3

CRIMINAL LAW BASICS

First, go to the end of the chapter. Skim the key terms and phrases and read the summary closely. Come back and look at the following news excerpts to focus your reading throughout the chapter to understand the law that gives authority to the government for putting people in jail for committing crimes; the mental states that govern how harshly an offender may be punished; how to determine whether an offender actually causes harm to, or the death of, another; and the legal requirements to hold offenders responsible for incomplete crimes. This chapter examines the basics of criminal law concepts that remain the same regardless of jurisdiction; these concepts include *mens rea*, *actus reus*, intent, criminal causation, and parties to crimes. It also discusses how society punishes the crimes of attempt, solicitation, and conspiracy. We open the chapter with a hypothetical (not real) case study loosely based on a series of events related to hurricanes hitting the American Gulf Coast. The case study illustrates the concepts under review in the chapter and the associated rules of law (ROLs) that apply in similar situations. As you read through the chapter, look for the references to the case study to help understand how the law is applied in specific fact situations.

WHY THIS CHAPTER MATTERS TO YOU	THE LEARNING OBJECTIVES AS REFLECTED IN THE NEWS
After you have read this chapter: **Learning Objective 1:** You will understand the four *mens rea* states to establish the defendant's "guilty mind."	Gaul's friends reported him after he fired two bullets at Walker's house from a position outside. One bullet became stuck in the wall. The other entered the wall and struck Walker in the head, killing her instantly. At trial, the defense admitted Gaul was the triggerman, but disputed his intent. Prosecutors said he committed premeditated, intentional murder. Gaul already admitted to a reckless conduct charge for firing into the occupied Walker house. (*Law & Crime*, May 4, 2018)
Learning Objective 2: You will be able to explain the legal basis for volitional *actus reus*, the "guilty act."	Seven Supreme Court of Canada judges have agreed with the legal team of a former Alberta couple, Collet and David Stephan, that the original trial judge erred in instructions to the 2016 jury who convicted the couple in the death of their toddler son. The two elements the judges believe were combined by the trial judge are *actus reus* and *mens rea*. *Actus reus*, Latin for guilty act, raises the question of whether the Stephans failed to provide their son with the medical attention that was necessary in the circumstances . . . in this case meaning not taking a child displaying symptoms of meningitis to the hospital. (CBC News, May 15, 2018)

WHY THIS CHAPTER MATTERS TO YOU	THE LEARNING OBJECTIVES AS REFLECTED IN THE NEWS
Learning Objective 3: You will competently discuss the elements of "causation" to assign criminal responsibility.	Kalo Doyle, 25, is charged with racing on a roadway causing serious bodily injury or death. He and Gilbert Burton, 52, both of Texarkana Texas, were said to be racing at a high rate of speed on the afternoon of March 20 [2018]. Police say Doyle's Mustang struck the side of LaQuania Hopkins' Toyota Avalon. She later died at the scene . . . [the crime of] 'Racing on Roadway Causing Serious Bodily Injury or Death' is a second-degree felony. (KSLA News [TX], April 27, 2018)
Learning Objective 4: You will know the common law differences between principals and accessories.	Sierras Cobb, 42, was on trial on a charge of accessory after the fact to second-degree murder. Forsyth County prosecutors accused Cobb of driving Anthony Abran away after Abran fatally shot Delmorio Blockson, 26, just after 3 a.m. May 27, 2015. When Abran got into Cobb's car, Cobb asked, "Bro, are you alright?" Then Cobb asked, "What can I do?" [The prosecutor] said those questions indicate that Cobb knew Abran had killed a man and Cobb wanted to see what he could do to help Abran get away from the crime scene. (*Winston-Salem Journal* [NC], April 20, 2018)
Learning Objective 5: You will understand the elements of inchoate crimes, such as solicitation, conspiracy, and attempt.	Last week, [the Vermont Legislature] was far less united in its response to the case of Jack Sawyer, the 18-year-old Poultney man police said had plans to kill as many people as he could at Fair Haven Union High School before the plot was foiled. The justices said merely planning a crime under state law does not rise to an attempt. As a result, prosecutors have since dismissed the most severe charges against the Poultney teen, including three counts of attempted murder. In its ruling, the high court invited the Legislature to make changes to the state's attempt law to avoid a similar situation from occurring again. (VTDigger, May 2, 2018)

Chapter-Opening Case Study: Hurricane Michael, October 2018

In Mexico Beach, Florida, on October 8, 2018, a few days before Hurricane Michael hit Florida's Panhandle, officials asked the owners of a local nursing home, Gerald Smith, 65, and his wife Mary, 62, whether they wanted to move the 71 residents to a safe shelter. The Smiths said no. They had been caring for the elderly at their nursing home for more than 10 years and had a spotless record. Gerald assured officials that they would evacuate if necessary. When Michael made landfall, 200,000 homes and businesses lost power. At the nursing home, 10 seniors died when the air conditioners, breathing machines, and dialysis machines failed. **(Rule of Law [ROL]: Reckless means you are aware of the risk of harm your behavior creates and you ignore it.)** A prosecutor charged the Smiths with 10 counts of homicide under the statute:

> Whoever purposely, knowingly, recklessly, or negligently causes the death of another, shall be guilty of homicide.

The Smiths were charged with manslaughter, but asserted in their defense that they had no duty to save the residents **(ROL: Duty by contract = the document defines affirmative obligations; duty by statute = the law creates affirmative obligations)** from a natural disaster and that they did not *cause* their deaths. **(ROL: Factual cause: "but for"; proximate**

cause: whether the harm was foreseeable; intervening cause: any events that broke the causal chain from the offender to the ultimate harm?)

The Smiths were not the only people in court after the hurricane. People who could not evacuate crammed into a local sports venue. Ken, who was pushed to the basketball court in a wheelchair and who was attached to a blood purification machine that required electricity to run, was placed next to an outlet powered by a generator, but no one knew the generator was not working. One man, Billy Bob **(ROL: Principal is the main actor in committing the crime)**, approached Charles **(ROL: Accessory is a helper, before, during, or after the crime)** and asked if Charles wanted to make some easy money by robbing all the old people in the venue. **(ROL: Solicitation is asking someone to commit a crime)** Charles agreed to rob the seniors. **(ROL: Conspiracy is an agreement to commit a crime.)** Carrying out their plan, Billy Bob and Charles approached vulnerable seniors. Billy Bob saw Ken near the outlet and hit Ken over the head, intending to kill him before robbing him. Unbeknownst to Billy Bob, at the time of the robbery Ken was already dead from the lack of electricity to run his life-saving machine. **(ROL: Attempt is specific intent + unsuccessful *actus reus*; ROL: impossibility is a defense based on the physical impossibility of completing the crime.)**

Billy Bob was charged with solicitation and, along with Charles, was charged with conspiracy and the attempted murder of Ken. How will the cases against Billy Bob, Charles, and the Smiths be resolved?

MENS REA: THE GUILTY MIND

Rule of Law: One can only be in one *mens rea* state at a time.

In criminal law, the defendant's state of mind when she committed a crime, or ***mens rea***, is critical for judges and juries to assign the proper level of responsibility for the crime. A contract killer who kills his victim after loading a pistol, pointing it, and shooting at the victim's vital organs is more responsible, blameworthy, and culpable than a driver who is obeying the speed limit in a residential neighborhood who hits a child who unexpectedly runs into the street. The *mens rea* is the springboard for the criminal act, called the *actus reus*. The *mens rea* for an intentional killing is purposely, whereas the *mens rea* for the accidental killing would be negligently.

Based on the state of mind of the offender, the law defines crimes and grades offenses, such as the difference between murder and manslaughter in the previous example. Some regulatory crimes designed to protect public safety, such as food inspections at restaurants and traffic offenses, require no *mens rea* for the offender to be found guilty. Such crimes are called strict liability crimes, discussed later in this chapter. One is guilty under strict liability by the simple act of committing the prohibited conduct, regardless of intent.

Today's criminal law can trace its roots to early church doctrine that defined acts that harmed society in terms of moral purity.[1] Early definitions of *mens rea* were described as acting "wantonly," "heedlessly," "maliciously," with a "depraved heart," "evil," and with "knowledge aforethought." Today, crimes are defined by legislatures enacting statutes defining forbidden conduct and the required mental state necessary for conviction. The words used to describe the various *mens rea* states can be a confusing and jumbled mess, as scholar Geraldine Moohr writes,

> By one count, federal criminal laws use seventy-eight different *mens rea* terms. These terms often have numerous and conflicting meanings. For example, in bribery and obstruction statutes, Congress uses the *mens rea* term "corruptly," which has no intrinsic meaning, and then guarantees indeterminacy by failing to define it. Courts must construe the term as best they can, depending on the circumstances of the case and a reading of congressional intent. Understandably, interpretations of identical terms have come to vary significantly.[2]

Students are advised to research their respective state jurisdictions and criminal codes to learn the state's crime definitions. A typical law assigning criminal responsibility by requiring concurrence of *mens rea* and *actus reus* is illustrated in the Ohio statute reprinted, in part, on the following page.

To be found guilty in Ohio, an offender needs a culpable mental state (called *culpability* in the statute), a voluntary act, and the absence of a defense, such as intoxication that might interfere with the formation of the requisite *mens rea*.[3] Remember from Chapter 1 the common law rule of lenity applies where courts will resolve any ambiguity in criminal statutes in the defendant's favor to lessen, rather than increase, the punishment.[4]

Ohio Revised Code Annotated 2901.21 (2015)

Requirements for Criminal Liability

(A) Except as provided in division (B) of this section, a person is not guilty of an offense unless both of the following apply:

(1) The person's liability is based on conduct that includes either a voluntary act, or an omission to perform an act or duty that the person is capable of performing;

(2) The person has the requisite degree of culpability for each element as to which a culpable mental state is specified by the language defining the offense.

(B) When the language defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in the section, then culpability is not required for a person to be guilty of the offense.

(C)

(1) When language defining an element of an offense that is related to knowledge or intent or to which *mens rea* could fairly be applied neither specifies culpability nor plainly indicates a purpose to impose strict liability, the element of the offense is established only if a person acts recklessly . . . .

(D) Omitted . . .

(E) Voluntary intoxication may not be taken into consideration in determining the existence of a mental state that is an element of a criminal offense. Voluntary intoxication does not relieve a person of a duty to act if failure to act constitutes a criminal offense. Evidence that a person was voluntarily intoxicated may be admissible to show whether or not the person was physically capable of performing the act with which the person is charged.

(F) As used in this section:

(1) Possession is a voluntary act if the possessor knowingly procured or received the thing possessed, or was aware of the possessor's control of the thing possessed for a sufficient time to have ended possession.

(2) Reflexes, convulsions, body movements during unconsciousness or sleep, and body movements that are not otherwise a product of the actor's volition, are involuntary acts.

(3) "Culpability" means purpose, knowledge, recklessness, or negligence, as defined in section 2901.22 of the Revised Code.

(4) "Intoxication" includes, but is not limited to, intoxication resulting from the ingestion of alcohol, a drug, or alcohol and a drug.

Mens Rea and the Model Penal Code

To streamline the various definitions of mental states used to assign criminal responsibility for an offender's actions, the Model Penal Code (MPC) offers four standard definitions of *mens rea*

states. The *mens rea* states listed in order of culpability (blame) from most to less serious are purposely, knowingly, recklessly, and negligently. Figure 3.1 illustrates how the *mens rea* states resemble the food chain in the sea where big fish eats little fish. The bigger the fish is, the higher the state of moral culpability will be and the more severe the punishment for the offense committed. The *mens rea* states are also exclusive—that is, one cannot possess more than one mental state at a time. One cannot both intentionally and negligently shoot someone even if a statute lists all four mental states, which is common, for example, defining homicide as the "purposeful, knowing, reckless, or negligent killing of another." The public policy reasons behind separating *mens rea* states are similar to the reasons we recognize certain defenses. Society does not hold the person who kills another on purpose to the same level of culpability as the careless smoker who falls asleep with a lit cigarette, setting a house on fire and killing people trapped inside. The average sentences for such crimes differ based on the *mens rea* of bringing about the result where people are harmed. The MPC also addresses **attendant circumstances**, which are external facts surrounding the criminal act required for conviction for certain crimes. In a sexual assault case, if the victim was under the influence of drugs and alcohol, was a child, or was intellectually or physically disabled, those attendant circumstances of victim vulnerability justifies elevating the assault to aggravated status eligible for harsher sentencing.

Rule of Law: Purposely is taking a specific act to bring about a specific result.

Purposely

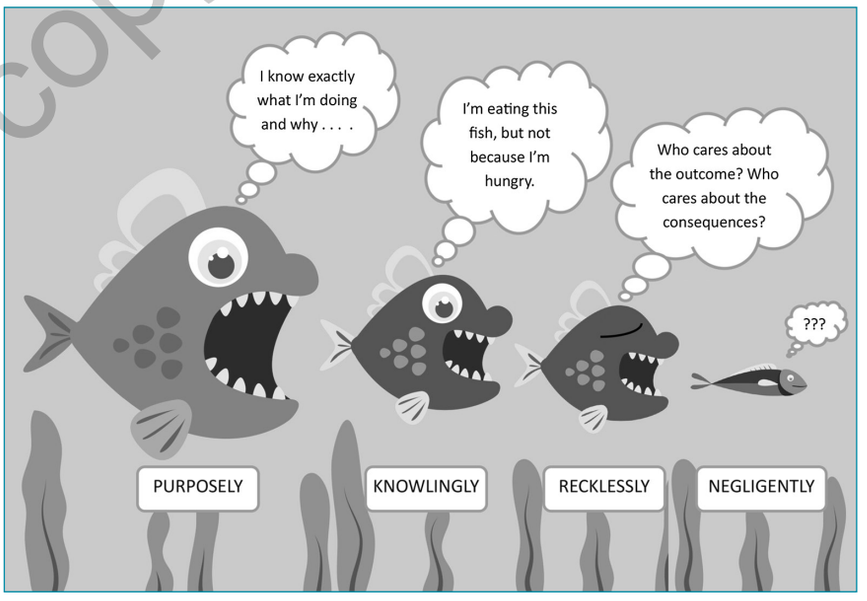
The MPC §2.02 defines ***Purposely*** in the following way:
A person acts purposely with respect to a material element of an offense when

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

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

Acting purposely is taking a specific act to bring about a specific result. If an offender takes a crow bar and creeps about at night with the intent to force open a window in an empty house with the specific intent to rob the house, he has acted purposefully to bring about a specific result, to steal things of value from the home. Purposely is the most culpable *mens rea* state, which would, for example, sustain a first-degree murder conviction, for which the death penalty may be imposed.

Figure 3.1 *Mens Rea* Food Chain



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Knowingly

Rule of Law: Knowingly means the offender was substantially certain that his conduct would bring about a specific result.

The MPC §2.02 defines ***Knowingly*** in the following way:
A person acts knowingly with respect to a material element of an offense when

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

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

Acting knowingly is acting not to bring about a specific result but knowing that such a result is practically certain to occur from one's actions. If a suspect running from the police is caught and flails his arms to free himself, he can be convicted of battery because he knew that his actions of resisting arrest would cause injury to an officer, even though the reason or purpose he flailed his arms was to escape. But the knowing requirement does not mean that the defendant knew a specific injury would result from his conduct, and the prosecutor need not prove that the defendant knew his acts would cause injury.

For instance, Morris burglarized a second-floor apartment and held a knife to the home's occupants, Truman and Harper, and demanded money. When Morris's back was turned, Truman jumped off the balcony. Harper, confused and not wanting to be in the apartment alone with Morris, also jumped off the balcony and sustained serious injuries. Morris was convicted of causing Harper's injuries because escape is a natural reaction to being held hostage. Because Harper's injuries were sustained as she tried to escape from Morris, Morris *knowingly* caused her serious physical harm.[5]

Recklessly

Rule of Law: Recklessly means the offender was aware of the risk of harm to others that his actions created, and he ignored the risk.

The MPC §2.02 defines ***Recklessly*** in the following way:

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.

An example of reckless conduct would be drag racing on a crowded street at rush hour. The racers are aware of but ignore the risk of injury to others that their behavior (driving too fast) creates. Similarly, two friends arguing on the street each pull out a handgun with the intent to scare the other; both guns go off, but a stray bullet enters an adjacent house injuring a man standing in his kitchen. The friends were aware of the risk of harm their behavior (shooting guns to scare each other) created, yet they both ignored the risk and acted anyway. Referring back to the chapter-opening case study, Florida has suffered through many storms, and the Smiths were reckless in not evacuating the residents because power failure is a known risk of hurricanes; they ignored the risk that medically infirm nursing home residents could suffer and perish.

Negligently

Rule of Law: Negligently means the offender is unaware of the risk of harm his behavior creates, but he should be aware.

The MPC §2.02 defines ***Negligently*** in the following way:

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 [the risk] 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 (emphasis added).

Negligent acts are often defined as accidents. Negligence is the smallest of the *mens rea* fish in Figure 3.1, and negligent offenders are the least culpable and suffer less severe punishment than more culpable offenders. The negligence mental state is often used to hold people responsible for accidents or harm caused by ignorance.

Laws That Criminalize Behavior and Identify More Than One *Mens Rea* State

If someone is convicted of a "misdemeanor crime of domestic violence," federal law prohibits them from possessing a firearm.[6] In 2004, Stephen Voisine pleaded guilty to assaulting his girlfriend, a misdemeanor under Maine law that makes it a crime to "intentionally, knowingly or recklessly cause[ ] bodily injury or offensive physical contact to another person."[7] Years later when Voisine killed a bald eagle and authorities found that Voisine owned a rifle, he was charged with violating the federal gun law prohibiting his possession. Voisine was convicted and argued on appeal that he was only "reckless" in assaulting his girlfriend, and his behavior was not the intentional and knowing use of force contemplated by the federal law when Congress decided who should, and who should not, possess a firearm. The U.S. Supreme Court disagreed with Voisine. In relying on the MPC's definitions of the *mens rea* states, the Court made some of the following distinctions and gave the following boyfriend/girlfriend examples about an offender's state of mind when taking actions to hurt people.[8] The examples of each *mens rea* state described by the Court are reflected in Figure 3.2.

Intentionally/Purposely = Act with a state of mind to take actions to hurt someone with the resulting harm the "conscious object" of taking the action. Boyfriend knows his girlfriend is trailing closely behind him and opens the door, turns around as she is about to walk through, and slams the door in her face to cause her harm.

Knowingly = Taking action with the state of mind that you are aware that harm is practically certain to result from your conduct/action. Boyfriend knows his girlfriend is trailing closely behind him and opens the door. If he slams the door shut with his girlfriend following close behind, then he has done so—regardless of whether he thinks it absolutely sure or only quite likely—knowing that he will catch her fingers in the jamb.

Recklessly = Act with a state of mind that a substantial risk of harm to another will result from your actions, but you ignore that risk of harm your behavior creates. Boyfriend throws a plate in anger against the wall near where his girlfriend is standing. The boyfriend was reckless even if he did not know for certain (or have as his state of mind the conscious object of his actions), but only "recognized a substantial risk, that a shard from the plate would ricochet and injure his girlfriend."

Negligently = An accident: Boyfriend "with soapy hands loses his grip on a plate, which then shatters and cuts his" girlfriend, the resulting harm unintentional.

The *Voisine* case is an example of how the high Court interprets criminal law statutes, discusses the antiquated role of common law in defining present-day criminal conduct, and relies on common sense and everyday appreciation for what the phrase "use of force" means in sustaining domestic violence convictions based on reckless conduct.

Springboard for Discussion

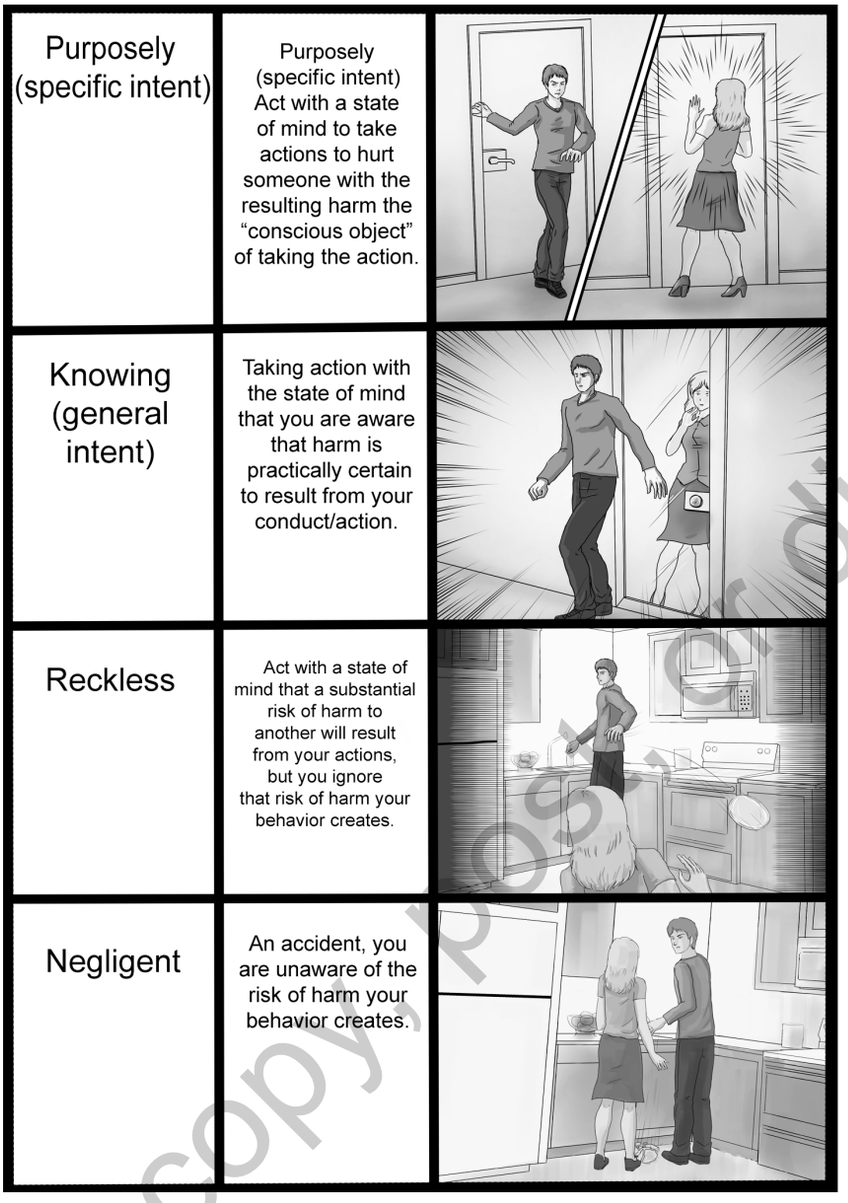
Give the definitions of the *mens rea* states of purposely, knowingly, recklessly, and negligently, and give a brief example of each from your own life experiences sufficient to show your understanding of the differences and similarities among the four mental states.

Intent

Specific and General Intent

Mens rea incorporates the concept of intent, and the terms may be used interchangeably. Some crimes require **specific intent**, which is similar to purposely taking a specific act for a specific

Figure 3.2 *Mens Rea* States



result, for example, punching someone in the nose to bring about the desired result—a broken nose. **General intent** crimes occur when the offender takes a specific action without necessarily desiring a specific result.[9] Today the distinctions between specific and general intent are less common but remain viable to determine if the offender can avail himself of certain defenses. For example, intoxication may be a defense to the charge that the offender had the specific intent to commit a crime such as first-degree murder, but intoxication may not be a defense to general intent crimes such as arson.

In *Linehan v. Florida* (1983),[10] the defendant set fire to his girlfriend's apartment, and a squatter who lived in a storage room died as a result. Linehan was drunk at the time but was convicted of arson (a felony) and felony murder (death occurring as a result of a felony). Linehan appealed his conviction and argued his voluntary intoxication was a defense to the general intent crime of arson. But the Florida

Rule of Law: Specific intent = purposely; general intent = knowingly.

appeals court disagreed and articulated a formula, illustrated by Figure 3.3, to distinguish specific intent from general intent crimes even when both statutes use specific intent language, such as committing a crime "willfully" or "intentionally."

Under the law it is presumed that a man intends the natural and foreseeable results of his actions. But a specific intent crime has an added, or plus, factor that satisfies something unique to the offender that motivates him to commit the crime. Something that is personal to the offender is called **subjective**, a common legal term of art that is best described by imagining a person is looking in a mirror and seeing his own reflection. The *Linehan* court said the crimes of arson, burglary, and kidnapping all require the offender "willfully" and "intentionally" take some action to bring about a desired result such as the burning of a building, the breaking and entering into a structure, the holding someone hostage. The crime of arson is general intent because by starting the fire, the natural consequence of damaging a building will ensue, pursuant to number 1 in Figure 3.3.

MAKING THE COURTROOM CONNECTION

You may find while watching trials, the government may have difficulty in proving a defendant's *mens rea* as defined in the statute under which the defendant has been charged. For instance, at a congressional hearing to confirm the U.S. attorney general in January 2017, a 61-year-old woman who was part of a self-described "Code Pink" activist group laughed out loud in response to a statement that the candidate "treated people equally." She was arrested and charged with "disorderly and disruptive conduct" intending "to impede, disrupt, and disturb the orderly conduct" of the hearing. She was convicted on counts related to the laugh, but a judge threw out her conviction and ordered a retrial because the government could not prove that the laugh fit the required *mens rea* state in the law to disturb the congressional hearing. Judges must apply the law as written.

But burglary and kidnapping are specific intent crimes because of the added plus factor of the offender getting something more out of the crime. The offender is breaking and entering, but it makes it burglary (imagine the offender looking in the mirror to get something more, to determine his subjective intent/reason for committing the crime) because he is going to commit a felony once inside the structure, pursuant to number 2 in Figure 3.3. Similarly, the offender is holding someone against their will by force, but it makes it kidnapping (imagine offender looking in the mirror to get something more, to determine his subjective intent/reason for committing the crime) because he is going to get ransom money in exchange for his hostage, pursuant to number 3 in Figure 3.3. When you read statutes that define crimes, examine whether there is just a general harm that the law proscribes (e.g., general intent in burning a building causing damage), or a more significant harm caused by the offender's personal motivation in committing the crime (e.g., specific intent in burning a building to commit insurance fraud and make money).

Specific Intent Required for Criminal Responsibility for Internet Threats. What happens in criminal law when, in a person's mind, he is just expressing fantasy wishes but other people become afraid and, in their minds, come to believe the fantasies are actual threats? The case excerpt *Elonis v. United States* (2015) concerns a Pennsylvania man who was charged and convicted under a 1939 federal law criminalizing threatening speech affecting interstate commerce. Elonis claimed his Internet postings were a form of online therapy, an activity protected by the First Amendment. In overturning Elonis's conviction, Chief Justice Roberts wrote that "wrongdoing must be conscious to be criminal." As you read the case excerpt on page 74, imagine you are a prosecutor. What type of proof would you introduce to convince a jury that Elonis intended to harm each of the targets named in his "rap"-like poetry?

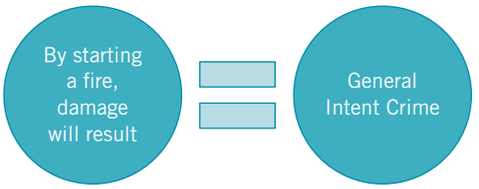
Figure 3.3 Specific Versus General Intent as Illustrated by the *Linehan* Case

***Linehan v. Florida,* 442 So.2d 244 (1983)**

The words "willfully" and "intentionally" are often used **NOT** to characterize specific intent, but to separate the volitional act from the accident.

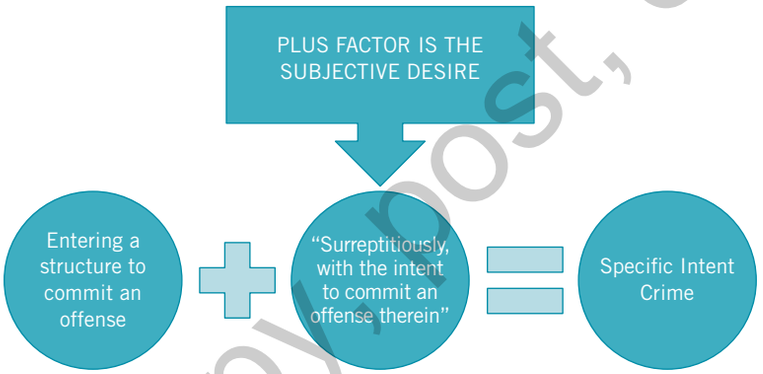
1. **GENERAL INTENT ARSON** **Fla. §806.01**

"Any person who willfully and unlawfully by fire or explosion, damages or causes to be damaged any dwelling"



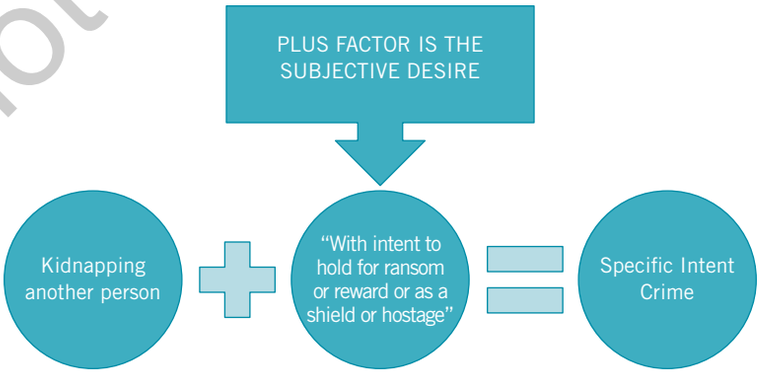
2. **SPECIFIC INTENT BURGLARY** **Fla. §810.02**

"Entering a dwelling, a structure, or a conveyance with the intent to commit an offense therein."



3. **SPECIFIC INTENT KIDNAPPING** **Fla. §787.01**

"Forcibly, secretly, or by threat confining, abducting, or imprisoning another person against her or his will and without lawful authority"



ELONIS V. UNITED STATES, 135 S.CT. 2001 (2015)

Supreme Court of the United States

Chief Justice Roberts delivered the opinion of the Court. (7–2)

FACTS: Anthony Douglas Elonis was an active user of the social networking Web site Facebook. Users of that Web site may post items on their Facebook page that are accessible to other users, including Facebook "friends" who are notified when new content is posted. In May 2010, Elonis's wife of nearly seven years left him, taking with her their two young children. Elonis began "listening to more violent music" and posting self-styled "rap" lyrics inspired by the music. Eventually, Elonis changed the user name on his Facebook page from his actual name to a rap-style nom de plume, "Tone Dougie," to distinguish himself from his "on-line persona." The lyrics Elonis posted as "Tone Dougie" included graphically violent language and imagery. This material was often interspersed with disclaimers that the lyrics were "fictitious," with no intentional "resemblance to real persons." Elonis posted an explanation to another Facebook user that "I'm doing this for me. My writing is therapeutic."

Elonis's co-workers and friends viewed the posts in a different light. Around Halloween of 2010, Elonis posted a photograph of himself and a co-worker at a "Halloween Haunt" event at the amusement park where they worked. In the photograph, Elonis was holding a toy knife against his co-worker's neck, and in the caption Elonis wrote, "I wish." Elonis was not Facebook friends with the co-worker and did not "tag" her, a Facebook feature that would have alerted her to the posting. But the chief of park security was a Facebook "friend" of Elonis, saw the photograph, and fired him.

In response, Elonis posted a new entry on his Facebook page:

> Moles! Didn't I tell y'all I had several? Y'all sayin' I had access to keys for all the f***in' gates. That I have sinister plans for all my friends and must have taken home a couple. Y'all think it's too dark and foggy to secure your facility from a man as mad as me? You see, even without a paycheck, I'm still the main attraction. Whoever thought the Halloween Haunt could be so f***in' scary?

This post became the basis for Count One of Elonis's subsequent indictment, threatening park patrons and employees. Elonis's posts frequently included crude, degrading, and violent material about his soon-to-be ex-wife. Shortly after he was fired, Elonis posted an adaptation of a satirical sketch that he and his wife had watched together. In the actual sketch, called "It's Illegal to Say . . .," a comedian explains that it is illegal for a person to say he wishes to kill the President, but not illegal to explain that it is illegal for him to say that. When Elonis posted the script of the sketch, however, he substituted his wife for the President. The posting was part of the basis for Count Two of the indictment, threatening his wife:

> Hi, I'm Tone Elonis.
>
> Did you know that it's illegal for me to say I want to kill my wife? . . .
>
> It's one of the only sentences that I'm not allowed to say. . . .
>
> Now it was okay for me to say it right then because I was just telling you that it's illegal for me to say I want to kill my wife. . . .
>
> Um, but what's interesting is that it's very illegal to say I really, really think someone out there should kill my wife. . . .
>
> But not illegal to say with a mortar launcher.
>
> Because that's its own sentence. . . .

After viewing some of Elonis's posts, his wife felt "extremely afraid for [her] life." A state court granted her a three-year protection-from-abuse order against Elonis (essentially, a restraining order). Elonis referred to the order in another post on his "Tone Dougie" page, also included in Count Two of the indictment:

> Fold up your [protection-from-abuse order] and put it in your pocket
>
> Is it thick enough to stop a bullet?
>
> Try to enforce an Order
>
> that was improperly granted in the first place
>
> Me thinks the Judge needs an education
>
> on true threat jurisprudence
>
> And prison time will add zeros to my settlement ...
>
> And if worse comes to worse
>
> I've got enough explosives
>
> to take care of the State Police and the Sheriff's Department.

At the bottom of this post was a link to the Wikipedia article on "Freedom of speech." Elonis's reference to the

police was the basis for Count Three of his indictment, threatening law enforcement officers.

[At trial] the jury instructions [read:]

> A statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual.

The Government's closing argument emphasized that it was irrelevant whether Elonis intended the postings to be threats—[the prosecutor said] "it doesn't matter what he thinks."

[Elonis was convicted and sentenced to three years.]

ISSUE: [Even though the federal threat statute makes no mention of *mens rea*, is the specific intent *mens rea* to make a threat required for a conviction, or is it enough that the people hearing the defendant's words feel threatened?]

HOLDING: The Third Circuit's [jury] instruction, requiring only negligence with respect to the communication of a threat, is *not sufficient to support a conviction* under Section 875(c) (emphasis added).

REASONING: An individual who "transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another" is guilty of a felony and faces up to five years' imprisonment. 18 U.S.C. §875(c). This statute requires that a communication be transmitted and that the communication contain a threat. It does not specify that the defendant must have any mental state with respect to these elements. In particular, it does not indicate whether the defendant must intend that his communication contain[s] a threat.

The fact that the statute does not specify any required mental state, however, does not mean that none exists. We have repeatedly held that "mere omission from a criminal enactment of any mention of criminal intent" should not be read "as dispensing with it." This rule of construction reflects the basic principle that "wrongdoing must be conscious to be criminal." As Justice Jackson explained, this principle 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."

The "central thought" is that a defendant must be "blameworthy in mind" before he can be found guilty, a concept courts have expressed over time through various terms such as *mens rea*, scienter, malice aforethought, guilty knowledge, and the like. Although there are exceptions, the "general rule" is that a guilty mind is "a necessary element in the indictment and proof of every crime." We therefore generally "interpret criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them."

This is not to say that a defendant must know that his conduct is illegal before he may be found guilty. The familiar maxim "ignorance of the law is no excuse" typically holds true. Instead, our cases have explained that a defendant generally must "know the facts that make his conduct fit the definition of the offense," even if he does not know that those facts give rise to a crime. The "presumption in favor of a *scienter requirement* should apply to each of the statutory elements that criminalize otherwise innocent conduct" (emphasis added). The mental state requirement must therefore apply to the fact that the communication contains a threat.

Elonis's conviction, however, was premised solely on how his posts would be understood by a reasonable person. Such a "reasonable person" standard is a familiar feature of civil liability in tort law, but is inconsistent with "the conventional requirement for criminal conduct—awareness of some wrongdoing." In light of the foregoing, Elonis's conviction cannot stand. The jury was instructed that the Government need prove only that a reasonable person would regard Elonis's communications as threats, and that was error.

CONCLUSION: The judgment of the United States Court of Appeals for the Third Circuit [upholding Elonis's conviction at trial] is reversed, and the case is remanded for further proceedings consistent with this opinion.

The high Court's reasoning in the *Elonis* case was based on the precedent that to be guilty of a crime that required intent, the government must prove the defendant's intent beyond a reasonable doubt. You recall from the discussion about jury instructions in Chapter 2 that the jury is only allowed to follow the law the judge defines. In *Elonis*, "The jury was instructed that the Government need prove only that a reasonable person would regard Elonis's communications as threats," and that was a mistake because the government had to prove Elonis *intended* to threaten his wife and others. The reasonable person

Springboard for Discussion

What would the consequences be for social media if the high Court found in favor of the government and upheld Elonis's conviction based on his posts?

standard from a victim's perspective is not a substitute for the government proving a defendant's specific intent *mens rea*.

The Scienter Requirement

Scienter is a legal term for knowledge of wrongdoing that some statutes require before a defendant may be found criminally responsible, such as receiving stolen property where the law requires the defendant have scienter that the property is, in fact, stolen. As noted in the *Elonis* case excerpt, the "presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct," which means the law requires the government prove the defendant knew the conduct she was engaging in was criminal. For instance, to be charged with assaulting a police officer, an offender would typically have to know that the victim was a police officer.

Rule of Law: Scienter is knowledge of wrongdoing.

In federal law, there is no scienter requirement to be found guilty of assaulting an officer.[11] In *United States v. Feola* (1975),[12] undercover federal law enforcement agents agreed to purchase heroin from Feola and others. Feola and his confederates planned to deliver fake heroin to their prospective buyers (the undercover officers) or, alternatively, to rob them. The U.S. Supreme Court upheld Feola's conviction for attacking the officers, despite his claim he had no scienter (i.e., no knowledge) that the victims were federal officers, because the law required only an intent to assault, not necessarily the intent to assault a federal officer. The Court declared that to hold otherwise—that Feola and friends could go home despite their criminal acts—would give no protection to undercover officers and society could not abide by such a result.

Strict Liability

Rule of Law: Under strict liability, an offender is guilty for the act alone; no mental state is required.

Under early common law, crimes were often defined or separated based on their perceived evil or damage to society. Regulatory crimes are typically **strict liability**, which means the offender may be found guilty simply by performing the prohibited act, no *mens rea* required. Strict liability crimes typically prohibit or constrain the sale of liquor, food, drugs, motor vehicle violations, and other safety regulations passed for the well-being of the general public. The Supreme Court described the genesis of strict liability crimes in *Morissette v. United States* (1952):

> 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.[13]

Thus, a manager at a gas station where they sell hot dogs that roll under hot lights overnight might receive a citation from the city health inspector for serving tainted food products, regardless of whether the station manager "intended" or "knew" (had the requisite *mens rea*) that the food sat out for far too long. Punishing the manager solely because of the act of leaving food out to spoil, and not his subjective intent to harm the public with contaminated hot dogs, sends a message to all establishments serving food that they had better pay attention to the quality of the food they sell or suffer the consequences. Traveling above the speed limit is often a strict liability crime. If people know they will receive an expensive fine if caught speeding regardless of their excuse or *mens rea* while driving fast, they will generally obey the speed limit, which, in turn, protects the public from unnecessary car accidents caused by reckless driving. The typical punishment for violating a strict liability statute is a fine and not jail.

Transferred Intent

Rule of Law: Intent to harm someone transfers to an unintended target.

Transferred intent is specific intent in which the offender intends to cause harm but hurts or damages the wrong target; the intent to harm transfers to the unintended target and the offender will be held responsible for the mistake. We see the doctrine of transferred intent most often in homicide cases where the defendant has bad aim and kills an innocent victim. Surely, no one wants to let the offender go free simply because he made a mistake and claims, "But I did not mean to kill Sally; I was aiming at Laval." The offender is responsible for the specific intent first-degree murder because the intent for the intended victim transferred to the bystander.

An offender has the same defenses under the doctrine of transferred intent as he would have in an ordinary case. For instance, Sam does not mean to kill Leslie, only hurt her. When Sam moves to hit Leslie, but Leslie ducks and Sam kills Bill instead, Sam still has a defense that he only meant to cause serious bodily harm to Leslie, not death. Likewise, if a police officer were executing a lawful arrest and unintentionally caused injury to a bystander, the officer's defense of simply doing her job would extend to the bystander.

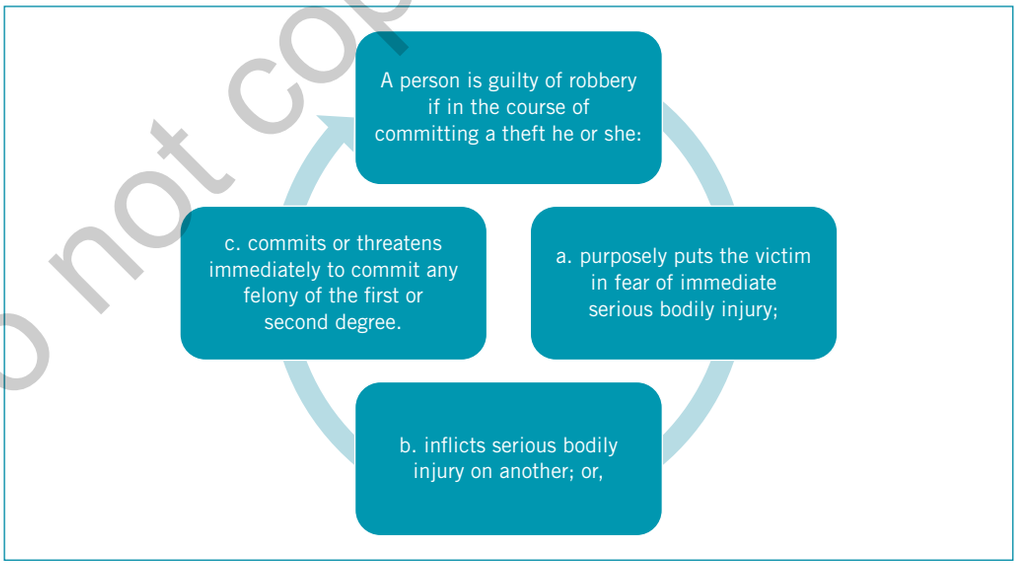
Element Analysis

Rule of Law: To find a defendant guilty, the prosecution must prove every element (piece) of a crime beyond a reasonable doubt.

Elements are like spokes on a wheel, without which the wheel could not turn; each **element** of a crime is an integral part of the crime that the prosecutor must prove beyond a reasonable doubt to convict the defendant. The elements of a criminal definition typically include a *mens rea* state (purposefulness, knowingness, recklessness, or negligence) and the prohibited conduct the law seeks to prevent or punish, as illustrated in Figure 3.4. For example, the basic elements of robbery are, while committing a theft, the offender purposely (*mens rea*) puts the victim in fear of immediate serious bodily injury (SBI), inflicts SBI, or commits or threatens immediately to commit any first- or second-degree felony (the *actus reus*). If the prosecutor fails to prove any element of the crime, the law requires that the defendant *must* be found not guilty of the charge. Learning the elements of crimes is a great aid in understanding what type of proof the prosecutor is required to introduce to convince a jury of the defendant's guilt.

Sometimes elements of charged crimes overlap. The same elements that might support a charge of assault and battery will also be included in the more serious charge of attempted murder.

Figure 3.4 Elements of Robbery Wheel



Assault and battery are charges lesser in severity than attempted murder; called **lesser included offenses**, they are the less serious crimes that are naturally part of the more serious crime. The doctrine of **merger** holds that if the defendant is convicted of the more serious offense, the lesser included offenses merge (get absorbed); for example, the crimes of assault and battery will merge on the defendant's conviction for murder. Often prosecutors charge a defendant with many different serious crimes and their lesser included offenses to ensure that the defendant is convicted of at least one crime. Notice that motive, the reason an offender may commit the crime, is not an element the prosecution must prove at trial.

Principle of Legality

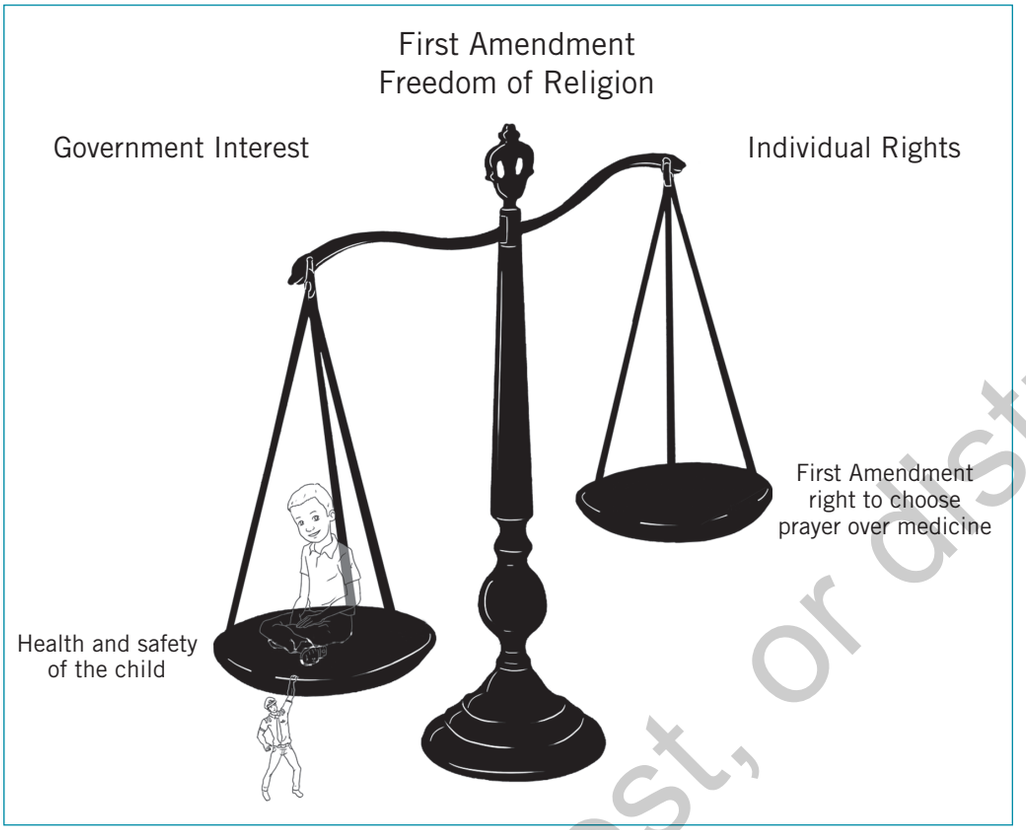
Society needs to clearly define criminal conduct to inform people which acts are criminal. The **principle of legality** requires that the law notify what conduct will be punished. Giving citizens fair warning of what conduct will be punished fosters respect for the law. Many states have written criminal codes based on the MPC's elements of crimes that establish liability on the part of the offender. To criminalize specific conduct, the government must state with specificity what behavior, if engaged in, will or will not be a crime.

An example of the principle of legality is the case *Commonwealth v. Twitchell* (1993),[14] in which the Christian Scientist Church of Boston, Massachusetts, asked the state's top legal authority, the state attorney general, if the adherents could choose prayer instead of seeking medical treatment. The state's answer was "yes," but when the Twitchell's 2-year-old son, Robyn, died of an easily curable bowel obstruction, the parents were prosecuted for allowing their son to die. The Twitchell's appeal was based on the principle of legality arguing that because the attorney general gave permission for the Church to choose prayer instead of medicine, how were the Twitchells to know they were breaking the law? The state argued in response that everyone should know a sick child requires a doctor's care and failure to seek care leads to criminal responsibility for the child's death. The appellate court found the principle of legality was violated because the law governing faith-based healing and the state's legal response to the church's practice were nonspecific; the Twitchells' conviction was overturned. The state declined to prosecute the Twitchells again, but the couple remained under court order to provide medical care for their other children until they reached adulthood. From a courtroom perspective, the *Twitchell* case demonstrates the balance of justice is in favor of the government's compelling state interest protecting the health and safety of children, which outweighs the family's First Amendment right to choose prayer over modern medicine, as illustrated by the scales of justice in Figure 3.5.

An example of the intersection of the law's requirement that the government prove the defendant guilty beyond a reasonable doubt of each and every element of the crime and the principle of legality's requirement that the law define what conduct will be punished is the federal law, the Armed Career Criminal Act (ACCA), initially passed into law to increase the severity of punishment for those repeat offenders who use firearms in the commission of their crimes (18 U.S.C. §924, 1984). The ACCA provides that if an offender has three or more previous convictions for a "violent felony" or a "serious drug offense," and she was convicted of a crime involving the use of a firearm, she would serve no less than 15 years in prison and up to a maximum life sentence. In defining the predicate (triggering) offenses for the ACCA sentencing enhancement, the law defined a "violent felony" as "otherwise involves conduct that presents a serious potential risk of physical injury to another," known as the residual clause. Samuel Johnson was convicted and sentenced under the ACCA's residual cause because one of his prior violent felonies was possession of a sawed-off shotgun. His appeal made it to the U.S. Supreme Court, which ultimately struck down the ACCA's residual clause as too "vague" in *Johnson v. United States* (2015).[15] Because people had to guess what "otherwise involves conduct" meant, the public did not know what acts were criminal, and the evidence was too imprecise to meet the burden of proof for that ACCA element violating the Constitution's guarantee of due process, the high Court said.

Lawmakers must ensure that the public is aware that the conduct sought to be punished is specifically described to put them on notice of the potential criminal liability of their actions.

Figure 3.5 The Scales of Justice Illustrating the *Twitchell* Case



ACTUS REUS: THE GUILTY ACT

Actus Reus Must Be Voluntary

Rule of Law: To be criminal, a person's acts must be voluntary.

Under the traditional common law, a person could not be charged with a crime for having criminal thoughts alone. Typically, individuals are free to think of committing criminal acts, and if they do not act on those desires, they will not be prosecuted.[16] The term ***actus reus*** means "guilty act"—a voluntary act that gives rise to criminal liability. Criminal acts must be voluntary. The MPC §2.01 has expressly excluded the following acts from those making one criminally responsible:

1. A reflex or convulsion;
2. A bodily movement during unconsciousness or sleep;
3. Conduct during hypnosis or resulting from hypnotic suggestion;
4. A bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual.

In the "Making the Courtroom Connection" feature earlier in this chapter, the woman prosecuted for laughing and disrupting a congressional hearing has the defense that her laugh was involuntary and, therefore, not criminal.

The *mens rea* must launch the offender into taking the *actus reus*, as the high Court has said, "an evil meaning mind with an evil doing hand."[17] **Concurrence** is the marriage of *mens rea* and *actus reus* at the time the crime is committed making the offender criminally responsible. If Joe

Rule of Law: Concurrence is the marriage of *mens rea* and *actus reus* at the time of committing the crime.

wants his neighbor dead and thinks about it all day and, while at the supermarket, backs out of his parking space without looking and strikes a pedestrian, later discovered to be his hated neighbor Frank, Joe will not be responsible for intentionally killing Frank. Joe's murderous thoughts about Frank did not form the springboard of the act of running Frank over. The concurrence requirement saves the criminal justice system from pursuing fruitless prosecutions for acts unconnected to any specific intent, even though those acts may be punished under a theory of negligence.

The Duty to Act and Liability for Acts by Omission

To determine whether someone has a duty to act under the law, the omission of which would lead to criminal liability, the first question to ask is to whom does a person owe a duty of reasonable care? In the seminal civil tort (injury) case *Palsgraf v. Long Island Railroad* (1928),[18] a woman was waiting on a train platform to go to Rockaway Beach, New York, when an outbound train stopped at the station. As the train was moving away from the station, a man carrying a package of fireworks jumped onto the train while one guard grabbed his arm and another pushed him from behind to get him onto the train. The package of fireworks fell from the man's arms onto the rails, exploded, and knocked over a set of scales next to Mrs. Palsgraf, who was injured. She sued the train company for her injuries, claiming that the employees' actions of pulling and pushing the man caused the fireworks to fall and explode, but her lawsuit failed. The court said, "Proof of negligence in the air, so to speak, will not do . . . negligence is the absence of care, according to the circumstances." The court said the railroad owed Mrs. Palsgraf *no* duty of care; rather, the railroad owed a duty of care directly to the man pushed and pulled before he boarded the train. A person owes a duty of care *only* to those whom he might injure by his actions.

Under the law today, we still punish those who have a certain duty of care to others and who breach (break) that duty by some act of commission or omission (failure to act). Different types of duty are recognized by the law. There is a **duty by contract**, which is a document creating affirmative legal obligations for the parties who sign the contract: for example, after a tenant signs a lease with a landlord, the landlord has a duty to provide a decent place to live and the tenant has a duty to pay rent. Similarly, there is a **duty by statute**, which are affirmative obligations stated in the law, such as the law that requires people involved in car accidents to remain at the scene and, in some instances, to render aid to known victims. In our chapter-opening case study, the Smiths had a duty by contract and by statute to care for the residents entrusted to them. The resident signed a contract agreeing to pay fees in exchange for care, and state law imposes responsibilities on those running assisted living facilities. In a **duty by relationship**, a parent, spouse, or other responsible family member has a legal obligation to provide medical, dental, and educational services to a dependent family member. The failure to do so could be considered a criminal act.

There is also an **assumption of the duty**, which is help freely given to others with no attendant legal obligation. People may help others in peril, and this creates no legal obligation between the parties. An individual who is an expert swimmer is not required by law to try and rescue a floundering swimmer in distress. But if someone undertakes the duty to rescue, then it is incumbent on the would-be rescuer to finish the job. That is, if a person on a crowded beach sees a swimmer floundering and says to the crowd of onlookers, "I'll save him; everybody stay here," and then halfway to the drowning victim, the rescuer changes his mind and turns back to shore, his actions prevented others from undertaking a rescue attempt and he may be criminally responsible for thwarting a successful rescue attempt if the swimmer does, indeed, drown and die.

Good Samaritan Laws. **Good Samaritan laws** protect from personal injury lawsuits those who rescue those in peril. Bad Samaritan laws punish people for failing to help victims in need.[19] All U.S. jurisdictions have a Good Samaritan statute whereby people who help others in distress are immune from liability (cannot be sued) for the help they give. Although each state's laws are different—for instance, in some states only those who are certified and trained as first-aid responders are protected from a lawsuit, and in other states all helpers are legally protected—there are some general features common to most Good Samaritan laws:

1. There is no duty to act unless a duty by relationship exists.
2. The help provided cannot be in exchange for money or financial reward.
3. The person giving aid need not put himself in any danger by providing services, but if there is no threat of harm and the giving of aid has begun, usually the first one to give aid should stay until help arrives.

Typically, there is no affirmative duty to report a crime and many states do not have laws imposing an obligation on people to help one another. But after gut-wrenching stories of people witnessing brutal sexual assaults, particularly against children, and doing nothing, many states enacted laws imposing a duty, in certain circumstances, on the bystander to attempt a rescue of a stranger in peril or to contact the authorities for help. If someone knows of the actual commission of a federal crime and does not alert authorities, the person may be guilty of the crime Misprision of a Felony, which carries on conviction the punishment of fines and imprisonment (18 U.S.C. §4).

Springboard for Discussion

In 2017, teenagers taunted 32-year-old James Dunn, who appeared to be drowning in a Cocoa, Florida, pond. The teens swore at the man and laughed as they filmed his last breath on a cell phone. One of the teens can be heard saying, "Oh, he just died." Florida's Good Samaritan laws do not require bystanders to help those in peril, so the teens did not face any criminal liability for their actions. Do you agree that the law should not force people to help others in need? How would the prosecutor prove the bystander's *mens rea* to hold them responsible?

Possession as an Act

In strict legal terms, possession of drugs, possession of contraband (items that are illegal to possess), and possession of illegal weapons are not acts, but under the law, possession is treated as *actus reus* for criminal responsibility. There are two types of possession generally recognized in the law, actual and constructive. **Actual possession** is physically possessing contraband—vials of crack cocaine in a pants pocket, for instance. **Constructive possession** is a legal fiction (false reality) that arises from inferences from facts that lead a jury to assume a logical conclusion. For example, three roommates share an apartment and share common living areas, the bathroom, kitchen, and living room. All roommates are deemed to have control over the common spaces. If the roommates are aware that there are bricks of marijuana hidden in the freezer and do nothing to terminate the possession (e.g., throw the marijuana away), then when the police come to execute a search warrant, all roommates can be arrested for drug possession. The prosecutor will have to prove that all the roommates knew or should have known that the drugs were in the freezer even though when seized, technically, none of the roommates "possessed" the drugs. The MPC, section 2.01, expressly provides that one is criminally responsible for possession if

Springboard for Discussion

What goals in society do possession laws help achieve? What type of evidence would sustain a constructive possession conviction?

1. The possessor knowingly procured or received the thing possessed.
2. The possessor was aware of his control thereof for a sufficient period to have been able to terminate his possession.

Status as an Act

One's **personal status** as an alcoholic, drug addict, or pedophile is not a crime because of the lack of a guilty act. Even though one's personal status as a drug addict may lead to criminal activity, such as stealing to support one's habit, the mere act of being a drug addict is not criminal. In *Robinson v. California* (1962), the U.S. Supreme Court overturned a California statute that criminalized status as an addict.[20] The Court invalidated the statute, and any others like it across the country, because "a law which made a criminal offense of such a disease would doubtless be universally thought of to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." Lower courts in subsequent cases have discussed whether alcoholism is a disease.[21] If alcoholism were a disease, and many medical experts agree that it is, alcoholics would be exempt from crimes committed while

Rule of Law: Personal status is not inherently criminal because there is no *actus reus*.

under the influence, because the alcoholic would have no control over his status. But the court went on to distinguish the status of being an alcoholic from the physical act of drinking and stated, "Alcoholics should be held responsible for their conduct; they should not be penalized for their condition."

Rule of Law: The offender must be the factual and legal cause of the victim's harm/death to be held criminally responsible.

CAUSATION

Causation Analysis

The concept of criminal **causation** serves to assign the appropriate level of blame in accordance with the offender's *mens rea* state and the ultimate harm or death the offender caused by his acts. For a defendant to be held responsible for a victim's harm or death, she must be *both* the factual and legal cause of the ultimate harm *without* an intervening cause severing the offender's original acts from the ultimate injury or death. The causation formula is

1. **Factual cause** = "but for" the offender's conduct, would the victim have been harmed?
2. **Proximate cause** = is the ultimate harm foreseeable from the offender's conduct?
3. **Intervening cause** = is there something external to the offender's conduct breaking the causal chain from the offender to the ultimate harm?

The factual cause is established by asking the question, "but for the defendant's acts, would the ultimate harm have happened?" or "but for X, would Y have happened?" If the answer is NO, the victim's harm would not have happened if the offender did not first act, then the offender is the factual cause of the victim's harm.[22] In the chapter-opening case study, "but for" the Smiths' decision not to move the residents before Hurricane Michael made landfall, would the residents have died? If the answer is "no," then the Smiths are the factual cause of the 10 resident deaths.

The next question in the causation analysis is whether the ultimate harm was foreseeable or predictable from the offender's first act. Proximate cause is the naturally foreseeable last event from the offender's action that caused the victim's harm. The law seeks to punish people for the natural consequences of their acts, not freakish random acts, even if their initial conduct started the chain of events that ended in harm. If one friend chases another into a swollen creek where he drowns, the drowning is a natural, foreseeable consequence of the initial chasing act. But if one friend chases another into a swollen creek where she is picked up by a band of pirates and forced to walk the plank to her death, this event is not a foreseeable consequence from the initial act of chasing. The chaser is the factual cause of the death: "But for" the chase into the creek, no death would have occurred. However, the harm suffered must be reasonably foreseeable as a natural consequence of the defendant's actions, which the pirate abduction is not. In our chapter-opening case study, the Smiths are the proximate cause of the residents' deaths because it is predictable that people will die in severe and violent storms and deciding not to evacuate increases the risk of harm.

Even if the ultimate harm was foreseeable, there may be an intervening cause that breaks the causal chain between the offender's act and the victim's harm. An intervening cause is external to the offender's conduct. But the existence of an intervening cause may not totally relieve the defendant from liability, as some jurisdictions find that if the defendant's initial conduct created intervening events they "do not operate to exempt a defendant from liability if the intervening event was put into operation by the defendant's" actions.[23]

For example, the state of New Jersey allows patients to make end-of-life decisions and terminate their life support and die peaceably. In a drunk-driving case, *New Jersey v. Pelham*, excerpted on the following page, the victim decided to die by shutting off his life support. The question for the court is whether the victim's suicide is an intervening cause breaking the causal chain between the drunk driver's responsibility for the accident and injury and the ultimate death of his victim. Read the case excerpt and question whether you agree with the court's reasoning under the traditional causation analysis.

NEW JERSEY V. PELHAM, 824 A.2D 1082 (N.J. 2003)

Supreme Court of New Jersey

FACTS: The facts of the horrific car accident in which [the] defendant, Sonney Pelham, was involved are summarized from the trial record. On the evening of December 29, 1995, William Patrick, a sixty-six-year-old lawyer, was driving his Chrysler LeBaron . . . At approximately 11:42 p.m., a 1993 Toyota Camry driven by [the] defendant struck the LeBaron from behind. The LeBaron sailed over the curb and slid along the guardrail, crashing into a utility pole before it ultimately came to rest 152 feet from the site of impact. The Camry traveled over a curb and came to rest in a grassy area on the side of the highway. Patrick was making "gurgling" and "wheezing" sounds, and appeared to have difficulty breathing. His passenger, Jocelyn Bobin, was semiconscious. Emergency crews extricated the two using the "jaws of life" and transported them to Robert Wood Johnson University Hospital. Bobin was treated and later released.

At the accident scene, Officer Heistand smelled an odor of alcohol on [the] defendant's breath, and noted that he was swaying from side to side and front to back. Three field sobriety tests were conducted. Defendant failed all three. Two separately administered tests indicated that [the] defendant's blood alcohol content (BAC) at that time was .18 to .19. Experts assessed his BAC between .19 and .22 at the time of the accident.

On March 13, 1996, Patrick was transferred to the Kessler Institute for Rehabilitation (Kessler), because it specialized in the care of patients with spinal cord injuries. When he arrived, Patrick was unable to breathe on his own, and was suffering from multi-organ system failure. Medication was required to stabilize his heart rhythm. He was extremely weak, with blood-protein levels that placed him at high risk of death. He was unable to clear secretions in his airways, and thus his oxygen levels would drop requiring medical personnel repeatedly to clear the secretions. Complications from the ventilator caused pneumonia to recur due to his inability to cough or to protect himself from bacteria. Bowel and urinary tract infections continued.

While at Kessler, Patrick also was monitored by psychiatric staff. He presented as depressed, confused, uncooperative, and not engaged psychologically. At times, he was "hallucinating," even "psychotic." The staff determined that he was "significantly" brain injured. Nonetheless, Patrick was aware of his physical and cognitive disabilities. During lucid moments, he expressed his unhappiness with his situation, and, on occasion, tried to remove his ventilator. Patrick improved somewhat during the month of April, but then his condition rapidly regressed. By early May, severe infections returned, as well as pneumonia.

It was undisputed at trial that Patrick had expressed to his family a preference not to be kept alive on life support. Because of his brain damage, his lack of improvement, and his severe infections, Patrick's family decided to act in accordance with his wishes and remove the ventilator. He was transferred to Saint Barnabas Medical Center and within two hours of the ventilator's removal on May 30, 1996, he was pronounced dead. The Deputy Middlesex County Medical Examiner determined that the cause of death was sepsis and bronchopneumonia resulting from multiple injuries from the motor vehicle accident.

ISSUE: Whether a jury may be instructed that, as a matter of law, a victim's determination to be removed from life support is a foreseeable event that does not remove or lessen criminal responsibility for death.

HOLDING: We hold that there was no error in instructing the jury that a victim's decision to invoke his right to terminate life support may not, as a matter of law, be considered an independent intervening cause capable of breaking the chain of causation triggered by defendant's wrongful actions.

REASONING: New Jersey has been in the forefront of recognizing an individual's right to refuse medical treatment. It is now well settled that competent persons have the right to refuse life-sustaining treatment. Even incompetent persons have the right to refuse life-sustaining treatment through a surrogate decision maker. We turn then to examine the effect to be given to a victim's exercise of that right in the context of a homicide trial.

Defendant was charged with aggravated manslaughter, which, according to the New Jersey Code of Criminal Justice (Code), occurs when one "recklessly causes death under circumstances manifesting extreme indifference to human life." The trial court charged the jury on aggravated manslaughter and the lesser-included offense of second-degree vehicular homicide, defined as "[c]riminal homicide . . . caused by driving a vehicle or vessel recklessly." Causation is an essential element of those homicide charges.

The Code defines "causation" as follows:

> . . . Conduct is the cause of a result when: (1) It is an antecedent but for which the result in question would not have occurred; and (2) The relationship between the conduct and result satisfies any additional causal requirements imposed by the code or by the law defining the offense. . . .

(Continued)

(Continued)

When the offense requires that the defendant recklessly or criminally negligently cause a particular result, the actual result must be within the risk of which the actor is aware or, in the case of criminal negligence, of which he should be aware, or, if not, the actual result must involve the same kind of injury or harm as the probable result and must not be too remote, accidental in its occurrence, or dependent on another's volitional act to have a just bearing on the actor's liability or on the gravity of his offense.

The causation requirement of our Code contains two parts, a "but-for" test under which the defendant's conduct is "deemed a cause of the event if the event would not have occurred without that conduct" and, when applicable, a culpability assessment. Under the culpability assessment, [w]hen the actual result is of the same character, but occurred in a different manner from that designed or contemplated [or risked], it is for the jury to determine whether intervening causes or unforeseen conditions lead to the conclusion that it is unjust to find that the defendant's conduct is the cause of the actual result. Although the jury may find that the defendant's conduct was a "but-for" cause of the victim's death, it may nevertheless conclude that the death differed in kind from that designed or contemplated [or risked] or that the death was too remote, accidental in its occurrence, or dependent on another's volitional act to justify a murder conviction.

Our Code [New Jersey law], like the Model Penal Code (MPC), does not identify what may be an intervening cause. "Intervening cause" is defined as "[a]n event that comes between the initial event in a sequence and the end result, thereby altering the natural course of events that might have connected a wrongful act to an injury" *Black's Law Dictionary* (7th ed., 1999).

Generally, to avoid breaking the chain of causation for criminal liability, a variation between the result intended or risked and the actual result of defendant's conduct must not be so out of the ordinary that it is unfair to hold defendant responsible for that result. A defendant may be relieved of criminal liability for a victim's death if an "independent" intervening cause has occurred, meaning "an act of an independent person or entity that destroys the causal connection between the defendant's act and the victim's injury and, thereby becomes the cause of the victim's injury." Removal of life sustaining treatment is a victim's right. Because the exercise of the right does not break unexpectedly or in any extraordinary way, the chain of causation that a defendant initiated and that led to the need for life support, it is not an intervening cause that may be advanced by the defendant.

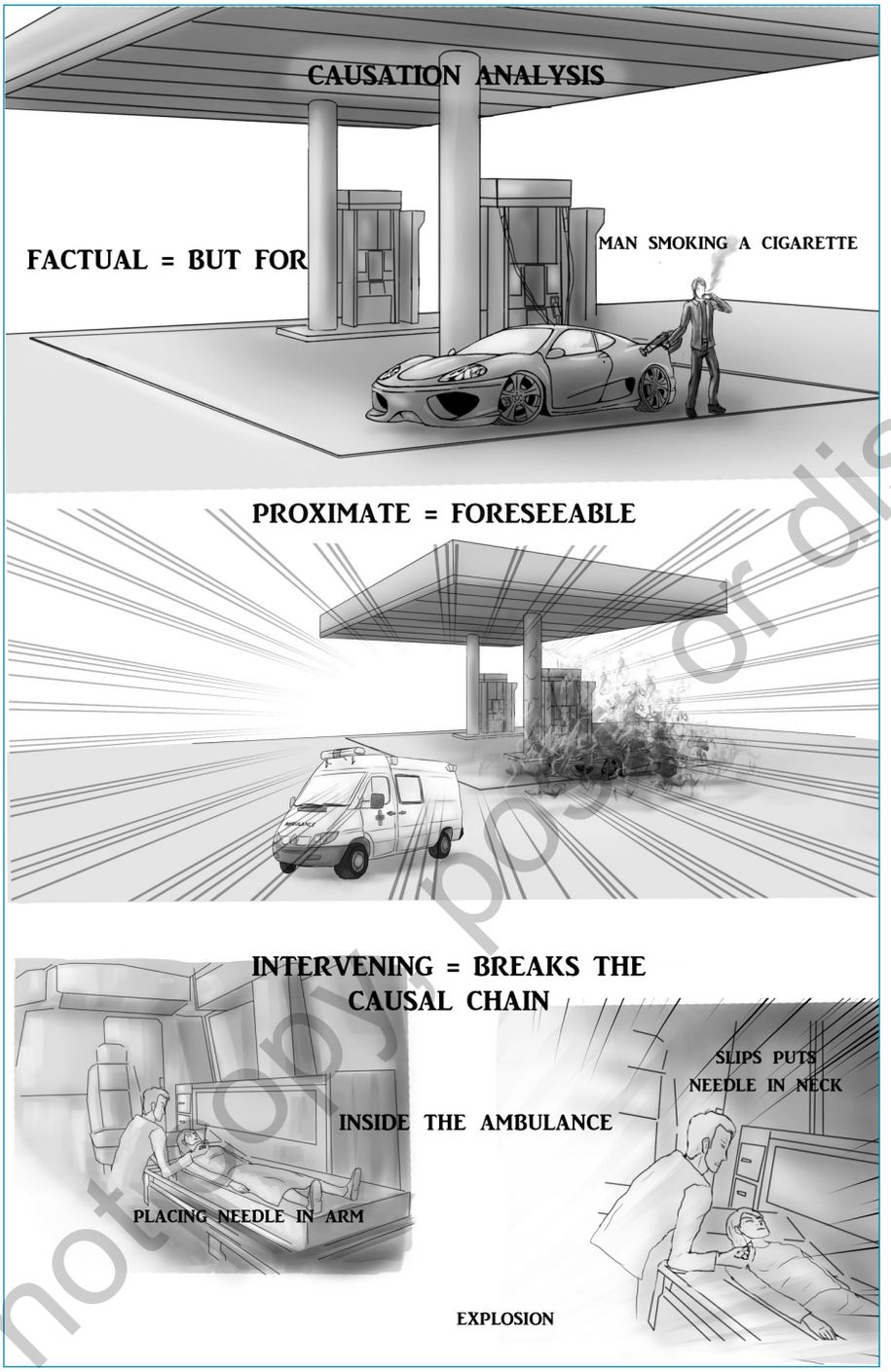
CONCLUSION: [Pelham's conviction is upheld.]

Springboard for Discussion

An offender led police on a high-speed chase. When the officer chasing him killed an innocent bystander, such a result was the natural, predictable consequence of the high-speed chase and the offender was held responsible for the bystander's death. But had the offender led the police on a high-speed chase and, as he was driving, the side of a building randomly and unpredictably collapsed on a bystander killing him, the result would be "so extraordinary or surprising" that the offender could not, under the law, be responsible for the bystander's death. Should people be responsible for all the harm caused when they set events in motion whether foreseeable or not? (*State v. Lovelace,* 1999).

In *Pelham*, state law allowed people to end life support, so the victim's decision to die was a naturally foreseeable result of the defendant's drunk driving. Because the victim's suicide was not an intervening cause, breaking the causal chain between the drunk driving and the victim's death, Pelham remained responsible for Patrick's death. Another example of the causation doctrine is a man who smokes a cigarette while pumping gas in a high-performance vehicle, causing an explosion, as illustrated in Figure 3.6. The subsequent explosion rocks the gas station and an ambulance driving nearby, causing a needle intended to be placed in the patient's arm to jerk and pierce the victim's neck, killing her. Is the smoking man criminally responsible for the ambulance patient's death? But for the smoking man, would the gas pumps have exploded? The answer is no, so the man is the factual cause. Is an explosion a foreseeable predictable event from smoking while pumping gas into a specialty car? The answer is yes, so the man is the proximate cause of the patient's death. The last question to ask is whether there is any intervening causes breaking the causal chain between the offender and the victim. The answer is yes; the emergency medical technician's slip of the intravenous needle, severing the patient's carotid artery while in the ambulance breaks the causal chain between the smoking man and the patient's death. The intervening cause is external to the smoker, and the patient's death was caused by the technician. The smoker will be responsible for harm flowing from the explosion but not the patient's death, because death by a needle in the neck is not a natural consequence of smoking at a gas station. In our chapter-opening case study, there was no intervening cause breaking the chain from the Smiths and the residents' deaths because loss of power is a natural consequence of a hurricane.

Figure 3.6 Causation Analysis Illustration



PARTIES TO CRIME

In common law, parties to crimes were defined either as principals, who committed the crime, or as accessories, those who helped the principals commit the crime or escape afterward. The common law distinction between principals and accessories went further and separated such parties

Rule of Law: An offender aids and abets a crime when, in addition to taking a step toward committing the crime, he intends to facilitate that offense's commission.

Rule of Law: Common law distinguished between principals and accessories to determine grades of punishment; under today's modern statutes, they are typically punished equally.

by degree, or an accessory before or after the fact—distinctions based on the level of participation and involvement of each actor.

Principals and Accessories

A **principal to the crime** is the primary perpetrator. Under common law, principals were divided into first and second degrees. A principal in the first degree is one who committed the crime, and one in the second degree (an aider or abettor) was one who aided, counseled, and assisted the commission of the crime and was present during the crime. An accessory is one who was absent during the commission of the crime but who participated as a contriver, instigator, or advisor. If the accessory gives help to the criminal principal before the crime, she is called an **accessory before the fact**. If she helps the criminal principal escape from the crime scene or hide from authorities, she is called an **accessory after the fact**. The common law distinction between principals and accessories was important for sentencing such offenders; society wanted to punish more harshly those who had committed the crime than those who merely helped. Today under many state statutes, the distinctions between principals and accessories are blurred and they are punished equally. The philosophy behind punishing them equally is that the crime could not be committed without both accessories and principals playing primary roles. The Michigan Compiled Laws §767.39 (2015), titled "Abolition of distinction between accessory and principal" is such an example and provides

> Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procedures, counsels, aids, and abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.[24]

In the chapter-opening case study, Billy Bob was the principal in organizing the crime and Charles was his accessory, but under present-day law, they would face similar penalties for their acts.

INCHOATE CRIMES

Inchoate crimes are preparatory or incomplete. Society punishes unsuccessful criminals who are unable to complete their criminal acts because their repeated attempts to achieve their criminal goals may pose more of a danger to society than the successful criminals.

Solicitation

Solicitation is defined by the MPC §5.02 as "asking, encouraging or demanding another commit a crime or an attempt to commit a crime." The crime is often associated with prostitution, where the sex worker will ask people to pay money in exchange for sexual favors. To be convicted of solicitation, an offender must demonstrate specific intent to engage someone else in the commission of the crime: the act of asking is the crime. Early solicitation statutes divided the crime into degrees, but most states have enacted comprehensive statutes that stipulate that once one person invites another to commit a crime, the harm has been done.

Rule of Law: Solicitation is asking, encouraging, or demanding someone commit a crime.

It is a defense to the crime of solicitation if the offender voluntarily renounces (abandons) the plan; that is, once you have asked someone to commit a crime, you may change your mind and withdraw by telling the person you solicited that you no longer wish to commit the crime, or if the criminal activity continues, by notifying the authorities that they should attempt to prevent the crime. Pennsylvania's statute is illustrative of how to renounce:

It is a defense that the actor, after soliciting another person to commit a crime, persuaded him not to do so or otherwise prevented the commission of the crime, under circumstances manifesting a complete and voluntary renunciation of his criminal intent. (18 Pa. Code §902)

It is not a defense for the one who asked another to commit a crime that the person so solicited could not have committed a crime, called factual impossibility. For example, if a businessman solicits murder by hiring a hit man to kill his partner, and the hitman turns out to be an undercover police officer, the businessman remains criminally responsible. The businessman will still be guilty of solicitation because the facts as he believed them to be, if true (hiring a hitman, not an undercover officer), would have led to the commission of the crime. Solicitation is not prosecuted as an attempt crime because the solicitous acts are preparatory and attempts require *actus reus* that goes beyond mere preparation.

Conspiracy

Conspiracy is a common charge in criminal cases because the elements are easy to prove when more than one person agrees to commit a crime. The basic element of a criminal **conspiracy** is an agreement to commit a crime and, in many jurisdictions, committing an overt act toward completing the object of the conspiracy. An example of a state statute of conspiracy is in the Texas Penal Code.

Texas Penal Code, Title 4 Inchoate Offenses, Chapter 15 Preparatory Offenses §15.02 (2015)

§15.02. Criminal Conspiracy

(a) A person commits criminal conspiracy if, with intent that a felony be committed:
  (1) he agrees with one or more persons that they or one or more of them engage in conduct that would constitute the offense; and
  (2) he or one or more of them performs an overt act in pursuance of the agreement.

(b) An agreement constituting a conspiracy may be inferred from acts of the parties.

(c) It is no defense to prosecution for criminal conspiracy that:
  (1) one or more of the co-conspirators is not criminally responsible for the object offense;
  (2) one or more of the co-conspirators has been acquitted, so long as two or more co-conspirators have not been acquitted;
  (3) one or more of the co-conspirators has not been prosecuted or convicted, has been convicted of a different offense, or is immune from prosecution;
  (4) the actor belongs to a class of persons that by definition of the object offense is legally incapable of committing the object offense in an individual capacity; or
  (5) the object offense was actually committed.

The U.S. Supreme Court has stated the fundamental characteristic of a conspiracy is two or more people agree to an "endeavor which, if completed, would satisfy all of the elements" of the crime the conspirators want to achieve.[25] Under the law of conspiracy, all conspirators are responsible for the aggregate (combined) results of the crime. In a drug smuggling ring with 10 people, if a low-level drug dealer sells 2 ounces of cocaine, but the entire conspiracy is responsible for selling 2,000 ounces of cocaine, the low-level dealer will be sentenced for the weight of 2,000 ounces rather

Rule of Law: Conspiracy is an agreement to commit a crime usually accompanied by an overt act toward completing the conspiracy.

than the 2 ounces she is directly responsible for selling. In many cases, the harsh sentencing for the entire "weight" of the drug conspiracy is often used as leverage to obtain guilty pleas and cooperating witness testimony from the low-level dealers in exchange for a reduced sentence that reflects their own, individual criminal involvement. The agreement to commit a crime does not have to be written; usually it is oral. Prosecutors can obtain a conviction for conspiracy even if the conspirators failed to achieve the conspiracy's goals and their criminal objective failed. For example, Tom and Kate get together and agree to rob the bank. If they take an overt act toward the completion of their planned act, such as buying guns and masks, they will be guilty of conspiracy even if they never accomplish the robbery. In our chapter-opening case study, Billy Bob and Charles entered into a conspiracy when they agreed to rob seniors in the sports venue and started to approach seniors looking for vulnerable targets.

Limitations on Parties to Conspiracy

The law establishes some limitations on parties to the crime of conspiracy even though not all jurisdictions recognize these limitations. One limitation on the extent of a conspiracy is **Wharton's Rule**, which provides offenders not be prosecuted for conspiracy to commit crimes that, by definition, require more than one person to commit. For example, the crime of adultery can only be accomplished by two people; therefore, the offenders cannot commit conspiracy to commit adultery. Similarly, the definition of conspiracy precludes one person from conspiring alone, courts have taken different positions on what happens if, for example, one of two alleged conspirators is acquitted. Technically, if there are only two alleged conspirators and one is acquitted, the other may not be convicted, as there would be only one party to the conspiracy. Some courts have taken this position, whereas others look to the reason why a second alleged co-conspirator was not convicted. For example, if one defendant was granted immunity (protection from being charged) in exchange for testifying against the second co-conspirator, a conspiracy conviction may be upheld on the defendant without immunity.

Springboard for Discussion

Do you believe all conspirators should be responsible for the entire extent of the criminal enterprise, or just their individual contribution? Why or why not?

Defenses to a conspiracy charge are similar to a solicitation charge and include renunciation (removing oneself from the agreement to commit a crime) by communicating to other co-conspirators that one wants out. Renunciation is difficult to prove, but the defense is often provided by law as illustrated by the Pennsylvania statute, which provides the following:

> It is a 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 intent.[26]

If an original conspirator successfully presents a renunciation defense, he may be acquitted on the original conspiracy charges. In the chapter-opening case study, if Charles, after he had agreed, told Billy Bob he had changed his mind and then never participated in achieving their joint criminal goals, he could still be convicted of conspiracy. Renunciation requires an affirmative act.

Attempt

Rule of Law: Attempt = specific intent *mens rea* to commit a crime + unsuccessful *actus reus*.

Attempt is a crime when one takes steps toward the commission of a crime and has a specific intent to commit that crime but, for some reason, is unable to complete the crime. Although in early English common law the attempt to commit a crime by itself was not a crime, it soon became a separate and distinct crime, and today most states criminalize the conduct of the unsuccessful criminal. Many jurisdictions have one statute that covers all attempt crimes, whereas some include a separate statute for each crime, for example, attempted rape, attempted robbery. An illustration of a comprehensive attempt statute can be found in the Texas Criminal Code.

Texas Penal Code, Title 4 Inchoate Offenses, Chapter 15 Preparatory Offenses §15.01 (2015)

§15.01. Attempt

(a) A person commits an offense if, with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended.

(b) If a person attempts an offense that may be aggravated, his conduct constitutes an attempt to commit the aggravated offense if an element that aggravates the offense accompanies the attempt.

(c) It is no defense to prosecution for criminal attempt that the offense attempted was actually committed.

(d) (omitted)

The crime of attempt has two elements:

1. Specific intent *mens rea* to commit a crime
2. Unsuccessful *actus reus*

The intent to commit an attempt crime is the intent to commit a crime that, for some reason, the defendant is unable to complete. Usually courts require that the defendant went beyond merely preparing for the crime and moved toward committing the crime. Preparing to commit a crime may be drawing a map of the bank to rob, whereas attempting to commit a crime involves taking direct steps to rob the bank, such as conducting surveillance and assembling the burglar tools. A nonexhaustive list of steps taken toward the commission of the crime, which may lead to criminal liability for attempt, may be found in the MPC's "substantial step" test. If the defendant takes one of these "substantial steps" toward completing the crime, he may be guilty of attempt.

Model Penal Code §5.01 Criminal Attempt

(2) Conduct Which May Be Held Substantial Step . . .

(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, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances;

(f) possession, collection or fabrication of materials to be employed in the commission, at or near the place contemplated for its commission, where 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.

APPLYING THE LAW TO THE FACTS

Is It Preparation or Criminal Attempt?

The Facts: Paul lived in Georgia and his daughter, Ann, lived in Florida with Paul's ex-wife and her boyfriend, Vic. Paul believed that Vic threatened to abuse Ann. In a plan to kill Vic, Paul called a contact in Florida to obtain two firearms. However, Paul's contact was also a confidential informant who told police of this communication. After Paul traveled to Florida and acquired the firearms, he was arrested and charged with attempted murder. Paul asserts in his defense that his actions were merely preparatory and did not constitute the legal definition of attempt. Is Paul correct?

The Law: No. Paul took the substantial step of obtaining the firearms to effectuate his plan to kill Vic, so he is guilty of attempted murder.[27]

In the *Indiana v. Haines* case reprinted in part below, the trial judge granted defendant Haines's motion to vacate his conviction of attempted murder charges. Even though Haines took actions he believed would infect first responders to human immunodeficiency virus (HIV), the judge found HIV transmission through biting and scratching was impossible and, therefore, Haines could not be convicted. In a rare appeal by the state to reinstate the conviction, the appellate court found in favor of the state and overturned the trial judge's decision because Haines had the specific intent and unsuccessful *actus reus* to meet the elements of an attempt crime. As you read the case, keep in mind the snapshot of time the case was pending and decided in the late 1980s.

INDIANA V. HAINES, 545 N.E.2D 834 (1989)

Court of Appeals of Indiana, Second District

PROCEDURAL HISTORY: [T]he State of Indiana (the State), appeals from the trial court's grant of . . . Donald J. Haines' (Haines) motion for judgment on the evidence, claiming that the trial judge erred in vacating the jury's verdicts of three counts of attempted murder . . .

FACTS: On August 6, 1987, Lafayette, Indiana, police officers John R. Dennis (Dennis) and Brad Hayworth drove to Haines' apartment in response to a radio call of a possible suicide. Haines was unconscious when they arrived and was lying face down in a pool of blood. Dennis attempted to revive Haines and noticed that Haines' wrists were slashed and bleeding. When Haines heard the paramedics arriving, he stood up, ran toward Dennis, and screamed that he should be left to die because he had AIDS [acquired immune deficiency syndrome]. Dennis told Haines they were there to help him, but he continued yelling and stated he wanted to f*** Dennis and "give it to him." Haines told Dennis that he would "use his wounds" and began jerking his arms at Dennis, causing blood to spray into Dennis' mouth and eyes. Throughout the incident, as the officers attempted to subdue him, Haines repeatedly yelled that he had AIDS, that he could not deal with it and that he was going to make Dennis deal with it.

Haines also struggled with emergency medical technicians Dan Garvey (Garvey) and Diane Robinson threatening to infect them with AIDS and began spitting at them. When Dennis grabbed Haines, Haines scratched, bit, and spit at him. At one point, Haines grabbed a blood-soaked wig and struck Dennis in the face with it. This caused blood again to splatter onto Dennis' eyes, mouth, and skin. When Dennis finally handcuffed Haines, Dennis was covered with blood. He also had scrapes and scratches on his arms and a cut on his finger that was bleeding. When Haines arrived at the hospital, he was still kicking, screaming, throwing blood, and spitting at Dennis, Garvey, and another paramedic, Rodney Jewell. Haines again announced that he had AIDS and that he was going to show everyone else what it was like to have the disease and die. At one point, Haines bit Garvey on the upper arm, breaking the skin.

Roger Conn, Haines' homosexual lover and former roommate, recalled that Dr. Kenneth Pennington (Pennington) informed Haines that he had the AIDS virus. Haines told Conn that he knew AIDS was a fatal disease. Haines

was charged with three counts of attempted murder. At trial, medical experts testified that the virus could be transmitted through blood, tears, and saliva. They also observed that policemen, firemen, and other emergency personnel are generally at risk when they are exposed to body products. One medical expert observed that Dennis was definitely exposed to the HIV virus and others acknowledged that exposure of infected blood to the eyes and the mouth is dangerous, and that it is easier for the virus to enter the blood stream if there is a cut in the skin. Following a trial by jury, Haines was convicted of three counts of attempted murder on January 14, 1988. On February 18, 1988, Haines moved for judgment on the evidence as to the three counts of attempted murder, which the trial court granted.

ISSUE: [Did Haines commit attempted murder with the HIV virus?]

HOLDING: [Yes.]

REASONING: When the trial judge sentenced Haines on February 2, 1988, he made this statement:

> I believe my decision in this case was made easier by the State's decision to not introduce any medical expert scientific evidence. The State believed that the disease known as AIDS was irrelevant to its burden of proof; that only the intent or state of mind of the defendant was relevant. I disagree with that. All of us know that the conduct of spitting, throwing blood and biting cannot under normal circumstances constitute a step, substantial or otherwise, in causing the death of another person, regardless of the intent of the defendant. More has to be shown, more has to be proven, in my judgment. And the more in this case was that the conduct had to be coupled with a disease, a disease which by definition is inextricably based in science and medicine.

There was no medical expert evidence that the person with ARC [AIDS-related complex] or AIDS can kill another by transmitting bodily fluids as alleged in this case. And there was no medical evidence from any of the evidence that the defendant had reason to believe that he could transmit his condition to others by transmitting bodily fluids as are alleged in this case. The verdicts of the jury as to attempted murder will be set aside and judgment of conviction of battery on a police officer resulting in bodily injury as a Class D felony will be entered on each of the three counts. A sentence of two years will be ordered on each of the three counts. Those sentences will run consecutively because I find aggravating circumstances and I will set those out at this time.

The trial judge's failure to consider all of the evidence and his comment at the February 2, 1988, sentencing hearing that he weighed the evidence in deciding whether to grant judgment on the evidence constituted error. Haines misconstrues the logic and effect of our attempt statute. While he maintains that the State failed to meet its burden insofar as it did not present sufficient evidence regarding Haines' conduct which constituted a substantial step toward murder, subsection (b) of [Indiana Code, section] 35-41-5-1 provides: "It is no defense that, because of a misapprehension of the circumstances, it would have been impossible for the accused person to commit the crime attempt."

In *Zickefoose v. State* (1979), our supreme court observed: "It is clear that section (b) of our statute rejects the defense of impossibility. It is not necessary that there be a present ability to complete the crime, nor is it necessary that the crime be factually possible. When the defendant has done all that he believes necessary to cause the particular result, regardless of what is actually possible under existing circumstances, he has committed an attempt. The liability of the defendant turns on his purpose as manifested through his conduct. If the defendant's conduct in light of all the relevant facts involved, constitutes a substantial step toward the commission of the crime and is done with the necessary specific intent, then the defendant has committed an attempt."

In accordance with [Indiana's attempt statute] the State was not required to prove that Haines' conduct could actually have killed. It was only necessary for the State to show that Haines did all that he believed necessary to bring about an intended result, regardless of what was actually possible. While we have found no Indiana case directly on point, the evidence presented at trial renders any defense of inherent impossibility inapplicable in this case. See *King v. State* (1984) (a defendant's intent and conduct is a more reliable indication of culpability than the hazy distinction between factual and legal impossibility). In addition to Haines' belief that he could infect others there was testimony by physicians that the virus may be transmitted through the exchange of bodily fluids. It was apparent that the victims were exposed to the AIDS virus as a result of Haines' conduct.

CONCLUSION: From the evidence in the record before us we can only conclude that Haines had knowledge of his disease and that he unrelentingly and unequivocally sought to kill the persons helping him by infecting them with AIDS, and that he took a substantial step towards killing them by his conduct believing that he could do so, all of which was more than a mere tenuous, theoretical, or speculative "chance" of transmitting the disease. [Haines's conviction for attempted murder reinstated.]

The unusual facts of the Haines case bear analysis. First, it is unusual when the prosecutor gets to appeal a favorable result for the defendant. Because Haines was incarcerated on other charges, the state could appeal without risking unlawful deprivation of Haines's liberty. Secondly, the state of knowledge of HIV transmission in 1989 was just becoming cemented into public consciousness. In the early to mid-1980s, many people believed one could get HIV from kissing, bathroom seats, and doorknobs. Contributing to the HIV hysteria was the belief that HIV was almost always fatal. The judge was bold to rule that it was impossible for Haines to kill the emergency medical technicians and officers in the way he tried, with scratches and bites. The federal Center for Disease Control has medical facts about HIV transmission. In August 1990, Haines was sentenced to 30 years for his attempt crime and died in prison the following year.

Rule of Law: Impossibility is the defense that the offender cannot meet the elements of the offense as charged.

The Defense of Impossibility

Should the defense of **impossibility**—that it was physically impossible to commit the crime—relieve the offender of criminal responsibility? There are two types of impossibility: factual and legal. **Factual impossibility** is when the offender takes all the steps necessary to complete the crime, but certain facts make the crime impossible to achieve, for example, trying to steal someone's wallet when the person's pocket is empty. The facts as the pickpocket believed as true—there was a wallet to steal from the person's pocket—were not true, and therefore it was impossible to pick an empty pocket. Such factual impossibility will generally *not* be a defense to attempt crimes because the pickpocket had the specific intent to steal and the unsuccessful *actus reus* of stealing the wallet: The justification for not recognizing factual mistakes as a defense is because the offender took all the necessary steps to complete the crime and she should escape criminal liability because the facts turned out differently than she planned.

Legal impossibility is when the offender takes all steps necessary to complete what he believes to be a crime, but the acts do not meet the legal definition of a crime. For example, John, who is 19 years old, engages in sexual intercourse with his girlfriend, Wanda, whom John believes is 15 years old, which, if true, would be a crime of statutory rape (consensual intercourse with a minor who is at least 4 years younger). In reality, Wanda is 18 years old and under the law it is impossible for John to commit the crime of statutory rape, even if his *mens rea* is criminal. The law recognizes legal impossibility based on the principle of legality, which requires the government inform the public what acts are criminal. If a statute defines a crime and the offender's behavior does not fall within the statute's definition, there can be no crime.

APPLYING THE LAW TO THE FACTS

Guilty of Attempted Murder?

The Facts: Ralph Damms forgot to put bullets in the gun when he aimed at his wife's head and pulled the trigger more than once. He was convicted of attempted murder. Damms appealed on the grounds that it was impossible to kill his wife with an unloaded gun. Is Damms correct?

The Law: No. Damms conviction is upheld because if Damms's gun had had bullets in it, his wife would be dead. The factual impossibility defense will not work.[28]

In our chapter-opening case study, Billy Bob could be charged with the attempted murder of Ken because he took specific acts and his *actus reus* was unsuccessful. Charles, as a co-conspirator, would be equally guilty of the attempt charge because once a conspirator enters into the agreement to commit the crime, he is responsible for its consequences. The men could raise the defense that it is factually impossible to kill a man who is already dead, but they will likely be unsuccessful.

SUMMARY

1. You will understand the four *mens rea* states to establish the defendant's "guilty mind." The law seeks to assign an appropriate level of punishment based on the defendant's *mens rea*, or guilty state of mind, at the time the crime was committed. The *mens rea* states are *purposely*, which is specific intent where the actor desires his conduct to cause a specific result; *knowingly*, which is a general intent crime where the actor undertakes an action but not necessarily to bring about a specific result; *recklessly*, where the actor ignores the risk of harm his behavior creates; and *negligently*, where the actor is unaware of the risk of harm his behavior creates, but he should be aware. Some crimes are strict liability crimes, which require no *mens rea*, and the actor will be guilty simply by performing the illegal act. Other crimes require scienter, which is knowledge of wrongdoing, such as knowing the property is stolen to be convicted of receiving stolen property. The public must be informed what behavior the law will punish; this is referred to as the principle of legality. The government must prove each and every element of the crime, such as the concurrence of the *mens rea* and *actus reus*, beyond a reasonable doubt; otherwise, the defendant must be found not guilty. The doctrine of merger operates to absorb the lesser included offenses on conviction of a more serious offense; for example, battery merges into murder.

2. You will be able to explain the legal basis for volitional *actus reus*, the guilty act. *Actus reus* is a voluntary act that leads to criminal liability. Some crimes that are defined as acts, such as possession of drugs, can be proven by surrounding circumstances such as constructive possession. Other so-called acts, such as personal status as a drug addict, may not be punished, but status as a pedophile may lead to legal restrictions. The law imposes a legal requirement to care for people in certain relationships recognized in law, for example, duty by relationship, such as parent–child; duty by contract, such as landlord–tenant; and duty by statute, such as police officer–citizen. There are also acts of kindness freely given, assumptions of the duty that, if undertaken, may impose legal liability if these acts create more danger. Many states have Good Samaritan laws that protect people in certain professions (e.g., emergency medical technicians) and others who try and help people in emergency situations from criminal and civil liability, but many states do not.

3. You will competently discuss the elements of "causation" to assign criminal responsibility. A causation analysis of the facts examines whether a person should be held responsible for committing certain acts. First, is the actor the factual cause of the harm? That is, "but for" the actor's initial conduct, would the harm have happened? Next, is the actor the proximate cause of the harm? Was the ultimate harm foreseeable by the actor's initial conduct? Last, were there any intervening causes that broke the causal chain from the actor's initial conduct to the ultimate harm? If the actor is both the factual and legal cause and there are no intervening causes, she will be liable for the harm caused.

4. You will know the common law differences between principals and accessories. Under common law, individuals who helped criminals, but did not directly participate in a crime, were punished less severely than those who actually participated in the crime. Today the modern trend in state statutes is to treat principals to crime (i.e., the offenders) the same as accessories (i.e., those who are there or who are close by when the crime is being committed and who assist the principals). An accessory before the fact helps the principal get ready to commit the crime by giving aid, instruction, or materials, whereas an accessory after the fact might, for example, give shelter to the fugitive.

5. You will understand the elements of inchoate crimes, such as solicitation, conspiracy, and attempt. The law seeks to punish those who try to commit crimes and fail or try to commit crimes that are otherwise incomplete. Solicitation is asking someone else to commit a crime, conspiracy is an agreement to commit a crime, and attempt is having the *mens rea* and taking a substantial step toward completing the crime but for some reason not being able to complete it. Factual impossibility—the fact that it would be impossible to complete the crime—is often no defense for people who attempt crimes, because society seeks to punish the intent and criminal effort to complete the act, even if it was unsuccessful. Legal impossibility is a defense because the law, as applied, does not define the defendant's conduct as a crime.

Go back to the beginning of the chapter and reread the news excerpts associated with the learning objectives. Test yourself to determine if you can understand the material covered in the text in the context of the news.

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PROBLEM-SOLVING EXERCISES

1. "Bid night" at the local fraternity is a big party where new pledges make their formal decision to join the brotherhood. In preparation, older brothers purchased $2,000 worth of alcohol. One drinking game for new pledges is to drink as much alcohol as possible in 2 minutes. Ron drank hard liquor and immediately became disoriented. Ron tried walking around, fell down, and passed out on the floor. Partygoers simply assumed Ron was drunk and "sleeping it off." While Ron was seemingly unconscious, fraternity brothers searched the Web for "alcohol poisoning remedies." By the time the brothers called 9-1-1, it was too late. Autopsy results indicated Ron's blood alcohol level (BAC) was "life-threatening." The frat brothers who purchased the alcohol and those who had walked by Ron without helping him were all charged under the following statute:

   Anyone who purposely, knowingly, recklessly, or negligently causes the death of another shall be guilty of a felony.

   All brothers facing charges claim they are not the cause of Ron's death and had no duty to help him. The brothers who walked by Ron when he was passed out claim they had no *mens rea* to harm Ron and are, therefore, not responsible for his death. Who will win at trial, the prosecution or defense? (**ROL: Purposely, knowingly, recklessly, negligently; causation; duty to act**)

2. A prisoner at the local jail, Kent Cool, was awaiting trial on the charge of conspiracy to commit tax fraud when he learned that one of his codefendants, who was also in jail, Miles Friend, was going to become a state's witness and testify against Cool. Cool saw Friend at lunch and told him to "keep his mouth shut." At Cool's pretrial hearing, Cool put two fellow prisoners, Blank and Macaw, on his witness list even though the two men did not testify. On return to prison, Blank and Macaw beat up Miles Friend. The government then charged Cool with conspiracy to retaliate against a witness. Does the government have enough evidence to sustain a conviction? (**ROL: Conspiracy**)

3. Betsy bought some jewelry thinking it was stolen, but it was not; it was just cheap. The jewelry was legally owned. Betsy was charged with receiving stolen property. She raised the defense of impossibility. Will she win her case? (**ROL: Scienter, impossibility**)