-2)

The original version of this chapter contained H5P content. You may want to remove or replace this element.

The original version of this chapter contained H5P content. You may want to remove or replace this element.

Withdrawal or Abandonment of a Conspiracy

Indiana Code § 35-41-5-2. Conspiracy

(a) A person conspires to commit a felony when, with intent to commit the felony, the person agrees with another person to commit the felony. A conspiracy to commit a felony is a felony of the same level as the underlying felony. However, a conspiracy to commit murder is:

(1) a Level 2 felony if the conspiracy does not result in the death of a person; and

(2) a Level 1 felony if the conspiracy results in the death of another person.

(b) The state must allege and prove that either the person or the person with whom he or she agreed performed an overt act in furtherance of the agreement.

(c) It is no defense that the person with whom the accused person is alleged to have conspired:

(1) has not been prosecuted;

(2) has not been convicted;

(3) has been acquitted;

(4) has been convicted of a different crime;

(5) cannot be prosecuted for any reason; or

(6) lacked the capacity to commit the crime.

Indiana Code § 35-42-1-1. Murder

A person who … knowingly or intentionally kills another human being … commits murder, a felony.

Indiana Code § 35-42-3-3. Confinement

A person who knowingly or intentionally confines another person without the other person's consent commits criminal confinement….

Curtis Lee WEIDA, Appellant–Defendant

v.

STATE of Indiana, Appellee–Plaintiff

Court of Appeals of Indiana
778 N.E.2d 843

Nov. 21, 2002

MATHIAS, Judge.

Curtis Weida was convicted of Conspiracy to Commit Murder and Confinement… The trial court vacated the Confinement conviction on double jeopardy grounds, but sentenced Weida to fifty years executed for the Conspiracy to Commit Murder conviction. Weida appeals and raises two issues, which we restate as:

I. Whether the evidence was sufficient to support Weida's conviction for Conspiracy to Commit Murder; and,

II. Whether the trial court abused its discretion when it refused to give Weida's tendered jury instruction on withdrawal from conspiracy.

We affirm in part, reverse in part and remand for a new trial on the Conspiracy to Commit Murder count.

The facts most favorable to the verdict reveal that on more than one occasion prior to June 13, 2000, Weida told Kristen Gross ("Gross"), a young woman residing in his home, that he had fantasies that involved kidnapping a young boy and performing sexual acts on him…. On June 13, 2000, Weida asked Gross to go for a drive with him. During the drive, Weida informed Gross that they were driving around "to look for a kid." Weida and Gross observed several young boys, and Weida made comments about them…

Eventually, Weida and Gross arrived in Kokomo, Indiana. While driving through a neighborhood, Weida and Gross observed a young boy, I.P., standing on the side of the road. Upon seeing I.P., Weida asked Gross, "[w]hat do you think," to which Gross replied, "[t]oo young." Weida then drove around the block and stopped the car near I.P. Gross asked Weida, "what do you want me to do, what's going on, what are you going to do?" Weida responded, "[w]ell, you're going to get out of the car and ask for directions to the mall or something."

Gross got out of the car and asked I.P. how to get to the mall. As he began to tell her, Gross told him to tell Weida. As I.P. moved closer to the car to give Weida directions, Weida pushed up the front passenger seat and Gross shoved I.P. into the back of the car. Weida then gave Gross, who was in the backseat with I.P., a plastic "band" to tie I.P.'s wrists together, which she did. Before they had spotted I.P., Weida had shown the band to Gross and told her that she could use it to tie up a boy's hands.

As they were driving out of Kokomo, Gross attempted to convince Weida that they should let I.P. go because she did not want Weida to kill I.P. Gross then made a failed attempt to burn the plastic band off of I.P.'s wrists. Weida told her that "if [they] couldn't get him loose there was no option." Gross's understanding of that statement was that if she could not remove the band from I.P.'s wrists, Weida would kill him. Weida eventually stopped at a gas station and borrowed a pair of scissors that were used to cut the band around I.P.'s wrists. Weida then told I.P. to stick out his hands, put a gun in them, and stated "[t]hat's what's going to happen to you if you tell." Weida drove back to Kokomo, and before they dropped I.P. off, Weida stated, "[n]ow you remember what will happen, we know where you live."

On September 18, 2000, Weida was charged with Conspiracy to Commit Murder, a Class A felony, and Confinement, as a Class B felony. On September 17, 2001, a jury trial began, and the jury found Weida guilty of both charges. At the sentencing hearing, the trial court vacated the Confinement conviction on double jeopardy grounds, but sentenced Weida to fifty years executed for the Conspiracy to Commit Murder conviction. Weida now appeals….

… To convict Weida of Conspiracy to Commit Murder, the State had to prove that while having the intent to commit murder, Weida and Gross entered into an agreement to commit murder, and either Weida or Gross performed an overt act in furtherance of the agreement. However, the State was not required to prove that murder was actually committed or even attempted.[5] Weida argues that the evidence did not establish that he intended to kill I.P. or that there was an agreement between himself and Gross to do so.

The State is not required to establish the existence of a formal express agreement to prove a conspiracy. "It is sufficient if the minds of the parties meet understandingly to bring about an intelligent and deliberate agreement to commit the offense." An agreement can be inferred from circumstantial evidence, which may include the overt acts of the parties in furtherance of the criminal act. With regard to the intent element, we note that to determine whether the defendant had the requisite intent to commit the crime alleged, "[t]he trier of fact must usually resort to circumstantial evidence or reasonable inferences drawn from examination of the circumstances surrounding the crime."

At trial, Gross testified that she and Weida had several conversations concerning Weida's fantasies that involved performing sexual acts on the dead body of a young boy. On the date they drove to Kokomo, Weida had two guns in the car and a plastic band. Weida told Gross that the band could be used to tie a boy's hands together. Weida drove through several towns and made comments about the young boys they observed indicating for example that a given boy was too old. Although Gross testified that she had no intent to kill I.P., she was aware of Weida's fantasies and testified that she knew Weida wanted to act out those fantasies after they spotted I.P., and he told her to ask him for directions. Furthermore, Gross actively participated in the crime by shoving I.P. into the car after Weida had pushed up the front seat and by tying the plastic band around I.P.'s wrists. From this evidence, the jury could have reasonably concluded that Weida intended to kill I.P. and that he and Gross entered into an agreement to do so. Therefore, the evidence presented at trial was sufficient to support Weida's conviction for Conspiracy to Commit Murder.

Weida also argues that the trial court abused its discretion when it refused to give his tendered jury instruction regarding withdrawal from the conspiracy. "The giving of jury instructions lies within the trial court's sound discretion, and we review the court's refusal to give a tendered instruction for an abuse of that discretion." …

At trial, Weida tendered the following jury instruction:

To withdraw from conspiracy, defendant must cease his activity in the conspiracy and take affirmative act to defeat or disavow conspiracy's purposes either by making full confession to the authorities or by communicating his withdrawal in a manner reasonably calculated to inform co-conspirators, and his withdrawal must be both complete and in good faith.

Withdrawal from a conspiracy is an affirmative defense under federal law and Weida's instruction adequately describes the elements of that defense. However, withdrawal from a conspiracy has not been recognized as a defense under Indiana law. In his brief, Weida argues that his tendered instruction is a correct statement of the [Indiana] defense of abandonment, which was not covered by any other instruction; therefore, the trial court abused its discretion when it refused to give the instruction to the jury.

The State argues that Weida's tendered instruction was not a correct statement of the law of the abandonment defense. Indiana Code section 35–41–3–10 describes the defense of abandonment [that can be raised by a defendant charged with conspiracy, attempt, or aiding and abetting an offense] and provides:

[I]t is a defense that the person who engaged in the prohibited conduct voluntarily abandoned his effort to commit the underlying crime and voluntarily prevented its commission.

Ind. Code § 35–41–3–10 (1998). "To be considered voluntary, the decision to abandon must originate with the defendant, not as a result of extrinsic factors that increase the probability of detection." *Estep v. State* (Ind. Ct. App. 1999). Also, the defendant must have forsaken the criminal plan before completion of the underlying crime or before it became inevitable. Comparing the defenses of withdrawal and abandonment, it is clear that they consist of the same concepts because both defenses require that the defendant forsake the conspiracy.

However, the State contends that the tendered withdrawal instruction "reduces Defendant's burden in establishing the affirmative defense of abandonment." We disagree. The defense of withdrawal requires the defendant to *affirmatively* act to defeat the conspiracy, whereas the defense of abandonment requires only that the defendant *voluntarily* abandon his effort to commit the crime. Like lesser-included offenses, an analogy could be made that abandonment is a lesser-included defense of withdrawal. For example, if a group of individuals agrees to rob a bank, and one of those individuals voluntarily decides to forsake his part in the conspiracy, those facts might be sufficient to establish the defense of abandonment. However, those facts would clearly not be sufficient to establish the defense of withdrawal unless the individual took some affirmative act to defeat the conspiracy, such as contacting the police.

Although abandonment is clearly established as a defense by statute, withdrawal has never been recognized as a defense in Indiana. While the defendant bears the additional burden of demonstrating that he took an affirmative act to defeat the goals of the conspiracy to establish the withdrawal defense, withdrawal and abandonment are essentially the same defense. The instruction was not covered by other instructions and there was evidence in the record that would support giving the withdrawal instruction to the jury because Weida did not attempt to murder I.P., but rather he set him free. Under these extraordinary facts and circumstances, we hold that refusal of Weida's withdrawal instruction was an abuse of the trial court's discretion.

Conclusion

The evidence presented at trial was sufficient to support Weida's conviction for Conspiracy to Commit Murder. However, the trial court abused its discretion when it refused to give his tendered instruction regarding the defense of withdrawal. Therefore, we reverse Weida's conviction for Class A felony Conspiracy to Commit Murder, but we further order the trial court to reinstate Weida's Class B felony Confinement conviction pending the result of any retrial.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

Notes and questions on *People v. Weida*

1. Did Kristen Gross agree to commit murder? Does it matter to Weida's criminal liability whether Gross agreed? Think again of bilateral and unilateral definitions of conspiracy. Which does Indiana seem to adopt?
2. What is the difference between the affirmative defense of withdrawal (described here by the court, and recognized under federal law, but not recognized as a defense under Indiana law) and the Indiana statutory defense of abandonment?
3. The jury convicted Weida of both conspiracy to commit murder and the separate crime of "confinement." The trial court then vacated the confinement conviction on double jeopardy grounds. Look at the confinement statute, reprinted before the court's

opinion. Why, in this case, would convictions for both confinement and conspiracy to commit murder violate double jeopardy? After the 2002 opinion you've just read, Weida was retried for both confinement and conspiracy to commit murder. He was allowed to present his abandonment argument at the new trial, but was convicted again of conspiracy to murder. Once he was convicted of the conspiracy to murder charge, the confinement charge was again vacated. As a state court later explained, "the evidentiary facts that supported the criminal confinement offense were most likely the same evidentiary facts that supported the conspiracy to commit murder charge…."

4. The Model Penal Code adopts a unilateral approach to conspiracy, and also offers an affirmative defense called "renunciation." Consider Model Penal Code § 5.03:

   (1) **Definition of Conspiracy.** A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:

   (a) agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime; or

   (b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

   (2) **Scope of Conspiratorial Relationship.** If a person guilty of conspiracy, as defined by Subsection (1) of this Section, knows that a person with whom he conspires to commit a crime has conspired with another person or persons to commit the same crime, he is guilty of conspiring with such other person or persons, whether or not he knows their identity, to commit such crime.

   (3) **Conspiracy with Multiple Criminal Objectives.** If a person conspires to commit a number of crimes, he is guilty of only one conspiracy so long as such multiple crimes are the object of the same agreement or continuous conspiratorial relationship.

   …

   (5) **Overt Act.** No person may be convicted of conspiracy to commit a crime, other than a felony of the first or second degree, unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired.

   (6) **Renunciation of Criminal Purpose.** It is an affirmative defense that the actor, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

   Is "renunciation" under the MPC similar to the federal defense of "withdrawal," the Indiana defense of "abandonment," or is it different from both?

Complicity, Conspiracy, and Drug Offenses

Rev. Code Washington 9.01.030 [since recodified]

Every person concerned in the commission of a felony, gross misdemeanor or misdemeanor, whether he directly commits the act constituting the offense, or aids or abets in its commission, and whether present or absent; and every person who directly or indirectly counsels, encourages, hires, commands, induces or otherwise procures another to commit a felony, gross misdemeanor or misdemeanor, is a principal, and shall be proceeded against and punished as such. The fact that the person aided, abetted, counseled, encouraged, hired, commanded, induced or procured, could not or did not entertain a criminal intent, shall not be a defense to any person aiding, abetting, counseling, encouraging, hiring, commanding, inducing or procuring him.

The STATE of Washington, Respondent

v.

Bruce W. GLADSTONE, Appellant

Supreme Court of Washington, En Banc
474 P.2d 274

Sept. 10, 1970

HALE, Justice.

A jury found defendant Bruce Gladstone guilty of aiding and abetting one Robert Kent in the unlawful sale of marijuana. Deferring imposition of sentence, the court placed defendant on probation. He appeals the order deferring sentencing contending that the evidence as a matter of law was insufficient to sustain a verdict of guilty. His point, we think, is well taken.

…Gladstone's guilt as an aider and abettor in this case rests solely on evidence of a conversation between him and one Douglas MacArthur Thompson concerning the possible purchase of marijuana from one Robert Kent. There is no other evidence to connect the accused with Kent who ultimately sold some marijuana to Thompson.

When asked by Thompson—an agent of the police—where marijuana could be bought, the defendant did no more than name Kent as an individual who might be willing to sell some and draw a sketch of his location. There was no evidence whatever that the defendant had any association, understanding, agreement or arrangement, direct or indirect, tacit or express with Kent to aid or persuade him in any way in the sale of marijuana.

The conversation between defendant and Thompson occurred at defendant's residence. Douglas MacArthur Thompson, a 25-year-old student at the University of Puget Sound in Tacoma and an employee of the Internal Revenue Service of the United States, had done some investigative work for the government. From time to time, the Tacoma Police Department engaged him to investigate the use, possession and sale of narcotics, principally marijuana, among college students….

Thompson testified that Lieutenant Seymour and Detective Gallwas of the narcotics detail asked him to attempt a purchase of marijuana from Gladstone. During the evening of April 10, 1967—between 10 and 11 o'clock—the two officers and Thompson drove in a police car to the vicinity of defendant's apartment. Thompson went to Gladstone's door alone, beyond the hearing and out of the sight of the two officers. He knocked at the door and Gladstone respond[ed]. Thompson asked Gladstone if he would sell him some marijuana. Describing this incident, Thompson testified as follows:

… Gladstone told me that he was—he did not have enough marijuana on hand to sell me any, but he did know an individual who had quite a sufficient quantity and that was very willing to sell and he named the individual as Robert Kent, or Bob Kent as he put it, and he gave me directions to the residence…. I asked him if, you know, if he could draw me a map and he did.

[Thompson] added, 'I'm not sure whether he did give me the exact address or not, he told me where the residence was.' He said that Gladstone then with pencil and paper sketched the location of Kent's place of residence…

The two officers then took Thompson to Kent's residence where marijuana was purchased. The actual purchase was made by Thompson directly from Kent while [the officers] stayed in the police car. Kent was subsequently arrested and convicted of selling Thompson approximately 8 ounces of marijuana—the very sale which defendant here was convicted of aiding and abetting.

That ended the prosecution's case. Even if it were accorded all favorable inferences, there appears at this point a gap in the evidence which we feel as a matter of law is fatal to the prosecution's cause. Neither on direct examination nor under cross-examination did Thompson testify that he knew of any prior conduct, arrangements or communications between Gladstone and Kent from which it could be even remotely inferred that the defendant had any understanding, agreement, purpose, intention or design to participate or engage in or aid or abet any sale of marijuana by Kent. Other than to obtain a simple map from Gladstone and to say that Gladstone told him Kent might have some marijuana available, Thompson did not even establish that Kent and the defendant were acquainted with each other….

Except for the conversation between Gladstone and Thompson and the map, the state showed only that the officers and their informant, Thompson, went to Kent's residence, more than 3 or 4 blocks from where Gladstone lived, [and] bought some marijuana from him…. Thus, at the close of its case in chief, the state had failed to show any connection or association whatever between Gladstone and Kent or even that they knew each other, and at that juncture a motion for dismissal would lie.

…Gladstone took the stand and testified that he had been a student at the University of Puget Sound in Tacoma for 2 years and that he did not know the police informant, Douglas MacArthur Thompson, personally but had seen him on campus. Prior to the evening of April 10, 1967, he said, Thompson had never been in his home. As to Kent, the party whom he was accused of aiding and abetting, he said he had seen him between classes having coffee at the student union building, and perhaps had been in his company about 10 times altogether. He knew where Kent lived because once en route home in his car he had given Kent a lift from the student union building to the latter's house. On this singular occasion, Gladstone did not get out of the car. He said that he did not know that Kent used marijuana or kept it for sale to other people.

Describing the incidents of April 10, 1967, when Thompson came to his door, Gladstone's version of the event differed somewhat from Thompson's. He testified that Thompson asked him to sell him some pot and Gladstone said, 'No,' and:

A. Then he asked me if I knew Rob Kent and I said yes. Q. What did you tell him? A. I said yes, I knew Rob Kent, and he asked me if I knew where Rob Kent lived and I said that I didn't know the address, nor did I know the street upon which he lived, but I told him that I could direct him there. Q. And did he ask you to direct him? A. Yes, I started to explain how to get there and he asked me if I would draw him a map. Q. And did you do so? A. Yes, I did.

… After that brief conversation, Thompson said, 'Thank you,' and left. Gladstone testified that he did not counsel, encourage, hire, command, induce or otherwise procure Robert Kent to make a sale of marijuana to Douglas Thompson—or do anything that would be their legal equivalent. Thus, the state at the close of its case had not established prima facie that Gladstone, as charged, aided and abetted Kent in the sale of marijuana, and its position did not improve with the defendant's case.

If all reasonable inferences favorable to the state are accorded the evidence, it does not, in our opinion, establish the commission of the crime charged. That vital element—a nexus between the accused and the party whom he is charged with aiding and abetting in the commission of a crime—is missing. The record contains no evidence whatever that Gladstone had any communication by word, gesture or sign, before or after he drew the map, from which it could be inferred that he counseled, encouraged, hired, commanded, induced or procured Kent to sell marijuana to Douglas Thompson as charged, or took any steps to further the commission of the crime charged. He was not charged with aiding and abetting Thompson in the purchase of marijuana, but with Kent's sale of it.

Nor can it be said here that the state proved the existence of a conspiracy. In this state, conspiracy to commit a crime is a gross misdemeanor. The crime is complete when the conspirators have reached an agreement or understanding or consummated a plan to do the unlawful acts, for the conspiracy statute does not require proof of the common-law element of an overt act in pursuance of the conspiracy. RCW 9.22.020. Conspiracy, therefore, is a crime separate, distinct from, and unincluded in the crime which the conspirators have agreed to commit. … One may become a principal through aiding and abetting another in the commission of a crime without participating in a conspiracy. But to be a principal one must consciously share in a criminal act and participate in its accomplishment.

Thus, even without prior agreement, arrangement or understanding, a bystander to a robbery could be guilty of aiding and abetting its commission if he came to the aid of a robber and knowingly assisted him in perpetrating the crime. But regardless of the modus operandi and with or without a conspiracy or agreement to commit the crime and whether present or away from the scene of it, there is no aiding and abetting unless one "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed."

In the instant case, the record is totally devoid of any proof whatever that the defendant and Kent had any arrangement, agreement or understanding, or in any way conspired and confederated with each other concerning the sale of marijuana by Kent. There was no proof that they had talked about it with each other, directly or through others. Whatever information the defendant is shown by the record to have given the police informant, to the effect that Kent might sell him some marijuana, amounted at most to no more than a statement of opinion and possibly no more than campus gossip, rumor or innuendo. That the police ultimately bought marijuana from Kent would not, without more, operate to convert defendant's statement to the police, that Kent would or might sell marijuana, into an aiding, abetting, counseling or encouraging of Kent to make the sale.

…Another case—and one nearly identical with the instant case—affirms the foregoing principles. In *Moreiv. United States* (6th Cir. 1942), undercover narcotic agents approached the defendant, a physician, and asked him to sell them narcotics. The doctor told the agents he had none, but gave the agents the name of another party and advised the agent to tell the latter that the doctor had sent him. The doctor added that 'he will take care of you.' The agents did arrange a purchase of illegal narcotics from the person to whom the doctor had referred them, and the doctor was thereupon charged with aiding and abetting in the sale.

After tracing the common-law distinction between a principal in the second degree and an accessory before the fact and pointing out that an aider and abettor must at least procure, counsel or command another to commit the felony actually committed, the court said:

It is not necessary that there should be any direct communication between an accessory before the fact and the principal felon; it is enough if the accessory direct an intermediate agent to procure another to commit the felony, without naming or knowing of the person to be procured. A person is not an accessory before the fact, unless there is some sort of active proceeding on his part; he

must incite, or procure, or encourage the criminal act, or assist or enable it to be done, or engage or counsel, or command the principal to do it….

* * * It is not to be assumed that Congress, in defining as a principal, one who 'procures the commission of an offense,' and using almost the identical language by which the common law defined aiders, abettors, and accessories, was providing for a new crime theretofore unknown. If the criterion for holding that one is guilty of procuring the commission of an offense, is that the offense would not have been committed except for such a person's conduct or revelation of information, it would open a vast field of offenses that have never been comprehended within the common law by aiding, abetting, inducing or procuring. * * *

* * * (T)he only thing Dr. Platt did was to give Beach the name of Morei as a man from whom he might secure heroin to does horses in order to stimulate them in racing. This is not the purposive association with the venture that, under the evidence in this case, brings Dr. Platt within the compass of the crime of selling or purchasing narcotics, either as principal, aider and abettor, or accessory before the fact. (Italics ours.)

This court has recognized the necessity of proof of a nexus between aider and abettor and other principals to sustain a conviction. In *State v. Hinkley* (1958), amplifying the term abet, we said:

Although the word 'aid' does not imply guilty knowledge or felonious intent, the word 'abet' includes knowledge of the wrongful purpose of the perpetrator, as well as counsel and encouragement in the crime.

and approved the instruction that:

To abet another in the commission of a crime implies a consciousness of guilt in instigating, encouraging, promoting or aiding in the commission of such criminal offense.

It would be a dangerous precedent indeed to hold that mere communications to the effect that another might or probably would commit a criminal offense amount to an aiding and abetting of the offense should it ultimately be committed.

There being no evidence whatever that the defendant ever communicated to Kent the idea that he would in any way aid him in the sale of any marijuana, or said anything to Kent to encourage or induce him or direct him to do so, or counseled Kent in the sale of marijuana, or did anything more than describe Kent to another person as an individual who might sell some marijuana, or would derive any benefit, consideration or reward from such a sale, there was no proof of an aiding and abetting, and the conviction should, therefore, be reversed as a matter of law. Remanded with directions to dismiss.

HAMILTON, Justice (dissenting).

In my view the majority has stepped into the jury box and with a flourishing dissection of the evidence placed its own interpretation thereupon and, together with deftly importing the conspiratorial element of community of purpose, has substituted its verdict for that of the jury.

Before discussing the evidence adduced at the trial, I consider it appropriate to briefly review the law concerning the offense of aiding and abetting.

At common law, persons associated in some way in the commission of a crime were classified as principals and accessories. These classifications in turn were broken down into the categories of principals in the first and second degree and accessories before and after the fact. The designation of principal in the first degree was applied to the actual perpetrator of the crime, while the characterization of principal in the second degree pertained to one who was present, either actually or constructively, at the scene of the crime assisting in some fashion the principal in the first degree. The rank of accessory before the fact was attached to one who, though not present at the scene of the offense, counseled, advised, or directed commission of the crime, while one who, knowing a crime had been committed, aided or assisted the felon in escaping capture and prosecution was denominated an accessory after the fact….

This state, in common with many jurisdictions, legislatively abolished the common law classifications of principals in the first and second degree and accessories before the fact by and through the enactment of RCW 9.01.030, which provides:

Every person concerned in the commission of a felony, gross misdemeanor or misdemeanor, whether he directly commits the act constituting the offense, or aids or abets in its commission, and whether present or absent; and every person who directly or indirectly counsels, encourages, hires, commands, induces or otherwise procures another to commit a felony, gross misdemeanor or misdemeanor, is a principal, and shall be proceeded against and punished as such. The fact that the person aided, abetted, counsel,

encouraged, hired, commanded, induced or procured, could not or did not entertain a criminal intent, shall not be a defense to any person aiding, abetting, counseling, encouraging, hiring, commanding, inducing or procuring him.

In the construction of this statute this court has said that each of the words of the statute, from which criminal culpability can flow, signifies the overt and affirmative doing or saying of something on the part of a person charged which directly or indirectly contributes to the commission of the primary crime.

It is not necessary to sustain a charge of aiding, abetting or counseling a crime that there be proof of a conspiratorial relationship or confederacy between the actual perpetrator of the primary crime and the one charged as an aider or abettor. Criminal conspiracy, in which concert of purpose becomes a salient element, is a separate substantive offense. RCW 9.22.010. Thus, it is stated in *Pereira v. United States* (1954);

Aiding, abetting, and counseling are not terms which presupposed the existence of an agreement. Those terms have a broader application, making the defendant a principal when he consciously shares in a criminal act, regardless of the existence of a conspiracy.

As is apparent from its language, our statute does not require the presence at the scene of the crime of one aiding, abetting, counseling or inducing the commission of a crime. Neither does it require a community of intent, for by the last sentence it provides that absence of criminal intent on the part of the person aided, abetted or induced to commit the primary offense is no defense to the aider or abettor. The statutory language and the overt action it contemplates does, however, give rise to the requirement that the aider or abettor entertain a conscious intent, I.e., knowledge and intent that his action will instigate, induce, procure or encourage perpetration of the primary crime.

The question to be resolved, then, in the instant case is whether the evidence sustains the jury's conclusion that the appellant entertain the requisite intent to render him culpable as an aider or abettor. In the resolution of this question, it is to be borne in mind that appellant's challenge to the sufficiency of the evidence requires that the evidence, and all reasonable inferences to be drawn therefrom, be interpreted in a light most favorable to the state. Furthermore, this court has held that an aider's or abettor's culpability may be established by circumstantial evidence.

Although the evidence in the case is conflicting, the jury was entitled to believe that on April 10, 1967, one Robert Kent sold marijuana to Douglas Thompson…; that prior to the evening of April 10, 1967, when Thompson talked to appellant, Thompson and the Tacoma Police Department were unaware of Kent or his association with marijuana; that appellant knew Kent, whom he met and associated with on the campus of the school they respectively attended; that both appellant and Kent lived off campus; that appellant knew where Kent lived and on at least one occasion had driven him home; that at the time in question the Tacoma Police Department had information that appellant was supposed to be holding a supply of marijuana for sale…; that appellant [told Thompson] that he did not have enough marijuana on hand to sell but that he knew an individual who did have an ample supply and who was willing to sell some and named the individual as Robert Kent; that upon request appellant orally gave Thompson directions to Kent's apartment and drew a map to aid Thompson in finding the address, utilizing as a reference point a building known to appellant to be a student rendezvous where drugs had been sold; that by using the map and oral directions Thompson and the police went to Kent's residence; That Thompson approached Kent and told him 'Gladstone had sent me' whereupon Kent invited him to a room and sold him some marijuana for $30; and that Thompson and one of the police officers later returned to the Kent residence, after again visiting appellant, and made a second purchase of marijuana at which time Kent was arrested.

Based upon the foregoing circumstances and the inferences reasonably derivable therefrom, I am satisfied that the jury was fully warranted in concluding that appellant, when he affirmatively recommended Kent as a source and purveyor of marijuana, entertained the requisite conscious design and intent that his action would instigate, induce, procure or encourage perpetration of Kent's subsequent crime of selling marijuana to Thompson. Furthermore, insofar as an element of preconcert be concerned, certainly the readiness with which the passwords, 'Gladstone had sent me,' gained a stranger's late evening entree to Kent's domain and produced two illegal sales strongly suggests, if not conclusively establishes, the missing communal nexus which the majority belabors.

Finally, the jury, with the witnesses before it, was in a far better position to evaluate the witnesses' candor, voice inflections, appearance, demeanor, attitude and credibility than this court viewing naught but the cold record.

I would sustain the jury's verdict and affirm the judgment.

Check Your Understanding (9-3)

The original version of this chapter contained H5P content. You may want to remove or replace this element.

Notes and questions on *Gladstone*

1. Bruce Gladstone was charged with selling marijuana as an accomplice, not with purchasing it or possessing it. That is, Gladstone was charged as an accomplice to Kent, not as an accomplice to Thompson, who was working as a police informant. Do you think that distinction makes a difference to the court?
2. The dissenting opinion offers one way to think about the difference between complicity and conspiracy. Conspiracy, the dissent argues, requires the "concert of purpose" or "community of intent" that the majority seems to believe is lacking in this case, but (the dissent would argue) complicity, or accomplice liability, does not require that concert of purpose. In other words, the dissent suggests that the majority has conflated conspiracy and complicity. Is this an accurate characterization of the majority opinion, in your view? Is it "community of intent" or "concert of purpose" that is missing from the prosecution's evidence, according to the majority opinion?
3. *Gladstone* also raises an important question about the appropriate criminal liability, if any, for what might be called aiding with indifference. Traditional doctrines of complicity require the accomplice to intend to facilitate the underlying criminal offense. That is, the required mental state for complicity is usually said to be "true purpose" or a real intention that the crime take place. But what about a person who facilitates criminal activity by others but is indifferent to their success? What if a defendant is, like Bruce Gladstone, aware that someone is seeking help with criminal activity, but not particularly invested in whether that activity takes place or not? Some states have enacted "criminal facilitation" statutes that do not require the purpose or intent traditionally required for accomplice liability. Here is one example:

A person is guilty of criminal facilitation in the second degree when, believing it probable that he is rendering aid to a person who intends to commit a class A felony, he engages in conduct which provides such person with means or opportunity for the commission thereof and which in fact aids such person to commit such class A felony.

N.Y. Penal Law §115.05. New York has more or less serious versions of criminal facilitation depending on the seriousness of the crime facilitated and the age of the person that the defendant assists.

4. Unlike many appellate opinions addressing complicity or conspiracy in the context of drug trafficking, *Gladstone* involves only a few parties and relatively simple facts. For that reason, it's a good case to help clarify complicity, conspiracy, and the relation between the two. But as a 1970 decision, *Gladstone* also offers a snapshot of a drug prosecution just before the War on Drugs gained new intensity and used expanded notions of complicity and conspiracy to obtain more drug trafficking convictions. Note that the *Gladstone* majority relies again on Judge Learned Hand's language from *United States v. Peoni*: accomplice liability requires that the defendant "associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed." Recall that Judge Hand applied this principle to conclude that Peoni, who sold counterfeit bills to Regno, could not be convicted as an accomplice to Dorsey after Regno sold the bills to Dorsey. Now imagine that the contraband is narcotics, not counterfeit bills. Contemporary prosecutors use expanded notions of accomplice liability and conspiracy, including but not limited to *Pinkerton* liability, to link together various participants in the drug trade, whether or not they have direct contact with each other or specific awareness of one another's offenses.

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1. [Fn. 7 by the Court:] Some authorities suggest an exception to the general rule when another crime is the "natural and probable consequence" of the crime the defendant intended to abet…. That question is not implicated here, because no one contends that a § 924(c) violation is a natural and probable consequence of simple drug trafficking. We therefore express no view on the issue. ↵
2. [Fn. 8 by the Court:] We did not deal in these cases, nor do we here, with defendants who incidentally facilitate a criminal venture rather than actively participate in it. A hypothetical case is the owner of a gun store who sells a firearm to a criminal, knowing but not caring how the gun will be used. We express no view about what sort of facts, if any, would suffice to show that such a third party has the intent necessary to be convicted of aiding and abetting. ↵
3. [Fn. 9 by the Court:] Of course, if a defendant continues to participate in a crime after a gun was displayed or used by a confederate, the jury can permissibly infer from his failure to object or withdraw that he had such knowledge. In any criminal

case, after all, the factfinder can draw inferences about a defendant's intent based on all the facts and circumstances of a crime's commission. ↵

4. [Fn. 10 by the Court:] Contrary to the dissent's view, nothing in this holding changes the way the defenses of duress and necessity operate. Neither does our decision remotely deny that the "intent to undertake some act is ... perfectly consistent with the motive of avoiding adverse consequences which would otherwise occur." Our holding is grounded in the distinctive intent standard for aiding and abetting someone else's act—in the words of Judge Hand, that a defendant must not just "in some sort associate himself with the venture" (as seems to be good enough for the dissent), but also "participate in it as in something that he wishes to bring about" and "seek by his action to make it succeed." For the reasons just given, we think that intent standard cannot be satisfied if a defendant charged with aiding and abetting a § 924(c) offense learns of a gun only after he can realistically walk away—i.e., when he has no opportunity to decide whether "he wishes to bring about" (or make succeed) an armed drug transaction, rather than a simple drug crime. And because a defendant's prior knowledge is part of the intent required to aid and abet a § 924(c) offense, the burden to prove it resides with the Government. ↵
5. [Fn. 6 by the court:] We also note that in many instances the alleged overt act in a conspiracy would also constitute a substantial step toward the commission of a crime, which is an essential element in an attempt conviction. This is the reason for the prohibition against conviction for conspiracy to commit a crime and conviction for attempt to commit the same underlying crime. ↵

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1.10: Affirmative Defenses

Introduction

Nearly universally, persons wish to avoid the burdens of a criminal conviction. Once charged with an offense, defendants often face a range of different outcomes. As you know by now, for many defendants a guilty plea may seem the best available option, especially if they face the threat of pretrial detention or more severe charges at trial. But for those defendants who decide against a guilty plea, there are a few main strategies to avoid conviction. The type of defense that is the focus of this chapter—the affirmative defense—is best understood in relation to other types of defense arguments that you have already seen.

Because the prosecution bears the burden of proof in a criminal case, one defense strategy is to argue that the prosecution has not met that burden. A failure of proof argument is a claim that the prosecution has not adequately proven all necessary elements of the charged offense. There are many variations of a failure of proof claim. You have seen sufficiency of the evidence claims, in which the defendant argues that the evidence is insufficient to establish one or more elements of the offense. Other failure of proof claims may be linked to questions of statutory interpretation. For example, a defendant may argue that, when the language of the statute is properly interpreted, it requires proof of a given mental state that the prosecution has not established. Challenges to jury instructions may also be a form of failure of proof claim. A defendant could argue that a jury instruction misstated the law and thus did not require the jury to find the precise elements required by the applicable statute. (Still another approach, one you will see frequently in a course in constitutional criminal procedure, is an effort to suppress the prosecution's key evidence by arguing that the evidence was seized in violation of the federal or state constitution. Without the necessary evidence, the prosecution would then be unable to meet its burden of proof. In this book, you saw this kind of argument in *Commonwealth v. Copenhaver* in Chapter One, but for the most part we do not address issues of constitutional criminal procedure.)

Less frequently, defendants may try to avoid a conviction (or get it reversed on appeal) by raising a constitutional challenge to the statute itself or to an enforcement decision other than the obtaining of evidence. In Chapters Two and Three, you saw examples of these types of constitutional challenges, such as the argument in *City of Chicago v. Morales* that Chicago's gang loitering statute was void for vagueness and thus a violation of the Due Process Clause, or the argument in *United States v. Armstrong* that prosecutors had selected defendants for prosecution in a racially biased manner that violated the Equal Protection Clause. And you have seen other appeals to both state and federal constitutional constraints occasionally throughout the book.

This chapter focuses on a third type of defense argument: the affirmative defense. In contrast to a failure of proof claim, an affirmative defense typically does not dispute that the prosecution can establish the elements of the charged offense. And in contrast to a constitutional claim, an affirmative defense argument does not challenge the government's constitutional authority to enact the relevant statute or use it against the defendant. Instead, an affirmative defense is an argument that the defendant should not be convicted and punished even if the evidence establishes the elements of the charged offense. Courts and scholars frequently speak of affirmative defenses in terms of justification and excuse. Some affirmative defenses, such as self-defense, are classified as justifications on the theory that a defendant was justified in committing the conduct that violates the statute, perhaps because committing the crime was necessary to avoid a still worse outcome (such as the defendant's own death at the hands of an attacker). Some affirmative defenses, such as insanity, are characterized as excuses rather than justifications: when a person with severe mental illness commits a crime, we do not say that the person was justified in acting that way, but we may choose to excuse the person from criminal liability if we think the mental illness was severe enough. You have seen a few examples of other types of affirmative defenses, such as the mistake-of-law affirmative defense that the defendant raised unsuccessfully in *People v. Marrero* (Chapter Seven), or the abandonment / renunciation defense to a charge of attempt, discussed in *People v. Acosta* (Chapter Eight). (In those two cases, neither court characterized the affirmative defense in terms of justification or excuse, but it's likely both the mistake-of-law and abandonment defenses would be seen as arguments that the defendant's conduct should be excused, rather than arguments that it was justified conduct.)

Affirmative defense arguments are not often successful, but they can be illuminating. They can help clarify the state's choices to impose criminal liability by providing a point of contrast: when does the legal system decline to impose criminal liability, even on someone whose conduct and mental state meets the statutory definition of a criminal offense? Self-defense arguments have drawn particular attention in recent years thanks to several high-profile cases in which a white (or non-Black) defendant killed an unarmed Black victim but avoided conviction by claiming self-defense. As will be discussed in this chapter, the success of a self-defense

claim usually depends on convincing a judge (and possibly a jury) that the defendant had a "reasonable" fear for his own life. Thus, self-defense claims often put the target of force on trial, in a sense; the question becomes whether the person who was shot or otherwise harmed was "reasonably" perceived as threatening. If race affects who is perceived as dangerous, then race can influence which self-defense claims are successful. Many commentators have argued that self-defense law undervalues Black lives by accommodating biased fears of Blacks. Indeed, the 2012 killing of Trayvon Martin by George Zimmerman, followed by Zimmerman's subsequent acquittal on grounds of self-defense, launched the Black Lives Matter movement. Though more empirical research is needed to fully understand racial disparities in self-defense claims, it appears that white defendants who kill Black victims are about ten times more likely to prevail with a self-defense claim than Black defendants who kill white victims, and white defendants who kill Black victims are about eight times more likely to prevail with a self-defense claim than all other combinations (white killing white, Black killing Black, etc.). See Addie C. Rolnick, *Defending White Space*, 40 Cardozo L. Rev. 1639, 1654-1655 (2019).

Race has been a contentious issue in many self-defense cases; gender has been salient in others. One strand of controversial self-defense cases involves women who kill allegedly abusive partners. Self-defense law generally requires proof that the defendant responded to an "imminent" threat using only "necessary" force. Gender can potentially influence the perception of a threat as imminent, or the perception that force is necessary. Some critics of traditional self-defense doctrine have argued that it is based on a background assumption of the "true man" that does not give abused women adequate leeway to protect themselves.

As is true with crime definitions, affirmative defenses may be defined differently in different jurisdictions. However, there are clear patterns and a lot of commonality across different states and the federal system. This chapter will identify the most common legal definitions of the affirmative defenses of self-defense, duress, necessity, and insanity. Like crime definitions, affirmative defenses can be described as lists of elements: what are the specific facts that must be established in order for the defendant to avoid conviction? But affirmative defenses differ from crime definitions in two important respects. First, common law doctrines remain more influential in the context of affirmative defenses. Although most U.S. jurisdictions require crimes to be defined by legislatures in statutory text, there is more variation with affirmative defenses. Some jurisdictions do define affirmative defenses by statute, but others rely on common law definitions. In this chapter, you will see examples of both approaches.

Second, the prosecution bears the burden of proof with respect to the elements of crimes, but the defendant often bears the burden of proving an affirmative defense. To be sure, the standard of proof is typically lower than "beyond a reasonable doubt" – for example, a defendant may have to prove the elements of duress by a preponderance of the evidence, or the elements of insanity by clear and convincing evidence. For self-defense, defendants typically have a burden of production but not the ultimate burden of proof. That is, most states provide that once the defendant has introduced sufficient evidence of self-defense, the prosecution then bears the burden of disproving the self-defense claim beyond a reasonable doubt. Just as the precise elements of an affirmative defense are defined by the specific jurisdiction, the allocation of the burden of proof, and the precise standard of proof, for such a defense will also be determined by the specific jurisdiction.

This chapter focuses on four affirmative defenses: self-defense, necessity, duress, and insanity. Each of these defenses is highly individualistic, in the sense that each focuses on the particular circumstances and mental states of an individual defendant. In this regard, the law of affirmative defenses (like the rest of criminal law) treats responsibility for crime as a matter of individual, rather than social, responsibility. Although there is considerable evidence that social and environmental factors – including poverty, family circumstances, access to health care, and similar variables – have substantial effects on the likelihood that a person will engage in conduct that leads to an arrest and prosecution, American criminal law has generally resisted taking any of those factors into account in deciding an individual's criminal liability. See, e.g., Richard Delgado, *"Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 Law & Inequality 9 (1985); Andrew E. Taslitz, *The Rule of Criminal Law: Why Courts and Legislatures Ignore Richard Delgado's Rotten Social Background*, 2 Ala. C.R. & C.L. L. Rev. 79 (2011).

Self-defense

N.Y. Penal Law § 35.15. Justification; use of physical force in defense of a person

1. A person may, subject to the provisions of subdivision two, use physical force upon another person when and to the extent he or she reasonably believes such to be necessary to defend himself, herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful physical force by such other person, unless:

(a) The latter's conduct was provoked by the actor with intent to cause physical injury to another person; or

(b) The actor was the initial aggressor; except that in such case the use of physical force is nevertheless justifiable if the actor has withdrawn from the encounter and effectively communicated such withdrawal to such other person but the latter persists in continuing the incident by the use or threatened imminent use of unlawful physical force; or

(c) The physical force involved is the product of a combat by agreement not specifically authorized by law.

2. A person may not use deadly physical force upon another person under circumstances specified in subdivision one unless:

(a) The actor reasonably believes that such other person is using or about to use deadly physical force. Even in such case, however, the actor may not use deadly physical force if he or she knows that with complete personal safety, to oneself and others he or she may avoid the necessity of so doing by retreating; except that the actor is under no duty to retreat if he or she is:

(i) in his or her dwelling and not the initial aggressor; or

(ii) a police officer or peace officer or a person assisting a police officer or a peace officer at the latter's direction, acting pursuant [to law]; or

(b) He or she reasonably believes that such other person is committing or attempting to commit a kidnapping, forcible rape, forcible criminal sexual act or robbery; or

(c) He or she reasonably believes that such other person is committing or attempting to commit a burglary, and the circumstances are such that the use of deadly physical force is authorized by § 35.20.

The PEOPLE of the State of New York, Appellant

v.

Bernhard GOETZ, Respondent

Court of Appeals of New York
68 N.Y.2d 96

July 8, 1986

Chief Judge WACHTLER.

A Grand Jury has indicted defendant on attempted murder, assault, and other charges for having shot and wounded four youths on a New York City subway train after one or two of the youths approached him and asked for $5. The lower courts, concluding that the prosecutor's charge to the Grand Jury on the defense of justification was erroneous, have dismissed the attempted murder, assault and weapons possession charges. We now reverse and reinstate all counts of the indictment.

I.

The precise circumstances of the incident giving rise to the charges against defendant are disputed, and ultimately it will be for a trial jury to determine what occurred. We feel it necessary, however, to provide some factual background to properly frame the legal issues before us. Accordingly, we have summarized the facts as they appear from the evidence before the Grand Jury. We stress, however, that we do not purport to reach any conclusions or holding as to exactly what transpired or whether defendant is blameworthy….

On Saturday afternoon, December 22, 1984, Troy Canty, Darryl Cabey, James Ramseur, and Barry Allen boarded an IRT express subway train in The Bronx and headed south toward lower Manhattan. The four youths rode together in the rear portion of the seventh car of the train. Two of the four, Ramseur and Cabey, had screwdrivers inside their coats, which they said were to be used to break into the coin boxes of video machines.

Defendant Bernhard Goetz boarded this subway train at 14th Street in Manhattan and sat down on a bench towards the rear section of the same car occupied by the four youths. Goetz was carrying an unlicensed .38 caliber pistol loaded with five rounds of ammunition in a waistband holster. The train left the 14th Street station and headed towards Chambers Street.

It appears from the evidence before the Grand Jury that Canty approached Goetz, possibly with Allen beside him, and stated "give me five dollars." Neither Canty nor any of the other youths displayed a weapon. Goetz responded by standing up, pulling out his

handgun and firing four shots in rapid succession. The first shot hit Canty in the chest; the second struck Allen in the back; the third went through Ramseur's arm and into his left side; the fourth was fired at Cabey, who apparently was then standing in the corner of the car, but missed, deflecting instead off of a wall of the conductor's cab. After Goetz briefly surveyed the scene around him, he fired another shot at Cabey, who then was sitting on the end bench of the car. The bullet entered the rear of Cabey's side and severed his spinal cord.

All but two of the other passengers fled the car when, or immediately after, the shots were fired. The conductor, who had been in the next car, heard the shots and instructed the motorman to radio for emergency assistance. The conductor then went into the car where the shooting occurred and saw Goetz sitting on a bench, the injured youths lying on the floor or slumped against a seat, and two women who had apparently taken cover, also lying on the floor. Goetz told the conductor that the four youths had tried to rob him.

While the conductor was aiding the youths, Goetz headed towards the front of the car. The train had stopped just before the Chambers Street station and Goetz went between two of the cars, jumped onto the tracks and fled. Police and ambulance crews arrived at the scene shortly thereafter. Ramseur and Canty, initially listed in critical condition, have fully recovered. Cabey remains paralyzed, and has suffered some degree of brain damage.

On December 31, 1984, Goetz surrendered to police in Concord, New Hampshire, identifying himself as the gunman being sought for the subway shootings in New York nine days earlier. Later that day, after receiving *Miranda* warnings, he made two lengthy statements, both of which were tape recorded with his permission. In the statements, which are substantially similar, Goetz admitted that he had been illegally carrying a handgun in New York City for three years. He stated that he had first purchased a gun in 1981 after he had been injured in a mugging. Goetz also revealed that twice between 1981 and 1984 he had successfully warded off assailants simply by displaying the pistol.

According to Goetz's statement, the first contact he had with the four youths came when Canty, sitting or lying on the bench across from him, asked "how are you," to which he replied "fine." Shortly thereafter, Canty, followed by one of the other youths, walked over to the defendant and stood to his left, while the other two youths remained to his right, in the corner of the subway car. Canty then said "give me five dollars." Goetz stated that he knew from the smile on Canty's face that they wanted to "play with me." Although he was certain that none of the youths had a gun, he had a fear, based on prior experiences, of being "maimed."

Goetz then established "a pattern of fire," deciding specifically to fire from left to right. His stated intention at that point was to "murder [the four youths], to hurt them, to make them suffer as much as possible." When Canty again requested money, Goetz stood up, drew his weapon, and began firing, aiming for the center of the body of each of the four. Goetz recalled that the first two he shot "tried to run through the crowd [but] they had nowhere to run". Goetz then turned to his right to "go after the other two". One of these two "tried to run through the wall of the train, but * * * he had nowhere to go." The other youth (Cabey) "tried pretending that he wasn't with [the others]" by standing still, holding on to one of the subway hand straps, and not looking at Goetz. Goetz nonetheless fired his fourth shot at him. He then ran back to the first two youths to make sure they had been "taken care of." Seeing that they had both been shot, he spun back to check on the latter two. Goetz noticed that the youth who had been standing still was now sitting on a bench and seemed unhurt. As Goetz told the police, "I said '[y]ou seem to be all right, here's another' ", and he then fired the shot which severed Cabey's spinal cord. Goetz added that "if I was a little more under self-control * * * I would have put the barrel against his forehead and fired." He also admitted that "if I had had more [bullets], I would have shot them again, and again, and again."

II.

… On March 27, 1985, [a] Grand Jury filed a 10–count indictment, containing four charges of attempted murder, four charges of assault in the first degree, one charge of reckless endangerment in the first degree, and one charge of criminal possession of a weapon in the second degree…. Goetz was arraigned on this indictment on March 28, 1985, and it was consolidated with [an] earlier three-count indictment.

On October 14, 1985, Goetz moved to dismiss the charges … alleging, among other things, that the evidence before the second Grand Jury was not legally sufficient to establish the offenses charged, and that the prosecutor's instructions to that Grand Jury on the defense of justification were erroneous and prejudicial to the defendant….

In an order dated January 21, 1986, Criminal Term granted Goetz's motion to the extent that it dismissed all counts of the second indictment, other than the reckless endangerment charge, with leave to resubmit these charges to a third Grand Jury. The court … rejected Goetz's contention that there was not legally sufficient evidence to support the charges [but held] that the prosecutor, in a supplemental charge elaborating upon the justification defense, had erroneously introduced an objective element into this defense by instructing the grand jurors to consider whether Goetz's conduct was that of a "reasonable man in [Goetz's] situation". The court … concluded that the statutory test for whether the use of deadly force is justified to protect a person should be wholly subjective, focusing entirely on the defendant's state of mind when he used such force. It concluded that dismissal was required for this error because the justification issue was at the heart of the case.

… On appeal by the People, a divided Appellate Division affirmed [the] dismissal of the charges. [The People appealed] to this court….

III.

Penal Law article 35 recognizes the defense of justification, which [permits] the use of force in defense of a person, encompassing both self-defense and defense of a third person. Penal Law § 35.15(1) sets forth the general principles governing all such uses of force: "[a] person may * * * use physical force upon another person when and to the extent he *reasonably believes* such to be necessary to defend himself or a third person from what he *reasonably believes* to be the use or imminent use of unlawful physical force by such other person" (emphasis added).

Section 35.15(2) sets forth further limitations on these general principles with respect to the use of "deadly physical force": "A person may not use deadly physical force upon another person under circumstances specified in subdivision one unless (a) He *reasonably believes* that such other person is using or about to use deadly physical force or (b) He *reasonably believes* that such other person is committing or attempting to commit a kidnapping, forcible rape, forcible sodomy or robbery" (emphasis added).

Thus, consistent with most justification provisions, Penal Law § 35.15 permits the use of deadly physical force only where requirements as to triggering conditions and the necessity of a particular response are met. As to the triggering conditions, the statute requires that the actor "reasonably believes" that another person either is using or about to use deadly physical force or is committing or attempting to commit one of certain enumerated felonies, including robbery. As to the need for the use of deadly physical force as a response, the statute requires that the actor "reasonably believes" that such force is necessary to avert the perceived threat.[1]

Because the evidence before the second Grand Jury included statements by Goetz that he acted to protect himself from being maimed or to avert a robbery, the prosecutor correctly chose to charge the justification defense in § 35.15 to the Grand Jury… When the prosecutor had completed his charge, one of the grand jurors asked for clarification of the term "reasonably believes." The prosecutor responded by instructing the grand jurors that they were to consider the circumstances of the incident and determine "whether the defendant's conduct was that of a reasonable man in the defendant's situation." It is this response by the prosecutor—and specifically his use of "a reasonable man"—which is the basis for the dismissal of the charges by the lower courts. As expressed repeatedly in the Appellate Division's plurality opinion, because section 35.15 uses the term "*he* reasonably believes," the appropriate test, according to that court, is whether a defendant's beliefs and reactions were "reasonable *to him.*" Under that reading of the statute, a jury which believed a defendant's testimony that he felt that his own actions were warranted and were reasonable would have to acquit him, regardless of what anyone else in defendant's situation might have concluded. Such an interpretation defies the ordinary meaning and significance of the term "reasonably" in a statute, and misconstrues the clear intent of the Legislature … to retain an objective element as part of any provision authorizing the use of deadly physical force.

Penal statutes in New York have long codified the right recognized at common law to use deadly physical force, under appropriate circumstances, in self-defense… These provisions have never required that an actor's belief as to the intention of another person to inflict serious injury be correct in order for the use of deadly force to be justified, but they have uniformly required that the belief comport with an objective notion of reasonableness….

In 1961 the Legislature established a Commission to undertake a complete revision of the Penal Law and the Criminal Code. The impetus for the decision to update the Penal Law came in part from the drafting of the Model Penal Code by the American Law Institute, as well as from the fact that the existing law was poorly organized and in many aspects antiquated…. The drafting of the general provisions of the new Penal Law, including the article on justification, was particularly influenced by the Model Penal

Code…. While using the Model Penal Code provisions on justification as general guidelines, however, the drafters of the new Penal Law did not simply adopt them verbatim.

…[U]nder Model Penal Code § 3.04(2)(b), a defendant charged with murder (or attempted murder) need only show that he *"believe[d]* that [the use of deadly force] was necessary to protect himself against death, serious bodily injury, kidnapping or [forcible] sexual intercourse" to prevail on a self-defense claim [against a charge of intentional murder or attempted murder]…. If the defendant's belief was wrong, and was recklessly, or negligently formed, however, he may be convicted of [a] homicide charge requiring only a reckless or negligent … criminal intent….

The drafters of the Model Penal Code recognized that the wholly subjective test set forth in section 3.04 differed from the existing law in most States by its omission of any requirement of reasonableness….

New York did not follow the Model Penal Code's equation of a mistake as to the need to use deadly force with a mistake negating an element of a crime, choosing instead to use a single statutory section which would provide either a complete defense or no defense at all to a defendant charged with any crime involving the use of deadly force. The drafters of the new Penal Law adopted in large part the structure and content of Model Penal Code § 3.04, but, crucially, inserted the word "reasonably" before "believes".

The plurality below agreed with defendant's argument that the change in the statutory language from "reasonable ground," used prior to 1965, to "he reasonably believes" in Penal Law § 35.15 evinced a legislative intent to conform to the subjective standard contained in Model Penal Code § 3.04. This argument, however, ignores the plain significance of the insertion of "reasonably." Had the drafters of § 35.15 wanted to adopt a subjective standard, they could have simply used the language of [MPC] § 3.04. "Believes" by itself requires an honest or genuine belief by a defendant as to the need to use deadly force. Interpreting the statute to require only that the defendant's belief was "reasonable to *him,"* as done by the plurality below, would hardly be different from requiring only a genuine belief; in either case, the defendant's own perceptions could completely exonerate him from any criminal liability.

We cannot lightly impute to the Legislature an intent to fundamentally alter the principles of justification to allow the perpetrator of a serious crime to go free simply because that person believed his actions were reasonable and necessary to prevent some perceived harm. To completely exonerate such an individual, no matter how aberrational or bizarre his thought patterns, would allow citizens to set their own standards for the permissible use of force. It would also allow a legally competent defendant suffering from delusions to kill or perform acts of violence with impunity, contrary to fundamental principles of justice and criminal law.

We can only conclude that the Legislature retained a reasonableness requirement to avoid giving a license for such actions. The plurality's interpretation, as the dissenters below recognized, excises the impact of the word "reasonably." …

…The conclusion that § 35.15 retains an objective element to justify the use of deadly force is buttressed by the statements of its drafters. The executive director and counsel to the Commission which revised the Penal Law have stated that the provisions of the statute with respect to the use of deadly physical force largely conformed with the prior law, with the only changes they noted not being relevant here… Nowhere in the legislative history is there any indication that "reasonably believes" was designed to change the law on the use of deadly force or establish a subjective standard….

Statutes or rules of law requiring a person to act "reasonably" or to have a "reasonable belief" uniformly prescribe conduct meeting an objective standard measured with reference to how "a reasonable person" could have acted…

Goetz … argues that the introduction of an objective element will preclude a jury from considering factors such as the prior experiences of a given actor and thus, require it to make a determination of "reasonableness" without regard to the actual circumstances of a particular incident. This argument, however, falsely presupposes that an objective standard means that the background and other relevant characteristics of a particular actor must be ignored. To the contrary, we have frequently noted that a determination of reasonableness must be based on the "circumstances" facing a defendant or his "situation." Such terms encompass more than the physical movements of the potential assailant. As just discussed, these terms include any relevant knowledge the defendant had about that person. They also necessarily bring in the physical attributes of all persons involved, including the defendant. Furthermore, the defendant's circumstances encompass any prior experiences he had which could provide a reasonable basis for a belief that another person's intentions were to injure or rob him or that the use of deadly force was necessary under the circumstances.

Accordingly, a jury should be instructed to consider this type of evidence in weighing the defendant's actions. The jury must first determine whether the defendant had the requisite beliefs under § 35.15, that is, whether he believed deadly force was necessary to avert the imminent use of deadly force or the commission of one of the felonies enumerated therein. If the People do not prove beyond a reasonable doubt that he did not have such beliefs, then the jury must also consider whether these beliefs were reasonable. The jury would have to determine, in light of all the "circumstances," as explicated above, if a reasonable person could have had these beliefs.

The prosecutor's instruction to the second Grand Jury that it had to determine whether, under the circumstances, Goetz's conduct was that of a reasonable man in his situation was thus essentially an accurate charge. It is true that the prosecutor did not elaborate on the meaning of "circumstances" or "situation" and inform the grand jurors that they could consider, for example, the prior experiences Goetz related in his statement to the police. We have held, however, that a Grand Jury need not be instructed on the law with the same degree of precision as the petit jury… This lesser standard is premised upon the different functions of the Grand Jury and the petit jury: the former determines whether sufficient evidence exists to accuse a person of a crime and thereby subject him to criminal prosecution; the latter ultimately determines the guilt or innocence of the accused, and may convict only where the People have proven his guilt beyond a reasonable doubt…

…[The prosecutor's] instructions were not as complete as the court's charge on justification [to a trial jury] should be, but they sufficiently apprised the Grand Jury of the existence and requirements of that defense to allow it to intelligently decide that there is sufficient evidence tending to disprove justification and necessitating a trial. The Grand Jury has indicted Goetz. It will now be for the petit jury to decide whether the prosecutor can prove beyond a reasonable doubt that Goetz's reactions were unreasonable and therefore excessive.

Notes and questions on *Goetz*

1. Goetz was charged with attempted murder, under the same attempt statute that you saw in *People v. Acosta* (Chapter Eight) and the same murder statute that you saw in *Patterson v. New York* (Chapter Five) and *People v. Russell* (Chapter Nine). The state relied on the portion of the New York second degree murder statute that criminalized an intentional killing: "A person is guilty of murder in the second degree when … [w]ith intent to cause the death of another person, he causes the death of such person…." Notice that Goetz did not contest that he tried to cause the death of his victims, or that he had intent to kill them. Indeed, he testified that his intent was to "murder" them. That claim of intent illustrates the distinctive nature of an affirmative defense. Goetz could concede that his conduct and mental state met the definition of attempted murder in New York, but he argued that even so he should not be punished because his actions—which did violate the terms of the murder statute—were justified.
2. After the New York Court of Appeals reinstated the charges (in the opinion you've just read), this case went to trial, and the jury acquitted Goetz of all charges except weapons possession. He spent eight months in jail. The case and trial captured national attention; Goetz was called "the subway vigilante" and embraced by many who saw his actions as a necessary response to prevalent urban crime. The court's opinion does not mention the races of the persons involved (Goetz was white, the four young men he shot were Black), but by one observer's account, racialized imagery and fears loomed large in the trial. Professor George Fletcher observed the trial and later reported that neither the prosecution or defense explicitly mentioned race, but Goetz's defense referred to the Black youths as "savages," "predators," and "vultures." According to Fletcher,

The covert appeal to racial bias came out most dramatically in [a re-enactment] of the shooting… The nominal purpose of the demonstration was to show the way in which the bullet entered the body of each victim. The defense's real purpose, however, was to recreate for the jury … the scene that Goetz encountered when four black passengers began to surround him. [Goetz's attorney] asked the Guardian Angels [a volunteer crime patrol organization] to send him … four young black men to act as the props in the demonstration. In came the four young black Guardian Angels, fit and muscular, dressed in T-shirts, to play the parts…

George P. Fletcher, *A Crime of Self-Defense: Bernhard Goetz and the Law on Trial* 206-207 (1988).

Should the New York Court of Appeals have addressed race in its opinion, and if so, what should it have said? Was the defense attorney's decision to stage a reenactment with young Black men problematic? If so, why? Some scholars have argued that the racial identity of parties operates (impermissibly, but unavoidably) as a kind of character evidence, because jurors are likely to draw conclusions about the parties on the basis of their racial identities. See Jasmine B. Gonzales Rose, *Toward A Critical Race Theory of Evidence*, 101 Minn. L. Rev. 2243, 2261-2268 (2017).

3. Darrell Cabey, who was shot in the spine and left paralyzed, sued Goetz in civil court and won a $43 million judgment in 1996. Goetz declared bankruptcy, however, and Cabey was unable to collect the judgment. As one newspaper reported,

The jury's decision was a stunning reversal for Goetz, 48, who was acquitted of attempted murder nine years ago in the same shooting and become a national symbol of urban rage and frustration.

But this time around—in a civil as opposed to a criminal trial, before a largely black jury in the Bronx instead of a largely white one in Manhattan, and at a time when crime here is on the downswing as opposed to the upswing—the six-person jury ruled against Goetz in about five hours.

It found that Goetz acted "recklessly" and "outrageously" in his attack on Darrell Cabey, now 30, who was left brain damaged and paralyzed from the chest down by one of Goetz's bullets.

Malcolm Gladwell, *Goetz Told to Pay $43 Million, But Plaintiff to Get Little of That*, South Florida Sun-Sentinel, April 24, 1996.

4. In the opinion you've read, the New York Court of Appeals is very focused on whether self-defense doctrine should use a subjective standard or an objective one to evaluate the defendant's beliefs. Self-defense doctrines always ask whether the specific defendant actually believed that he faced a sufficient threat to warrant the use of deadly force, but do we also need to evaluate whether the defendant's belief was "objectively" reasonable? The Court of Appeals found that the second inquiry was indeed necessary. How is "objective" reasonableness determined? Which factors do you think mattered most to the jury that acquitted Goetz?The newspaper article about the civil trial quoted in the previous note suggests that both the race of the jurors and the overall salience of crime as an issue could influence a jury's decision. The decisionmakers who determine whether a defendant's fears are "objectively" reasonable are, of course, themselves human beings with particular perspectives and particular experiences. Are average members of a jury – at least, average members of a mostly white jury – more likely to find fear to be "objectively" reasonable when the person who is feared is Black? Or does the legal language of objectivity successfully push decisionmakers to leave aside their own specific experiences and biases?
5. The basic framework of self-defense is consistent across most jurisdictions: a defendant who uses force and claims self-defense must show that a) a reasonable belief that b) there existed an imminent threat c) of great bodily harm to the defendant and d) the force used was necessary to avert the threat. Most jurisdictions require proportionality, meaning that the defendant's use of force should not be more than is necessary to avert the threat. Beyond these basic requirements, jurisdictions vary on specific details such as what to do with defendants who start a fight that then escalates, or whether defendants have an obligation to retreat, if it is safe to do so, before using force. (It may seem that an option to retreat safely defeats a claim that force is "necessary," but the concept of necessity is itself susceptible to multiple interpretations.) Under the New York self-defense statute, a defendant who is "the initial aggressor" cannot generally claim self-defense, except an aggressor who later withdraws from the conflict may regain the right to use force if the other person "persists in continuing the incident." Notice also that the New York statute includes a duty to retreat under some circumstances. Was there any plausible argument that Goetz was the initial aggressor? Was there any plausible argument that Goetz had a duty to retreat before using deadly force?
6. The classification of a defendant as an aggressor is thus important, and often contentious. Many definitions of self-defense, like the New York statute, refer to aggressors but do not define the term. Some New York courts have said that the term "initial aggressor" in the New York statute means "the first person who uses or threatens the imminent use of offensive physical force." But if the first use of force is non-deadly and is met with deadly force, then courts may treat "the first person in the encounter to use deadly physical force" as the initial aggressor. See *People v. McWilliams*, 852 N.Y.S.2d 523, 524 (N.Y. App. Div. 2008). It is fairly common for jury instructions to refer to an aggressor as "one who provokes the conflict," and also common for courts to leave the term "aggressor" undefined and allow the jury to interpret the word on its own.
7. Recall the facts of *People v. Russell*, presented in Chapter Nine: two young men, Russell and Bekka, were crossing a courtyard when they encountered a third man, Burroughs. Someone started shooting, and soon all three were shooting. A bystander was killed. Each of the three men later claimed he had fired in self-defense. Why were the self-defense claims unsuccessful in that case? Apply N.Y. Penal Code § 35.15. Note: as a doctrinal matter, it is not the identity of the victim that makes a difference here. Most states provide that if a reasonable use of force harms someone other than the person threatening the defendant, the privilege to use force still protects the defendant from criminal liability for the injury to the third person. An unreasonable use of force, however, may result in criminal liability. See, e.g., People v. Morris, 491 N.Y.S.2d 860, 863 (N.Y. App. Div. 1985).
8. The *Goetz* court notes that the New York legislature chose not to follow the Model Penal Code's precise approach to self-defense. The MPC definition of self-defense is reprinted below for reference, but it is not as influential as other portions of the

MPC that we've considered. Only a few states have adopted this particular definition of self-defense. See Richard Singer, *The Resurgence of Mens Rea: II – Honest but Unreasonable Mistake of Fact in Self-Defense*, 28 B.C. L. Rev. 459, 505 (1987). The relevant text can be found in MPC § 3.04:

(1) **Use of Force Justifiable for Protection of the Person.** Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.

(2) **Limitations on Justifying Necessity for Use of Force.**

(a) The use of force is not justifiable under this Section:

(i) to resist an arrest that the actor knows is being made by a peace officer, although the arrest is unlawful; or

(ii) to resist force used by the occupier or possessor of property or by another person on his behalf, where the actor knows that the person using the force is doing so under a claim of right to protect the property, except that this limitation shall not apply if:

(A) the actor is a public officer acting in the performance of his duties or a person lawfully assisting him therein or a person making or assisting in a lawful arrest; or

(B) the actor has been unlawfully dispossessed of the property and is making a re-entry or recaption justified by Section 3.06; or

(C) the actor believes that such force is necessary to protect himself against death or serious bodily injury.

(b) The use of deadly force is not justifiable under this Section unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat; nor is it justifiable if:

(i) the actor, with the purpose of causing death or serious bodily injury, provoked the use of force against himself in the same encounter; or

(ii) the actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action that he has no duty to take, except that:

(A) the actor is not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be; and

(B) a public officer justified in using force in the performance of his duties or a person justified in using force in his assistance or a person justified in using force in making an arrest or preventing an escape is not obliged to desist from efforts to perform such duty, effect such arrest or prevent such escape because of resistance or threatened resistance by or on behalf of the person against whom such action is directed.

(c) Except as required by paragraphs (a) and (b) of this Subsection, a person employing protective force may estimate the necessity thereof under the circumstances as he believes them to be when the force is used, without retreating, surrendering possession, doing any other act that he has no legal duty to do or abstaining from any lawful action.

(3) **Use of Confinement as Protective Force.** The justification afforded by this Section extends to the use of confinement as protective force only if the actor takes all reasonable measures to terminate the confinement as soon as he knows that he safely can, unless the person confined has been arrested on a charge of crime.

9. Model Penal Code § 3.04 could be read as a significant broadening of self-defense, since it allows a defense for any defendant who "believes" the use of force is immediately necessary, without an inquiry into whether the defendant's belief is reasonable. However, the MPC is somewhat less favorable to defendants claiming self-defense than it may first appear. In a separate provision, MPC § 3.09, the MPC adopts what it sometimes called "imperfect self-defense." On this approach, a defendant who has a genuine, but mistaken and unreasonable, belief that he needs to use force will have partial, but only partial, protection from criminal liability. If a defendant forms the belief that it is necessary to use deadly force against a purported attacker, but is reckless or negligent in forming that belief, he still may be convicted of a crime for which recklessness or negligence is a sufficient mens rea. Consider carefully the text of MPC § 3.09(2):

Model Penal Code § 3.09

(1) The justification afforded by Sections 3.04 to 3.07, inclusive, is unavailable when:

(a) the actor's belief in the unlawfulness of the force or conduct against which he employs protective force or his belief in the lawfulness of an arrest that he endeavors to effect by force is erroneous; and

(b) his error is due to ignorance or mistake as to the provisions of the Code, any other provision of the criminal law or the law governing the legality of an arrest or search.

(2) When the actor believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under Sections 3.03 to 3.08 but the actor is reckless or negligent in having such belief or in acquiring or failing to acquire any knowledge or belief that is material to the justifiability of his use of force, the justification afforded by those Sections is unavailable in a prosecution for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

(3) When the actor is justified under Sections 3.03 to 3.08 in using force upon or toward the person of another but he recklessly or negligently injures or creates a risk of injury to innocent persons, the justification afforded by those Sections is unavailable in a prosecution for such recklessness or negligence towards innocent persons.

Check Your Understanding (10-1)

The original version of this chapter contained H5P content. You may want to remove or replace this element.

The original version of this chapter contained H5P content. You may want to remove or replace this element.

As should be clear by now, self-defense law is largely focused on beliefs, so we are again in the world of mental states. But in most jurisdictions, a self-defense claim requires not only a showing that the defendant believed force was necessary, but also a showing that the defendant's belief was reasonable (even if mistaken). *Goetz* raises questions about whether and how race influences perceptions of threat, and judgments of reasonableness. Another line of self-defense doctrine grapples with killings that follow domestic violence; here the question is whether gender influences either perceptions of threat or judgments about the reasonableness of those perceptions. *State v. Gartland*, below, illustrates this area of self-defense law. New Jersey's self-defense statute is followed by the state supreme court opinion.

N.J. S.A. § 2C:3-4. Use of force in self-protection [as of 1997; since amended]

a. …[T]he use of force upon or toward another person is justifiable when the actor reasonably believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.

b. Limitations on justifying necessity for use of force.

…

(2) The use of deadly force is not justifiable under this section unless the actor reasonably believes that such force is necessary to protect himself against death or serious bodily harm; nor is it justifiable if:

(a) The actor, with the purpose of causing death or serious bodily harm, provoked the use of force against himself in the same encounter; or

(b) The actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action which he has no duty to take, except that:

(i) The actor is not obliged to retreat from his dwelling, unless he was the initial aggressor or is assailed by another person whose dwelling the actor knows it to be; and

(ii) A public officer justified in using force in the performance of his duties … or a person justified in using force in making an arrest or preventing an escape is not obliged to desist from efforts to perform such duty, effect such arrest or prevent such escape because of resistance or threatened resistance by or on behalf of the person against whom such action is directed.

…

c. (1) Notwithstanding [other statutory provisions], the use of force or deadly force upon or toward an intruder who is unlawfully in a dwelling is justifiable when the actor reasonably believes that the force is immediately necessary for the purpose of protecting himself or other persons in the dwelling against the use of unlawful force by the intruder on the present occasion.

(2) A reasonable belief exists when the actor, to protect himself or a third person, was in his own dwelling at the time of the offense or was privileged to be thereon and the encounter between the actor and intruder was sudden and unexpected, compelling the actor to act instantly and:

(a) The actor reasonably believed that the intruder would inflict personal injury upon the actor or others in the dwelling; or

(b) The actor demanded that the intruder disarm, surrender or withdraw, and the intruder refused to do so.

(3) An actor employing protective force may estimate the necessity of using force when the force is used, without retreating, surrendering possession, withdrawing or doing any other act which he has no legal duty to do or abstaining from any lawful action.

STATE of New Jersey, Plaintiff–Respondent

v.

Ellen GARTLAND, Defendant–Appellant

Supreme Court of New Jersey
694 A.2d 564

Decided June 19, 1997

PER CURIAM.

This appeal concerns the statutory duty to retreat before resorting to the use of deadly force in self-defense. …

I

The killing occurred on February 8, 1993. The jury heard evidence of long-standing physical and emotional abuse inflicted by the victim on defendant. Witnesses portrayed John Gartland as a violent and threatening husband obsessed with jealousy.

On the afternoon of the killing, the Gartlands … returned home at about 5:00 p.m., [and] a neighbor heard Mr. Gartland (John) threaten his wife. Other neighbors heard similar abuse and threats. The argument continued when John could not find the remote control for the television and accused Ellen of hiding it. Angered, he left the home. When he returned, he renewed the argument about the remote control. Ellen asked him to leave her alone and went upstairs to her bedroom. For over ten years, she and her husband had had separate bedrooms.

Previously, John had left her alone in this room. On this evening, he followed her into her bedroom. She told him to go to bed and to leave her alone. He approached her, threatening to strike her. One of them, the parties dispute which, said “I’m going to hurt you” as he approached her.

Ellen took her son’s hunting shotgun from her bedroom closet. She pointed it at her husband and told him to stop. He said, “You’re not going to do [anything] to me because you, bitch, I’m going to kill you.” He lunged at her with his fists clenched. She pulled the trigger. The shotgun blast hit her husband. He stepped into the hallway and fell.

Ellen dropped the gun, called an operator, and asked for an ambulance, saying that she had just shot her husband. She then called her son as well as John Gartland’s son. She told the responding officers that she had feared for her life. She said that she would never forget the look on his face and that he approached her looking “like a devil.”

At trial, the jury had asked twice during its deliberations for clarification of the court’s charge on self-defense. On both occasions the trial court repeated its initial instructions. The instruction never specifically apprised the jury that it could consider the seventeen years of spousal abuse suffered by Mrs. Gartland in determining whether she honestly and reasonably believed that

deadly force was necessary to protect herself against her husband. The trial court used the Model Jury Charge and told the jury that "[a] reasonable belief is one which is to be held by a person of ordinary prudence and intelligence situated as Mrs. Gartland was on February 8, 1993."

Prior to the charge, defense counsel objected to the court's intent to charge that Ellen had a duty to retreat before resorting to deadly force. Counsel renewed his objection immediately after the charge. Before the first recharge on self-defense, defense counsel again objected. He noted that because Ellen had been in her own room, one that her husband never occupied, he was not a cohabitant and under the law she had no duty to retreat from her own separate dwelling. The trial court ruled that "under the statute, there was a duty to retreat." …

The jury convicted Mrs. Gartland of reckless manslaughter. Two jurors later contacted the court describing confusion and indecision in their deliberations. After denying a motion for a new trial, the court sentenced Mrs. Gartland to a five-year term with a mandatory three-years imprisonment under the Graves Act. She was freed on bail pending appeal. The Appellate Division affirmed the conviction. ….

II

Should the appeal be dismissed because defendant died before her appeal could be heard by this Court?

… Unlike the federal constitution, the New Jersey Constitution does not confine the exercise of the judicial power to actual cases and controversies. Our courts will entertain a case that has become moot when the issue is of significant public importance and is likely to recur. We decided the right of one to die even though her death had occurred before we could decide her appeal. …

Our Legislature has made a strong commitment to the eradication of domestic violence. To the extent that this decision addresses concerns in this area, it is worth the judicial effort. … [I]mportant interests of the defendant or society at large may be at stake if an erroneous conviction is left standing. We find those important interests present here.

III

Did the trial court err in failing to instruct the jury that defendant had no duty to retreat if defendant's bedroom functioned as a separate dwelling and that her husband was an intruder into that separate room within the house that they shared?

New Jersey is among the minority of jurisdictions that impose a duty of retreat on a woman attacked by her cohabitant spouse. The New Jersey Code of Criminal Justice contains carefully articulated standards for determining when the use of force against another is justified. The drafters of our Code originally approached the concept of justification in terms of the subjective attitudes of the criminal actor. However, in the course of legislative modifications the self-defense provisions of the Code were altered to reestablish objective standards of self-defense…. Concerning deadly force, the Code provides: "The use of deadly force is not justifiable under this section unless the actor reasonably believes that such force is necessary to protect [the actor] against death or serious bodily harm …." *N.J.S.A.* 2C:3–4b(2). Even if deadly force is permissible, the actor still has the duty to retreat from the scene if the actor can do so safely. *N.J.S.A.* 2C:3–4b(2)(b). One exception to this duty to retreat is if the actor is in his or her own home at the time of the attack (the so-called "castle doctrine"), unless the attacker is a cohabitant. *N.J.S.A.* 2C:3–4b(2)(b)(i) states that "[t]he actor is not obliged to retreat from [the] dwelling, unless [the actor] was the initial aggressor or is assailed in [the actor's own] dwelling by another person whose dwelling the actor knows it to be…." *N.J.S.A.* 2C:3–4c provides special rules for the use of deadly force on an intruder into one's dwelling. For example, under this provision, deadly force may be used against an intruder to counter any level of unlawful force threatened by the intruder.

The Public Defender argues that it is ironic that Ellen Gartland could have used the shotgun against a burglar who intended to do her no serious harm but was precluded from using the same force against the true threat in her life, her husband. Instead, the law requires her to flee from her bedroom, which she had described as the only sanctuary in her chaos-filled home.

The retreat doctrine is one of several related legal doctrines affecting battered women as criminal defendants. The male pronouns used in the Code reflect a history of self-defense that is derived from a male model.[2]

Under the common law regime, even if faced with immediate danger of death or great bodily harm, an individual could use only equal force to repel the danger. The doctrine of equal force, developed on a prototype of two males of equal size and strength, held that, if attacked without a deadly weapon, one could not respond with a deadly weapon. This doctrine obviously disadvantaged women, who are generally smaller and lack the same upper-body strength as men.

Traditional common law self-defense imposes no duty to retreat, except for co-occupants of the same house. Given that most men are assaulted and killed outside their homes by strangers, while most women are assaulted and killed within their homes by male intimates, this doctrine also disadvantaged women.

[Marina Angel, *Criminal Law And Women: Giving The Abused Woman Who Kills A Jury Of Her Peers Who Appreciate Trifles*, 33 Am. Crim. L.Rev. 229, 320 (1996).]

… These are grave concerns. When the drafters of our Code of Criminal Justice commenced their work in 1971, the public was not fully aware of the epidemic of domestic violence. Knowledge of the problem, however, was more widespread at the time of the adoption of the Code in 1979. Legislative activity in the field of domestic abuse was already underway. For example, New Jersey had adopted the Prevention of Domestic Violence Act [later repealed] and the Shelters for Victims of Domestic Violence Act. However, there is no evidence that the Legislature specifically considered the loophole in the castle doctrine. As presently structured, the Code of Criminal Justice requires that a cohabitant who can safely leave the home to avoid violence should do so before resorting to deadly force. We have invariably adhered to the Code's concepts of self-defense.

… There is no … basis for departing from the language of the Code…. Although we find present the statutory duty to retreat, we commend to the Legislature consideration of the application of the retreat doctrine in the case of a spouse battered in her own home. There are arguments to be made on each side of the issue.

… That leaves for resolution whether John Gartland could be considered a cohabitant of Ellen's bedroom. Put the other way, the question is whether the upstairs bedroom in which Ellen slept was a separate dwelling. It is a close question on this record but we agree with the courts below that the bedroom was not a separate dwelling….

Defendant emphasizes that the Prevention of Domestic Violence Act implicitly recognizes the concept of a private dwelling within a larger home by authorizing the issuance of in-house restraining orders in its attempt to prevent spousal attacks….

It is true that one building may have separate apartments. However, the idea of a dwelling is that one has an "exclusive right to occupy" a portion of a building…. In this case, there is simply no evidence that the door to the bedroom had normally been kept locked or that John Gartland did not generally have access to the room. Defendant merely testified that because of sexual dysfunction, the couple slept in separate rooms. We cannot say that Ellen had the exclusive right to occupy this room. Hence, we agree, on this record, that the court correctly charged the statutory duty to retreat.

IV

Did the trial court err in failing specifically to instruct the jury that the evidence that defendant was abused by the decedent could be considered in assessing her claim of self-defense?

…[This Court has recognized that] evidence of prior abuse has the potential to confuse the jury and that expert testimony is useful to clarify and refute common myths and misconceptions about battered women…. Like the elements of passion-provocation manslaughter, the elements of self-defense contain subjective and objective factors that focus, respectively, on the sincerity and reasonableness of the defendant's beliefs. Thus, defendant argues that because evidence of prior abuse is relevant to the issue of self-defense and because evidence of prior abuse is potentially confusing, it follows that the jury must be properly instructed concerning how to consider and give effect to such evidence in assessing a claim of self-defense. The trial court specifically instructed the jury to consider the evidence of prior abuse in determining the question of provocation. However, it did not specifically instruct the jury to consider evidence of prior abuse in determining the question of self-defense.

We agree that a better charge would have instructed the jury to consider the history of prior abuse in assessing the honesty and reasonableness of defendant's belief in the need to use deadly force. Our courts have always admitted evidence of a victim's violent character as relevant to a claim of self-defense so long as the defendant had knowledge of the dangerous and violent character of the victim.

The issue arises in this case as one of plain error and the question is whether the absence of the specific instruction was such that it was clearly capable of producing an unjust result. We have often emphasized that instructions to a jury are to be examined as a whole. … Taken as a whole, the instruction could not be understood to foreclose the jury's full and appropriate consideration of the prior abuse in assessing the honesty and reasonableness of defendant's belief.

The possibility that the jury might not have considered the prior abuse in assessing the self-defense claim appears highly attenuated in this case. A major focus of the opening and closing remarks of defense counsel was that the jury could and should consider the long-standing abuse of defendant by her husband in assessing her claim of self-defense. In his opening remarks defense counsel said:

Now this is not a case, ladies and gentlemen, where a woman who claimed to have been abused for years walked into the bedroom one night and shot her sleeping husband or set the bed on fire when he was sleeping because she couldn't take it anymore, that is not this case. This is self-defense. If Mrs. Gartland hadn't acted to defend herself that night Johnny Gartland would be on trial for murder right now, that is what the case is all about.

So, yes, there are always many dynamics at work in a case like this and you're going to have to try to understand some of them, but in the end what is the single most important reason that the evidence in this case will show as to why it's important that Johnny Gartland beat up Ellen Gartland and abused her for so many years? You know why? Because on February 8, 1993, she knew what type of violence he was capable of inflicting against her and that's why it's important. She had every reason in the world to be afraid of him because *she knew what he had done to her before. She knew what he was capable of doing* and she knew the imminency of the threats, and she saw the look when he came in the bedroom to hit her. [Emphasis added.]

In his summation, he repeated this theme:

You see what is important, ladies and gentlemen, about the history and the context of this case is that she knew he was capable of doing serious injury to her *because he had done it before.* She knew he was capable of beating the hell out of her…. Ladies and gentlemen, in the end the history is important because that it why Ellen knew that she had a good reason to be afraid. She knew that he was capable of hurting her very badly…. He was known to be violent and abusive when he was drunk, that he had beaten his wife on occasions over a seventeen-year marriage…. [Emphasis added.]

The court's instructions did not foreclose the jury's consideration of that prior abuse; nor were its instructions so erroneous as to confuse or mislead the jury in its consideration of self-defense. The instructions gave the members of the jury an opportunity to consider fully whether an honest and reasonable belief in the necessity to use deadly force was present. The trial court explicitly told the jurors to consider passion-provocation in the context of knowing or purposeful murder. It also told the jurors that they could not find the defendant guilty of murder or any of the lesser-included offenses if they had a reasonable doubt as to whether or not the defendant had killed her victim in the honest and reasonable belief that the use of deadly force was necessary on the occasion.

V

We now turn to consider other aspects of this case that have been neither raised nor argued by the parties, that would have been grounds for retrial in the case of a living defendant.

In a long series of cases, we have held that an essential ingredient to a fair trial is that adequate and understandable instructions be given to the jury. We have regularly insisted that courts give content to statutory language in their charges to juries….

The instructions in this case were largely devoid of reference to the specific circumstances of the case. As noted, the trial court instructed the jury that if Mrs. Gartland "knew that she could avoid the necessity of using deadly force by retreating from that house, providing … [that] she could do so with complete safety, then the defense is not available to her." We intend no criticism of the trial court because neither party requested a charge tailored to the facts. However, an abstract charge on the duty to retreat could only have been confusing in the circumstances of this case. Exactly where could she retreat? As we understand the record, there was no other way out of the bedroom other than the doorway where her assailant stood. The charge should have asked whether, armed with a weapon, she could have safely made her way out of the bedroom door without threat of serious bodily injury to herself. In the similar circumstances of *State v. Thomas* (Ohio 1997) a woman trapped in her trailer retreated to the bathroom. Unable to escape, she ran to a closet and took out a gun. She fired two warning shots and even after being shot her assailant continued to threaten her. The concurring judge asked, "[h]ad the defendant gotten around [her cohabitant] to the door of the small trailer, would her attempt to escape the altercation have increased the risk of her death? Would [the cohabitant] have become further enraged and tried to kill her?" These are the circumstances that a jury must evaluate. One of the problems in applying the retreat doctrine to the case of a battered woman is that the jurors may confuse the question of leaving the abusive partner with the duty to retreat on the occasion. Among the many myths concerning battered women is the belief "that they are masochistic and actually

enjoy their beatings, that they purposely provoke their husbands into violent behavior, and, most critically … that women who remain in battering relationships are free to leave their abusers at any time."

The charge on self-defense should also have been tailored to the circumstances of the case. In *State v. Wanrow*, 559 P.2d 548 (1977), the Washington Supreme Court recognized that its traditional self-defense standard failed to account for the perspective of abused women. Any limitation of the jury's consideration of the surrounding acts and circumstances to those occurring at or immediately before the killing would be an erroneous statement of the applicable law. The Washington court held that a battered woman was entitled to have the jury consider her actions in the light of her own perceptions of the situation, including those perceptions that were the product of our nation's unfortunate history of sex discrimination. At a minimum, the jury in Ellen Gartland's case should have been asked to consider whether, if it found such to be the case, a reasonable woman who had been the victim of years of domestic violence would have reasonably perceived on this occasion that the use of deadly force was necessary to protect herself from serious bodily injury.

In another context, the failure to relate to the facts of the case the duty to retreat and right of self-defense might not have cut so mortally into a defendant's ability to maintain a defense on the merits. However, the persistent stereotyping of the victims of domestic violence requires special concern. Both partners to the domestic tragedy are now deceased. Although we cannot fully right past wrongs, we can correct errors in the charge that were clearly capable of producing an unjust result.

The judgment of the Appellate Division is reversed and the conviction of manslaughter is set aside.

Notes and questions on *Gartland*

1. Ellen Gartland had passed away between the time that she was convicted of manslaughter and the time that the New Jersey Supreme Court heard the appeal to her conviction. The state court took the case even though defendant had died, on the grounds that the case raised issues "of significant public importance" that are "likely to recur." What were those issues of public importance?
2. After hearing the deceased defendant's appeal, the state court then rejected the defense's two main arguments. What were those arguments, and why did the court reject them? Finally, in Part V, the court turns to "other aspects of this case that have been neither raised nor argued by the parties." What are those aspects? Why does the court eventually reverse Gartland's conviction?
3. Be sure to understand the castle doctrine, and the "loophole" in it referred to by the *Gartland* court. The castle doctrine is essentially an exception to a duty to retreat. Many states that impose a duty to retreat provide an exception to that duty for a defendant who is threatened in his or her own home. (The name of the doctrine comes from the phrase, "A man's home is his castle," and reflects a view that no one should have to retreat from an attacker in one's own "castle.") But under the New Jersey law applicable at the time of *Gartland*, the castle doctrine was itself subject to an exception: if the attacker also lives in the same home, then the duty to retreat apparently arises again. Even so, the duty to retreat (rather than use force in self-defense) applies only when one can retreat "with complete safety." Do the reported facts suggest an option of safe retreat here? (In 1999, not long after *Gartland*, the state legislature amended the statute to remove the requirement of retreat from a cohabitant.)
4. As Gartland's public defender pointed out, the New Jersey statute gave Ellen Gartland broader leeway to use force against an intruder who did not threaten deadly force than against her husband who had directly threatened to kill her. Consider carefully the terms of N.J.S.A. § 2C:3-4c. This section provides that the use of deadly force against an intruder is justifiable "when the actor reasonably believes that the force is immediately necessary for the purpose of protecting himself or others … against the use of unlawful force by the intruder on the present occasion." That much is consistent with general self-defense doctrine. But then the statute goes on to state the necessary reasonable belief exists if the defendant had any fear of personal injury, or the defendant "demanded that the intruder disarm, surrender, or withdraw, and the intruder refused to do so."
5. The National Rifle Association has had a significant influence on American self-defense law. According to one study, since 2005 more than 40 states have enacted or proposed new legislation that broadens the right to use deadly force. These new laws, "conceived and advocated by the National Rifle Association, … purport to change existing self-defense law in one or both of the following ways: First, they permit a home resident to kill an intruder by presuming rather than requiring proof of reasonable fear of death or serious bodily harm; second, they reject a general duty to retreat from attack, even when retreat is possible, not only in the home, but also in public space." Jeannie Suk, *The True Woman: Scenes from the Law of Self-Defense*, 31 Harv. J. L. & Gender 237, 238 (2008). The latter type of law is often labeled a "Stand Your Ground" law. Both types of provisions are sometimes championed as efforts to help women protect themselves from violence. Critics argue that in practice, the effect of

these legal changes has been "the normalization and promotion of (often white) male violence in an increasing number of scenarios," rather than any greater protection for women who are subjected to physical abuse. See, e.g., Mary Anne Franks, *Real Men Advance, Real Women Retreat: Stand Your Ground, Battered Women*, 69 Univ. Miami L. Rev. 1099 (2014).

6. As suggested by the quotation from Professor Franks in the previous note, criticisms of Stand Your Ground laws have focused at least as much on race as on gender. By giving defendants greater leeway to respond to perceived threats with force (even when retreat is an option), Stand Your Ground laws may exacerbate the effects of racial bias in threat perceptions. So argues one scholar: even in a state without a Stand Your Ground law, a white defendant is more than twice as likely to succeed with a self-defense claim if the victim of the force was Black rather than white. In states that do have Stand Your Ground Laws, a white defendant is more than three times as likely to succeed with a self-defense claim if the victim of the force was Black rather than white. See Jasmine B. Gonzales Rose, *Toward A Critical Race Theory of Evidence*, 101 Minn. L. Rev. 2243, 2267-2268 (2017).
7. Some courts and commentators frame debates about self-defense law in terms of objectivity (usually, reasonable person standards) and subjectivity (standards that are more attentive to the particular experiences of the individual defendant). You saw this debate in *People v. Goetz*, and here again in *Gartland*. Notice that the objectivity vs. subjectivity framing assumes that objectivity is an option – that is, it assumes that legal decisionmakers can develop and apply legal standards without taking their own subjective perspectives into account. Against that assumption, one study of self-defense cases suggested that the "objective" elements of self-defense doctrine are actually vehicles for decisionmakers to shape outcomes based on the details that the individual decisionmaker sees as important.

   The problem with the law of self-defense is neither new nor limited to the battered woman; it is as old and as persistent as the law's search for an objective meaning for necessity. Based on a survey of twenty years of self-defense cases, I sought to "test" claims of objectivity by focusing on what purports to be one of the most objective of self-defense rules: the requirement that the threat must have been "imminent" for the defendant's response to have been permissible. …

   My survey shows that the important question is not whether the law has become too soft or subjectified but what we mean by its objectivity. The case law shows that imminence has many meanings; indeed, imminence often operates as a proxy for any number of other self-defense factors—for example, strength of threat, retreat, proportionality, and aggression. Perhaps more importantly, my survey shows that the conventional image of imminence may be incorrect. It is widely believed by scholars that the "problem" of imminence is one of too much time between the threat and the killing. If my survey is right, however, most judicial opinions raising imminence do not involve long periods of time between the threat and the killing. They are cases of weak threats and extended fights, cases in which the defendant is struggling with the victim, is faced with a gun, believes that the victim is advancing, or hears a stranger in the woods outside his home. This should confound traditional doctrinal understandings of the term "imminence" (which presume imminence as relevant only in nonconfrontational "waiting" cases). Indeed, it presents strong evidence supporting my hypothesis—that imminence carries undeclared meanings.

   This has important implications for both the law of self-defense as well as our image of the problem of battered women. The law of self-defense, if I am right, is far from as settled or coherent as it is assumed to be; its meaning and theory remain, in my view, largely unresolved. What seems so objective—the status quo—turns out to be a good deal more complex and contingent than has been assumed.

   V.F. Nourse, *Self-Defense and Subjectivity*, 68 U. Chi. L. Rev. 1235, 1236-1237 (2001).

Check Your Understanding (10-2)

The original version of this chapter contained H5P content. You may want to remove or replace this element.

From Justification to Excuse: Necessity and Duress

[The relevant statutory provision is included in footnote 1 in the opinion below.]

UNITED STATES, Petitioner

v.

Clifford BAILEY et al.

Supreme Court of the United States
444 U.S. 394

Decided Jan. 21, 1980

Mr. Justice REHNQUIST delivered the opinion of the Court.

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.[3] 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…. We granted certiorari, and now reverse the judgments of the Court of Appeals.

In reaching our conclusion, we must decide the state of mind necessary for violation of § 751(a) and the elements that constitute defenses such as duress and necessity. In explaining the reasons for our decision, we find ourselves in a position akin to that of the mother crab who is trying to teach her progeny to walk in a straight line, and finally in desperation exclaims: "Don't do as I do, do as I say." The Act of Congress we construe consists of one sentence set forth in the margin, n. 1, *supra* ; our own pragmatic estimate … is that "in general, trials for violations of § 751(a) should be simple affairs." Yet we have written, reluctantly but we believe necessarily, a somewhat lengthy opinion supporting our conclusion, because in enacting the Federal Criminal Code Congress legislated in the light of a long history of case law that is frequently relevant in fleshing out the bare bones of a crime that Congress may have proscribed in a single sentence. See *Morissette v. United States* (1952).

I

All respondents requested jury trials and were initially scheduled to be tried jointly. At the last minute, however, respondent Cogdell secured a severance. Because the District Court refused to submit to the jury any instructions on respondents' defense of duress or necessity and did not charge the jury that escape was a continuing offense, we must examine in some detail the evidence brought out at trial.

The prosecution's case in chief against Bailey, Cooley, and Walker was brief. The Government introduced evidence that each of the respondents was in federal custody on August 26, 1976, that they had disappeared, apparently through a cell window, at approximately 5:35 a. m. on that date, and that they had been apprehended individually between September 27 and December 13, 1976.

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. In describing the conditions at the jail, they introduced evidence of frequent fires in "Northeast One," the maximum-security cellblock occupied by respondents prior to their escape. Construed in the light most favorable to them, this evidence demonstrated that the inmates of Northeast One, and on occasion the guards in that unit, set fire to trash, bedding, and other objects thrown from the cells. According to the inmates, the guards simply allowed the fires to burn until they went out. Although the fires apparently were confined to small areas and posed no substantial threat of spreading through the complex, poor ventilation caused smoke to collect and linger in the cellblock.

Respondents Cooley and Bailey also introduced testimony that the guards at the jail had subjected them to beatings and to threats of death. Walker attempted to prove that he was an epileptic and had received inadequate medical attention for his seizures.

Consistently during the trial, the District Court stressed that, to sustain their defenses, respondents would have to introduce some evidence that they attempted to surrender or engaged in equivalent conduct once they had freed themselves from the conditions they described. But the court waited for such evidence in vain. Respondent Cooley, who had eluded the authorities for one month, testified that his "people" had tried to contact the authorities, but "never got in touch with anybody." He also suggested that someone had told his sister that the Federal Bureau of Investigation would kill him when he was apprehended.

Respondent Bailey, who was apprehended on November 19, 1976, told a similar story. He stated that he "had the jail officials called several times," but did not turn himself in because "I would still be under the threats of death." Like Cooley, Bailey testified that "the FBI was telling my people that they was going to shoot me."

Only respondent Walker suggested that he had attempted to negotiate a surrender. Like Cooley and Bailey, Walker testified that the FBI had told his "people" that they would kill him when they recaptured him. Nevertheless, according to Walker, he called the FBI three times and spoke with an agent whose name he could not remember. That agent allegedly assured him that the FBI would not harm him, but was unable to promise that Walker would not be returned to the D.C. jail. [The FBI disputed that Walker contacted them at all.] Walker testified that he last called the FBI in mid-October. He was finally apprehended on December 13, 1976.

At the close of all the evidence, the District Court rejected respondents' proffered instruction on duress as a defense to prison escape.[4] The court ruled that respondents had failed as a matter of law to present evidence sufficient to support such a defense because they had not turned themselves in after they had escaped the allegedly coercive conditions. After receiving instructions to disregard the evidence of the conditions in the jail, the jury convicted Bailey, Cooley, and Walker of violating § 751(a).

Two months later, respondent Cogdell came to trial before the same District Judge who had presided over the trial of his co-respondents…. [T]he District Court ruled that Cogdell could not present evidence of conditions at the jail. Cogdell subsequently chose not to testify on his own behalf, and was convicted by the jury of violating § 751(a).

By a divided vote, the Court of Appeals reversed each respondent's conviction and remanded for new trials. The majority concluded that the District Court should have allowed the jury to consider the evidence of coercive conditions in determining whether the respondents had formulated the requisite intent to sustain a conviction under § 751(a). According to the majority, § 751(a) required the prosecution to prove that a particular defendant left federal custody voluntarily, without permission, and "with an intent to avoid confinement." The majority then defined the word "confinement" as encompassing only the "normal aspects" of punishment prescribed by our legal system. Thus, where a prisoner escapes in order to avoid "non-confinement" conditions such as beatings or homosexual attacks, he would not necessarily have the requisite intent to sustain a conviction under § 751(a)…

The dissenting judge objected to what he characterized as a revolutionary reinterpretation of criminal law by the majority. He argued that the common-law crime of escape had traditionally required only "general intent," a mental state no more sophisticated than an "intent to go beyond permitted limits."…

II

… 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.

A

…As relevant to the charges against Bailey, Cooley, and Walker, § 751(a) required the prosecution to prove (1) that they had been in the custody of the Attorney General, (2) as the result of a conviction, and (3) that they had escaped from that custody. As for the charges against respondent Cogdell, § 751(a) required the same proof, with the exception that his confinement was based upon an arrest for a felony rather than a prior conviction. Although § 751(a) does not define the term "escape," courts and commentators are in general agreement that it means absenting oneself from custody without permission.

Respondents have not challenged the District Court's instructions on the first two elements of the crime defined by § 751(a). It is undisputed that, on August 26, 1976, respondents were in the custody of the Attorney General as the result of either arrest on charges of felony or conviction. As for the element of "escape," we need not decide whether a person could be convicted on evidence of recklessness or negligence with respect to the limits on his freedom. A court may someday confront a case where an escapee did not know, but should have known, that he was exceeding the bounds of his confinement or that he was leaving without permission. Here, the District Court clearly instructed the juries that the prosecution bore the burden of proving that respondents "knowingly committed an act which the law makes a crime"…. At a minimum, the juries had to find that respondents knew they were leaving the jail and that they knew they were doing so without authorization. The sufficiency of the evidence to support the juries' verdicts under this charge has never seriously been questioned, nor could it be.

The majority of the Court of Appeals, however, imposed the added burden on the prosecution to prove as a part of its case in chief that respondents acted "with an intent to avoid confinement." While, for the reasons noted above, the word "intent" is quite

ambiguous, the majority left little doubt that it was requiring the Government to prove that the respondents acted with the purpose —that is, the conscious objective—of leaving the jail without authorization. In a footnote explaining their holding, for example, the majority specified that an escapee did not act with the requisite intent if he escaped in order to avoid " 'non-confinement' conditions" as opposed to "normal aspects of 'confinement.' "

We find the majority's position quite unsupportable. Nothing in the language or legislative history of § 751(a) indicates that Congress intended to require either such a heightened standard of culpability or such a narrow definition of confinement. As we stated earlier, the cases have generally held that, except in narrow classes of offenses, proof that the defendant acted knowingly is sufficient to support a conviction. Accordingly, we hold that the prosecution fulfills its burden under § 751(a) if it demonstrates that an escapee knew his actions would result in his leaving physical confinement without permission….

B

Respondents also contend that they are entitled to a new trial because they presented (or, in Cogdell's case, could have presented) sufficient evidence of duress or necessity to submit such a defense to the jury….

Common law historically distinguished between the defenses of duress and necessity. Duress was said to excuse criminal conduct where the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law. While the defense of duress covered the situation where the coercion had its source in the actions of other human beings, the defense of necessity, or choice of evils, traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils. Thus, where A destroyed a dike because B threatened to kill him if he did not, A would argue that he acted under duress, whereas if A destroyed the dike in order to protect more valuable property from flooding, A could claim a defense of necessity.

Modern cases have tended to blur the distinction between duress and necessity. In the court below, the majority discarded the labels "duress" and "necessity," choosing instead to examine the policies underlying the traditional defenses. In particular, the majority felt that the defenses were designed to spare a person from punishment if he acted "under threats or conditions that a person of ordinary firmness would have been unable to resist," or if he reasonably believed that criminal action "was necessary to avoid a harm more serious than that sought to be prevented by the statute defining the offense." The Model Penal Code redefines the defenses along similar lines. See Model Penal Code § 2.09 (duress) and § 3.02 (choice of evils).

We need not speculate now, however, on the precise contours of whatever defenses of duress or necessity are available against charges brought under § 751(a). Under any definition of these defenses one principle remains constant: if there was a reasonable, legal alternative to violating the law, "a chance both to refuse to do the criminal act and also to avoid the threatened harm," the defenses will fail. Clearly, in the context of prison escape, the escapee is not entitled to claim a defense of duress or necessity unless and until he demonstrates that, given the imminence of the threat, violation of § 751(a) was his only reasonable alternative.

In the present case, the Government contends that respondents' showing was insufficient on two grounds. First, the Government asserts that the threats and conditions cited by respondents as justifying their escape were not sufficiently immediate or serious to justify their departure from lawful custody. Second, the Government contends that, once the respondents had escaped, the coercive conditions in the jail were no longer a threat and respondents were under a duty to terminate their status as fugitives by turning themselves over to the authorities.

Respondents, on the other hand, argue that the evidence of coercion and conditions in the jail was at least sufficient to go to the jury as an affirmative defense to the crime charged. As for their failure to return to custody after gaining their freedom, respondents assert that this failure should be but one factor in the overall determination whether their initial departure was justified. According to respondents, their failure to surrender "may reflect adversely on the bona fides of [their] motivation" in leaving the jail, but should not withdraw the question of their motivation from the jury's consideration.

We need not decide whether such evidence as that submitted by respondents was sufficient to raise a jury question as to their initial departures. This is because we decline to hold that respondents' failure to return is "just one factor" for the jury to weigh in deciding whether the initial escape could be affirmatively justified. On the contrary, several considerations lead us to conclude that, in order to be entitled to an instruction on duress or necessity as a defense to the crime charged, an escapee must first offer evidence justifying his continued absence from custody as well as his initial departure[5] and that an indispensable element of such an offer is

testimony of a bona fide effort to surrender or return to custody as soon as the claimed duress or necessity had lost its coercive force.

First, we think it clear beyond peradventure that escape from federal custody as defined in § 751(a) is a continuing offense and that an escapee can be held liable for failure to return to custody as well as for his initial departure. Given the continuing threat to society posed by an escaped prisoner, "the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." Moreover, every federal court that has considered this issue has held, either explicitly or implicitly, that § 751(a) defines a continuing offense.

… The Anglo-Saxon tradition of criminal justice, embodied in the United States Constitution and in federal statutes, makes jurors the judges of the credibility of testimony offered by witnesses. It is for them, generally, and not for appellate courts, to say that a particular witness spoke the truth or fabricated a cock-and-bull story. An escapee who flees from a jail that is in the process of burning to the ground may well be entitled to an instruction on duress or necessity, "for he is not to be hanged because he would not stay to be burnt." *United States v. Kirby* (1869). And in the federal system it is the jury that is the judge of whether the prisoner's account of his reason for flight is true or false. But precisely because a defendant is entitled to have the credibility of his testimony, or that of witnesses called on his behalf, judged by the jury, it is essential that the testimony given or proffered meet a minimum standard as to each element of the defense so that, if a jury finds it to be true, it would support an affirmative defense—here that of duress or necessity.

We therefore hold that, where a criminal defendant is charged with escape and claims that he is entitled to an instruction on the theory of duress or necessity, he must proffer evidence of a bona fide effort to surrender or return to custody as soon as the claimed duress or necessity had lost its coercive force. We have reviewed the evidence examined elaborately in the majority and dissenting opinions below, and find the case not even close, even under respondents' versions of the facts, as to whether they either surrendered or offered to surrender at their earliest possible opportunity. Since we have determined that this is an indispensable element of the defense of duress or necessity, respondents were not entitled to any instruction on such a theory. Vague and necessarily self-serving statements of defendants or witnesses as to future good intentions or ambiguous conduct simply do not support a finding of this element of the defense.

III

In reversing the judgments of the Court of Appeals, we believe that we are at least as faithful as the majority of that court to its expressed policy of "allowing the jury to perform its accustomed role" as the arbiter of factual disputes. The requirement of a threshold showing on the part of those who assert an affirmative defense to a crime is by no means a derogation of the importance of the jury as a judge of credibility. Nor is it based on any distrust of the jury's ability to separate fact from fiction. On the contrary, it is a testament to the importance of trial by jury and the need to husband the resources necessary for that process by limiting evidence in a trial to that directed at the elements of the crime or at affirmative defenses. If, as we here hold, an affirmative defense consists of several elements and testimony supporting one element is insufficient to sustain it even if believed, the trial court and jury need not be burdened with testimony supporting other elements of the defense.

These cases present a good example of the potential for wasting valuable trial resources. In general, trials for violations of § 751(a) should be simple affairs. The key elements are capable of objective demonstration; the *mens rea*, as discussed above, will usually depend upon reasonable inferences from those objective facts. Here, however, the jury in the trial of Bailey, Cooley, and Walker heard five days of testimony. It was presented with evidence of every unpleasant aspect of prison life from the amount of garbage on the cellblock floor, to the meal schedule, to the number of times the inmates were allowed to shower. Unfortunately, all this evidence was presented in a case where the defense's reach hopelessly exceeded its grasp. Were we to hold, as respondents suggest, that the jury should be subjected to this potpourri even though a critical element of the proffered defenses was concededly absent, we undoubtedly would convert every trial under § 751(a) into a hearing on the current state of the federal penal system.

Because the juries below were properly instructed on the *mens rea* required by § 751(a), and because the respondents failed to introduce evidence sufficient to submit their defenses of duress and necessity to the juries, we reverse the judgments of the Court of Appeals.

Reversed.

Mr. Justice MARSHALL took no part in the consideration or decision of these cases.

[Concurring opinion by Justice STEVENS omitted.]

Mr. Justice BLACKMUN, with whom Mr. Justice BRENNAN joins, dissenting.

The Court's opinion, it seems to me, is an impeccable exercise in the undisputed general principles and technical legalism: The respondents were properly confined in the District of Columbia jail. They departed from that jail without authority or consent. They failed promptly to turn themselves in when, as the Court would assert by way of justification, the claimed duress or necessity "had lost its coercive force." Therefore, the Court concludes, there is no defense for a jury to weigh and consider against the respondents' prosecution for escape….

It is with the Court's assertion that the claimed duress or necessity had lost its coercive force that I particularly disagree. The conditions that led to respondents' initial departure from the D.C. jail continue unabated. If departure was justified—and on the record before us that issue, I feel, is for the jury to resolve as a matter of fact in the light of the evidence, and not for this Court to determine as a matter of law—it seems too much to demand that respondents, in order to preserve their legal defenses, return forthwith to the hell that obviously exceeds the normal deprivations of prison life and that compelled their leaving in the first instance. The Court, however, requires that an escapee's action must amount to nothing more than a mere and temporary gesture that, it is to be hoped, just might attract attention in responsive circles. But life and health, even of convicts and accuseds, deserve better than that and are entitled to more than pious pronouncements fit for an ideal world.

The Court, in its carefully structured opinion, does reach a result that might be a proper one were we living in that ideal world, and were our American jails and penitentiaries truly places for humane and rehabilitative treatment of their inmates. Then the statutory crime of escape could not be excused by duress or necessity, by beatings, and by guard-set fires in the jails, for these would not take place, and escapees would be appropriately prosecuted and punished.

But we do not live in an ideal world "even" (to use a self-centered phrase) in America, so far as jail and prison conditions are concerned. The complaints that this Court, and every other American appellate court, receives almost daily from prisoners about conditions of incarceration, about filth, about homosexual rape, and about brutality are not always the mouthings of the purely malcontent. The Court itself acknowledges that the conditions these respondents complained about do exist. It is in the light of this stark truth, it seems to me, that these cases are to be evaluated. It must follow, then, that the jail-condition evidence proffered by respondent Cogdell should have been admitted, and that the jury before whom respondents Bailey, Cooley, and Walker were tried should not have been instructed to disregard the jail-condition evidence that did come in. I therefore dissent.

I

The atrocities and inhuman conditions of prison life in America are almost unbelievable; surely they are nothing less than shocking. The dissent in the *Bailey* case in the Court of Appeals acknowledge that "the circumstances of prison life are such that at least a colorable, if not credible, claim of duress or necessity can be raised with respect to virtually every escape." And the Government concedes: "In light of prison conditions that even now prevail in the United States, it would be the rare inmate who could not convince himself that continued incarceration would be harmful to his health or safety."

A youthful inmate can expect to be subjected to homosexual gang rape his first night in jail, or, it has been said, even in the van on the way to jail. Weaker inmates become the property of stronger prisoners or gangs, who sell the sexual services of the victim. Prison officials either are disinterested in stopping abuse of prisoners by other prisoners or are incapable of doing so, given the limited resources society allocates to the prison system. Prison officials often are merely indifferent to serious health and safety needs of prisoners as well.

Even more appalling is the fact that guards frequently participate in the brutalization of inmates. The classic example is the beating or other punishment in retaliation for prisoner complaints or court actions.

The evidence submitted by respondents in these cases fits that pattern exactly. Respondent Bailey presented evidence that he was continually mistreated by correctional officers during his stay at the D.C. jail. He was threatened that his testimony in the Brad King case would bring on severe retribution. Other inmates were beaten by guards as a message to Bailey. An inmate testified that on one occasion, three guards displaying a small knife told him that they were going [kill Bailey, using a racial epithet to refer to

Bailey]. The threats culminated in a series of violent attacks on Bailey. Blackjacks, mace, and slapjacks (leather with a steel insert) were used in beating Bailey.

Respondent Cooley also elicited testimony from other inmates concerning beatings of Cooley by guards with slapjacks, blackjacks, and flashlights. There was evidence that guards threatened to kill Cooley.

… It cannot be doubted that excessive or unprovoked violence and brutality inflicted by prison guards upon inmates violates the Eighth Amendment…. There can be little question that our prisons are badly overcrowded and understaffed and that this in large part is the cause of many of the shortcomings of our penal systems. This, however, does not excuse the failure to provide a place of confinement that meets minimal standards of safety and decency. Penal systems in other parts of the world demonstrate that vast improvement surely is not beyond our reach….

II

The real question presented in this case is whether the prisoner should be punished for helping to extricate himself from a situation where society has abdicated completely its basic responsibility for providing an environment free of life-threatening conditions such as beatings, fires, lack of essential medical care, and sexual attacks. To be sure, Congress in so many words has not enacted specific statutory duress or necessity defenses that would excuse or justify commission of an otherwise unlawful act. The concept of such a defense, however, is "anciently woven into the fabric of our culture." J. Hall, General Principles of Criminal Law 416 (2d ed. 1960), quoted in Brief for United States 21. And the Government concedes that "it has always been an accepted part of our criminal justice system that punishment is inappropriate for crimes committed under duress because the defendant in such circumstances cannot fairly be blamed for his wrongful act."

Although the Court declines to address the issue, it at least implies that it would recognize the common-law defenses of duress and necessity to the federal crime of prison escape, if the appropriate prerequisites for assertion of either defense were met. Given the universal acceptance of these defenses in the common law, I have no difficulty in concluding that Congress intended the defenses of duress and necessity to be available to persons accused of committing the federal crime of escape.

I agree with most of the Court's comments about the essential elements of the defenses. I, too, conclude that intolerable prison conditions are to be taken into account through affirmative defenses of duress and necessity, rather than by way of the theory of intent espoused by the Court of Appeals… I therefore agree that it is appropriate to treat unduly harsh prison conditions as an affirmative defense.

I also agree with the Court that the absence of reasonable less drastic alternatives is a prerequisite to successful assertion of a defense of necessity or duress to a charge of prison escape. One must appreciate, however, that other realistic avenues of redress seldom are open to the prisoner. Where prison officials participate in the maltreatment of an inmate, or purposefully ignore dangerous conditions or brutalities inflicted by other prisoners or guards, the inmate can do little to protect himself. Filing a complaint may well result in retribution, and appealing to the guards is a capital offense under the prisoners' code of behavior. In most instances, the question whether alternative remedies were thoroughly "exhausted" should be a matter for the jury to decide.

I, too, conclude that the jury generally should be instructed that, in order to prevail on a necessity or duress defense, the defendant must justify his continued absence from custody, as well as his initial departure. I agree with the Court that the very nature of escape makes it a continuing crime. But I cannot agree that the only way continued absence can be justified is by evidence "of a bona fide effort to surrender or return to custody." The Court apparently entertains the view, naive in my estimation, that once the prisoner has escaped from a life- or health-threatening situation, he can turn himself in, secure in the faith that his escape somehow will result in improvement in those intolerable prison conditions. While it may be true in some rare circumstance that an escapee will obtain the aid of a court or of the prison administration once the escape is accomplished, the escapee, realistically, faces a high probability of being returned to the same prison and to exactly the same, or even greater, threats to life and safety.

The rationale of the necessity defense is a balancing of harms. If the harm caused by an escape is less than the harm caused by remaining in a threatening situation, the prisoner's initial departure is justified. The same rationale should apply to hesitancy and failure to return. A situation may well arise where the social balance weighs in favor of the prisoner even though he fails to return to custody. The escapee at least should be permitted to present to the jury the possibility that the harm that would result from a return to custody outweighs the harm to society from continued absence.

Even under the Court's own standard, the defendant in an escape prosecution should be permitted to submit evidence to the jury to demonstrate that surrender would result in his being placed again in a life- or health-threatening situation. The Court requires return to custody once the "claimed duress or necessity had lost its coercive force." Realistically, however, the escapee who reasonably believes that surrender will result in return to what concededly is an intolerable prison situation remains subject to the same "coercive force" that prompted his escape in the first instance. It is ironic to say that that force is automatically "lost" once the prison wall is passed.

The Court's own phrasing of its test demonstrates that it is deciding factual questions that should be presented to the jury. It states that a "bona fide" effort to surrender must be proved. Whether an effort is "bona fide" is a jury question. The Court also states that "[v]ague and necessarily self-serving statements of defendants or witnesses as to future good intentions or ambiguous conduct simply do not support a finding of this element of the defense.". Traditionally, it is the function of the jury to evaluate the credibility and meaning of "necessarily self-serving statements" and "ambiguous conduct."

Finally, I of course must agree with the Court that use of the jury is to be reserved for the case in which there is sufficient evidence to support a verdict. I have no difficulty, however, in concluding that respondents here did indeed submit sufficient evidence to support a verdict of not guilty, if the jury were so inclined, based on the necessity defense. Respondent Bailey testified that he was in fear for his life, that he was afraid he would still face the same threats if he turned himself in, and that "[t]he FBI was telling my people that they was going to shoot me." Respondent Cooley testified that he did not know anyone to call, and that he feared that the police would shoot him when they came to get him. Respondent Walker testified that he had been in "constant rapport" with an FBI agent, who assured him that the FBI would not harm him, but who would not promise that he would not be returned to the D.C. jail. Walker also stated that he had heard through his sister that the FBI "said that if they ran down on me they was going to kill me."

Perhaps it is highly unlikely that the jury would have believed respondents' stories… Nevertheless, such testimony, even though "self-serving," and possibly extreme and unwarranted in part, was sufficient to permit the jury to decide whether the failure to surrender immediately was justified or excused. This is routine grist for the jury mill and the jury usually is able to sort out the fabricated and the incredible.

In conclusion, my major point of disagreement with the Court is whether a defendant may get his duress or necessity defense to the jury when it is supported only by "self-serving" testimony and "ambiguous conduct." It is difficult to imagine any case, criminal or civil, in which the jury is asked to decide a factual question based on completely disinterested testimony and unambiguous actions. The very essence of a jury issue is a dispute over the credibility of testimony by interested witnesses and the meaning of ambiguous actions.

…[T]he Court here appears to place an especially strict burden of proof on defendants attempting to establish an affirmative defense to the charged crime of escape. That action is unwarranted. If respondents' allegations are true, society is grossly at fault for permitting these conditions to persist at the D.C. jail. The findings of researchers and government agencies, as well as the litigated cases, indicate that in a general sense these allegations are credible. The case for recognizing the duress or necessity defenses is even more compelling when it is society, rather than private actors, that creates the coercive conditions. In such a situation it is especially appropriate that the jury be permitted to weigh all the factors and strike the balance between the interests of prisoners and that of society. In an attempt to conserve the jury for cases it considers truly worthy of that body, the Court has ousted the jury from a role it is particularly well suited to serve.

Notes and questions on *U.S. v. Bailey*

1. *Bailey* provides a good illustration of the difference between, on one hand, a failure of proof claim based on inadequate evidence of the necessary mental state, and, on the other hand, an affirmative defense. The lower federal court, the Court of Appeals, had reversed the defendants' convictions with an argument focused on mental states. Specifically, the lower court held that the federal escape statute required the prosecution to prove that the defendant left custody "with an intent to avoid confinement," meaning, an intent to avoid ordinary prison conditions rather than an intent to avoid extreme violence or especially poor conditions. At the Supreme Court, both the majority and the dissenting opinions rejected this reading of the statute. But the majority also rejected the defendants' separate argument that the jury should have been instructed on the affirmative defenses of necessity and duress. Justice Blackmun's dissent argued that the defendants had introduced enough evidence in support of these affirmative defenses to allow the jury to consider them.

2. Notice that the question of jury instructions here is not about the specific way that necessity or duress doctrines will be described to the jury, but about whether the jury should have been told to consider these affirmative defenses at all. Judges typically serve as gatekeepers for affirmative defense arguments, meaning that the trial judge considers the evidence that the defendant wishes to present in support of the affirmative defense, and then decides whether the defendant's evidence is substantial enough for the question to be presented to the jury. The process is comparable to a court making a probable cause determination pre-trial: a court could, in theory, decide that the evidence in support of a prosecution's charge is so weak that it does not even establish "probable cause" and the case should not go forward. In practice, judges rarely throw out prosecutorial charges for lack of probable cause, but judges deny defendants' requests to present affirmative defenses to juries fairly often. In Bailey's trial, he and his co-defendants were initially allowed to present extensive evidence of the deplorable conditions in the DC jail, but the trial judge subsequently denied the defendants' request for jury instructions on necessity and duress, and instead told the jury to disregard the evidence concerning jail conditions.
3. Neither necessity nor duress was defined by statute in federal law at the time of this case, so the Supreme Court relies on common law to identify the elements of each defense. Necessity is sometimes called "the choice of evils" defense. The *Bailey* Court describes necessity as applicable to "the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils," but does not give a specific list of elements. Here is one more specific, and fairly standard, definition of necessity from a state court:

(1) there must be a situation of emergency arising without fault on the part of the actor concerned;
(2) this emergency must be so imminent and compelling as to raise a reasonable expectation of harm, either directly to the actor or upon those he was protecting;
(3) this emergency must present no reasonable opportunity to avoid the injury without doing the criminal act; and
(4) the injury impending from the emergency must be of sufficient seriousness to outmeasure the criminal wrong.

State v. Thayer, 14 A.3d 231, 233 (Vt. 2010). In *Thayer*, the Vermont Supreme Court rejected a necessity defense raised by a woman prosecuted for growing marijuana. Vermont had legalized medical marijuana before the woman's arrest, but required growers to meet certain conditions, such as growing the marijuana in an indoor facility. The woman argued that marijuana was necessary to treat her ailing son and that she needed to cultivate plants outdoors in order to produce a sufficient quantity. The court found that the defendant had not established a true necessity to grow the plants inside, and noted, "to the extent defendant justifies the violation based on her disagreement or disapproval of the law's provisions, this argument falls outside the scope of the necessity defense. The necessity defense is generally not available to excuse criminal activity by those who disagree with the policies of the government." *Thayer*, 14 A.3d at 235.

4. Duress is similar to necessity, but usually defined to require evidence that a specific person or persons threatened the defendant or a third party with death or great bodily injury, and the defendant reasonably believed that the commission of the offense was the only way to avoid that harm. The *Bailey* Court's description of the conditions that will give rise to a duress defense, "threats or conditions that a person of ordinary firmness would have been unable to resist," is typical. And as the *Bailey* Court notes, the traditional understanding of the necessity defense identifies some circumstance or condition ("physical forces beyond the actor's control") that generates the need to commit a crime, while the traditional understanding of duress identifies a human being (or multiple humans) as the source of the threat to the defendant. Necessity is classified as a justification, whereas duress is classified as an excuse.
5. Self-defense doctrine typically applies only to defendants who are charged with the use of force against another person, so self-defense is raised most often in homicide, attempted homicide, and assault cases. Necessity and duress defenses could in principle be raised against any kind of criminal charge, although many jurisdictions say that necessity and duress are not available as a defense to murder or other homicide charges. Necessity and duress claims are infrequently raised, and they are usually unsuccessful. One context in which both claims are raised by defendants with some regularity (but again, usually without success) is gun possession.
6. Be sure to understand why the trial court, and the U.S. Supreme Court, found it proper to deny the defendants' request for a necessity or duress instruction to the jury: "[W]here a criminal defendant is charged with escape and claims that he is entitled to an instruction on the theory of duress or necessity, he must proffer evidence of a bona fide effort to surrender or return to custody as soon as the claimed duress or necessity had lost its coercive force." Does Justice Blackmun's dissent reject this requirement? What is the key disagreement between majority and dissent in this case?

7. The exponential growth of the U.S. prison population that eventually produced the term “mass incarceration” began in the 1970s and continued throughout the 1980s and 1990s, finally leveling off early in the twenty-first century. In the first decades of mass incarceration, there was a great deal of attention to, and litigation over, conditions in U.S. prisons and jails. By many accounts, prisoners’ challenges to their conditions of confinement eventually achieved a measure of success, in that prisons and jails became somewhat safer and less overcrowded. This was accomplished in part by judicial injunctions that led to the building of more prisons and the investment of more resources to manage them. For an overview and analysis of the courts’ role in this lengthy and significant change, see Malcolm Feeley & Edward Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America’s Prisons* (1998). In 1976, when Bailey and his co-defendants escaped from the DC jail, conditions were still terrible at many institutions. Note the contrast between the way that the conditions identified by the majority opinion (“garbage on the cellblock floor … the meal schedule … the number of times the inmates were allowed to shower”) and the conditions identified by the concurring and dissenting opinions. The dissenting opinion reports that jail officials had made specific threats to kill Bailey and Cooley, another defendant, that the officials had used a racial epithet in referring to Bailey, and that both men were subjected to “a series of violent attacks” by jail employees.

Check Your Understanding (10-3)

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Insanity

Cal. Penal Code 25. Diminished capacity; insanity.

(a) The defense of diminished capacity is hereby abolished. In a criminal action, as well as any juvenile court proceeding, evidence concerning an accused person’s intoxication, trauma, mental illness, disease, or defect shall not be admissible to show or negate capacity to form the particular purpose, intent, motive, malice aforethought, knowledge, or other mental state required for the commission of the crime charged.

(b) In any criminal proceeding, including any juvenile court proceeding, in which a plea of not guilty by reason of insanity is entered, this defense shall be found by the trier of fact only when the accused person proves by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense.

(c) Notwithstanding the foregoing, evidence of diminished capacity or of a mental disorder may be considered by the court only at the time of sentencing or other disposition or commitment.

(d) The provisions of this section shall not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.

THE PEOPLE, Plaintiff and Respondent

v.

BETTY HORN, Defendant and Appellant

Court of Appeal, Third District, California
158 Cal.App.3d 1014, 205 Cal.Rptr. 119

Aug 1, 1984

SPARKS, J.

“It is fundamental to our system of jurisprudence that a person cannot be convicted for acts performed while insane.” People v. Kelly (1973). But who is insane? In this case we explore that question by considering the type of showing which will support a finding of not guilty by reason of insanity under Penal Code section 25, subdivision (b), a new statute added to that code by the enactment of Proposition 8, the Victim’s Bill of Rights, at the June 1982 Primary Election. Under this statute, a defendant is insane

only when “he or she was incapable of knowing or understanding the nature and quality of his or her act *and* of distinguishing right from wrong at the time of the commission of the offense.” (Pen. Code, § 25, subd. (b), italics added.) The central issue is whether the use of the word “and” rather than “or” reflects an intent of the people to reject California’s version of the historic *M’Naghten* standard of insanity and adopt instead the “wild beast” test of antiquity. We conclude that it does not and consequently hold that the initiative measure reinstated the California *M’Naghten* right and wrong test as the measure of criminal insanity in this state.

…The factual circumstances are not in dispute. On the afternoon of September 17, 1982, defendant drove her automobile into the self-service island of a Texaco gas station. She put $15 worth of gasoline into her car and then attempted to pay for it with a Triple A Towing Card. When told the attendant could not accept the card, defendant stated she must have left her credit card at home…. The attendant … suggested defendant call someone to bring some cash to the station. Defendant agreed and used the telephone.

Defendant told the gas station attendant that someone was bringing money to her and the attendant suggested defendant move her car so she would not block the island. Defendant got into her car and drove out of the station. As she did so she almost struck another car. She then drove through a parking lot, across a cement border into a field, into another parking lot, and finally onto the road. An attendant from the gas station followed defendant on his motorcycle. He observed defendant travel at 80 to 85 miles per hour, and run a red light. Defendant continued at 80 to 85 miles per hour until she approached another red light. At that time she applied her brakes and slowed to about 60 miles per hour, and then entered the intersection. There defendant collided with another motorcycle and tragically killed the rider.

Defendant was charged with vehicular manslaughter. She entered pleas of not guilty and not guilty by reason of insanity. Defendant waived a jury trial and submitted the issue of guilt to the trial court…. Predictably, she was found guilty. The plea of not guilty by reason of insanity was then tried to the court.

During the sanity trial it was established beyond any doubt that defendant suffers from mental illness. …[S]he has been under treatment for mental illness for a number of years. Dr. Alfred French, a court-appointed psychiatrist, diagnosed defendant’s illness as a manic-depressive disorder. The other court-appointed psychiatrist, Dr. Audrey Mertz, concurred and added that defendant’s illness is a bipolar affective disorder. This means that she is subject to mood swings and may suffer from both the manic and depressive aspects of the disease at different times.

Defendant has been hospitalized from time to time for her illness, including a hospitalization as recent as July 1982. During her treatment for the disease defendant has been given lithium, which is one of the primary means of treating her illness. When she was discharged from the hospital in July 1982, her lithium treatment was discontinued.

Dr. French testified that in his opinion defendant would have been incapable of knowing or understanding the nature and quality of her acts and distinguishing right from wrong at the time of the accident. The discontinuance of her lithium treatment would cause her condition to deteriorate and lead to an increase in her manic state. This would result in the characteristics of impulsiveness, irrational thinking, grandiosity and irritability. This, coupled with the “provocation” she would perceive from being followed by a motorcyclist, would impair her ability to perceive her true situation accurately.

Dr. Mertz agreed that in the manic phase of her illness defendant would have difficulty determining right from wrong and in understanding the nature and quality of her acts. Her judgment, in Mertz’s opinion, was seriously impaired….

Defendant testified at the insanity phase of the trial. It appeared that in the months before the accident her life had been in turmoil. Her husband had taken the children and filed for a dissolution…. She had been using her husband’s credit card for living expenses, but had been required to return it. She had then begun selling her furniture to obtain funds. Shortly before this incident there had been a fire in defendant’s residence. [As a result of that fire, defendant was charged with arson, but was found not guilty by reason of insanity.]

…[On the day of the accident,] she wanted her husband to come to the station and pay for her gas. When she called him, however, he either could not or would not come to the station. She then got into her car and headed towards a friend’s house to obtain money. She observed the attendant from the station following on his motorcycle and was afraid of him, although she was not trying to get away from him. She remembered seeing the red light before the collision, but could not remember if she tried to stop. She did not see the motorcyclist before the collision.

Based upon this evidence, the trial court found that defendant was sane at the time of the accident. The court [found] that Proposition 8 added a more strict standard than any of the usual tests for insanity. The court expressly indicated that defendant “was

legally insane under every standard known to the law except for the mental standard." The court said defendant was insane under both prongs of the American Law Institute (ALI) test; under the knowledge of wrongfulness prong of the M'Naghten Test, and under the so-called Durham or product test. The court further indicated that it would be prepared to find that at the time of the incident defendant was incapable of distinguishing between right and wrong by reason of her mental illness. Nevertheless, the court concluded that defendant had not sustained her burden of showing that she was also incapable of knowing the nature and quality of her act, and therefore ruled that she was not insane under § 25. Defendant was sentenced to state prison for the lower base term of 16 months.

Discussion

This case squarely presents issues of the meaning and validity of § 25(b). In order to resolve these issues it will be necessary to recite a brief review of the history of the insanity defense.

"The starting point from an historical point of view is the ancient position which did not regard mental disorder, or insanity, as having any bearing upon the matter of criminal guilt." (Perkins on Criminal Law (2d ed. 1969). … When insanity became a defense to a charge of crime, it was generally held that the insanity must be total: the accused had to be wholly without the capacity to understand and remember in order to be innocent by reason of insanity.

In the nineteenth century the celebrated case of Daniel M'Naghten arose. M'Naghten had attempted to assassinate the Prime Minister of England, and instead succeeded in killing the Prime Minister's secretary. He was found not guilty by reason of his insanity. Because of the prominence of M'Naghten's intended victim, there was great public excitement and eventually the House of Lords put five hypothetical questions to the judges of the common law courts concerning the law of criminal responsibility. It was the judges' response to two of those questions which ultimately became the basis for the insanity test in all American states except New Hampshire. The response asserted: "[T]o establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." *M'Naghten's Case* (1843) 10 Clark & Fin. 200.

The *M'Naghten* "right and wrong" standard was early adopted in California as the standard for an insanity defense…. The insanity test based upon the *M'Naghten* case has generally become known as the "right and wrong" test. [The court contrasted *M'Naghten* to an older "wild beast" test, which exempted a defendant from punishment on grounds of insanity only if he was "a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast, such a one is never the object of punishment."] … Although various phrases have been used to set forth the *M'Naghten* test, "[i]n substance these all have reference to whether the defendant really knew what he was doing, and this is true whether we have in mind an extreme situation such as Stephen's illustration of a man who thought his homicidal act was 'breaking a jar,' or an inquiry whether there was an understanding of the 'real nature and true character of the act as a crime, and not … the mere act itself.'

Although the *M'Naghten* right and wrong standard became the test for insanity in the majority of American jurisdictions, numerous criticisms were directed at it. Some jurisdictions have modified or abandoned the *M'Naghten* test in favor of tests providing a broader scope of insanity. The primary manner in which the test has been modified has been by the addition of a volitional element, usually referred to as an "irresistible impulse" test, and also known as "moral insanity" or "emotional insanity." Under this test the accused may escape criminal liability for his acts regardless whether he was capable of understanding the nature and quality of those acts and that they were wrong, if he was unable to choose between right and wrong, or to conform his conduct to the requirements of the law. In short, "this rule, broadly stated, tells jurors to acquit by reason of insanity if they find the defendant had a mental disease which kept him from controlling his conduct." As we shall see, California's rejection of the irresistible impulse test came early, and has persisted.

Another test developed was the Durham or "product" test [*Durham v. United States* (D.C. Cir. 1954).] That test required the trier of fact to determine whether the accused was insane, and if so, whether the wrongful act was the product of his insanity. The Durham formulation received little support from lawmakers and courts….

From an early date the California Supreme Court was urged to adopt the irresistible impulse test as a means of determining criminal responsibility, but the court refused to do so. In *People v. Hoin*, the court explained that there are three powerful restraints to a disposition to commit crime—the restraint of religion, the restraint of conscience, and the restraint of law. If a criminal

disposition or influence may itself serve as an excuse for crime, then a most powerful restraint is withdrawn, that forbidding and punishing its perpetration. Accordingly, unless the impulse under which the deed was done was one which altogether deprived the accused of the ability to know that he was doing wrong, he is responsible for his actions.

… [However,] [i]n *People v. Drew* the Supreme Court … judicially abandoned *M'Naghten*. In its stead the court decreed that trial courts should apply the test developed by the American Law Institute for its Model Penal Code, known as the ALI test. Under that test, "[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." (Model Penal Code (Official Draft 1962) § 4.01.) This test alters the test for insanity in at least two major respects. First, it does away with the all-or-nothing language of *M'Naghten*, and replaces it with a less stringent standard of substantial capacity. Second, it adds a volitional prong to the test by requiring the capacity to conform to legal requirements….

The ALI test was itself rejected four years later when the people exercised the legislative power through the retained right of initiative by enacting Proposition 8 at the June 1982 Primary Election. Among other things that measure enacted Penal Code § 25. For the first time in California's history, the defense of insanity was statutorily defined. Subdivision (b) of § 25 now provides: "In any criminal proceeding, including any juvenile court proceeding, in which a plea of not guilty by reason of insanity is entered, this defense shall be found by the trier of fact only when the accused person proves by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense."

Although the insanity provisions of Proposition 8 are couched in the language of *M'Naghten*, the conjunctive "and" is used rather than the disjunctive "or" between the two prongs of the test. Defendant argues that Proposition 8 was not intended to create a new test of insanity, but was only intended to abrogate the decision in *Drew* and to return to California's version of the *M'Naghten* right and wrong test for criminal insanity. For reasons we shall explain, we agree.

[The court explained that confusion had arisen because trial courts sometimes spoke of the definition of sanity, and in other cases, of the definition of insanity. One formulation required "and"; the other required "or."] [As put in *People v. Wolff*,] "The test of sanity is this: First, did the defendant have sufficient mental capacity to know *and understand* what he was doing, and second, did he know *and understand* that it was wrong *and a violation of the rights of another*?" (italics in original.) As can be seen, this test of *sanity* uses the conjunctive "and" construction. Conversely, the test of *insanity* necessarily must use the disjunctive "or" form. In order to be sane, "'the defendant must be able to know *and understand* the nature and quality of his act *and* to distinguish between right and wrong at the time of the commission of the offense."' (*Ibid.*, italics in original.) Thus if a defendant knows and understands the nature and quality of his act but does not know it is wrong, he is, by definition, insane. Hence the reciprocal tests of sanity and insanity were correctly stated in CALJIC No. 4.00 (3d ed. 1970): "If you find that the defendant was capable of knowing and understanding the nature and quality of his act and, in addition, was capable of knowing and understanding that his act was wrong, you will find that he was legally sane. However, if you find that the defendant was not capable of knowing or understanding the nature and quality of his act, you will find that he was legally insane; or, if you find that he was incapable of knowing or understanding that his act was wrong, you will find that he was legally insane." The confusion over the correct usage of the conjunctive/disjunctive form of the *M'Naghten* rule thus arises from the failure to distinguish between the alternative definitions of sanity and insanity. This not uncommon confusion is evident in the Proposition 8 formulation of the *M'Naghten* test. We accept this blurred statement for what it appears to be, a careless draft, rather than divining in it some inexplicable regression by California's citizens to medieval barbarism.

We do not lightly disregard the fact that the word "and" is used in the statute. Nevertheless, "the word 'or' is often used as a careless substitute for the word 'and'; that is, it is often used in phrases where 'and' would express the thought with greater clarity." … Where, as here, we are concerned with a measure adopted by the people through the initiative power, it is appropriate that the purpose of the measure be determined by reference to the language used, the ballot summary, the argument and analysis presented to the voters, and the contemporaneous construction by the Legislature.

… Proposition 8 was … intended to serve as a deterrent to criminal behavior. Deterrence was the precise reason our courts refused to adopt the irresistible impulse theory before *Drew*… But this purpose of deterrence would not be served by the abrogation of the *M'Naghten* test as well. This is because the restraint of law is dependent upon the ability of the individual to make a choice between right and wrong, and a person who cannot understand right and wrong cannot make such a choice. … Thus, as the Supreme Court of Washington noted: "*M'Naghten* is preferable to the American Law Institute test in that the *M'Naghten* rule better

serves the basic purpose of the criminal law-to minimize crime in society. … [W]hen *M'Naghten* is used, all who might possibly be deterred from the commission of criminal acts are included within the sanctions of the criminal law." *State v. White* (Wash. 1962).

The primary means by which Proposition 8 deters crime is through punishment. … The criminal law has long been based upon the concept of freedom of choice and adherence to the *M'Naghten* test has been based upon the refusal of the courts to accept the proposition that a person who knowingly commits a wrongful or criminal act should not be held accountable. But the *M'Naghten* test recognizes that those who are incapable of understanding the wrongfulness of their conduct have no opportunity of choice and cannot harbor an evil intent or mens rea….

It can thus be seen that the purposes of Proposition 8 would be served by the abrogation of *Drew*, but not by the abrogation of *M'Naghten*….

Proposition 8 was passed by the electorate on June 8, 1982, and became law the following day. On that day the Attorney General [explained the new law]: "Essentially, this restores the traditional *M'Naghten* rule as to insanity, which was overturned by the California Supreme Court in *People v. Drew* (1978). While 'and' is used between the two phrases, although 'or' was used in the former test, there appears to be little practical difference between the former version of *M'Naughton* and the new structure." We agree with this assessment that the new statute "restores the traditional *M'Naghten* rule."

… For all of these reasons, we decline to interpret the statute as enacting a new drooling idiot test in place of the century old *M'Naghten* standard merely because it uses the single, and often misused, conjunctive "and." That conjunctive is too thin a reed to support such a massive doctrinal transformation.

In this case in addition to the briefs from defendant and the People we have accepted amicus curiae briefs from the State Public Defender and the California Attorneys for Criminal Justice in support of defendant, and from the Criminal Justice Legal Foundation in support of the People. It is significant that all of the parties who have submitted briefs are in agreement that the insanity provisions of Proposition 8 were intended to abrogate *Drew* and return to the traditional *M'Naghten* standard. While we are reluctant to decide a matter of statewide significance based upon a concession of the parties, in this case our independent research convinces us that this position is sound. Accordingly, we hold that § 25(b) reinstates the California *M'Naghten* right and wrong test as the standard for the insanity defense in this state.

Since we conclude that Proposition 8 and § 25(b) abrogate the *Drew* decision and return California to the right and wrong standard of criminal insanity, it is unnecessary for us to consider the contentions that a stricter standard would violate the constitutional requirement of due process and the prohibition against cruel and unusual punishment. The right and wrong test passes constitutional muster. … We turn then to a consideration whether defendant is entitled to a finding of not guilty by reason of insanity.

Defendant contends the People are collaterally estopped to deny that she was insane [because she] was found to have been legally insane [in an earlier proceeding regarding an arson charge]. We reject [this] contention…. The issue in an insanity trial is whether the defendant, at the time of the commission of the offense, could appreciate right and wrong in relation to the very act with which she is charged. Whether defendant could appreciate the wrongfulness of her conduct in relationship to an arson some days before this incident is not determinative of her sanity in this case and hence poses a different issue in a different controversy. As the psychiatric testimony in this case established, defendant's … mental capacity at one point in time is not necessarily indicative of her capacity at another time. In short, the sanity issue decided in the Placer County prosecution is not identical to the issue posed in this case because proof of insanity on one day is not proof of insanity on another.

The People, while agreeing that § 25(b) reinstates the *M'Naghten* standard, urge that the two prongs of the *M'Naghten* test are really the same thing. As our earlier discussion forecasts, we must reject this contention. A person who is capable of understanding the nature and quality of her action is not necessarily capable of appreciating the wrongfulness of her conduct. The evidence in this case illustrates this truism. There was no real evidence that defendant could not understand the nature and quality of her act. From her testimony it is clear that she was aware that she was driving her car, was being followed by the gas station attendant on his motorcycle, and that she was entering an intersection on a red light. However, the psychiatric testimony and defendant's own recollection supported the claim that she was incapable of appreciating the wrongfulness of her conduct.

The trial court rejected the insanity defense, but in doing so it expressly found that defendant met the second prong of the *M'Naghten* test because she was incapable of distinguishing between right and wrong at the time of the incident. Since this finding

established insanity under the *M'Naghten* test, defendant is entitled to a judgment of not guilty by reason of insanity.

The judgment is reversed and the cause is remanded to the trial court with directions to enter a judgment of not guilty by reason of insanity and to take such further proceedings as are required by law.

EVANS, Acting P. J., dissenting.

…The text of § 25(b) demonstrates that the initiative enacted by the People imposes a far more stringent standard which requires proof that the accused suffered from both aspects of the *M'Naghten* test.

Viewed from any intellectual position, the harshness of the result extracted by the clear, unambiguous language of the provisions of § 25(b) is apparent. However, that harshness does not rise to prohibitive constitutional dimension or compel a statutory change by judicial decision; the fact that the statute compels a harsh result does not render it ambiguous and subject to interpretation. Merely because the language used results in the imposition of a strict standard for the defense of criminal insanity, we may not be permitted to indulge a judicial preference and conjure a judicial amendment to the statute by construing "and" to mean "or."

The terms "and" and "or," clearly conjunctive and disjunctive, may have at times in the past been erroneously used interchangeably by careless courts; however, that circumstance does not permit us to be so presumptive as to conclude the people, by their initiative process, didn't mean what they clearly stated, that the conjunctive rather than the disjunctive be required and both prongs of the *M'Naghten* test be established in order to prove insanity as a criminal defense.

… Proposition 8 received widespread publicity. … Each voter was … provided written arguments [for and against] Proposition 8… In those documents the analysis by the legislative analyst described the test of insanity in the conjunctive and stated, "These provisions could increase the difficulty of proving that a person is not guilty by reason of insanity." In the argument submitted to the voters in favor of Proposition 8 was the statement, "[Y]ou will limit the ability of violent criminals to hide behind the insanity defense, … Of those *convicted* of felonies, one-third go to state prison and the remaining two-thirds are back in the community in a relatively short period of time. There Is Absolutely No Question That the Passage of This Proposition Will Result in … More Criminals Being Sentenced to State Prison, and More Protection for the Law-Abiding Citizenry …."

The defendant implicates the argument that the voters were misled or confused in requiring the more difficult standard of proving both prongs of the *M'Naghten* test. Such an argument can only be based upon the improbable assumption that the people did not know what they were doing. In our judicial review, we should not lightly presume that the voters were unaware of the consequences of their actions in approving Proposition 8….

…I can find nothing in the statute, the entire initiative, the arguments presented in favor of, in rebuttal to, or in explanation of the text of the initiative, that would imply that the voters did not intend the conjunctive to be the requirement rather than by implication the disjunctive. Under the statute, criminally insane persons, that is those who know neither the nature of their act nor its wrongfulness, would presumably be unable to benefit from the punishment imposed by way of a criminal sentence or to be rehabilitated or deterred thereby. Conversely, persons who know the nature and consequences of their act, *or* know the act they are committing is wrong, could presumably benefit from or be deterred by the imposition of criminal punishment. As a result, the criminally insane as established under § 25(b) are different than the noncriminally insane with respect to the legitimate purpose of the law.

Since the defendant failed to establish by a preponderance of the evidence that she met both standards enunciated in the statute, I would affirm the judgment.

Notes and questions on *People v. Horn*

1. Apparently, Daniel M'Naghten, the man who tried to kill the Prime Minister of England in 1843 and the man for whom the most common definition of insanity is named, was inconsistent with the spelling of his own name. Courts have been similarly inconsistent; older opinions sometimes refer to McNaughton, M'Naughten, or McNaughten. Whatever spelling is adopted, the underlying legal doctrine is the prevailing test for insanity in the United States: a defendant can be relieved of criminal liability on grounds of insanity if "at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, … he did not know he was doing what was wrong." This test is often described as one that focuses on cognition, or the defendant's knowledge of the nature or wrongfulness of his own acts.

2. The “irresistible impulse” test adopted by some courts as an expansion of *M’Naghten* focuses on volition rather than cognition. The question is whether the defendant was “unable to choose between right and wrong, or [unable] to conform his conduct to the requirements of the law.” The Model Penal Code combined both the cognitive inquiry of *M’Naghten* and the volitional inquiry of irresistible impulse, but broadened both. Traditional interpretations of *M’Naghten* required a total failure of cognition (the defendant did not know his own acts or that they were wrong), and the irresistible impulse test required a total failure of volition (the defendant was “unable” to control his own conduct). In contrast, MPC § 4.01 allows a defendant to establish insanity by showing a lack of “substantial capacity” with regard to either cognition or volition:

Model Penal Code § 4.01. Mental disease or defect excluding responsibility

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.

(2) As used in this Article, the terms “mental disease or defect” do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

3. *People v. Horn* concerns a new statutory definition of insanity, adopted as part of Proposition 8, that seems close to *M’Naghten* but uses the word “and” where *M’Naghten* used “or.” To require a defendant to show both prongs of the *M’Naghten* test, rather than just one, would significantly narrow the definition of insanity. The *Horn* court’s conclusion that the “and” was a drafting error and should be read as “or” was subsequently endorsed by the California Supreme Court in *People v. Skinner*, 704 P.2d 752 (1985).
4. As of 2015, the majority of states and the federal government used some version of *M’Naghten* to define insanity. A minority of states use some version of the Model Penal Code’s definition, and just one state, New Hampshire, uses the *Durham* or “product” test described in *People v. Horn*. Four states have “abolished” the insanity defense altogether, as discussed below. For a history of insanity law and an overview of current law, with a specific focus on “deific decrees” or claims by a defendant that he acted under God’s command, see Rabia Belt, *When God Demands Blood: Unusual Minds and the Troubled Juridical Ties of Religion, Madness, and Culpability*, 69 U. Miami L. Rev. 755, 784 (2015).
5. Insanity is usually understood as a true affirmative defense, meaning that a defendant can avoid criminal liability even if she had the mental state (and engaged in the conduct) specified in the charged offense. Betty Horn was convicted of vehicular manslaughter, a crime that required proof that defendant killed “the victim ‘without malice but with gross negligence … while driving a vehicle ….” In a footnote, the *Horn* court explained “the definition of gross negligence in vehicular manslaughter as ‘the failure to exercise any care, or the exercise of so little care that [the jurors] are justified in believing that the person whose conduct is involved was wholly indifferent to the consequences of his conduct and to the welfare of others.’” Could a defendant have the mens rea required for this offense and yet still be insane? The *Horn* court noted, “Presumably the trial court found that defendant failed to prove by a preponderance of the evidence that she was incapable of knowing or understanding that she was driving a motor vehicle with gross negligence.” Because the trial court had found that both prongs of *M’Naghten* were required for insanity, and the trial court found only one of those prongs (inability to know that one’s actions are wrong) to be established, the trial court rejected the insanity claim and convicted Horn. The appellate court held that only one prong of *M’Naghten* need be established and reversed Horn’s conviction, as you know, but this issue illustrates the close connection between insanity claims and mens rea inquiries.
6. Given the close connection between a claim of insanity and a claim about one’s mental state, a few states have abolished a separate affirmative defense of insanity altogether. Under “the mens rea approach,” as it sometimes called, a state allows a defendant to introduce evidence of mental disease to show that he or she lacked the mental state required for the charged offense. But evidence of mental disease or defect is not otherwise admissible. In *Kahler v. Kansas*, 140 S.Ct. 1021 (2020), the U.S. Supreme Court considered and rejected a constitutional challenge to the mens rea approach. The defendant had argued that the Due Process Clause of the federal constitution was violated if he was punished despite a mental illness that prevented him from distinguishing right from wrong. The court held that the Constitution did not require adoption of the M’Naghten rule or any specific definition of insanity:

[J]ust decades ago Congress gave serious consideration to adopting a mens rea approach like Kansas’s as the federal insanity rule. See *United States v. Pohlot* (C.A.3 1987). The Department of Justice at the time favored that version of the insanity test. Perhaps

more surprisingly, the American Medical Association did too…. Although Congress chose in the end to adhere to the *M'Naghten* rule, the debate over the bill itself reveals continuing division over the proper scope of the insanity defense.

Nor is that surprising, given the nature of the inquiry. As the American Psychiatric Association once noted, "insanity is a matter of some uncertainty." Across both time and place, doctors and scientists have held many competing ideas about mental illness. And that is only the half of it. Formulating an insanity defense also involves choosing among theories of moral and legal culpability, themselves the subject of recurrent controversy. At the juncture between those two spheres of conflict and change, small wonder there has not been the stasis Kahler sees—with one version of the insanity defense entrenched for hundreds of years.

And it is not for the courts to insist on any single criterion going forward. We have made the point before…. Just a brief reminder: "[F]ormulating a constitutional rule would reduce, if not eliminate, [the States'] fruitful experimentation, and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold." Or again: In a sphere of "flux and disagreement," with "fodder for reasonable debate about what the cognate legal and medical tests should be," due process imposes no one view of legal insanity. Defining the precise relationship between criminal culpability and mental illness involves examining the workings of the brain, the purposes of the criminal law, the ideas of free will and responsibility. It is a project demanding hard choices among values, in a context replete with uncertainty, even at a single moment in time. And it is a project, if any is, that should be open to revision over time, as new medical knowledge emerges and as legal and moral norms evolve. Which is all to say that it is a project for state governance, not constitutional law.

We therefore decline to require that Kansas adopt an insanity test turning on a defendant's ability to recognize that his crime was morally wrong. Contrary to Kahler's view, Kansas takes account of mental health at both trial and sentencing. It has just not adopted the particular insanity defense Kahler would like. That choice is for Kansas to make—and, if it wishes, to remake and remake again as the future unfolds. No insanity rule in this country's heritage or history was ever so settled as to tie a State's hands centuries later.

Kahler v. Kansas, 140 S.Ct. at 1037.

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1. [Fn. 5 by the court:] While the portion of section 35.15(2)(b) pertaining to the use of deadly physical force to avert a felony such as robbery does not contain a separate "retreat" requirement, it is clear from reading subdivisions (1) and (2) of section 35.15 together, as the statute requires, that the general "necessity" requirement in subdivision (1) applies to all uses of force under section 35.15, including the use of deadly physical force under subdivision (2)(b). ↵
2. [Fn. 1 by the court:] For example, the "true man" doctrine basically provides that "an individual need not retreat, even if he can do so safely, where he has a reasonable belief that he is in imminent danger of death or great bodily harm, is without fault, and is in a place that he has a right to be. The rationale behind this rule comes from a policy against making a person act in a cowardly or humiliating manner." *State v. Renner*, 1994 WL 501778.... ↵
3. [Fn. 1 by the Court:] Title 18 U.S.C. § 751(a) provides: "Whoever escapes or attempts to escape from the custody of the Attorney General or his authorized representative, or from any institution or facility in which he is confined by direction of the Attorney General, or from any custody under or by virtue of any process issued under the laws of the United States by any court, judge or magistrate, or from the custody of an officer or employee of the United States pursuant to lawful arrest, shall, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense, be fined not more than $5,000 or imprisoned not more than five years, or both; or if the custody or confinement is for extradition or by virtue of an arrest or charge of or for a misdemeanor, and prior to conviction, be fined not more than $1,000 or imprisoned not more than one year, or both." ↵
4. [Fn. 3 by the Court:] Respondents asked the District Court to give the following instruction:

   "Coercion which would excuse the commission of a criminal act must result from:

"1) Threathening [sic] conduct sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm; "2) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant; "3) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and "4) The defendant committed the act to avoid the threathened [sic] harm." ↵

- [Fn. 9 by the Court:] ... Our holding here is a substantive one: an essential element of the defense of duress or necessity is evidence sufficient to support a finding of a bona fide effort to surrender or return to custody as soon as the claimed duress or necessity has lost its coercive force. As a general practice, trial courts will find it saves considerable time to require testimony on this element of the affirmative defense of duress or necessity first, simply because such testimony can be heard in a fairly short time, whereas testimony going to the other necessary elements of duress or necessity may take considerably longer to present.... ↵
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