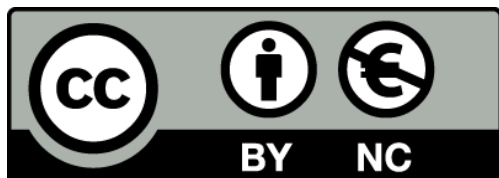


2020

Criminal Law

SECOND EDITION
COREY RAYBURN YUNG

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This casebook has been written entirely by me and any errors are mine. If you find any mistakes or have any suggestions, no matter how small, please do not hesitate to let me know via email (coreyyung@ku.edu). Yolanda Huggins is not responsible for any errors herein and I want to thank for correcting many of my mistakes and fighting against Microsoft Word's quirky formatting system.

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INTRODUCTION

Welcome to Criminal Law. There is widespread agreement across political and professional lines that the American criminal justice system is broken. Although violent crime has been declining since the early 1990s, the United States still has a much higher homicide rate than similarly situated countries. Plea bargaining, a practice barred in most countries with criminal law derived from the English common law, helps to drive a mass incarceration rate that dwarfs that of other nations. The collateral consequences of arrest and conviction make it extremely difficult for many people to find gainful employment. As a result, efforts to decrease recidivism have repeatedly failed. There is very little disagreement as to these basic facts.

This course cannot address all those important concerns. It focuses on one critical portion of our criminal justice system: substantive criminal law. The substance, as opposed to procedure, of criminal law defines what is made illegal by sovereign governments throughout the United States. As a result of this emphasis, more than any other traditional introductory law school course, Criminal Law is about statutes. Whereas courses such as Civil Procedure primarily focus on a single set of codified rules, Criminal Law requires the exploration of an incredible number of statutes utilizing varied words, phrases, and structures. For that reason, it is very important for you to focus on the specific statutory language in the cases you read in this text. The scope of substantive criminal law is well-described in the following article excerpt.

Paul H. Robinson, Matthew G. Kussmaul, Camber M. Stoddard, Ilya Rudyak and Andreas Kuersten, *The American Criminal Code: General Defenses*, 7 J. LEGAL ANALYSIS 37 (2015)

There are fifty-two bodies of criminal law in the USA. Each stakes out often diverse positions on a range of issues....

American criminal codes (ACCs) are in many ways the most advanced in the world.... But despite the practical appeal of American code approach, there is a serious limitation on their influence on codification in other countries, and, more importantly, within the USA: how can one know what the American rule is when there are in fact fifty-two American rules?

Each of the fifty states, the District of Columbia, and the federal government has its own criminal code. Contrary to the assumption of many in other countries, the federal criminal code has little role in shaping and stating American criminal law. The U.S. Constitution gives police power to the states and, as a result, the federal criminal law has limited practical significance beyond organized crime and drug cases. Knowing the American rule could be of enormous help to those wishing to take account of the majority American position in formulating their own criminal law.

The American rule can also have significant influence in state legislatures. At present, states are left to speculate about the rule most commonly adopted by their peers, generally acting on what is taken to be the common wisdom. But the common wisdom is commonly wrong, and understandably so. It is a major research undertaking to determine the majority rule among the fifty-two jurisdictions on any matter. Thus, state legislatures considering criminal law reform are often left to ignore what other states have done in the area, to guess what the majority rule might be, or to focus on just a few states without knowing whether those states reflect a common or an outlier position among the fifty-two jurisdictions.

A primary source of criminal law in the United States is the English common law. When our nation declared its independence, it maintained the substantive criminal law of England. Over time, the American system deviated from that of England, but its roots are still visible and important. The modern common law of criminal law refers to statutes, principles, and doctrines of criminal liability derived from British and American judicial decisions. The common-law traditions have been codified into written statutes in jurisdictions throughout the United States.



Figure 1: Headquarters of The American Law Institute, Philadelphia, PA (SPDuffy527, 2014)

A major portion of modern criminal law in the United States was influenced by the Model Penal Code (MPC). In 1962, the American Law Institute, a group of distinguished jurists, scholars, and practitioners, published the MPC to address numerous perceived shortcomings in substantive criminal law. No state has adopted the MPC in its entirety, but many portions of the MPC have been enacted by state governments throughout the

nation. Every jurisdiction has some portions of its code derived from both the common-law tradition and MPC.

As a result of the variance among statutes, the court cases you will read in this course serve a slightly different function than in many other law school courses. Court opinions in Criminal Law should primarily be understood as illustrations of concepts and ideas central to this course. Rarely will the cases embody a universal rule of law. Instead, cases you will read typically demonstrate a crucial idea that you need to understand or include a set of facts that is useful for fleshing out the relevant doctrines. For that reason, you will read cases from the federal courts, highest state courts, and lower state courts.

Although this course is focused on the substance, and not procedure, of criminal law, it is important to have some familiarity with the procedural design of the criminal justice system. Figure 2 provides a complex view of how cases proceed through the American criminal justice system.

What is the sequence of events in the criminal justice system?

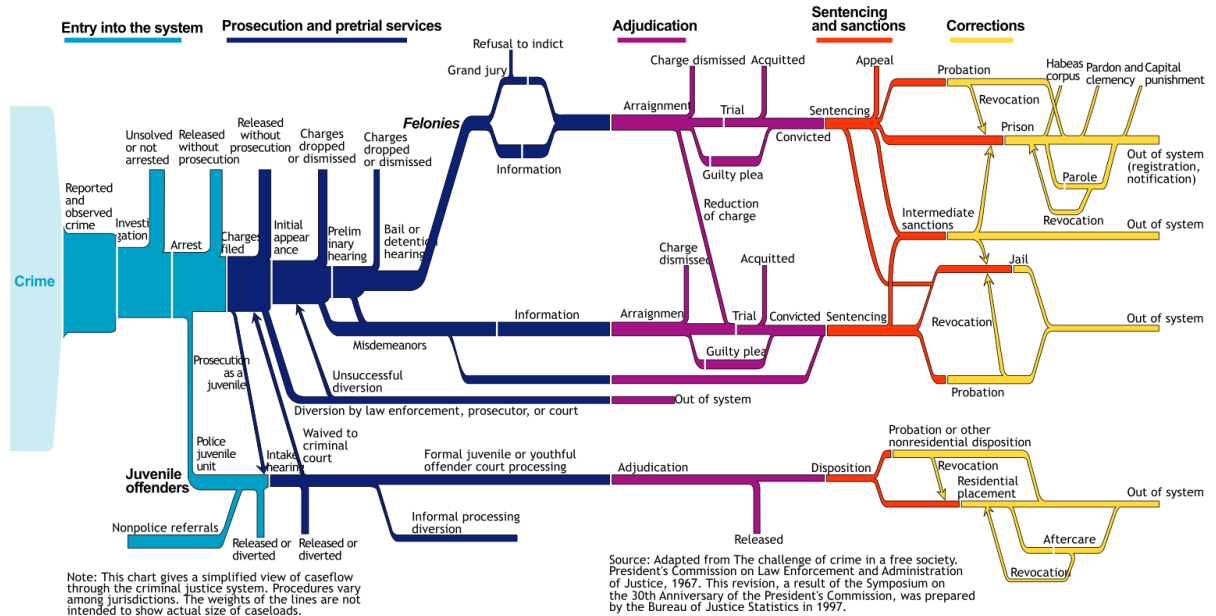


Figure 2: The American Criminal Justice Process (Bureau of Justice Statistics, <https://www.bjs.gov/content/justsys.cfm>)

To simplify, the United States criminal justice process can also be represented as a funnel. At each stage of the funnel, there is attrition and fewer cases proceed. Figure 3 illustrates the various stages in a typical criminal case where some cases falter.

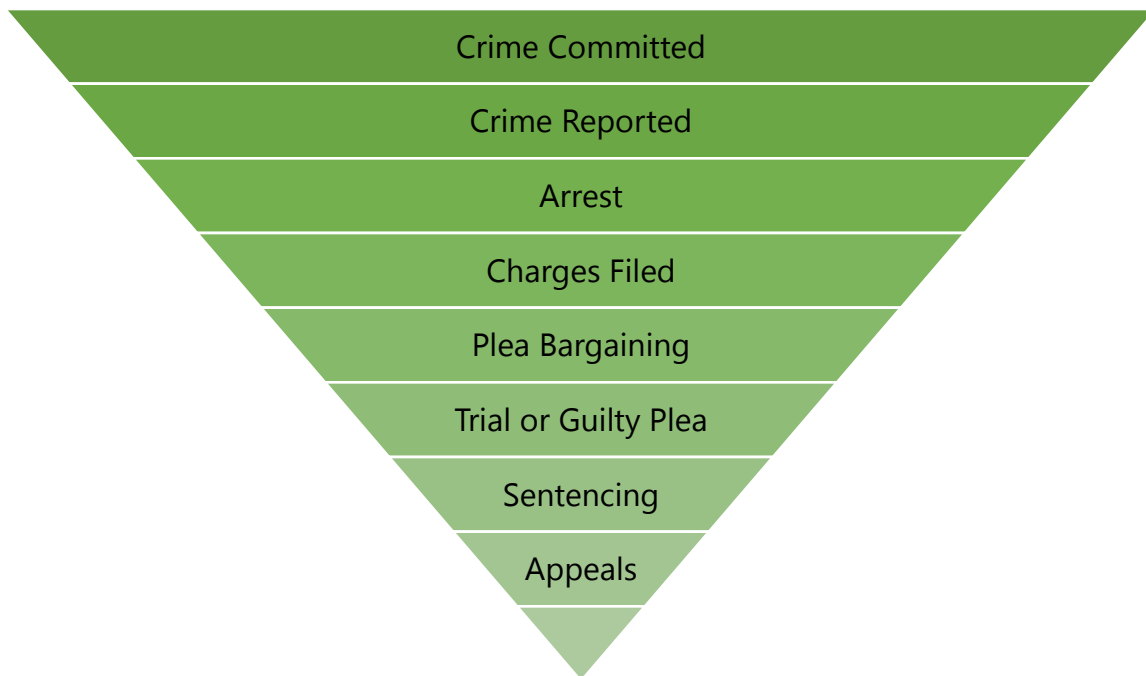


Figure 3: The Crime Funnel

The nature of using the case method in Criminal Law is that you learn only about cases at the very last stage of the funnel depicted above. This raises concerns about completeness and representativeness. By virtue of reviewing appellate opinions, the information about the criminal justice system is inevitably incomplete. Further, the cases that reach the appellate stage are neither a random nor representative sample of the complete universe of crimes. The difference between the cases being appealed is often heightened in particular areas of substantive law.

The general argument used to overcome concerns about the completeness and representativeness problems is that the layers of the crime funnel are interdependent and the law determined at the appellate stage has the most significant effects on shaping the criminal justice system. So, while the cases on appeal might be atypical in certain respects, the doctrine that emerges from the opinions issued in such cases will control the legal doctrine in similar future cases that were never likely to be appealed. However, with the growth of plea bargaining and the unusualness of appeals in certain substantive areas, this assumption might be unwarranted. As a result, it is worth keeping in mind the problems that the funnel model embodies when reading cases throughout this semester.

It is also essential that you have some understanding of the quantum of proof necessary for someone to be found guilty of violating criminal law: proof beyond a reasonable doubt. The following case illustrates one of the most recent attempts by the Supreme Court to explain its role and meaning.

Victor v. Nebraska, 511 U.S. 1 (1994)

Justice O'CONNOR delivered the opinion of the Court.

The government must prove beyond a reasonable doubt every element of a charged offense. In *re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Although this standard is an ancient and honored aspect of our criminal justice system, it defies easy explication. In these cases, we consider the constitutionality of two attempts to define "reasonable doubt."

The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course. Indeed, so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, see *Jackson v. Virginia*, 443 U.S. 307, 320, n. 14, 99 S.Ct. 2781, 2789, n. 14, 61 L.Ed.2d 560 (1979), the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. Rather, "taken as a whole, the instructions [must] correctly convey the concept of reasonable doubt to the jury." *Holland v. United States*, 348 U.S. 121, 140, 75 S.Ct. 127, 137, 99 L.Ed. 150 (1954)....

At Victor's trial, the judge instructed the jury that "[t]he burden is always on the State to prove beyond a reasonable doubt all of the material elements of the crime charged, and this burden never shifts." App. in No. 92- 8894, p. 8 (Victor App.). The charge continued:

"'Reasonable doubt' is such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon. It is such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, to a moral certainty, of the guilt of the accused. At the same time, absolute or mathematical certainty is not required. You may be convinced of the truth of a fact beyond a reasonable doubt and yet be fully aware that possibly you may be mistaken. You may find an accused guilty upon the strong probabilities of the case, provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable. A reasonable doubt is an actual and substantial doubt reasonably arising from the evidence, from the facts or circumstances shown by the evidence, or from the lack of evidence on the part of the State, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture." *Id.*, at 11 (emphasis added).

On state postconviction review, the Nebraska Supreme Court rejected Victor's contention that the instruction, particularly the emphasized phrases, violated the Due Process Clause. 242 Neb. 306, 310-311, 494 N.W.2d 565, 569 (1993)....

Victor's primary argument is that equating a reasonable doubt with a "substantial doubt" overstated the degree of doubt necessary for acquittal. We agree that this construction is somewhat problematic. On the one hand, "substantial" means "not seeming or imaginary"; on the other, it means "that specified to a large degree." Webster's Third New International Dictionary, at 2280. The former is unexceptionable, as it informs the jury only that a reasonable doubt is something more than a speculative one; but the latter could imply a doubt greater than required for acquittal under *Winship*. Any ambiguity, however, is removed by reading the phrase in the context of the sentence in which it appears: "A reasonable doubt is an actual and substantial doubt

... as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture." *Victor* App. 11 (emphasis added)....

In any event, the instruction provided an alternative definition of reasonable doubt: a doubt that would cause a reasonable person to hesitate to act. This is a formulation we have repeatedly approved ... and to the extent the word "substantial" denotes the quantum of doubt necessary for acquittal, the hesitate to act standard gives a common sense benchmark for just how substantial such a doubt must be. We therefore do not think it reasonably likely that the jury would have interpreted this instruction to indicate that the doubt must be anything other than a reasonable one....

Finally, *Victor* argues that the reference to "strong probabilities" in the instruction unconstitutionally understated the government's burden. But in the same sentence, the instruction informs the jury that the probabilities must be strong enough to prove the defendant's guilt beyond a reasonable doubt. We upheld a nearly identical instruction in *Dunbar v. United States*, 156 U.S. 185, 199, 15 S.Ct. 325, 330, 39 L.Ed. 390 (1895): "While it is true that [the challenged instruction] used the words 'probabilities' and 'strong probabilities,' yet it emphasized the fact that those probabilities must be so strong as to exclude any reasonable doubt, and that is unquestionably the law" (citing *Hopt v. Utah*, supra, 120 U.S., at 439, 7 S.Ct., at 618). That conclusion has lost no force in the course of a century, and we therefore consider *Dunbar* controlling on this point....

The Due Process Clause requires the government to prove a criminal defendant's guilt beyond a reasonable doubt, and trial courts must avoid defining reasonable doubt so as to lead the jury to convict on a lesser showing than due process requires. In these cases, however, we conclude that "taken as a whole, the instructions correctly conveyed the concept of reasonable doubt to the jury." *Holland v. United States*, supra, 348 U.S., at 140, 75 S.Ct., at 137. There is no reasonable likelihood that the jurors who determined petitioners' guilt applied the instructions in a way that violated the Constitution. The judgments in both cases are accordingly

Affirmed.

[Separate opinions by Justices Kennedy, Ginsburg, and Blackmun omitted]

Discussion Questions and Notes

- 1) Do you think the instructions described in *Victor* accurately describe "proof beyond a reasonable doubt?"
- 2) Two fundamental ideas of criminal justice are not specifically mentioned in the Bill of Rights: proof beyond a reasonable doubt and presumption of innocence. Do

you think they are sufficiently implied? If not, do you think they should be enforced by courts anyway?

- 3) If there is a presumption of innocence right, why do you think some people are held in jail before trial (sometimes for years) without bail or high bail?

CHAPTER 1: PUNISHMENT AND CRIMINALIZATION

This chapter addresses the purposes of criminal punishment and justifications for criminalization. You need to understand and be conversant with these topics throughout this course as the themes and issues discussed in this Chapter will reappear.

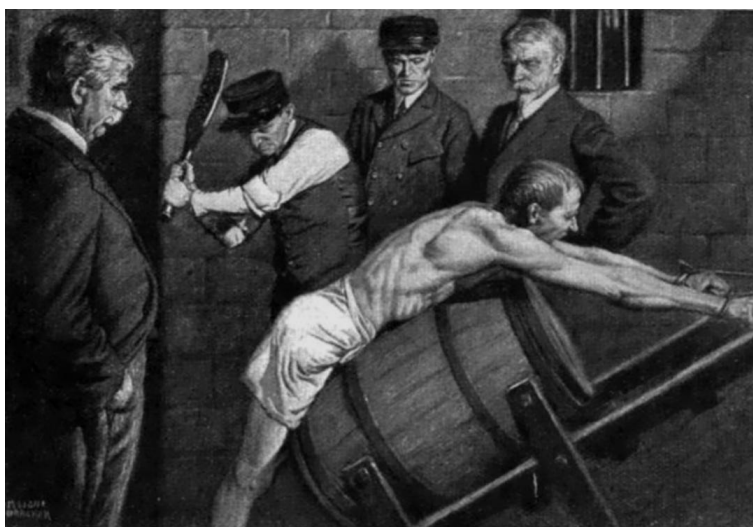


Figure 4: The Punishment of the Paddle (Julian Leavitt, The Man in the Cage, 73 THE AMER. MAG. 533, 537 (1911-12))

I. Punishment

A fundamental concept of our criminal justice system is that people should be punished for transgressions of criminal law. That simple idea, however, embodies a complex set of assumptions about morality and proportionality. Consider these examples where our law requires a decision to be made as to the appropriate punishment:

- 1) What should be the of punishment for a person that distributes 100 grams of cocaine per week? Does it matter if the criminal has a prior criminal history of distributing cocaine? Should the criminal be punished more harshly than someone who commits automobile theft? Assault and battery with a deadly weapon? Embezzlement?
- 2) If a woman is arrested for shoplifting, should the sentencing judge consider alternatives to a jail sentence if she is pregnant? If so, does your opinion change if the expectant mother is guilty of battery? Grand theft? Homicide?
- 3) Who should be punished more harshly in the following homicide cases: a highly-intoxicated person who shoots and kills her friend during a heated argument; an assassin who kills another person for profit; a fifteen-year-old who kills a bully at

school; or, a husband who kills his spouse when he finds out that his spouse has committed adultery?

Your answers to the above questions necessarily reflect some, at least tentative, ideas about punishment theory. Debates about which methods governments should use to determine appropriate punishment are longstanding and little consensus has developed. Nonetheless, any criminal justice system must proceed with some norms and ideas about the goals and limitations of appropriate punishments in particular cases. As a result, this Section is focused on understanding the dominant theories of punishment and how those theories affect case outcomes.

It also essential to recognize that individual punishment decisions have systemic effects. Over the last couple of years, the United States has started to confront how different it is, relative to other nations, in applying long prison sentences for a wide range of crimes. As a result, led by a group of reform-oriented states, the incarceration rate has decreased substantially. Nonetheless, even with those decreases in mass incarceration, the United States remains an outlier in incarceration rate, as exhibited in Figure 5.

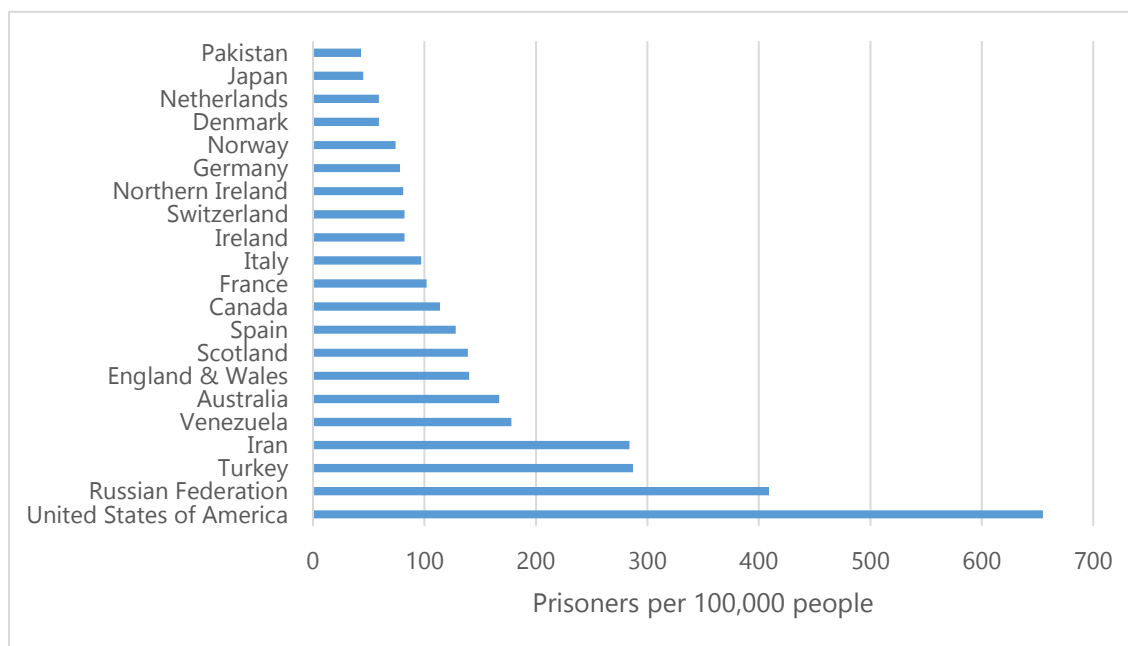


Figure 5: Incarceration Rate of Select Nations in 2018 (source: World Prison Brief)

The role of the punishment theories is most readily apparent in determining the appropriate sentence of a convicted criminal. Review Judge Jack Weinstein's unusually detailed evaluation of competing punishment theories in sentencing two defendants found guilty of money laundering and related crimes.

United States v. Blarek II, 7 F. Supp. 2d 192 (E.D.N.Y. 1998)

WEINSTEIN, Senior District Court Judge

This sentencing presents the unusual case of two talented decorators whose desires to rise in the ranks of their profession while having access to unlimited funding for their creative endeavors induced them to become the facilitators, through money washing, of a ruthless and notorious Colombian drug cartel's operations.

A long term of incarceration and severe monetary penalties that will strip defendants of all their assets is required. The sentences are designed to penalize the defendants for their criminal behavior and to deter other business and professional people from assisting drug traffickers.

Defendants Blarek and Pellecchia were arrested in March 1996. They were charged with Racketeering, 18 U.S.C. § 1962(c), Racketeering Conspiracy, 18 U.S.C. § 1962(d), and Conspiring to Launder Monetary Instruments, 18 U.S.C. §§ 371 and 1956(h), for their alleged involvement in the activities of the Santacruz faction of the Cali Colombia drug mob. Blarek was additionally charged with one count of Interstate Travel in Aid of Racketeering, 18 U.S.C. § 1952(a)(1).... Both defendants pleaded not guilty.

Blarek [and] Pellecchia ... established a new decorating company. Blarek was President and Pellecchia Vice-President. The venture was successful. Defendants designed, remodeled, and renovated homes and offices for a broad range of private persons and businesses.

Beginning in the early-1980's, the nature of defendants' operation changed. From that time forward they worked almost exclusively for a single, ill-famed and powerful criminal client – Jose Santacruz Londono....

Over a twelve year period, the defendants designed and decorated a number of offices and living spaces for Santacruz, his wife, his mistresses, and his children. Defendants provided everything from blue prints and construction designs to lighting, appliances for huge kitchens, carpeting, draperies, furniture, artwork, and even specially produced crockery and flatware....

There is little doubt that defendants delivered exceptional design services to Santacruz. They also knowingly provided something even more valuable to him – a method for laundering his drug cash in the United States and converting it to assets movable to Columbia. Defendants laundered, spent, and were compensated with millions of dollars, the proceeds of the cartel's profitable drug trade in the United States.

Defendants knowingly laundered tainted cash for Santacruz in the United States in order to continue exercising their own craft and to enhance their own lives. They could not help but be aware of the illegal drug-related activities of their client. Both Blarek and Pellecchia knew who Jose Santacruz was, what he did, and from where his money was derived. Yet, each voluntarily agreed to, and in fact did, "wash" his drug proceeds. They converted huge amounts of currency that was delivered to them secretly in boxes, paper sacks, duffel bags, and an expensive designer sachel into assets the drug cartel could remove from this country.

Elaborate and elusive bookkeeping methods were developed in order to keep track of the funds received from Santacruz, while at the same time protecting his identity....

Nearly all transactions between Santacruz and defendants were in cash. Defendants traveled to Miami, New York City, and other pre-determined locations to receive large sums of money from Santacruz's couriers. Payments as high as one million dollars at a time were hand-delivered to defendants in piles of fifty and one-hundred dollar bills. Defendants moved the cash between cities, traveling by car or train to avoid airport searches....

After a two week trial, in February, 1997, defendants were each found guilty of the Racketeering Conspiracy and Money Laundering Conspiracy counts. The jury also returned a verdict of Blarek's guilt of Interstate Travel in Aid of Racketeering....

Taking these factors into account, the Presentence Report indicates Blarek[']s imprisonment range would then be 135 to 168 months. A fine range for Blarek's crimes of \$20,000 to \$14,473,063, as well as a required period of supervised release of at least two but not more than three years is also indicated.

Pellecchia's ... assessment results in an imprisonment range of 135 to 168 months. The Presentence Report also indicates a fine range of \$17,500 to \$14,473,063 and a required period of supervised release of at least two but not more than three years....

....

Traditional Sentencing Rationales

....

Four core considerations, in varying degrees and permutations, have traditionally shaped American sentencing determinations: incapacitation of the criminal, rehabilitation of the offender, deterrence of the defendant and of others, and just desert for the crime committed.... "Over the last two hundred years, courts have witnessed significant changes in sentencing policy, which have been shaped by the priorities assigned to [these] four competing sanction goals" Theresa Walker Karle & Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals?: An Empirical and Case Law Analysis*, 40 EMORY L.J. 393, 393 (1991)...

Ascertaining priorities among these potentially conflicting notions has long been a point of contention amongst legislators, scholars, jurists, and practitioners. Somewhat oversimplifying, there are two basic camps. Retributivists contend that "just deserts" are to be imposed for a crime committed. Utilitarians, in their various manifestations, suggest that penalties need to be viewed more globally by measuring their benefits against their costs." The debate between the desert justification and the various utilitarian justifications such as deterrence, incapacitation, and rehabilitation has continued to divide criminal law thinkers" Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 455 (1997)....

In the nineteenth and most of the twentieth century American prison and punishment system reforms were designed primarily to rehabilitate the prisoner as a protection against further crime. Two eighteenth and nineteenth century philosophers set the terms of the current late twentieth century debate.

1. Kant's Retributive Just Desert Theory

Immanuel Kant, born in East Prussia in 1724, is regarded by some as "one of the most important philosophers in Western culture." DIANE COLLINSON, FIFTY MAJOR PHILOSOPHERS: A REFERENCE GUIDE 89 (1992); *see also, e.g.*, IMMANUEL KANT, CRITIQUE OF PURE REASON (Vasilis Politis ed. & trans., Everyman's Library 1994) (1781); IMMANUEL KANT, THE MORAL LAW (Kant's GROUNDWORK OF THE METAPHYSICS OF MORALS), (H.J. Paton ed. & trans., Hutchinson Univ. Library 3d ed. 1965) (1785)...

For Kant and his adherents, "punishment that gives an offender what he or she deserves for a past crime is a valuable end in itself and needs no further justification." *The Utility of Desert, supra*, at 454. "It is not inflicted because it will give an opportunity for reform, but because it is merited." EDMUND L. PINCOFFS, THE RATIONALE OF LEGAL PUNISHMENT 7 (1966). Kantian "just deserts" theory, therefore, focuses almost exclusively on the past to determine the level of punishment that should be meted out to right the wrong that has already occurred as a result of the defendant's delict....

2. Bentham's Utilitarian Theory

Jeremy Bentham, an English philosopher born in 1748, advocated a far different, more prospective approach through his "Principle of Utility." For him, law in general, and criminal jurisprudence in particular, was intended to produce the "greatest happiness for the greatest number," a concept sometimes referred to as the "felicity calculus."

This is not to say that Bentham did not believe in sanctions. It was his view that punishment was sometimes essential to ensure compliance with public laws. *See* JEREMY BENTHAM, BENTHAM'S POLITICAL THOUGHT 167-68 (Bhikhu Parekh ed., Harper & Row 1973)....

Unlike his contemporary, Kant, Bentham was not interested in criminal punishment as a way of avenging or canceling the theoretical wrong suffered by society through a deviation from its norms. Rather, a criminal sanction was to be utilized only when it could help ensure the greater good of society and provide a benefit to the community....

Under the Benthamitic approach, deterring crime, as well as correction and reformation of the criminal, are primary aspirations of criminal law....

3. Sanctions in Strict Retributive and Utilitarian Models

Given the divergence in underlying assumptions and theory, the competing retributivist and utilitarian theories suggest opposing methods for ascertaining proper penalties....

In the case of murder, some believe that just desert is clear. A taker of life must have his own life taken. Even in the case of killings, however, there are degrees of *mens rea*, and over large portions of the world capital punishment is outlawed on a variety of just desert and utilitarian grounds.

For lesser offenses, reaching a consensus on the proper "price" for the criminal act under the Kantian approach is even more difficult....

Two main theoretical problems are presented by this just deserts approach. The degree of the earned desert – that is to say the extent or length of the appropriate punishment – is subjective. The upper and lower limits of the punishment can be very high or very low, justified on personal views and taste. The “earned” punishment may be quite cruel and do more harm to society, the criminal, and his family, than can be justified on utilitarian grounds.

Determining the appropriateness of sanction differs under Bentham’s utilitarian approach, although it too poses challenging theoretical and practical tasks for the sentencer....

As in the case of Kantian just deserts, the felicity calculation is subject to considerable difficulty and dispute. Another major problem with the utilitarian approach is that the individual criminal can be treated very cruelly, to gain some societal advantage even through the crime is minor – or very leniently, despite the shocking nature of the crime – if that will on balance benefit society....

Utility and Retribution Under Sentencing Guidelines

The Sentencing Guidelines, written by the United States Sentencing Commission pursuant to the SENTENCING REFORM ACT, *see* PUB. L. 98-473, § 217, 98 Stat. 1987, 2019 (1984), purport to comport with the competing theoretical ways of thinking about punishment. The Guidelines state that they provided “for the development of guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation.” A systematic, theoretical approach to these four purposes was not, however, employed by the Commission...

The Commission decided not to create a solely retributivist or utilitarian paradigm, or “accord one primacy over the other.” U.S.S.G. Ch. 1, Pt. A(3) (The Basic Approach)...

It is claimed that, “as a practical matter this choice [between the competing purposes of criminal punishment] was unnecessary because in most sentencing decisions the application of either philosophy will produce the same or similar results.” *Id.* This premise is flawed. In practice, results may vary widely depending upon theory. A penalty imposed based upon pure utilitarian considerations would hardly ever be identical to one that was imposed in a pristine retributive system. While it cannot be said that one is always harsher than the other, seldom would their unrestrained application produce the same sentence....

Traditional and Statutory Sentencing Rationales

1. Incapacitation

Incapacitation seeks to ensure that “offenders ... are rendered physically incapable of committing crime.” ARTHUR W. CAMPBELL, LAW OF SENTENCING § 2:3, at 27-28 (1991). In colonial America, incapacitation was sometimes imposed in a literal sense. *Id.* at 28 (loss of organs). With the development of the penitentiary system, incarceration was seen as “a more reliable means of incapacitation.” ADAM J. HIRSCH, THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA 44 (1992).

In the instant case, incapacitation is not an important factor. First, these defendants have no prior criminal record indicating any propensity towards crime. Second, their connection to the criminal world, Santacruz, is now deceased. Third, it does not appear that long term restriction is necessary to ensure that defendants do not reenter a life of crime.

Consistent with utilitarian-driven analysis, little would be gained if the sentences emphasized incapacitation.

2. Rehabilitation

Rehabilitation is designed to instill in the offender proper values and attitudes, by bolstering his respect for self and institutions, and by providing him with the means of leading a productive life. Neither of these men is wayward or in need of special instruction on the mores of civilized society. They have in place strong communal support systems, as evidenced by the many letters submitted to the court by family and friends. They know how to live a law abiding life. It is not required that a penalty be fashioned that teaches them how to be moral in the future. This criterion, rehabilitation, therefore, is not one that is useful in assessing a penalty.

3. Deterrence

Of the two forms of deterrence that motivate criminal penalties – general and specific – only one is of substantial concern here.

Specific deterrence is meant to disincline individual offenders from repeating the same or other criminal acts. Such dissuasion has likely already occurred. Defendants regret their actions. The ordeal of being criminally prosecuted and publically shamed by being denominated felons and the imposition of other penalties has taught them a sobering lesson.

General deterrence attempts to discourage the public at large from engaging in similar conduct. It is of primary concern in this case. Defendants' activities have gained a great deal of attention. Notorious cases are ideal vehicles for capturing the attention of, and conveying a message to, the public at large. While it is not appropriate under just desert views for defendants in famous cases to be treated more harshly than defendants in less significant ones simply for the sake of making an example of them, under a utilitarian view the notoriety of particular a defendant may be taken into account by sentencing courts provided the punishment is not disproportionate to the crime.

4. Retribution

Retribution is considered by some to be a barbaric concept, appealing to a primal sense of vengeance. It can not, however, be overlooked as an appropriate consideration. When there is a perception on the part of the community that the courts have failed to sensibly sanction wrongdoers, respect for the law may be reduced. This is a notion applicable under both just deserts and utilitarian balancing concepts that has had some resurgence with the current growth of the rights of victims to

be heard at sentencing. *See, e.g.*, 18 U.S.C. § 3555 (order of notice to victims). *But see* Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 365 (1996) ("victim impact statements are narratives that should be suppressed because they evoke emotions inappropriate in the context of criminal sentencing").

Should punishment fail to fit the crime, the citizenry might be tempted to vigilantism. This may be why, according to one group of scholars, "a criminal law based on the community's perceptions of just desert is, from a utilitarian perspective, the more effective strategy for reducing crime." Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 454 (1997). "White collar" "victimless" offenses, such as the ones committed by these defendants, are harmful to all society, particularly since drugs are involved. It is important, therefore, that the imposition of a penalty in this case captures, to some rational degree, the "worth" of defendants' volitional criminal acts.

5. Sufficient But Not Greater Than Necessary

Mercy is seldom included on the list of "traditional" rationales for sentencing. It is, however, evinced by the federal sentencing statute, 18 U.S.C. § 3553(a), which provides, as noted above, that the lowest possible penalty consistent with the goals of sentencing be imposed.

The notion that undue harshness should be avoided by those sitting in judgment has long been a part of the human fabric and spirit. Lenity is often the desirable route....

Individual Sentences

The final task is weighing sentencing considerations already delineated, with particular emphasis on general deterrence and imposition of a punishment that can be viewed as deserved in light of the seriousness and danger to society of the crimes. While defendants have forfeited most of their property to the government via forfeiture, and do deserve a downward departure from the Guidelines, a stiff fine to eliminate all assets as well as a substantial period of incarceration is required.

1. Blarek

Blarek, whose actions indicate a somewhat greater culpability than do Pellecchia's ... is sentenced towards the lower end of the Guidelines' range ... to a concurrent term of 68 months' incarceration for his conviction on the three counts....

In addition, Blarek is fined a total of \$305,186, which represents his approximate total net worth after his forfeiture of over \$2,000,000 in cash and property to the government, and his payment of attorney's fees.

The maximum period of supervised release, three years, is imposed. U.S.S.G. §§ 5D1.1(a), During the time that defendant is under supervision, he may not work for any clients or employers outside

of the United States to ensure that he is not tempted again into money laundering. A mandatory special assessment of \$150 is also imposed.

2. Pellecchia

....

A concurrent term of incarceration of 48 months, at the lower end of offense level 23, is imposed for [Pellachia's] conviction on two counts.

No fine has been imposed for Pellecchia since he will have a negative net worth of over \$100,000 after payment of attorney's fees.

Three years of supervised release is ordered. Like his co-defendant, Pellecchia may not be employed by anyone outside of this country during his period of supervision to minimize chances of his being tempted again into money laundering. A special assessment of \$100 is also imposed.

Conclusion

Defendants' money laundering, racketeering, and interstate travel in aid of racketeering did not involve weapons, direct physical injury to victims, or the taking of a life. Yet, these are serious crimes that have induced talented and intelligent individuals, including many business people, to enter the drug-trafficking world.

Blarek and Pellecchia did not aspire to become criminals, but they allowed themselves to be lured into felonies by the promise of prestige and money. The sentences imposed follow statutory and case law mandates requiring these defendants to be treated harshly, primarily to deter others. It balances just deserts theory with utilitarian concerns.

Discussion Questions and Notes

- 1) Which punishment theory do you think should be the primary means of determining criminal sentences?
- 2) Do you think the sentences of the two defendants were appropriate? If not, what sentence would you have given the defendants?
- 3) Prisons and jails have become a core method of punishment in the United States. However, historically, incarceration has not served that role. Do you think prisons and jails should be a primary means of punishment? If not, what alternatives do you think should be used?

II. Criminalization

In the modern United States system of criminal justice, crimes are defined by statute. Judges and juries are responsible for interpreting and applying those statutes to particular sets of facts. The two questions that we need to focus on in this section are: 1) what actions should be made illegal; and 2) is there any foundational rule or set of rules for what is defined as illegal in modern America?

A. What Should be Criminal?

Although we all have precepts about what should be criminal and legal, it is often difficult to articulate a consistent rule or set of rules underlying those beliefs. Should only those things that harm others be illegal? If so, how do we define "harm?" Should criminal law ever be paternalistic, protecting people from themselves? Should there be constitutional or doctrinal limits on what is defined as criminal? The answers to those questions, whether from individuals or governments, are often messy and unsatisfactory for the reasons described in the following classic article.

Henry M. Hart, Jr., *The Aims of Criminal Law*, 23 L. AND CONTEMP. PROBS. 401 (1952)

In trying to formulate the aims of the criminal law, it is important to be aware both of the reasons for making the effort and of the nature of the problem it poses. The statement has been made, as if in complaint, that "there is hardly a penal code that can be said to have a single basic principle running through it." But it needs to be clearly seen that this is simply a fact, and not a misfortune. A penal code that reflected only a single basic principle would be a very bad one. Social purposes can never be single or simple, or held unqualifiedly to the exclusion of all other social purposes; and an effort to make them so can result only in the sacrifice of other values which also are important. Thus, to take only one example, the purpose of preventing any particular kind of crime, or crimes generally, is qualified always by the purposes of avoiding the conviction of the innocent and of enhancing that sense of security throughout the society which is one of the prime functions of the manifold safeguards of American criminal procedure. And the same thing would be true even if the dominant purpose of the criminal law were thought to be the rehabilitation of offenders rather than the prevention of offenses.

Examination of the purposes commonly suggested for the criminal law will show that each of them is complex and that none may be thought of as wholly excluding the others. Suppose, for example, that the deterrence of offenses is taken to be the chief end. It will still be necessary to recognize that the rehabilitation of offenders, the disablement of offenders, the sharpening of the community's sense of right and wrong, and the satisfaction of the community's sense of just

retribution may all serve this end by contributing to an ultimate reduction in the number of crimes. Even socialized vengeance may be accorded a marginal role, if it is understood as the provision of an orderly alternative to mob violence. The problem, accordingly, is one of the priority and relationship of purposes as well as of their legitimacy-of multivalued rather than of single-valued thinking. There is still another range of complications which are ignored if an effort is made to formulate any single "theory" or set of "principles" of criminal law. The purpose of having principle and theories is to help in organizing thought. In the law, the ultimate purpose of thought is to help in deciding upon a course of action.

In the criminal law, as in all law, questions about the action to be taken do not present themselves for decision in an institutional vacuum. They arise rather in the context of some established and specific procedure of decision: in a constitutional convention; in a legislature; in a prosecuting attorney's office; in a court charged with the determination of guilt or innocence; in a sentencing court; before a parole board; and so on. This means that each agency of decision must take account always of its own place in the institutional system and of what is necessary to maintain the integrity and workability of the system as a whole. A complex of institutional ends must be served, in other words, as well as a complex of substantive social ends.

Although the Supreme Court's decision in *Lawrence v. Texas* is commonly discussed as a matter of constitutional law, there is also an important substantive criminal law element from which we can learn. The debate in the excerpted portions of the majority opinion by Justice Anthony Kennedy and dissent by Justice Antonin Scalia are largely about the appropriate scope of criminal law in a free and democratic society.

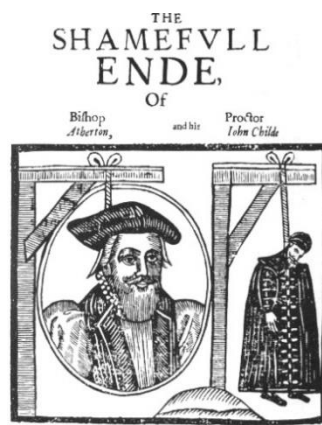


Figure 6: John Atherton and John Childe Hanged for Sodomy in 1640 (LOUIS CROMPTON, *HOMOSEXUALITY & CIVILIZATION* (2003)).

Lawrence v. Texas, 539 U.S. 558 (2003)

Justice Kennedy delivered the opinion of the Court.

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions....

The question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.

In Houston, Texas, officers of the Harris County Police Department were dispatched to a private residence in response to a reported weapons disturbance. They entered an apartment where one of the petitioners, John Geddes Lawrence, resided. The right of the police to enter does not seem to have been questioned. The officers observed Lawrence and another man, Tyron Garner, engaging in a sexual act. The two petitioners were arrested, held in custody over night, and charged and convicted before a Justice of the Peace.

The complaints described their crime as "deviate sexual intercourse, namely anal sex, with a member of the same sex (man)." The applicable state law is TEX. PENAL CODE ANN. §21.06(a) (2003). It provides: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." The statute defines "[d]eviate sexual intercourse" as follows:

"(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or

"(B) the penetration of the genitals or the anus of another person with an object."
§21.01(1)....

The petitioners were adults at the time of the alleged offense. Their conduct was in private and consensual....

We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution....

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.... The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

The judgment of the Court of Appeals for the Texas Fourteenth District is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice Scalia, with whom The Chief Justice and Justice Thomas join, dissenting.

....

It seems to me that the "societal reliance" on the principles confirmed in *Bowers* [*v. Hardwick*, 478 U.S. 186 (1986)] and discarded today has been overwhelming. Countless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority's belief that certain sexual behavior is "immoral and unacceptable" constitutes a rational basis for regulation. *See, e.g., Williams v. Pryor*, 240 F.3d 944, 949 (CA11 2001) (citing *Bowers* in upholding Alabama's prohibition on the sale of sex toys on the ground that "[t]he crafting and safeguarding of public morality ... indisputably is a legitimate government interest under rational basis scrutiny"); *Milner v. Apfel*, 148 F.3d 812, 814 (CA7 1998) (citing *Bowers* for the proposition that "[l]egislatures are permitted to legislate with regard to morality ... rather than confined to preventing demonstrable harms"); *Holmes v. California Army National Guard*, 124 F.3d 1126, 1136 (CA9 1997) (relying on *Bowers* in upholding the federal statute and regulations banning from military service those who engage in homosexual conduct); *Owens v. State*, 352 Md. 663, 683, 724 A. 2d 43, 53 (1999) (relying on *Bowers* in holding that "a person has no constitutional right to engage in sexual intercourse, at least outside of marriage"); *Sherman v. Henry*, 928 S.W. 2d 464, 469-473 (Tex. 1996) (relying on *Bowers* in rejecting a claimed constitutional right to commit adultery). We ourselves relied extensively on *Bowers* when we concluded, in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991), that Indiana's public indecency statute furthered "a substantial government interest in protecting order and morality," *ibid.*, (plurality opinion); *see also id.*, at 575 (Scalia, J., concurring in judgment). State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding. *See ante*, at 11 (noting "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex" (emphasis added)). The impossibility of distinguishing homosexuality from other traditional "morals" offenses is precisely why *Bowers* rejected the rational-basis challenge. "The law," it said, "is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." 478 U.S., at 196....

TEXAS PENAL CODE ANN. §21.06(a) (2003) undoubtedly imposes constraints on liberty. So do laws prohibiting prostitution, recreational use of heroin, and, for that matter, working more than 60 hours per week in a bakery. But there is no right to "liberty" under the Due Process Clause, though today's opinion repeatedly makes that claim. *Ante*, at 6 ("The liberty protected by the Constitution allows homosexual persons the right to make this choice"); *ante*, at 13 ("These matters ... are central to the liberty protected by the Fourteenth Amendment' "); *ante*, at 17 ("Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government"). The Fourteenth Amendment expressly allows States to deprive their citizens of "liberty," so long as "due process of law" is provided:

"No state shall ... deprive any person of life, liberty, or property, without due process of law." AMDT. 14 (emphasis added)....

[T]he [majority] says: "[W]e think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." *Ante*, at 11 (emphasis added). Apart from the fact that such an "emerging awareness" does not establish a "fundamental right," the statement is factually false. States continue to prosecute all sorts of crimes by adults "in matters pertaining to sex": prostitution, adult incest, adultery, obscenity, and child pornography. Sodomy laws, too, have been enforced "in the past half century," in which there have been 134 reported cases involving prosecutions for consensual, adult, homosexual sodomy. GAYLAW 375. In relying, for evidence of an "emerging recognition," upon the American Law Institute's 1955 recommendation not to criminalize "'consensual sexual relations conducted in private,'" *ante*, at 11, the Court ignores the fact that this recommendation was "a point of resistance in most of the states that considered adopting the Model Penal Code." GAYLAW 159....

The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are "immoral and unacceptable," *Bowers, supra*, at 196—the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity. *Bowers* held that this was a legitimate state interest. The Court today reaches the opposite conclusion. The Texas statute, it says, "further[s] no legitimate state interest which can justify its intrusion into the personal and private life of the individual," *ante*, at 18 (emphasis added). The Court embraces instead Justice Stevens' declaration in his *Bowers* dissent, that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice," *ante*, at 17. This effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a legitimate state interest, none of the above-mentioned laws can survive rational-basis review.

[Separate opinions by Justices O'Connor and Thomas were omitted]

Discussion Questions and Notes

- 1) What do you think is Justice Scalia's best example of a law that would be in jeopardy because of the majority's holding and reasoning?
- 2) Do you think the majority opinion embodies a principle that a person should be free to do whatever she likes as long as it does not harm another? If not, what is the principle articulated in the majority opinion?
- 3) The sodomy law struck down by the Court was passed by the majority of the Texas legislature and signed by the Governor. Is there a basis other than the applicable federal or state constitutions for courts to nullify the statute which was the product of representative democracy? Should there be such a basis?
- 4) Do the punishment theories that we read about help us resolve the differences between Justices Kennedy and Scalia?
- 5) What substantive criminal laws in modern America do you think should be repealed?
- 6) What conduct that is presently legal do you think should be made illegal?

B. "Victimless" Crimes

Now let us look at instances where courts have applied the precedent of *Lawrence v. Texas*. You might see a marked difference between your interpretation of the Supreme Court's majority opinion and that of other courts. This is important to recognize. Although criminal law focuses substantially on interpreting statutes, courts are also charged with interpreting the scope of prior precedent. Given the ambiguity of portions of the *Lawrence* majority opinion, it is not surprising that courts have applied it in sometimes inconsistent ways. First, let's examine whether the decision in *Lawrence* would result in laws prohibiting possession of certain drugs being held unconstitutional as Justice Scalia contended in his *Lawrence* dissent.



Figure 7: *Reefer Madness* (1936)

Wisconsin v. Beecraft, 727 N.W.2d 375 (Wi. Ct. App. 2006)

VERGERONT, J.

Steven Beecraft appeals the judgment of conviction and sentence for possession of THC as party to a crime in violation of Wis. STAT. §§ 961.41(3g) and 939.05. He contends that the possession of marijuana in the privacy of his own home is protected from interference by the State under various provisions of the United States and Wisconsin Constitutions. For the reasons we explain below, we reject his contentions and affirm the judgment of conviction and sentence....

The background facts relevant to this appeal are not in dispute and were presented by the State at Beecraft's trial.

A deputy from the Columbia County Sheriff's Department was dispatched to Beecraft's residence, looking for a third party who, the deputy was told, might be there. While speaking with Beecraft in the front hallway of his house, the deputy detected what he thought was the odor of burnt marijuana. In response to questions from the deputy, Beecraft admitted that he had been smoking marijuana; he got it and gave it to the deputy. The material Beecraft gave the deputy, together with the baggie it was in, weighed 4.32 grams. Testing of the material showed the presence of THC....

On appeal, Beecraft renews his argument that prohibiting his possession of marijuana for personal use in his home violates protections afforded him under the Wisconsin and United States Constitutions. We agree with the circuit court that there is no merit to any of his arguments....

We address first Beecraft's argument that he has a Fifth and Fourteenth Amendment due process right to liberty in his personal conduct, as established in *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003). The Supreme Court there held the personal liberty guaranteed by the due process clauses of the Fifth and Fourteenth Amendments prevented criminalizing the conduct of consenting adults engaging in homosexual sexual acts in private. The Court's analysis relied heavily on sexual behavior— "the most private human conduct"—in one's home— "the most private of places." Beecraft has provided no legal authority for treating, for purposes of the liberty interest protected by the Fifth and Fourteenth Amendment, marijuana use in one's home the same as adult-consenting sexual conduct in one's home....

Judgment affirmed.

Discussion Questions and Notes

- 1) This result probably seems unsurprising given the dissimilarity in facts in the *Beecraft* case from those in *Lawrence*. However, Justice Scalia contended that such laws, including statutes criminalizing heroin possession, would be in jeopardy after *Lawrence*. In fact, no court has held a drug law unconstitutional because of the

majority's opinion in *Lawrence*. Does that mean that Justice Scalia was simply wrong? Is there a difference in the way Justice Scalia read the majority in *Lawrence* versus the way other judges have?

- 2) Do you think marijuana should be legal in the United States for recreational use? If so, do you think there is a fundamental right to possess marijuana?
- 3) Do you have any concern about the reasoning of the *Beecraft* court when it dismissed his claim largely based upon this argument?: "Beecraft has provided no legal authority for treating, for purposes of the liberty interest protected by the Fifth and Fourteenth Amendment, marijuana use in one's home the same as adult-consenting sexual conduct in one's home."

Now, let us look at a case regarding whether an anti-sodomy statute (referred to as a crimes-against-nature law in North Carolina) survives a constitutional challenge when applied to a different factual situation than in *Lawrence*.

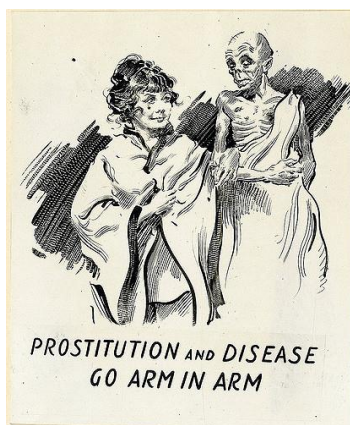


Figure 8: *Prostitution and Disease Go Arm in Arm*, National Museum of Health and Medicine (circa World War I era)

North Carolina v. Pope, 608 S.E.2d 114 (N.C. Ct. App. 2005)

HUNTER, Judge.

In this appeal, this Court must decide whether the United States Supreme Court opinion in *Lawrence v. Texas*, 539 U.S. 558, 156 L. Ed. 2d 508, 123 S. Ct. 2472 (2003) renders North Carolina's crime against nature statute, N.C. GEN. STAT. § 14-177, unconstitutional. For the reasons stated herein, it did not.

Teresa Pope ("defendant"), was charged with four counts of solicitation of a crime against nature, based upon her encounter with undercover police officers in which she indicated she would perform oral sex in exchange for money. She was also charged with one count of solicitation of prostitution to which she entered a plea of guilty....

Defendant ... contends that the charges should be dismissed because *Lawrence v. Texas* precludes the prosecution of her for solicitation of a crime against nature, to wit: offering to perform oral sex for money.

N.C. Gen. Stat. § 14-177 (2003) states: "Crime against nature. If any person shall commit the crime against nature, with mankind or beast, he shall be punished as a Class I felon." As explained by our Supreme Court:

The crime against nature is sexual intercourse contrary to the order of nature. It includes acts with animals and acts between humans per anum and per os. "Our statute is broad enough to include in the crime against nature other forms of the offense than sodomy and buggery. It includes all kindred acts of a bestial character whereby degraded and perverted sexual desires are sought to be gratified."

State v. Harward, 264 N.C. 746, 746, 142 S.E.2d 691, 692 (1965)....

In *Lawrence v. Texas*, 539 U.S. 558, 156 L. Ed. 2d 508, 123 S. Ct. 2472, the United States Supreme Court overturned its decision in *Bowers v. Hardwick*, 478 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986). In *Bowers*, the United States Supreme Court sustained a Georgia law that made it a criminal offense to engage in sodomy, whether the participants were of the same sex or not. In overruling *Bowers*, the United States Supreme Court ... held that the Due Process Clause of the Fourteenth Amendment protects the right of two individuals to engage in fully and mutually consensual private sexual conduct.

However, the *Lawrence* Court limited its holding when it stated:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.

Lawrence, 539 U.S. at 578, 156 L. Ed. 2d at 525 (emphasis added); *see also State v. Clark*, 161 N.C. App. 316, 588 S.E.2d 66 (2003) and *State v. Oakley*, 167 N.C. App. 318, 605 S.E.2d 215 (2004) (indicating this limiting language in *Lawrence* narrows the constitutional effect of the holding in *Lawrence*). As the *Lawrence* Court expressly excluded prostitution and public conduct from its holding, the State of North Carolina may properly criminalize the solicitation of a sexual act it deems a crime against nature.

Accordingly, we affirm the superior court's order reversing the district court's dismissal of the four charges of solicitation of a crime against nature. This case is remanded to the superior court for remand to the district court for trial.

Affirmed and remanded.

Discussion Questions and Notes

- 1) The excerpted quote from the *Lawrence* majority opinion seems clear: "The present case does not involve ... prostitution." So, is the court in *Pope* right that the *Lawrence* decision does not actually rule anti-sodomy statutes unconstitutional in cases involving prostitution?
- 2) Do you think prostitution, as described in the *Pope* case, should be legal? If so, do you think any other conduct related to prostitution that should be made illegal?
- 3) Is there any justifiable rationale, consistent with the holding *Lawrence*, for punishing prostitution involving sodomy more harshly than prostitution involving vaginal penetration?

As a final test, review this case testing whether an incestuous relationship between an adult stepfather and adult stepdaughter (who have no blood relationship) is protected by the right articulated by the majority in *Lawrence*.

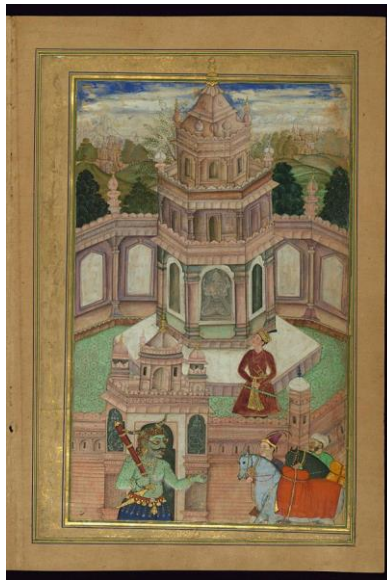


Figure 9: *The Story of the Man Falsely Accused of Incest as Told by the Princess of the Sandwood Pavilion* (Amir Khusrow, 1597-1598, Pakistan)

Ohio v. Lowe, 861 N.E.2d 512 (Ohio 2007)

LANZINGER, J.

In this case, accepted on a discretionary appeal, we consider R.C. 2907.03(A)(5), Ohio's incest statute, and hold that the statute is constitutional as applied to the consensual sexual conduct between a stepparent and adult stepchild....

The Stark County Grand Jury indicted defendant-appellant, Paul Lowe, on one count of sexual battery, a felony violation of R.C. 2907.03(A)(5), as a result of his consensual sex with his 22-year-old stepdaughter, the biological daughter of his wife, on March 19, 2003. Lowe pleaded not guilty and filed a motion to dismiss... Lowe argued that the statute was unconstitutional as applied to his case because the government has no legitimate interest in regulating sex between consenting adults.

After the trial court overruled his motion, Lowe changed his plea to no contest, was convicted, and was sentenced to 120 days of incarceration and three years of community control. The trial court also classified him as a sexually oriented offender. The Fifth District Court of Appeals upheld Lowe's conviction, holding that R.C. 2907.03(A)(5) clearly and unambiguously prohibits sexual conduct between a stepparent and stepchild regardless of the stepchild's age. The court of appeals also held that Lowe "does not have a constitutionally protected right to engage in sex with his stepdaughter."

....

R.C. 2907.03(A) states:

"No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:

"* * *

"(5) The offender is the other person's natural or adoptive parent, or a stepparent, or guardian, custodian, or person in loco parentis of the other person."

....

Lowe cites *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508, to argue that he has a constitutionally protected liberty interest to engage in private, consensual, adult sexual conduct with his stepdaughter when that activity does not involve minors or persons who may be easily injured or coerced. In *Lawrence*, a Texas statute criminalizing homosexual conduct was held to be unconstitutional as applied to adult males who had engaged in private and consensual acts of sodomy. Lowe contends that *Lawrence* named a new fundamental right to engage in consensual sex in the privacy of one's home.

... [T]he state in this case distinguishes *Lawrence* as being limited to consensual sexual conduct between unrelated adults.

... [W]e conclude that, as applied in this case, Ohio's statute serves the legitimate state interest of protecting the family unit and family relationships. While it is not enough under the rational-basis test for the government to just announce a noble purpose behind a statute, the statute will pass if it is reasonably related to any legitimate state purpose. Ohio has a tradition of acknowledging the "importance of maintaining the family unit." *In re Cunningham* (1979), 59 Ohio St.2d 100, 104, 13 O.O.3d 78, 391 N.E.2d 1034. A sexual relationship between a parent and child or a stepparent and stepchild is especially destructive to the family unit. R.C. 2907.03(A)(5) was designed to protect the family unit by criminalizing incest in Ohio. Stepchildren and adopted children have been included as

possible victims of the crime of incest because society is concerned with the integrity of the family, including step and adoptive relationships as well as blood relationships, and sexual activity is equally disruptive, whatever the makeup of the family. *See Camp v. State* (1986), 288 Ark. 269, 704 S.W.2d 617. As the "traditional family unit has become less and less traditional, * * * the legislature wisely recognized that the parental role can be assumed by persons other than biological parents, and that sexual conduct by someone assuming that role can be just as damaging to a child." *State v. Noggle* (1993), 67 Ohio St.3d 31, 33, 1993 Ohio 189, 615 N.E.2d 1040. This reasoning applies not only to minor children, but to adult children as well. Moreover, parents do not cease being parents – whether natural parents, stepparents, or adoptive parents – when their minor child reaches the age of majority.

Accordingly, as applied in this case, R.C. 2907.03(A)(5) bears a rational relationship to the legitimate state interest in protecting the family, because it reasonably advances its goal of protection of the family unit from the destructive influence of sexual relationships between parents or stepparents and their children or stepchildren. If Lowe divorced his wife and no longer was a stepparent to his wife's daughter, the stepparent-stepchild relationship would be dissolved. The statute would no longer apply in that case.

We hold that R.C. 2907.03(A)(5) is constitutional as applied to consensual sexual conduct between a stepparent and adult stepchild, because it bears a rational relationship to the state's legitimate interest in protecting the family. The judgment of the Court of Appeals for Stark County is affirmed.

Judgment affirmed.

....

PFEIFER, J., dissenting.

....

The majority reads R.C. 2907.03 as making certain private, consensual sexual relations between two adults illegal. R.C. 2907.03(A)(5) and its legislative history indicate that that statute is designed to protect children, not to criminalize sexual activity between consenting adults. Imbued in R.C. 2907.03(A)(5) is the notion of parental, or quasi-parental, responsibility and control over the victim. It makes illegal sexual conduct that occurs when "[t]he offender is the other person's natural or adoptive parent, or a stepparent, or guardian, custodian, or person in loco parentis of the other person." THE SUMMARY OF AM. SUB. H.B. 511, *supra*, at 14, indicates that it is children and those who are unable to care for themselves that are being protected by the statute: "Incestuous conduct is also included, though defined in broader terms than formerly, so as to include not only sexual conduct by a parent with his child, but also sexual conduct by a step-parent with his step-child, a guardian with his ward, or a custodian or person in loco parentis with his charge." Contrary to the majority's reading of the Legislative Service Commission's Comments to the statute, R.C. 2907.03(A)(5) does not "protect[] the family unit more broadly"; instead, it protects children against a broader class of persons who can exert a parental role. In *State v. Noggle* (1993), 67 Ohio St.3d 31, 1993 Ohio 189, 615 N.E.2d 1040, this court wrote that "[s]imply put, [R.C. 2907.03(A)(5)] applies to the people the

child goes home to.” A stepparent, who may not even have married his or her spouse until after the spouse’s children had reached adulthood, has no legal responsibility to his or her adult stepchildren.

The majority writes that the statute “advances its goal of protection of the family unit from the destructive influence of sexual relationships between parents or stepparents and their children or stepchildren.” I suspect that the statute was not employed in this case as a means to preserve Ohio’s fractured extended families. Rather, the state used R.C. 2907.03(A)(5) as a means to prosecute a strict-liability, slam-dunk sex offense that does not allow the defendant to present any evidence regarding the consent of the victim. R.C. 2907.03(A)(5) provides a shortcut to a conviction. This sort of use of the statute demeans its true purpose. The consent of the alleged victim should remain a valid defense in cases involving adults.

Discussion Questions and Notes

- 1) As with the decision in *Pope*, the Ohio Supreme Court seemingly read the majority in *Lawrence* very narrowly. However, unlike the court in *Pope*, the *Lowe* court did not rely on specific language in the *Lawrence* opinion to support its narrow reading. Do you agree with the Ohio court’s reasoning?
- 2) How do we differentiate the concern of protecting the family in *Lowe*, which the majority views as justifying Lowe’s conviction, with the constitutionally impermissible rationale of historical animus? Is the distinction complicated by the court’s admission that the relationship in *Lowe* would have been legally permissible the moment that Paul Lowe divorced his wife?
- 3) Should Paul Lowe have been the only one prosecuted in this case? Because the stepdaughter was also an adult, should she also have been prosecuted? Is there any sound justification for only prosecuting the stepfather when the relationship at issue occurred between two adults?

CHAPTER 2: INTERPRETING STATUTES

As discussed at the outset of this text, this course is primarily about statutes. Crimes are defined by the terms the legislatures use in codifying criminal statutes. This chapter is dedicated to giving you some basic tools for analyzing and interpreting statutory language. However, the basic examples used in this chapter do not complete your education regarding interpretation in Criminal Law. Rather, each subsequent chapter will introduce novel issues and doctrines related to interpreting statutes. As a result, you will build on the lessons in this chapter throughout the remainder of the course.

Although you certainly have a general intuitive sense of what acts are necessary for certain well-known crimes, legislators often have great difficulty defining criminal acts with precision. Even core crimes, such as murder, kidnapping, and battery, can be difficult to define with precision at the boundaries. History and social norms often heavily inform how a criminal statute is interpreted and applied. For example, Professor Stuart Green discusses the problems that emerge in differentiating prostitution from legal conduct.



Figure 10: Restaurant Sign outside of Mexican Restaurant in China (photo by law student circa 2009)

Stuart Green, *What Counts as Prostitution?*, 4 BERGEN J. OF CRIM. L. & CRIM. JUST. 65 (2016)

What counts, or should count, as prostitution? In the criminal law today, prostitution is understood to involve the provision of sexual services in exchange for money or other benefits. But what exactly is a 'sexual service'? Is it prostitution to receive a fee in return for sexual conduct that does not involve penetration or other touching of the genitals (such as lap dancing)? Is it prostitution if there is no physical contact at all between the seller and another person (as when the buyer pays to watch the seller strip or masturbate), or if the only physical contact is between the seller and a third party (as when the buyer pays others to perform in a sex show or the filming of a pornographic movie)? And what exactly is the nature of the required 'exchange'? Is it prostitution if, in return for sex, a person gives money to his spouse or other steady sexual partner? Is it prostitution if sex is provided in return for money in the context of a 'therapeutic' relationship? Would it be prostitution if a person agreed to exchange sex in return for non-property benefits such as a job promotion or political favour? Would it be prostitution if a person accepted money as 'thanks' for having sex, or for her incidental 'expenses', rather than pursuant to a quid pro quo agreement?

Despite the enormous literature that exists on the law and morality of prostitution, there has been hardly any attention paid to basic definitional questions of this sort....

Deciding what should count as prostitution is not likely to be easy. The concept of prostitution is deeply embedded within complex cultural, moral, and legal constructs, all highly contested. Indeed, there is probably no type of sexual offence the moral and legal status of which has generated broader disagreement among scholars and legislatures alike. There is controversy even about the term 'prostitution' itself....

A [] modern approach to defining prostitution is to specify what it is that must be bought or sold. In a majority of U.S. states, as well as in England and Wales, Norway, and Sweden, this is done by referring to the sale or purchase of 'sexual activity', 'sexual services', or 'sexual contact', sometimes with further specification of acts, but often without. A few other jurisdictions prohibit the sale or purchase of conduct that is 'lewd,' a notoriously vague term that in this context seems to mean something like 'tend[ing] to incite sensual desire or imagination'. Defining prostitution as 'sexual' or 'lewd' conduct for hire may be a bit better than referring simply to 'being a prostitute,' but it hardly solves the problem of vagueness. By itself, the term gives us almost no direction on how to decide puzzling cases involving conduct such as oral sex, manual-genital stimulation, lap dancing, or stripping. The final means of defining prostitution is to enumerate exactly which sexual acts for hire are prohibited. While this approach would seem to solve the problem of vagueness and overbreadth, it nevertheless raises questions of policy. Which acts should be included here? It is probably no surprise that every U.S. state that follows the enumeration approach includes on its list of prohibited acts that of 'sexual intercourse'. But beyond that, it is striking how little consensus there is....

One of the most basic requirements that defines the offense of prostitution is that sex be exchanged for money or other property. In practice, this means that receiving or giving something of value merely as 'thanks' for, or incident to, a sexual act, would not constitute prostitution. Rather, the transaction of sex for money must constitute a quid pro quo. As such, prostitution is analogous

to bribery, which requires that something of value be given 'in exchange for' an official act. A good illustration of what this quid pro quo requirement means in practice can be seen in the the Hawaii case of *Xiao*. The defendant, Xiao, met Wagner, an undercover cop, at a nightclub in Honolulu. Wagner bought her several drinks, after which she 'slow danced' with him (i.e., rubbed her body against his body and groin area). Prosecuted for selling sex, Xiao argued that there was no evidence that the drinks constituted a 'fee' and that any any sexual conduct that occurred between her and Wagner was 'merely gratuitous'. Perhaps surprisingly, given that the drinks cost forty dollars each, the Hawaii Supreme Court agreed with Xiao's contention. Even though there was nothing, in principle, to prevent the purchase of a drink from constituting the payment of a 'fee', the court said, the prosecution had failed to present sufficient evidence that Xiao had agreed to provide sex in return for the drinks....

While all prostitution statutes require that sex be exchanged for something of value, they vary considerably in precisely how the thing of value is defined. Among U.S. statutes, prostitution is defined as sex 'for hire', for a 'fee', 'as a business,' that is 'purchased', or that is exchanged for 'money', 'money or its equivalent', 'money or other property', 'money, property, or services', or 'anything of value'....

For example, in the Illinois case of *Johnson*, the defendant contended that the prostitution statute was unconstitutionally vague because it would 'make a "prostitute" of a woman who offers, performs or agrees to perform sexual acts in overt or tacit exchange for an expensive dinner or a concert, an exchange the defendant contends is part of an unwritten social code'. In rejecting this vagueness argument, the court stated that the 'committee which drafted the statute specifically limited its language to apply only to sex acts performed for "money," instead of for "any valuable consideration."' Thus, 'an offer or agreement to receive money, rather than, for example, a fur coat or a night at the opera ... is essential to a prostitution conviction'. To construe the statute otherwise, the court said, would have the untoward effect of interfering with what it called 'ordinary social situations', and 'discourag[ing] exchanges of sexual acts as a part of social companionship or for gifts of material goods'. Presumably, this strict sex-for-cash approach would also have the even more perverse effect of excluding a wide range of transactions in which sex is exchanged for drugs, cases that pose some of the most serious public health risks associated with commercialised sex.

Recognizing the inherent ambiguity of language and difficulties that arise under a statute-based criminal justice system, many doctrines have been used to guide and constrain interpretation. This course just touches on just a few rules of interpretation. To have an even basic comprehension of criminal law in the United States, you must be familiar with these rules.

I. Principle of Legality

The principle of legality is a fundamental premise of the American system of criminal law that necessarily constrains interpretation of statutes. The basic concept is that a crime must be defined by the legislature before the defendant commits her criminal acts. The notion that criminal law must be predefined for just punishment is well-embedded in the laws of nations derived from the British common law system, among other sources of the principle.

Rudolf Leonhard & Kaiser Wilhelm, *German and American Criminal Law Compared*, 4 PROCEEDINGS OF THE AM. POL. SCI. ASSOC. 285 (1908)

We live in accordance with the rule *Nulla poena sine lege*... This rule is not at all a matter of course but a result of a historical development. It is not even satisfying because the possibility of punishing offenders whose do not fall within the narrow frontiers of written texts has advantages. But we mean in our country that these must be sacrificed to a higher degree of civilization and especially the sentiments of pity for the broad classes of people who come conflict with the criminal laws and who can expect and demand specific definition of what is forbidden and what is permitted.

The United States, in contrast to jurisdictions truer to British common law, maintains a particularly strong version of this rule. However, as this case illustrates, even the American principle of legality has its limits.

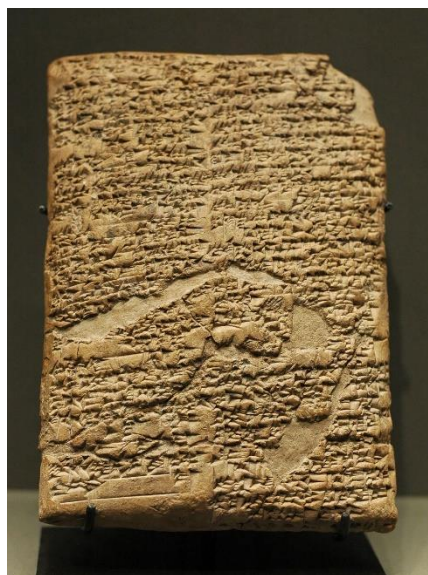


Figure 11: Prologue of the Code of Hammurabi (circa 1780 BC)

Louisiana v. Robbins, 986 So. 2d 828 (La. Ct. App. 2008)

MOORE, J.

The defendant, Paul Robbins, was convicted of distribution of methadone and distribution of marijuana. After being adjudicated an habitual offender, he was sentenced to 45 years at hard labor on each count, the sentences to run concurrently. The defendant now appeals. For the reasons set forth below, we affirm the convictions and sentences....

The crime occurred on August 3, 2005. Robbins was convicted on July 18, 2006 and adjudicated an habitual offender on May 14, 2007. On August 10, 2007, he was sentenced as an habitual offender on both crimes arising out of the single drug transaction. The defense objected to both sentences being enhanced. On appeal, he contends that enhancing both sentences was contrary to the law at the time, and violated due process.

Three months after the habitual offender sentences were imposed, the Louisiana Supreme Court in *State v. Shaw*, 06-2467 (La. 11/27/07), 969 So. 2d 1233, held that the Habitual Offender Law did not bar enhancement of more than one conviction obtained on the same date and arising out of a single criminal episode or course of conduct, overruling *State ex rel. Porter v. Butler*, 573 So. 2d 1106 (La. 1991). The court also noted that the holding applied retroactively to all non-final convictions. Notwithstanding this pronouncement from the court, counsel for the appellant contends that retroactive application of *Shaw* is barred...

The principle of legality is the basic premise of criminal law that "conduct is not criminal unless forbidden by law which gives advance warning that such conduct is criminal." This principle is based on four interconnected rules or principles: (1) the ancient rule of *nullem crimen sine lege* ("no crime without a law"); (2) the prohibition of retroactively criminalizing conduct (e.g., ex post facto laws); (3) the ancient rule of *nullem poena sine lege* ("no punishment without law") (This principle operates to prevent a heavier penalty than that authorized by statute); and, (4) the prohibition against the retroactive imposition of more severe penalties than previously authorized.

The fundamental issue raised by this assignment is whether the defendant is afforded protection under either the principle of legality or the more narrow corollary of this principle-the constitutional prohibition against ex post facto laws. Ordinarily, the principle of legality and the prohibition against ex post facto laws apply to legislatively enacted criminal statutes and laws. However, as observed by counsel, "if a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect." *Bouie v. City of Columbia*, 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964).

We note, however, that the court in *Shaw* not only held that La. R.S. 15:529.1 (the Habitual Offender Sentencing Statute) was misinterpreted or misconstrued in *State ex rel. Porter v. Butler*, *supra*, it also regarded the jurisprudence construing the statute as unsettled, as demonstrated by the analysis in this court's opinion in *State v. Shaw*, 41,233 (La. App. 2 Cir. 8/23/06), 939 So. 2d 519 5 and *State v. Johnson*, 2003-2993 (La. 10/19/04), 884 So. 2d 568. Hence, the supreme court's rationale for

retroactive application to non-final cases appears to be that overruling *State ex rel. Porter v. Butler* does not actually constitute a change in the law as it was enacted and amended by the legislature. We are therefore unwilling to characterize the supreme court's construction of the statute as "unexpected and indefensible with reference to previously expressed law."

Although counsel's lucid, well-reasoned arguments raise interesting and fundamental questions regarding retroactive application of the supreme court's construction of La. R.S. 15:529.1, we are constrained by the authority of its decision in *State v. Shaw, supra*, to apply that court's most recent expression of the law. Accordingly, we must conclude that this assignment is without merit...

For the foregoing reasons, the defendant's convictions and sentences are affirmed.

Discussion Questions and Notes

- 1) What are the advantages to a principle of legality? What are the disadvantages? What sort of abuses might the government engage in without a principle of legality?
- 2) A portion of the principle of legality is embodied in the Ex Post Facto Clause of the Constitution. In fact, there are two Ex Post Facto Clauses – one restricts actions by the federal government while the other restricts actions by the states. However, unlike most of the individual rights articulated in the Constitution, the Ex Post Facto Clause is not in the Bill of Rights. Instead, it is in the unamended constitutional text itself. Why do you think the Ex Post Facto Clause was part of the original Constitution instead of protections against speech restrictions, impingements on the right to bear arms, unreasonable searches and seizures, denial of legal counsel, or cruel and unusual punishment?

II. Vagueness

Vagueness and ambiguity are different, but related, concepts in criminal law. Although other academic fields, particularly the philosophy of language, also distinguish the two ideas, the distinction in criminal law, as limited by the Constitution, is functionally different. If a criminal statute is deemed to be "vague," it represents an unconstitutional violation of a person's right to due process. However, if a law is merely ambiguous, then it is considered unremarkable and consistent with American legal tradition. Courts rarely find statutes to be unconstitutionally vague. Yet the line between "vagueness" and "ambiguity" is difficult to describe with any precision. In those cases where a statute is ruled unconstitutionally void for vagueness, the courts usually have policy concerns beyond the unclear language of the

statute. This article discusses the basic counters of the modern vagueness doctrine and some of the difficulties and shortcomings associated with it.

Carissa Byrne Hessick, *Vagueness Principles*, 50 ARIZ. ST. L.J. 1137 (2017)

The void-for vagueness doctrine is hardly a new invention. Since 1914, the Court has insisted that the Due Process Clause requires that a criminal statute “clearly define the conduct it proscribes.”¹ Laws that are insufficiently definite, the Court has said, fail to give the public sufficient notice about what conduct is prohibited, lead to arbitrary and discriminatory enforcement, and represent an impermissible delegation by the legislature.

At the same time that courts have enforced the prohibition against vague statutes, they have neglected to take the principles underlying vagueness seriously in other criminal justice contexts. Ordinary criminal prosecutions often raise the same problems as vague statutes. For example, the current state of traffic laws and traffic enforcement have led to enforcement that is as arbitrary and discriminatory as the enforcement of vague laws. And there is a rich literature explaining how the broad discretion accorded to prosecutors in charging and plea bargaining has led to arbitrary and discriminatory enforcement. Arbitrary and discriminatory enforcement are not the only vagueness principles that are threatened by the enforcement of non-vague statutes. Non-vague laws also fail to give defendants notice about their criminal exposure, and those laws regularly delegate criminal policy matters to the executive. Yet, outside the vagueness context, current doctrine provides no avenue for defendants to raise these arguments....

The void-for-vagueness doctrine requires that a criminal statute “clearly define the conduct it proscribes.”² Laws that are insufficiently precise violate the Due Process Clauses. The Supreme Court has found a number of laws to be unconstitutionally vague. For example, in *Kolender v. Lawson*, the Court struck down a California statute requiring persons who loiter or wander on the streets to provide “credible and reliable” identification whenever requested by the police.³ The Court held that the statute was unconstitutionally vague because it failed to clarify what constituted “credible and reliable” identification.⁴ Similarly, in *Smith v. Goguen*, the Court struck down a Massachusetts statute that criminalized public contemptuous treatment of the U.S. flag for failing to define “contemptuous treatment.”⁵

¹ Johnson v. United States, 135 S. Ct. 2551, 2563 (2015). [footnotes from this article excerpt have been renumbered]

² Skilling v. United States, 561 U.S. 358, 415 (2010) (Scalia, J., concurring in part and concurring in the judgment).

³ 461 U.S. 352 (1983).

⁴ *Id.* at 353-54.

⁵ 415 U.S. 566 (1974).

More recently, in *City of Chicago v. Morales*, the Court used the vagueness doctrine to strike down a Chicago anti-loitering ordinance aimed at gang members.⁶ The city ordinance prohibited "criminal street gang members" from loitering in public places.⁷ The ordinance defined the term "loiter" as "to remain in any one place with no apparent purpose," a definition that the Court deemed unconstitutionally vague.⁸ Just a few terms ago, in *Skilling v. United States*, the Court created its own limited definition of "honest services" fraud based on the conclusion that a broader interpretation of the relevant federal statute posed a threat of unconstitutional vagueness.⁹ And most recently, in *Johnson v. United States*, the Court struck down as unconstitutionally vague a provision of the Armed Career Criminal Act that defined a violent felony as, inter alia, a crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another."¹⁰

The Supreme Court has usually offered two reasons why a vague criminal statute violates the right to due process. The first is that vague laws give insufficient notice to citizens about what conduct is permitted and what conduct is prohibited. Without such notice, an individual may accidentally engage in illegal conduct. As a consequence, in order to avoid conviction under vague statutes, citizens may choose to avoid large swaths of conduct that might be prohibited by the vague statute. That is to say, not only are vague statutes a trap for the unwary, but they also may chill legal conduct...

The second rationale the Court has provided for striking down vague statutes is that vague statutes provide "insufficient standards for enforcement."¹¹ When a statute fails to give police and prosecutors a clear indication of what conduct is legal, the statute "vests virtually complete discretion in the hands" of law enforcement.¹² According to the Court, such unfettered discretion may result in "arbitrary and discriminatory enforcement" because it "allows policemen, prosecutors, and juries to pursue their personal predilections."¹³

To illustrate the issues related to vagueness in modern criminal law, it is helpful to review one of the Supreme Court's foundational, but problematic, cases in the area.

⁶ 527 U.S. 41 (1999).

⁷ *Id.* at 46-47.

⁸ *Id.* at 56.

⁹ 561 U.S. 358, 408-09 (2010).

¹⁰ 135 S. Ct. 2551 (2015).

¹¹ *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 503 (1982).

¹² *Kolender*, 461 U.S. at 358.

¹³ *Goguen*, 415 U.S. at 573.



Figure 12: Justice William O. Douglas

Papachristou v. City of Jacksonville, 405 U.S. 156 (1972)

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case involves eight defendants who were convicted in a Florida municipal court of violating a Jacksonville, Florida, vagrancy ordinance....¹ The case here on a petition for certiorari, which we granted. For reasons which will appear, we reverse....

Margaret Papachristou, Betty Calloway, Eugene Eddie Melton, and Leonard Johnson were all arrested early on a Sunday morning, and charged with vagrancy – “prowling by auto.”

....

¹ JACKSONVILLE ORDINANCE CODE § 26-57 provided at the time of these arrests and convictions as follows:

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

Class D offenses at the time of these arrests and convictions were punishable by 90 days’ imprisonment, \$500 fine, or both. JACKSONVILLE ORDINANCE CODE § 1-8 (1965). The maximum punishment has since been reduced to 75 days or \$450. § 304.101 (1971)....

We are advised that at present the Jacksonville vagrancy ordinance is § 330.107 and identical with the earlier one except that “juggling” has been eliminated.

The facts are stipulated. Papachristou and Calloway are white females. Melton and Johnson are black males....

At the time of their arrest the four of them were riding in Calloway's car on the main thoroughfare in Jacksonville. They had left a restaurant owned by Johnson's uncle where they had eaten and were on their way to a nightclub. The arresting officers denied that the racial mixture in the car played any part in the decision to make the arrest. The arrest, they said, was made because the defendants had stopped near a used-car lot which had been broken into several times. There was, however, no evidence of any breaking and entering on the night in question.

Of these four charged with "prowling by auto" none had been previously arrested except Papachristou who had once been convicted of a municipal offense....

This ordinance is void for vagueness, both in the sense that it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," *United States v. Harriss*, 347 U.S. 612, 617, and because it encourages arbitrary and erratic arrests and convictions. *Thornhill v. Alabama*, 310 U.S. 88; *Herndon v. Lowry*, 301 U.S. 242.

Living under a rule of law entails various suppositions, one of which is that "[all persons] are entitled to be informed as to what the State commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453....

The Jacksonville ordinance makes criminal activities which by modern standards are normally innocent. "Nightwalking" is one. Florida construes the ordinance not to make criminal one night's wandering, *Johnson v. State*, 202 So. 2d, at 855, only the "habitual" wanderer or, as the ordinance describes it, "common night walkers." We know, however, from experience that sleepless people often walk at night, perhaps hopeful that sleep-inducing relaxation will result.

Luis Munoz-Marin, former Governor of Puerto Rico, commented once that "loafing" was a national virtue in his Commonwealth and that it should be encouraged. It is, however, a crime in Jacksonville.

"Persons able to work but habitually living upon the earnings of their wives or minor children" – like habitually living "without visible means of support" – might implicate unemployed pillars of the community who have married rich wives.

"Persons able to work but habitually living upon the earnings of their wives or minor children" may also embrace unemployed people out of the labor market, by reason of a recession or disemployed by reason of technological or so-called structural displacements.

Persons "wandering or strolling" from place to place have been extolled by Walt Whitman and Vachel Lindsay. The qualification "without any lawful purpose or object" may be a trap for innocent acts. Persons "neglecting all lawful business and habitually spending their time by frequenting ... places where alcoholic beverages are sold or served" would literally embrace many members of golf clubs and city clubs.

Walkers and strollers and wanderers may be going to or coming from a burglary. Loafers or loiterers may be "casing" a place for a holdup. Letting one's wife support him is an intra-family matter, and normally of no concern to the police. Yet it may, of course, be the setting for numerous crimes.

The difficulty is that these activities are historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness. They have encouraged lives of high spirits rather than hushed, suffocating silence.

They are embedded in Walt Whitman's writings, especially in his "Song of the Open Road." They are reflected, too, in the spirit of Vachel Lindsay's "I Want to Go Wandering," and by Henry D. Thoreau.⁷

This aspect of the vagrancy ordinance before us is suggested by what this Court said in 1876 about a broad criminal statute enacted by Congress: "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *United States v. Reese*, 92 U.S. 214, 221.

While that was a federal case, the due process implications are equally applicable to the States and to this vagrancy ordinance. Here the net cast is large, not to give the courts the power to pick and choose but to increase the arsenal of the police....

Another aspect of the ordinance's vagueness appears when we focus, not on the lack of notice given a potential offender, but on the effect of the unfettered discretion it places in the hands of the Jacksonville police. Caleb Foote, an early student of this subject, has called the vagrancy-type law as offering "punishment by analogy." Such crimes, though long common in Russia, are not compatible with our constitutional system. We allow our police to make arrests only on "probable cause," a Fourth and Fourteenth Amendment standard applicable to the States as well as to the Federal Government. Arresting a person on suspicion, like arresting a person for investigation, is foreign to our system, even when the arrest is for past criminality. Future criminality, however, is the common justification for the presence of vagrancy statutes....

Those generally implicated by the imprecise terms of the ordinance – poor people, nonconformists, dissenters, idlers – may be required to comport themselves according to the lifestyle

⁷ "I have met with but one or two persons in the course of my life who understood the art of Walking, that is, of taking walks, – who had a genius, so to speak, for sauntering: which word is beautifully derived 'from idle people who roved about the country, in the Middle Ages, and asked charity, under pretence of going a la Sainte Terre,' to the Holy Land, till the children exclaimed, 'There goes a Sainte Terror,' a Saunterer, a Holy-Lander. They who never go to the Holy Land in their walks, as they pretend, are indeed mere idlers and vagabonds; but they who do go there are saunterers in the good sense, such as I mean. Some, however, would derive the word from sans terre, without land or a home, which, therefore, in the good sense, will mean, having no particular home, but equally at home everywhere. For this is the secret of successful sauntering. He who sits still in a house all the time may be the greatest vagrant of all; but the saunterer, in the good sense, is no more vagrant than the meandering river, which is all the while sedulously seeking the shortest course to the sea. But I prefer the first, which, indeed, is the most probable derivation. For every walk is a sort of crusade, preached by some Peter the Hermit in us, to go forth and reconquer this Holy Land from the hands of the Infidels." *EXCURSIONS* 251-252 (1893).

deemed appropriate by the Jacksonville police and the courts. Where, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law. It furnishes a convenient tool for "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." *Thornhill v. Alabama*, 310 U.S. 88, 97-98. It results in a regime in which the poor and the unpopular are permitted to "stand on a public sidewalk ... only at the whim of any police officer." *Shuttlesworth v. Birmingham*, 382 U.S. 87, 90....

A presumption that people who might walk or loaf or loiter or stroll or frequent houses where liquor is sold, or who are supported by their wives or who look suspicious to the police are to become future criminals is too precarious for a rule of law. The implicit presumption in these generalized vagrancy standards – that crime is being nipped in the bud – is too extravagant to deserve extended treatment. Of course, vagrancy statutes are useful to the police. Of course, they are nets making easy the roundup of so-called undesirables. But the rule of law implies equality and justice in its application. Vagrancy laws of the Jacksonville type teach that the scales of justice are so tipped that even-handed administration of the law is not possible. The rule of law, evenly applied to minorities as well as majorities, to the poor as well as the rich, is the great mucilage that holds society together.

The Jacksonville ordinance cannot be squared with our constitutional standards and is plainly unconstitutional.

Reversed.

Discussion Questions and Notes

- 1) The excerpt includes a significant amount of colorful and flowery language as Justice Douglas was prone to use in his opinions. Footnote 7, for instance, is dedicated to the topic of sauntering, and its etymology, which had a particular interest to Justice Douglas. What does that discussion have to do with a statute being unconstitutionally vague?
- 2) The Supreme Court's opinion in *Papachristou* is still good law and cited by the modern Court in vagueness cases. And yet, we might wonder what parts of the Jacksonville ordinance were actually vague in a linguistic sense. Look back at footnote 1 in the opinion and identify language you think is genuinely vague. Were any of the named defendants in the consolidated cases charged with a crime you deem to be impermissibly vague?
- 3) It might surprise you, after having read the *Papachristou* opinion, to learn that vagrancy statutes are still quite common across the United States. Similarly, disorderly conduct and loitering are illegal across the country. Given Justice Douglas' concerns, how do you think that have those laws survived constitutional vagueness challenges?

In the following case, you can see the modern Supreme Court continuing to struggle with how to apply the vagueness doctrine in subsequent cases.

Johnson v. United States, 135 S. Ct. 2551 (2015)

Justice Scalia delivered the opinion of the Court.

Under the Armed Career Criminal Act of 1984, a defendant convicted of being a felon in possession of a firearm faces more severe punishment if he has three or more previous convictions for a “violent felony,” a term defined to include any felony that “involves conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. §924(e)(2)(B). We must decide whether this part of the definition of a violent felony survives the Constitution’s prohibition of vague criminal laws....

The Act defines “violent felony” as follows:

“any crime punishable by imprisonment for a term exceeding one year ... that –

“(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

“(ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*” §924(e)(2)(B) (emphasis added).

The closing words of this definition, italicized above, have come to be known as the Act’s residual clause. Since 2007, this Court has decided four cases attempting to discern its meaning. We have held that the residual clause (1) covers Florida’s offense of attempted burglary, *James v. United States*, 550 U.S. 192, 127 S. Ct. 1586, 167 L. Ed. 2d 532 (2007); (2) does *not* cover New Mexico’s offense of driving under the influence, *Begay v. United States*, 553 U.S. 137, 128 S. Ct. 1581, 170 L. Ed. 2d 490 (2008); (3) does *not* cover Illinois’ offense of failure to report to a penal institution, *Chambers v. United States*, 555 U.S. 122, 129 S. Ct. 687, 172 L. Ed. 2d 484 (2009); and (4) does cover Indiana’s offense of vehicular flight from a law-enforcement officer, *Sykes v. United States*, 564 U.S. 1, 131 S. Ct. 2267, 180 L. Ed. 2d 60(2011)....

This case involves the application of the residual clause to another crime, Minnesota’s offense of unlawful possession of a short-barreled shotgun. Petitioner Samuel Johnson is a felon with a long criminal record. In 2010, the Federal Bureau of Investigation began to monitor him because of his involvement in a white-supremacist organization that the Bureau suspected was planning to commit acts of terrorism. During the investigation, Johnson disclosed to undercover agents that he had manufactured explosives and that he planned to attack “the Mexican consulate” in Minnesota, “progressive bookstores,” and “liberals.” Revised Presentence Investigation in No. 0:12CR00104-001 (D. Minn.), p. 15, ¶16. Johnson showed the agents his AK-47 rifle, several semiautomatic firearms, and over 1,000 rounds of ammunition.

After his eventual arrest, Johnson pleaded guilty to being a felon in possession of a firearm in violation of §922(g). The Government requested an enhanced sentence under the Armed Career Criminal Act. It argued that three of Johnson's previous offenses—including unlawful possession of a short-barreled shotgun, *see* MINN. STAT. §609.67 (2006) – qualified as violent felonies. The District Court agreed and sentenced Johnson to a 15-year prison term under the Act. The Court of Appeals affirmed. 526 Fed. Appx. 708 (CA8 2013) (*per curiam*). We granted certiorari to decide whether Minnesota's offense of unlawful possession of a short-barreled shotgun ranks as a violent felony under the residual clause. We later asked the parties to present reargument addressing the compatibility of the residual clause with the Constitution's prohibition of vague criminal laws....

We are convinced that the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges. Increasing a defendant's sentence under the clause denies due process of law.

Two features of the residual clause conspire to make it unconstitutionally vague. In the first place, the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime. It ties the judicial assessment of risk to a judicially imagined "ordinary case" of a crime, not to real-world facts or statutory elements. How does one go about deciding what kind of conduct the "ordinary case" of a crime involves? "A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?" *United States v. Mayer*, 560 F. 3d 948, 952 (CA9 2009) (Kozinski, C. J., dissenting from denial of rehearing en banc). To take an example, does the ordinary instance of witness tampering involve offering a witness a bribe? Or threatening a witness with violence? Critically, picturing the criminal's behavior is not enough; as we have already discussed, assessing "potential risk" seemingly requires the judge to imagine how the idealized ordinary case of the crime subsequently plays out. *James* illustrates how speculative (and how detached from statutory elements) this enterprise can become. Explaining why attempted burglary poses a serious potential risk of physical injury, the Court said: "An armed would-be burglar may be spotted by a police officer, a private security guard, or a participant in a neighborhood watch program. Or a homeowner ... may give chase, and a violent encounter may ensue." 550 U.S., at 211, 127 S. Ct. 1586, 167 L. Ed. 2d 532. The dissent, by contrast, asserted that any confrontation that occurs during an attempted burglary "is likely to consist of nothing more than the occupant's yelling 'Who's there?' from his window, and the burglar's running away." *Id.*, at 226, 127 S. Ct. 1586, 167 L. Ed. 2d 532 (opinion of Scalia, J.). The residual clause offers no reliable way to choose between these competing accounts of what "ordinary" attempted burglary involves....

The Government and the dissent claim that there will be straightforward cases under the residual clause, because some crimes clearly pose a serious potential risk of physical injury to another. *See post*, at ___ - ___, 192 L. Ed. 2d, at 604 (opinion of Alito, J.). True enough, though we think many of the cases the Government and the dissent deem easy turn out not to be so easy after all. Consider just one of the Government's examples, Connecticut's offense of "rioting at a correctional institution." *See United States v. Johnson*, 616 F. 3d 85 (CA2 2010). That certainly sounds like a violent felony—until one realizes that Connecticut defines this offense to include taking part in "any disorder, disturbance, strike, riot or other organized disobedience to the rules and regulations" of the prison. CONN. GEN. STAT. §53a-179b(a) (2012). Who is to say which the ordinary "disorder" most closely

resembles—a full-fledged prison riot, a food-fight in the prison cafeteria, or a “passive and nonviolent [act] such as disregarding an order to move,” *Johnson*, 616 F. 3d, at 95 (Parker, J., dissenting)?

....

We hold that imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution’s guarantee of due process. Our contrary holdings in *James* and *Sykes* are overruled. Today’s decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act’s definition of a violent felony.

We reverse the judgment of the Court of Appeals for the Eighth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice Alito, dissenting.

The Court is tired of the Armed Career Criminal Act of 1984 (ACCA) and in particular its residual clause. Anxious to rid our docket of bothersome residual clause cases, the Court is willing to do what it takes to get the job done. So brushing aside *stare decisis*, the Court holds that the residual clause is unconstitutionally vague even though we have twice rejected that very argument within the last eight years. The canons of interpretation get no greater respect. Inverting the canon that a statute should be construed if possible to avoid unconstitutionality, the Court rejects a reasonable construction of the residual clause that would avoid any vagueness problems, preferring an alternative that the Court finds to be unconstitutionally vague. And the Court is not stopped by the well-established rule that a statute is void for vagueness only if it is vague in all its applications. While conceding that some applications of the residual clause are straightforward, the Court holds that the clause is now void in its entirety. The Court’s determination to be done with residual clause cases, if not its fidelity to legal principles, is impressive....

ACCA’s residual clause unquestionably provides an ascertainable standard. It defines “violent felony” to include any offense that “involves conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. §924(e)(2)(B)(ii). That language is by no means incomprehensible. Nor is it unusual. There are scores of federal and state laws that employ similar standards. The Solicitor General’s brief contains a 99-page appendix setting out some of these laws. *See* App. to Supp. Brief for United States; *see also James, supra*, at 210, n. 6, 127 S. Ct. 1586, 167 L. Ed. 2d 532. If all these laws are unconstitutionally vague, today’s decision is not a blast from a sawed-off shotgun; it is a nuclear explosion....

... [T]he clause is [] not void for vagueness. “It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined” on an as-applied basis. *United States v. Mazurie*, 419 U.S. 544, 550, 95 S. Ct. 710, 42 L. Ed. 2d 706 (1975). “Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk.” *Maynard v. Cartwright*, 486 U.S. 356, 361, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988). Thus, in a due process vagueness case, we will hold that a law is facially invalid “only if the enactment is impermissibly vague

in *all* of its applications." *Hoffman Estates*, 455 U.S., at 494-495, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (emphasis added); see also *Chapman*, 500 U.S., at 467, 111 S. Ct. 1919, 114 L. Ed. 2d 524.

In concluding that the residual clause is facially void for vagueness, the Court flatly contravenes this rule.... [R]ather than exercising the restraint that our vagueness cases prescribe, the Court holds that the residual clause is unconstitutionally vague even when its application is clear.

The Court's treatment of this issue is startling. Its facial invalidation precludes a sentencing court that is applying ACCA from counting convictions for even those specific offenses that this Court previously found to fall within the residual clause. Still worse, the Court holds that vagueness bars the use of the residual clause in other cases in which its applicability can hardly be questioned. Attempted rape is an example....

Because I would not strike down ACCA's residual clause, it is necessary for me to address whether Johnson's conviction for possessing a sawed-off shotgun qualifies as a violent felony....

There should be no doubt that Samuel Johnson was an armed career criminal. His record includes a number of serious felonies. And he has been caught with dangerous weapons on numerous occasions. That this case has led to the residual clause's demise is confounding. I only hope that Congress can take the Court at its word that either amending the list of enumerated offenses or abandoning the categorical approach would solve the problem that the Court perceives.

Separate opinions by Justices Kennedy and Thomas are omitted.

Discussion Questions and Notes

- 1) Do you think that the residual clause of the ACCA was sufficiently vague to be deemed unconstitutional?
- 2) If Congress wants to redraft the ACCA residual clause to comply with the majority opinion, what changes should it make?

Review Exercise 1

To help you learn to apply the vagueness doctrine, please watch [this video clip](#). This is the relevant portion of the statute we will be examining:

One: All public disruptions and acts of vandalism are to cease immediately.

Two: All citizens of Pleasantville are to treat one another in a courteous and pleasant manner.

Three: the area commonly known as lover's lane as well as the Pleasantville public library shall be closed until further notice.

Four: the only permissible recorded music shall be the following: Pat Boone, Johnny Mathis, Perry Como, Jack Jones, the marches of John Phillips Souza, or the Star Spangled Banner. In no event shall any music be tolerated that is not of a temperate or pleasant nature.

Review each section of the above law and assess whether you think it is unconstitutionally vague.

III. Resolving Ambiguity

Whereas vagueness is the exceptional case, ambiguity is quite normal in criminal law. Criminal statutes are rarely revised and often enacted with little debate. As a result, many laws are enacted without significant forethought about all of the potential applications. Further, the language of statutes, while generally clear, may appear to be ambiguous when applied to specific sets of facts. Perhaps the most important tool you will develop in this course is how to better resolve ambiguity of meaning in statutes.

Statutory interpretation is more of an art than a science. Unlike mechanical engineering or calculus, one cannot go to a textbook that outlines a method that all professionals in the field agree should be followed and then use this method to arrive at demonstrably correct answers. As the materials below indicate, lawyers often disagree about the proper method(s) of statutory interpretation. By understanding different approaches to statutory interpretation, lawyers can enlarge their arsenal of arguments and more effectively persuade the judges before whom they appear. Read the following case carefully; it illustrates the application of some of the most common doctrines of interpretation with which you will need to be familiar.

United States v. Dauray, 215 F.3d 257 (2d Cir. 2000)

JACOBS, Circuit Judge:

Defendant-appellant Charles Dauray was arrested in possession of pictures (or photocopies of pictures) cut from one or more magazines. He was convicted following a jury trial in the United States District Court for the District of Connecticut (Arterton, J.) of violating *18 U.S.C. § 2252(a)(4)(B)*, which punishes the possession of (*inter alia*) "matter," three or more in number, "which contain any visual depiction" of minors engaging in sexually explicit conduct. On appeal from the judgment of conviction, Dauray argues that the wording of *§ 2252(a)(4)(B)*—which has since been amended—is ambiguous as applied to possession of three or more pictures, and that the rule of lenity should therefore apply to resolve this ambiguity in his favor. We agree, reverse the conviction, and direct that the indictment be dismissed.

On May 13, 1994, an officer of the Connecticut Department of Environmental Protection approached Dauray's car in a state park and found Dauray in possession of thirteen unbound pictures of minors. The pictures were pieces of magazine pages and photocopies of those pages. On November 18, 1998, a federal grand jury returned a one-count indictment, charging Dauray with possessing child pornography in violation of *18 U.S.C. § 2252(a)(4)(B)*. The version of the statute then in force punished the possession of "*3 or more* books, magazines, periodicals, films, video tapes, or *other matter*" that have passed in interstate or foreign commerce and "*which contain* any visual depiction" showing (or produced by using) a minor engaged in sexually explicit conduct. *18 U.S.C. § 2252(a)(4)(B)* (1994) (amended 1998) (emphases added). The statute defined "sexually explicit conduct" in part as "actual or simulated-lascivious exhibition of the genitals or pubic area of any person." *§ 2256(2)(E)*....

The question presented on appeal is whether individual pictures are "other matter which contain any visual depiction" within the meaning of *§ 2252(a)(4)(B)*. This question of first impression is one of law, which we review *de novo*. See *United States v. Alfonso*, 143 F.3d 772, 775 (2d Cir. 1998). Notwithstanding diligent efforts to construe *§ 2252(a)(4)(B)*, we conclude that it can be read either to support or to defeat this indictment. We therefore apply the rule of lenity to resolve the ambiguity in Dauray's favor.

A. Plain Meaning

Our starting point in statutory interpretation is the statute's plain meaning, if it has one. See *United States v. Piervinanzi*, 23 F.3d 670, 677 (2d Cir. 1994). Congress provided no definition of the terms "other matter" or "contain." We therefore consider the ordinary, common-sense meaning of the words. See *Harris v. Sullivan*, 968 F.2d 263, 265 (2d Cir. 1992).

Among the several dictionary definitions of the verb "to contain," Dauray presses one, and the government emphasizes another.

(i) "To contain" means "to have within: hold." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 491 (unabridged ed. 1981). Dauray argues that a picture is not a thing that contains itself. Thus in the natural meaning of the word, a pictorial magazine "contains" pictures, but it is at best redundant to say that a picture "contains" a picture.

(ii) "To contain" also means "to consist of wholly or in part: comprise; include," *id.*, and the government argues that each underlying piece of paper is "matter" (as opposed perhaps to anti-matter) that contains the picture printed on it. It is also possible, applying this latter meaning, to say that each picture, composed of paper and ink, is matter that contains its imagery.

The district court assumed that Congress meant to employ both meanings. See *Dauray*, 76 F. Supp. 2d at 194 ("The word 'contain' as used in the statute can mean both that items that *enclose* or *hold* visual depictions of minors engaged in sexually explicit conduct are included within the statute's ambit (such as a book), and that items that are *comprised* of such visual depictions are also included (such as a photograph)."). The district court thus recognized that one critical word of the statute lends itself to (at least) two meanings, only one of which can sustain the conviction, but then assumed, without resort to tools of construction, that the statutory language was drafted to support every

meaning that would impose punishment. Resort to tools of construction is necessary in this case, however, to decide whether the language used gave adequate notice that this defendant's conduct was forbidden by this statute.

The plain meaning of another critical term – “other matter” – is also elusive. The dictionary defines “matter” as “the substance of which a physical object is composed.” WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1394. Everything is more or less organized matter (as Napoleon observed). But Congress employed “matter” in a specific context, as the final, general term at the end of a list. We must “consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme. ‘The meaning of statutory language, plain or not, depends on context.’” *Bailey v. United States*, 516 U.S. 137, 145, 133 L. Ed. 2d 472, 116 S. Ct. 501 (1995) (quoting *Brown v. Gardner*, 513 U.S. 115, 118, 130 L. Ed. 2d 462, 115 S. Ct. 552 (1994)). Other courts have construed “other matter” in § 2252(a)(4)(B) as “simply something which, at a minimum, must be capable of containing a visual depiction,” *United States v. Vig*, 167 F.3d 443, 447 (8th Cir.), *cert. denied*, 145 L. Ed. 2d 125, 120 S. Ct. 146, and *cert. denied*, 1999 U.S. LEXIS 5632, 120 S. Ct. 314 (1999); *accord United States v. Hall*, 142 F.3d 988, 999 (7th Cir. 1998), or as “physical media on which are contained ... images,” *United States v. McKelvey*, 203 F.3d 66, 71 (1st Cir. 2000); *accord United States v. Lacy*, 119 F.3d 742, 748 (9th Cir. 1997). These definitions are unhelpful for our purposes.

There is no doubt that a pictorial magazine is “matter” that “contains” visual images. But no court that has construed § 2252(a)(4)(B) has considered whether a loose photograph clipped from such a magazine is itself “matter” that “contains” a visual image. The First Circuit recently held that a single negative film strip containing three images constituted only one piece of “matter” under § 2252(a)(4)(B). *See McKelvey*, 203 F.3d at 71. The court noted that “had Congress meant for the number of images to be the relevant criterion, it would have likely stated as much.” *Id.* The case concerned the character of singular “matter” containing multiple images, not whether each image—if loosed from the container—could itself constitute prohibited “matter.”

B. Canons of Construction

Because the government and Dauray each rely on a reasonable meaning of § 2252(a)(4)(B), we resort to the canons of statutory interpretation to help resolve the ambiguity. *See United States v. Turkette*, 452 U.S. 576, 581, 69 L. Ed. 2d 246, 101 S. Ct. 2524 (1981).

1. *Lists and Other Associated Terms.* Two related canons inform our analysis of the meaning of “other matter.” First, the meaning of doubtful terms or phrases may be determined by reference to their relationship with other associated words or phrases (*noscitur a sociis*). *See, e.g., Dole v. United Steelworkers of America*, 494 U.S. 26, 36, 108 L. Ed. 2d 23, 110 S. Ct. 929 (1990). Second, “where general words follow a specific enumeration of persons or things, the general words should be limited to persons or things similar to those specifically enumerated” (*ejusdem generis*). *Turkette*, 452 U.S. at 581; *see United States v. Carrozzella*, 105 F.3d 796, 800 (2d Cir. 1997). In this case, “other matter” should be construed to complete the class of items or things in the list preceding it, namely “books, magazines, periodicals, films, [or] video tapes.”

Dauray argues that the listed items form a category of picture containers that can enclose within them multiple visual depictions. Because a picture taken from a magazine is not itself a picture container, like books or magazines, but is rather a thing abstracted from its container, Dauray contends that a picture in itself cannot be considered "other matter" within the meaning of the statute, and that possession of three of them is not prohibited.

But these canons equally support the government's argument. The list—at a sufficient level of generality, and completed by the catch-all "other matter"—can be read to include any physical medium or method capable of presenting visual depictions. A picture cut from a magazine, considered as paper and ink employed to exhibit images, can be said to contain an image or as many images as can be perceived in a picture or photograph, which depends on how one looks at it.

2. *Statutory Structure.* "[A] statute is to be considered in all its parts when construing any one of them." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 36, 140 L. Ed. 2d 62, 118 S. Ct. 956 (1998). The Protection of Children Against Sexual Exploitation Act contains four substantive subsections (of which § 2252(a)(4) is one): § 2252(a)(1) prohibits the interstate transportation of child pornography; § 2252(a)(2) prohibits the receipt or distribution of it; and § 2252(a)(3) prohibits its sale or possession with intent to sell. Only § 2252(a)(4) specifies that the conduct forbidden involves "books, magazines, periodicals, films, video tapes or other matter which contain" the pornography. The others more simply forbid "any visual depiction" of child pornography, period. Dauray and the government both find support in this statutory structure.

According to Dauray, the different drafting demonstrates that Congress knew how to prohibit the possession of individual pictures if it wanted to do so. The plain language of the other sections—each of which targets "any visual depiction"—is such that if Dauray had transported, distributed or sold the pictures he merely possessed, he would have violated the law unambiguously.

But the government could argue: that the transport, distribution and sale of child pornography are most harmful to children, and were therefore prohibited regardless of the medium or number of visual depictions; that Congress did not want to cast so fine a net in the context of mere possession in order to assure that the accidental possessor of one piece of pornography avoids liability while the collector does not; and that Congress implemented the distinction by punishing only persons who possess a threshold number (three) of anything that contains pornographic images, *i.e.*, "books, magazines, periodicals, films, video tapes or other matter." If the statute simply read "3 or more visual depictions," then the accidental possession of one pictorial magazine could violate the statute. The difference between the language in § 2252(a)(4) and the other subsections is therefore (according to this view) fully consistent with a congressional intent to punish the possession of three or more individual pictures, postcards, posters, still frames, or even fragments of magazine pages.

3. *Statutory Amendment.* A statute should be construed to be consistent with subsequent statutory amendments. *See Bowen v. Yuckert*, 482 U.S. 137, 149-51, 96 L. Ed. 2d 119, 107 S. Ct. 2287 (1987). In 1998, Congress amended the statute by replacing "3 or more" with "1 or more" of the same list of "books, magazines, periodicals, films, video tapes or other matter." *See* PROTECTION OF CHILDREN FROM SEXUAL PREDATORS ACT OF 1998, Pub. L. No. 105-314, § 203(a)(1), 112 Stat. 2974, 2978 (codified as amended at 18 U.S.C. § 2252(a)(4)(B) (West Supp. 1999)). At the same time, Congress established an affirmative defense for a defendant who could show that he possessed "less than three matters containing" child pornography and "promptly and in good faith ... took reasonable steps to destroy"

the pornography or report it to law enforcement officials without disseminating it to others. *Id.* (codified at 18 U.S.C. § 2252(c)) (emphasis added).

According to the government, the list, with its catch-all of "other matter," is designed to reach even an individual photograph. That could have been accomplished without the list, however, by an amendment that simply prohibits possession of "1 or more visual depictions." Dauray argues with some force that the list is superfluous post-amendment unless it serves to distinguish a "container" such as a magazine, from its contents, such as individual pictures cut from the magazine's pages.

4. *Avoiding Absurdity.* A statute should be interpreted in a way that avoids absurd results. *See, e.g., United States v. Hendrickson*, 26 F.3d 321, 336 (2d Cir. 1994). Whichever interpretation one accepts, the statute tends to produce absurd results. Dauray's reading would prohibit the possession of three books, each of which contains one image, but allow the possession of stacks of unbound photographs. Equally absurd, the government's reading would prohibit the possession of three individual photographs (unless they were mounted in a single album), but allow the possession of two thick illustrated tomes.

C. Legislative History

When the plain language and canons of statutory interpretation fail to resolve statutory ambiguity, we will resort to legislative history. *See, e.g., Lee v. Bankers Trust Co.*, 166 F.3d 540, 544 (2d Cir. 1999). Unfortunately, "examination of [§ 2252's] legislative history ... reveals no insight as to what Congress intended the precise scope of 'other matter' to be." *Vig*, 167 F.3d at 449 (citing 1990 U.S.C.C.A.N. 6472 *et seq.*).

Due process requires that a criminal statute "give fair warning of the conduct that it makes a crime." *Bouie v. City of Columbia*, 378 U.S. 347, 350-51, 12 L. Ed. 2d 894, 84 S. Ct. 1697 (1964). "Before a man can be punished as a criminal under the Federal law his case must be 'plainly and unmistakably' within the provisions of some statute." *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 649 (2d Cir. 1993) (quoting *United States v. Gradwell*, 243 U.S. 476, 485, 61 L. Ed. 857, 37 S. Ct. 407 (1917)) (internal quotation marks omitted). The rule of lenity springs from this fair warning requirement. "In criminal prosecutions the rule of lenity requires that ambiguities in the statute be resolved in the defendant's favor." *Id.*; *see also United States v. Velastegui*, 199 F.3d 590, 593 (2d Cir. 1999) ("If we find that the ambit of the criminal statute is ambiguous, the ambiguity should be resolved in favor of lenity."). This expedient "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *United States v. Lanier*, 520 U.S. 259, 266, 137 L. Ed. 2d 432, 117 S. Ct. 1219 (1997).

But "because the meaning of language is inherently contextual," the Supreme Court has "declined to deem a statute 'ambiguous' for purposes of lenity merely because it was possible to articulate a construction more narrow than that urged by the Government." *Moskal v. United States*, 498 U.S. 103, 108, 112 L. Ed. 2d 449, 111 S. Ct. 461 (1990). "Instead, [the Court has] always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even after resort to 'the language and structure, legislative history, and motivating policies' of the statute." *Id.* (quoting *Bifulco v. United States*, 447 U.S. 381, 387, 65 L. Ed. 2d 205, 100 S. Ct. 2247 (1980)). It is a

"doctrine of last resort." *United States v. Hescorp, Heavy Equip. Sales Corp.*, 801 F.2d 70, 77 (2d Cir. 1986); see also *United States v. Granderson*, 511 U.S. 39, 54, 127 L. Ed. 2d 611, 114 S. Ct. 1259 (1994) (applying the rule of lenity "where text, structure, and history fail to establish that the Government's position is unambiguously correct.").

Here, we have done what we can. We have read the plain language of § 2252(a)(4)(B), considered the traditional canons of statutory construction, looked for legislative history, and canvassed potentially relevant case law. And we are left with no more than a guess as to the proper meaning of the ambiguous language here.

While it is true that "our role as a court is to apply the provision as written, not as we would write it," *Demerritt*, 196 F.3d at 143, the statute's ambiguity makes it impossible for us to apply the provision in this case without simply guessing about congressional intent. Cf. *Vig*, 167 F.3d at 451 (Arnold, M., dissenting) (arguing for the application of the rule of lenity in a computer files case because § 2252(a)(4)(B) is "grievously ambiguous, and, after looking to the arguments of the parties and the legislative history, we still can make 'no more than a guess' as to which of two reasonable interpretations would accomplish Congress's intention"). Indeed, the government conceded at oral argument that Dauray would not have violated the statute had his pictures been found in a photo album rather than in an unbound stack.

The government did not show that the pictures at issue were taken from more than a single magazine. At the time of Dauray's arrest, the statute did not forbid possession of such a magazine. Nor did the statute give Dauray notice that removing several pictures from the magazine, and keeping them, would subject him to criminal penalties. This result is unconstitutionally surprising. Under these circumstances, we must apply the rule of lenity and resolve the ambiguity in Dauray's favor.

For the foregoing reasons, the judgment is hereby reversed.

KATZMANN, Circuit Judge, dissenting.

I respectfully dissent from the majority's well-argued opinion. I would not apply the rule of lenity in this case. In *Muscarello v. U.S.*, 524 U.S. 125, 118 S. Ct. 1911, 1919, 141 L. Ed. 2d 111 (1998), the Supreme Court stated that the "simple existence of some statutory ambiguity ... is not sufficient to warrant application of that rule, for most statutes are ambiguous to some degree." The Court continued: "To invoke the rule, we must conclude that there is a grievous ambiguity or uncertainty in the statute." 118 S. Ct. at 1919 (internal quotation marks omitted). I do not think that there is such a "grievous ambiguity or uncertainty" in the statute before us, or that we can make "no more than a guess as to what Congress intended." *United States v. Wells*, 519 U.S. 482, 499, 137 L. Ed. 2d 107, 117 S. Ct. 921 (1997). The statute requires that the visual depiction be contained within books, magazines, periodicals, films, video tapes, or other matter. The word "contain" in the statute, consistent with its purposes, could mean both "comprise" and "hold" and still, in my view, not lead to "grievous ambiguity or uncertainty." Nothing in the statute itself or in the legislative record suggests that Congress did not intend to use both ordinary meanings of the word "contain." It makes sense, given

the statute's purposes, that a photograph could be understood - quite naturally - to "contain" a visual depiction.

I fully agree with the majority that the statute could result in some incongruous interpretations. But in the end, I conclude that we must "apply the provision as written, not as we would write it." *United States v. Demeritt*, 196 F.3d 138, 143 (2d Cir. 1999).

Discussion Questions and Notes

- 1) Of the interpretative methods discussed, which do you think should be the primary means of interpreting statutes? Why?
- 2) The opinion discusses the Rule of Lenity. The Rule is often invoked by criminal defendants, but rarely supports a winning argument. Justice Scalia was one of the few modern Supreme Court Justices who gave it significant attention. With his passing, it is unclear who will be a prominent voice in support of the Rule. Why do you think the Rule rarely matters in modern criminal law?

Read this classic Supreme Court case where a unanimous Court interpreted a statute in a manner you might find shocking. Does Justice Holmes apply, implicitly or explicitly, the interpretative doctrines described in *Dauray*?

McBoyle v. United States, 283 U.S. 25 (1931)

MR. JUSTICE HOLMES delivered the opinion of the Court.

The petitioner was convicted of transporting from Ottawa, Illinois, to Guymon, Oklahoma, an airplane that he knew to have been stolen, and was sentenced to serve three years' imprisonment and to pay a fine of \$2,000. The judgment was affirmed by the Circuit Court of Appeals for the Tenth Circuit. A writ of certiorari was granted by this Court on the question whether the National Motor Vehicle Theft Act applies to aircraft. That Act provides: "Sec. 2. That when used in this Act: (a) The term 'motor vehicle' shall include an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails; ... Sec. 3. That whoever shall transport or cause to be transported in interstate or foreign commerce a motor vehicle, knowing the same to have been stolen, shall be punished by a fine of not more than \$5,000, or by imprisonment of not more than five years, or both."

Section 2 defines the motor vehicles of which the transportation in interstate commerce is punished in § 3. The question is the meaning of the word 'vehicle' in the phrase "any other self-propelled vehicle not designed for running on rails." No doubt etymologically it is possible to use the word to signify a conveyance working on land, water or air, and sometimes legislation extends the use in that direction, e. g., land and air, water being separately provided for, in the Tariff Act, September 22, 1922, c. 356, § 401 (b), 42 STAT. 858, 948. But in everyday speech 'vehicle' calls up the picture of a thing moving on land. Thus in Rev. Stats. § 4, intended, the Government suggests, rather to enlarge than to restrict the definition, vehicle includes every contrivance capable of being used "as a means of transportation on land." And this is repeated, expressly excluding aircraft, in the Tariff Act, June 17, 1930, c. 997, § 401 (b); 46 STAT. 590, 708. So here, the phrase under discussion calls up the popular picture. For after including automobile truck, automobile wagon and motor cycle, the words "any other self-propelled vehicle not designed for running on rails" still indicate that a vehicle in the popular sense, that is a vehicle running on land, is the theme. It is a vehicle that runs, not something, not commonly called a vehicle, that flies. Airplanes were well known in 1919, when this statute was passed; but it is admitted that they were not mentioned in the reports or in the debates in Congress. It is impossible to read words that so carefully enumerate the different forms of motor vehicles and have no reference of any kind to aircraft, as including airplanes under a term that usage more and more precisely confines to a different class. The counsel for the petitioner have shown that the phraseology of the statute as to motor vehicles follows that of earlier statutes of Connecticut, Delaware, Ohio, Michigan and Missouri, not to mention the late Regulations of Traffic for the District of Columbia, TITLE 6, c. 9, § 242, none of which can be supposed to leave the earth.

Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft, simply because it may seem to us that a similar policy applies, or upon the speculation that, if the legislature had thought of it, very likely broader words would have been used.

Judgment reversed.

Discussion Questions and Notes

- 1) Other than the removal of a few citations, the entire opinion of the Court is included above. This opinion, by modern standards, is very short. There is no reasoning or argument left out. Can you isolate the different reasons why Justice Holmes decides that an airplane is not a "vehicle" for purposes of the National Motor Vehicle Theft Act? Can you think of any reasons supporting Justice Holmes' interpretation that are not discussed?

- 2) Do you agree with Justice Holmes' interpretation of the National Motor Vehicle Theft Act? Why or why not?
- 3) Contrast the residual clause at issue in *McBoyle* with the one in *Johnson*. What makes one constitutional and the other unconstitutionally vague?

This next case is a modern example of a seemingly clear word in a statute, "force," being interpreted differently by a panel of appellate judges.

Ohio v. Fagan, 2012-Ohio-5135 (Ct. App. Ohio 2012)

OPINION

SHAW, P.J.

Defendant-appellant Lindsey R. Fagan ("Fagan") appeals the November 3, 2011 judgment of the Crawford County Court of Common Pleas sentencing her to 36 months in prison following a jury trial wherein she was found guilty of Robbery in violation of R.C. 2911.02(A)(3), a felony of the third degree.

The facts relevant to this appeal are as follows. William Gasuras ("Gasuras") owned a restaurant called Little Athens in Bucyrus, Ohio. On January 24, 2011, shortly after 8 p.m., Gasuras was walking out to his vehicle after closing down the restaurant with a moneybag in his hand. As Gasuras moved toward his car a person later identified to be Joshua White ("White") approached Gasuras from behind and yanked the moneybag away from Gasuras. White then took off running along with another individual.

Gasuras pursued the individuals, but being 70 years old, he was unable to keep up. Gasuras stopped after roughly a block and asked two people that had pulled up in a truck to call the police. The individuals assisted Gasuras in attempting to follow the two robbers but all three were ultimately unsuccessful.

Eventually White was caught and confessed to robbing Gasuras. During White's confession he implicated Fagan as the other individual involved in the robbery....

Ultimately ... the court found sufficient evidence had been presented to prove all of the elements of Robbery in violation of R.C. 2911.02(A)(3)....

On October 28, 2011 Fagan was found guilty of Robbery by the jury.... At the sentencing hearing, Fagan was sentenced to 36 months in prison with credit for time served.

The statute and subsections for Robbery pertinent to this case read as follows:

(A) No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:

...

(3) Use or threaten the immediate use of force against another.

...Fagan argues that there was legally insufficient evidence to convict her of robbery and that the court erred by denying her ... motion for acquittal. Specifically, Fagan contends that no "force" was proven to satisfy that particular element of robbery....

The test for sufficiency of evidence has also been held applicable to determining a CRIM.R. 29 motion for acquittal. "Pursuant to CRIM.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt....

Force is defined by R.C. 2901.01(A) as, "violence, compulsion, or constraint physically exerted by any means upon or against a person or a thing."

At trial, the State first called William Gasuras, the owner of Little Athens and victim of the crime. Gasuras, 70 years old at the time of this incident, testified that he followed his normal routine closing down Little Athens and then walked out to his vehicle in the parking lot carrying a moneybag. As Gasuras approached his vehicle someone came up "forcefully behind [him], yank[ed his] bag and started to run." Gasuras testified that he "felt [White's] arm go through * * * [his] arm and [his] bag disappeared." Gasuras turned and saw two subjects running down the street and he chased them down an alley, yelling for them to stop....

The State called Josh White as its second witness. White was serving a prison term for the robbery in this case and was offered a reduced sentence for his cooperation....

White's testimony mirrored Gasuras' in that White testified when Gasuras came out to his car carrying the moneybag, White forcefully grabbed the moneybag and then took off running.

Despite Fagan's claims that there was not enough evidence to find that "force" was used in this case, the testimony establishes that Gasuras, the 70-year-old elderly victim, had his moneybag forcefully yanked away from him. This type of "force" has been found sufficient in other cases, especially where the victim is elderly or young and particularly vulnerable on account of age.

Moreover, White, who was in prison for committing the robbery against Gasuras, specifically testified that he used "force" on Gasuras to acquire the moneybag and deprive Gasuras of its contents. Based upon these facts we find that the testimony presented by the State constitutes sufficient evidence for a jury to find that the element of "force" to prove Robbery as indicted was presented. In addition, we find that the evidence produced at trial was sufficient to prove the remaining elements of robbery. Therefore, as there was sufficient evidence to convict Fagan of the Robbery, it was not an error to deny Fagan's Rule 29 motions....

ROGERS, J., Dissenting.

I respectfully dissent from the majority's disposition ... because I would find that the State failed to present sufficient evidence to establish the element of force beyond a reasonable doubt.

As the majority correctly notes, "force" is defined as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." R.C. 2901.01(A). The Committee Comment to R.C. 2911.02 provides, in relevant part, "that the difference between theft and robbery

is an element of actual or potential harm to persons.” In *State v. Furlow*, the court noted that “[t]he definition of ‘force’ in R.C. 2901.01(A), without more, does not serve to sufficiently distinguish the offenses of theft and robbery, which carry very different penalties.” Thus, the court reasoned, “[r]equiring that the force necessary to elevate a theft to a robbery involve actual or potential harm provides a meaningful distinction between the two offenses.” I find this reasoning persuasive.

In *Furlow*, the defendant was convicted of robbery after he stole five one dollar bills and a wallet from the victim’s hands. The defendant asked the victim whether he had change for a five dollar bill. In response, the victim pulled his wallet out and removed five one dollar bills from his wallet, holding the wallet and money in different hands. The defendant took the victim’s wallet and money from his hands and fled. At trial, the victim described the incident as follows:

* * * I had the billfold in my left hand, five ones in my right. And he came toward me and I said, well? I looked up at him and I said where’s your five? And just like that-I was looking at him. He grabbed the billfold out of one hand, five ones, turned and took off.

* * *

The minute I saw his hand out there and nothing in it it started dawning on me. But it was too late. I knew right then-I put a little grip on it so he had to snatch hard.

At most, the court reasoned, the victim’s testimony established that the victim “was gripping * * * his hands more tightly than he normally would have.” Based on this testimony, the court determined that the defendant’s taking of the victim’s money and wallet did not fall within the ambit of the word violent, or occasioned either actual or potential harm to the victim. Accordingly, the court determined that there was insufficient evidence to establish the element of force beyond a reasonable doubt, and remanded the matter for sentencing on the lesser included offense of theft.

In *Weaver*, the defendant was convicted of robbery, among other offenses, for stealing the victim’s purse from her person. While the victim waited to enter a parked car, the defendant ran up from behind her and took her purse. At trial, the victim described the incident as follows:

We came out of the Douglas Inn and we were parked across the street by the Moose Club, and we were walking over to the car; and as I was waiting for him to unlock the door for me, I had my purse on my shoulder and my hand on my shoulder strap, and someone grabbed my purse from behind, had come up running and grabbed it, took off and went down Miami Street.

* * *

Q. And when the purse was taken from you, were you actually wearing it at that time?

A. Yes, I had it up on my shoulder with my hand on this strap (indicating), but not on-on the purse itself.

* * *

Q. And was it ripped away from you?

A. Yes.

Based on this testimony, the court determined that the evidence did not establish that the victim “suffered actual physical harm or its potential from the Defendant’s acts.” Accordingly, the court determined that there was insufficient evidence to establish the element of force beyond a reasonable doubt, and remanded the matter for sentencing on the lesser included offense of theft.

Similarly, in *Myatt*, the court, considering *Furlow* and *Weaver*, found that there was insufficient evidence to establish the element of force where the evidence simply demonstrated that the thief “yanked” the victim’s purse from her person.

I find that the facts of the present case to be similar to those in *Furlow*, *Weaver*, and *Myatt*. Here, Gasuras described the incident as follows:

That particular evening, I’d done my routine and I was getting ready to leave. Uhm, I opened the back door and I proceeded to my car that was parked behind the store. Once, as I got to the car, I was carrying my, uhm, money bag and newspaper in my hand, my right hand, as I approached my car, I pushed the remote, then I switched my newspaper and my money bag to my left hand to open the door. At that particular time, I felt someone forcefully behind me, yank my bag and started to run.

Based on Gasuras’ description, I fail to see the difference between the force used to take the moneybag from his hands and the force used to take the money in *Furlow* and the purses in *Weaver* and *Myatt*. Similar to the defendants in those cases, White simply “yank[ed]” the moneybag from Gasuras’ hands. There is no evidence that this “yank” could be considered violent, as provided for in R.C. 2901.01(A), caused actual harm, or had the potential of causing harm to Gasuras.

In finding sufficient evidence of force, the majority appears to rely on Gasuras’ age (70 years old), suggesting that it caused him to be more vulnerable to harm. However, there is nothing in the record which suggests that Gasuras was vulnerable simply because he was 70 years old. If anything, Gasuras’ action of chasing White and Fagan demonstrates that he was not as vulnerable as the majority suggests. Thus, I find the majority’s reliance on Gasuras’ age and perceived vulnerability unavailing.

For the reasons stated above, I would find that the State failed to present sufficient evidence to establish the element of force, and, therefore, would sustain Fagan’s first assignment of error.

Discussion Questions and Notes

- 1) Who do you think has the better argument among the two opinions? Looking at the other cases cited by the dissent, which ones do you think “force” was used?
- 2) Why might we not want the testimony of William Gasuras and others that “force” was used to resolve the issue?

Review Exercise 1

To help you learn how to identify and resolve ambiguity, please watch [this film clip](#). These are the two statutory provisions that I want you to apply:

N.J. Stat. § 2C:20-3: A person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with purpose to deprive him thereof.

N.J. Stat. § 2C:15-1: A person is guilty of robbery if, in the course of committing a theft, he:

- (1) Inflicts bodily injury or uses force upon another; or
- (2) Threatens another with or purposely puts him in fear of immediate bodily injury...

Review Exercise 2

Watch [this film clip](#) and apply the following statute:

§ 565.052 R.S.Mo.: A person commits the offense of assault in the second degree if he or she ... [a]ttempts to cause or knowingly causes physical injury to another person by means of a deadly weapon or dangerous instrument...

Review Exercise 3

Watch [this film clip](#) and apply the following statute:

O.C.G.A. § 16-11-61. Peeping Toms

(a) It shall be unlawful for any person to be a "peeping Tom" on or about the premises of another or to go about or upon the premises of another for the purpose of becoming a "peeping Tom."

(b) As used in this Code section, the term "peeping Tom" means a person who peeps through windows or doors, or other like places, on or about the premises of another for the purpose of spying upon or invading the privacy of the persons spied upon and the doing of any other acts of a similar nature which invade the privacy of such persons.

CHAPTER 3: *ACTUS REUS* REQUIREMENTS

In a typical American criminal prosecution, the government must prove beyond a reasonable doubt that the defendant committed the illegal act(s) (*actus reus*) and had the requisite *mens rea*. As we will discuss in the next chapter, the criminal law does not always require these two aspects of substantive criminal law. A minority of offenses are strict liability, meaning that the government need not prove *mens rea*. For now, it is enough to know that *mens rea* concerns the mental state of a person alleged to have committed a crime.

In this Chapter, we want to focus exclusively on the criminal acts and leave the *mens rea* discussion for Chapter 4. Broadly speaking, *actus reus* refers to the actions, or in rare instances failure to take actions, that criminal law bars a person from performing. Some crimes are defined such that the defendant must have committed multiple acts in order to be found guilty.

I. Voluntariness

To establish criminal liability, the act(s) by the defendant must be voluntary. The simplest definition of a voluntary act is some bodily movement that results from an exertion of will. Often jurisdictions define “involuntary” acts instead of “voluntary” ones. Missouri’s statute is fairly typical of the modern statutory approach to defining the voluntary act requirement.

Mo. Rev. Stat. § 562.011

1. A person is not guilty of an offense unless his or her liability is based on conduct which includes a voluntary act.
2. A “voluntary act” is:
 - (1) A bodily movement performed while conscious as a result of effort or determination; or
 - (2) An omission to perform an act of which the actor is physically capable.

. Voluntariness in both common law and MPC jurisdictions has generally been defined through examples. Criminal law recognizes four primary instances wherein a defendant has committed an involuntary act, and is ordinarily not guilty of the charged crime(s):

- 1) Physically coerced movement. As an example, if one person is pushed into the defendant who knocks another person into oncoming traffic, the defendant has committed an involuntary battery.

- 2) Reflex movement. There are not many charged crimes where a defendant's muscular reflexes have triggered prosecutions. However, the definition of "reflex" under criminal law is a bit broader and includes situations like a person's flailing reaction to a swarm of bees. Many fact patterns fitting in this category involve a defendant driver a car or operating other large machinery.
- 3) Muscular contraction or paralysis produced by disease or stroke. In cases of affirmative conduct by the defendant, this category has little applicability. However, if a defendant commits a crime by failing to act (through omission), then a person's paralysis is deemed involuntary and bars criminal liability.
- 4) Unconsciousness. As with the prior category, many examples here concern crimes of omission. However, consider a classic, tragic example and whether you think a defendant should be criminally liable: a father sleeps by his infant and rolls onto the baby killing the infant through suffocation.

In addition to instances of clear involuntary acts, defendants are sometimes in states of impaired consciousness wherein a fact-specific inquiry determines whether the defendant was genuinely acting in an involuntary manner. There are at least four commonly recognized states of impaired consciousness that can free the defendant from criminal liability in certain cases:

- 1) Concussion. Particularly in the cases of severe concussions, a person might not be able to process information about their external reality and are said to commit involuntary acts.
- 2) Somnambulism. More commonly this category is known as involving sleepwalking or night terrors.
- 3) Hypoglycemia or hyperglycemia. In cases low or high blood sugar, a person might lose control of their body.
- 4) Involuntary intoxication. Unlike situations where a person knowingly drinks alcohol or uses a legal or illegal narcotic, cases in this area concern situations where a person has been administered an intoxicant without their consent.

Voluntariness is a requirement for all criminal statutes even when it is not explicitly stated in the codification of individual crimes, as illustrated in the following case.



Figure 13: Malt Bitters, 19th Century American Trade Cards (~1870-1900)

Martin v. State, 17 So. 2d 427 (Ala. Crim. App. 1944)

Simpson, Judge.

Appellant was convicted of being drunk on a public highway, and appeals. Officers of the law arrested him at his home and took him onto the highway, where he allegedly committed the proscribed acts, viz., manifested a drunken condition by using loud and profane language.

The pertinent provisions of our statute are: "Any person who, while intoxicated or drunk, appears in any public place where one or more persons are present, * * * and manifests a drunken condition by boisterous or indecent conduct, or loud and profane discourse, shall, on conviction, be fined", etc. Code 1940, Title 14, Section 120.

Under the plain terms of this statute, a voluntary appearance is presupposed. The rule has been declared, and we think it sound, that an accusation of drunkenness in a designated public place cannot be established by proof that the accused, while in an intoxicated condition, was involuntarily and forcibly carried to that place by the arresting officer. *Thomas v. State*, 33 Ga. 134, 125 S.E. 778; *Reddick v. State*, 35 Ga. 256, 132 S.E. 645; *Gunn v. State*, 37 Ga. 333, 140 S.E. 524; 28 C.J.S., Drunkards, § 14, p. 560.

Conviction of appellant was contrary to this announced principle and, in our view, erroneous. It appears that no legal conviction can be sustained under the evidence, so, consonant with the prevailing rule, the judgment of the trial court is reversed and one here rendered discharging appellant. Code 1940, Title 7, Section 260; *Robison v. State*, 30 Ala.App. 12, 200 So. 626; *Atkins v. State*, 27 Ala.App. 212, 169 So. 330.

Of consequence, our original opinion of affirmance was likewise laid in error. It is therefore withdrawn.

Reversed and rendered.

One difficulty that courts sometimes have is separately the voluntary act requirement from issues of *mens rea* which we will address in the next chapter. Read the next two cases with a critical eye and assess whether the voluntary act requirement is being properly applied.

United States v. Torres, 74 M.J. 154 (Armed Forces App. 2015)

Judge OHLSON delivered the opinion of the Court.

At a general court-martial composed of officer members, Appellant was convicted contrary to his plea of one specification of aggravated assault under Article 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928 (2012). Specifically, Appellant was found guilty of "commit[ting] an assault ... [on his wife] by choking her throat with his hands with a force likely to produce death or grievous bodily harm."

At trial, the defense sought to show that Appellant assaulted his wife while in an altered state of consciousness following an epileptic seizure, and that Appellant's conduct was therefore involuntary. The defense asked the military judge to instruct the panel accordingly. However, the military judge declined to do so, and instead provided the panel an instruction consistent with the affirmative defense of "lack of mental responsibility" due to a severe mental disease or defect under Rule for Courts-Martial (R.C.M.) 916(k)(1).

We find that the military judge erred in the manner in which he handled the instructions in this case. However, based on the weight of the evidence, we conclude that the military judge's error was harmless beyond a reasonable doubt. We therefore affirm the decision of the United States Air Force Court of Criminal Appeals.

FACTS

The evidence adduced at trial showed that on May 12, 2008, Appellant and his wife hosted a party at their on-base residence. During the course of the party, Appellant consumed approximately eight to ten shots of alcohol. At approximately 2:00 a.m. on May 13, 2008, Appellant and his wife went to bed while some of their guests went to sleep elsewhere in the home. Upon rising several hours later, Appellant's wife discovered Appellant partially clothed and curled up on the floor,

apparently asleep. She shook Appellant and informed him that she was driving some of their guests home. Appellant did not respond.

Appellant's wife returned to their home a short time later. She again shook Appellant trying to rouse him, but again he did not respond. When she tried to lift Appellant to an upright position, Appellant grabbed his wife, threw her on the bed, squeezed her head, punched her, choked her, and hit her head against the bed's headboard.

Appellant's wife finally managed to escape by hitting Appellant in the head with a bedside telephone base and running out of the bedroom. Appellant walked into the living room, and asked a remaining guest what happened to his wife. When the guest exclaimed that Appellant had just severely beaten his wife, Appellant went back into the bedroom and lay down. When military law enforcement officials arrived shortly thereafter, Appellant did not respond until he was shaken vigorously, whereupon he once again inquired about the location of his wife.

At trial, Appellant sought to show that he had an epileptic seizure on the morning of May 13, 2008, and that he thus was experiencing an altered state of consciousness when he assaulted his wife. Appellant further asserted that this altered state of consciousness rendered his actions involuntary, and argued that the Government had therefore failed to prove that his conduct "was done with unlawful force or violence" as required for aggravated assault. MANUAL FOR COURTS-MARTIAL, UNITED STATES PT. IV, PARA. 54.b.(4)(a)(iii) (2012 ed.) (MCM) (emphasis added)....

ANALYSIS

....

[A]t the time of trial in the instant case, the state of the law was not particularly clear in regard to whether automatism should be viewed as potentially negating an accused's mens rea, or potentially negating the actus reus, or both. What was clear, however, was that neither epilepsy nor automatism constituted a mental disease or defect and this Court has never held that the affirmative defense of lack of mental responsibility applies in these cases. Indeed, we find it was error for the military judge in the instant case to instruct the panel in that manner....

Having found instructional error in the instant case, we will assume – without deciding – that the military judge's failure to provide the defense-requested instruction similarly constituted error. We now turn to whether Appellant was prejudiced by the instructional error. In conducting this harmlessness analysis, we examine whether it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *McDonald*, 57 M.J. at 20. We conclude that this standard has been met in the instant case...

[T]he Government's expert witness, a neurologist, testified that: (a) postictal of the note violence is rare among people who have epilepsy; (b) those individuals who do engage in postictal violence do it "every time," but Appellant did not have a history of postictal violence; (c) in those rare instances when postictal violence does occur, it typically happens in the "immediate postictal state" rather than twenty to thirty minutes from the beginning of the postictal state as posited in the instant case; and (d) Appellant's version of events where he engaged in postictal violence then got up, got dressed,

talked to a guest in his home, and then regressed into a "somnolent" state again didn't "add up" in the expert's mind....

[A]rguably most damaging to Appellant, when the defense's own expert witness testified on cross-examination, he agreed that it was "highly improbable" that Appellant assaulted his wife due to the effects of being in a postictal state... Thus, we hold that the military judge's instructional error in this case was harmless beyond a reasonable doubt....

Although the Model Penal Code does not specifically address automatism, many of its tenets are useful in addressing criminality in the context of involuntary behavior. For example, the Model Penal Code predicates criminal liability on the essential requirement of a voluntary act. MODEL PENAL CODE § 2.01(1) (1962). ("A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act"). And we especially note that the Model Penal Code excludes from "voluntary acts" reflexes, convulsions, and movements occurring during unconsciousness. *Id.* at § 2.01(2)(a), (b).

The approach taken by the Model Penal Code is consistent with the common law, which required criminal acts to be voluntary. *See Berri*, 33 M.J. at 341 n.9. Moreover, it is consistent with this Court's view that "[n]o societal interest is furthered by criminalizing acts committed in the throes of a seizure, where there is no control over one's reflexes." *Rooks*, 29 M.J. at 292. Therefore, we now adopt the actus reus approach in automatism cases, and hold that in those cases where the evidence reasonably raises the issue of automatism, military judges must instruct panels accordingly.

CONCLUSION

The military judge committed instructional error in this case, but the error was harmless beyond a reasonable doubt. We therefore affirm the decision of the United States Air Force Court of Criminal Appeals.

STUCKY, Judge, with whom ERDMANN, Judge, joins (dissenting):

I concur with the majority's holding that the military judge erred when he refused to give the defense-requested voluntariness instruction and instead gave the standard mental responsibility instruction. I disagree with the holding that such error was harmless beyond a reasonable doubt....

The evidence presented at trial included facts inconsistent with a finding that Appellant acted voluntarily. At trial, Appellant's wife endorsed her testimony from the Article 32, UCMJ, 10 U.S.C. § 832 (2012), investigation that she had never seen Appellant act like that before and "[i]t was like – it was a different person, not my husband." After assaulting her, Appellant emerged from the bedroom and asked what happened to his wife. *United States v. Torres*, No. 37623, 2013 CCA LEXIS 853, at *4, 2013 WL 5878809, at *1 (A.F. Ct. Crim. App. Oct. 3, 2013). A guest told him that he had beaten her up. A few minutes later Appellant's flight chief found him lying face down on the bed, where he remained unresponsive until the police arrived. The defense's expert neurologist testified that, while postictal violence is rare, Appellant suffered a history of epileptic seizures and it was possible that

Appellant's actions on this occasion were the product of a postictal state. These facts raise the possibility of a reasonable doubt.

Since voluntariness is an implicit element of the offense, the Government had the burden to prove beyond a reasonable doubt that Appellant acted voluntarily. *See United States v. Berri*, 33 M.J. 337, 341 n.9 (C.M.A. 1991) (noting that common law treats voluntariness as an implicit element of an offense)...

The military judge's failure to give the voluntariness instruction "eviscerated" Appellant's theory of the case and thereby deprived him of a defense. *See Dearing*, 63 M.J. at 485. Without a correct instruction, "the members did not have guideposts for an informed deliberation." *Id.* (internal quotation marks omitted). The omission of the instruction meant that the panel members were unable to consider the defense of involuntariness in their deliberations. In a close case such as this, this error cannot be harmless beyond a reasonable doubt.

I respectfully dissent.

Pennsylvania v. Collins, 810 A.2d 698 (Pa. Super. Ct., 2002)

OPINION BY JOHNSON, J.:

....

Jennie Collins appeals the judgment of sentence imposed following her conviction of Driving Under the Influence of a Controlled Substance (phencyclidine or PCP). She contends that the trial court's jury instruction on involuntary intoxication improperly placed the burden of proof on the defendant and violated Section 301 of the Pennsylvania Crimes Code. We hold that the trial court rightly placed the burden of proof for the affirmative defense of involuntary intoxication on the defendant and conclude, accordingly, that the trial court properly instructed the jury. Accordingly, we affirm the judgment of sentence.

This matter arises out of Collins's involvement in a series of traffic violations in the Borough of West Chester. The evidence at the trial established that, on March 17, 2001, Collins agreed to pick up her friend, Megan Neff, and drive to McDonald's to purchase a milkshake for Collins's mother. On her way to Neff's house, Collins stopped at a mini-market, where she encountered several acquaintances. They invited her to a party in a nearby neighborhood and Collins accepted the invitation. While at the party, Collins drank something that "tasted like fruit punch." Fifteen minutes later, she left the party and went to Neff's residence. Collins arrived at Neff's house and complained that she was suffering from a headache. As the two proceeded to McDonald's, Neff observed that Collins was not engaged in conversation. Without explanation, Collins drove past the McDonald's and straight through five or six stop signs without stopping. Neff began to yell at Collins telling her to stop the vehicle, but Collins gave no indication that she heard Neff. Collins turned the vehicle and

began to swerve into oncoming traffic. Shortly thereafter, Collins applied the brake and Neff steered the car off the road. At that point, Collins appeared to lose consciousness. When the police arrived, Collins was slumped over the steering wheel of the car. As ambulance attendants took Collins out of the vehicle, she regained consciousness and began to scream and lash out at the attendants. At the hospital, Collins's urine sample tested positive for phencyclidine or PCP.

The Commonwealth charged Collins with Driving Under the Influence of a Controlled Substance (phencyclidine or PCP) and Failure to Comply With Duties at a Stop Sign. At the conclusion of the trial, the jury found Collins guilty of driving under the influence of a controlled substance.... Collins appealed...

At the outset, it is important to note that the issue of whether involuntary intoxication is a defense to a DUI charge is unclear in Pennsylvania. *See* COMMITTEE NOTE, PA.S.S.J.I. CRIM. 8.308(c) (stating that "the existence and scope of the defense of involuntary intoxication is not yet fully established in Pennsylvania law."); *see also Commonwealth v. Griscom*, 411 Pa. Super. 49, 600 A.2d 996, 997 (Pa. Super. 1991) (concluding that the Pennsylvania appellate courts have not determined involuntary intoxication to be a viable defense against a DUI charge)....

Collins [] asserts that the trial court should have required the Commonwealth to prove that she voluntarily ingested the controlled substance. We disagree. Section 3731 states, in pertinent part:

§ 3731. Driving under influence of alcohol or controlled substance

(a) Offense defined. A person shall not drive, operate or be in actual physical control of the movement of a vehicle in any of the following circumstances:

(2) While under the influence of any controlled substance, as defined in the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act, to a degree which renders the person incapable of safe driving.

75 PA.C.S. § 3731(A)(2). Therefore, in order to sustain a conviction under Section 3731(a)(2), the Commonwealth had to prove beyond a reasonable doubt that Collins was: (1) driving, operating or physically controlling the movement of a vehicle and (2) that while operating the vehicle, Collins was under the influence of a controlled substance to such a degree as to render her incapable of driving safely.

Collins's arguments would require this Court to engraft an additional element—namely voluntariness—into the DUI statutory scheme. However, the statute does not make use of the terms "intentionally," "knowingly" or "willfully." Therefore, the Commonwealth was not required to prove that Collins's intoxication was intentional or voluntary....

Collins also contends that the trial court's jury instructions violated Section 301 of the Pennsylvania Crimes Code. We find this argument to be unpersuasive. Section 301 states, in pertinent part:

§ 301. Requirement of voluntary act

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

18 Pa.C.S. § 301....

Moreover, as discussed above, the statutory language found in 75 PA.C.S. SECTION 3731(a)(2) omits any reference to culpability. We interpret this omission to mean that the legislature intended Driving Under the Influence to be a strict or absolute liability offense. Therefore, we conclude that the trial court's jury instructions did not violate the voluntary act requirement of Section 301.

For the foregoing reasons, we affirm the judgment of sentence.

Judgment of sentence AFFIRMED.

Discussion Questions and Notes

- 1) The *Torres* opinion illustrates the difficulty some courts have in determining the potential relevance of underlying medical conditions to legal doctrines. In the facts of that case, do you think the post-seizure acts of the defendant were relevant to the defendant's voluntariness? Would your answer be any different if he assaulted his wife during a seizure?
- 2) The *Collins* opinion is a bad one. You should neither read it as embodying the modern law on voluntariness nor as a proper application of doctrine. Still, there is much to be learned by reading it (and other bad court opinions). The *Collins* court commits major doctrinal errors that I want you all to avoid in analyzing fact patterns with voluntariness issues. Can you identify the court's mistakes?
- 3) Compare *Pennsylvania v. Collins* with *State v. Martin*. If we apply the court's reasoning in *Collins*, would the *Martin* case come out differently?

Consider this next case and try to understand the differing approaches of Arizona and Oregon in a difficult voluntariness case.



Figure 14: Prison Contraband in Hong Kong (Hong Kong Correctional Services Museum)

Arizona v. Alvarado, 200 P.3d 1037 (Ariz. Ct. App. 2008)

HALL, Judge

The offense of promoting prison contraband occurs when a person “knowingly takes contraband into a correctional facility or the grounds of such facility.” ARIZ. REV. STAT. (A.R.S.) § 13-2505 (2001). The trial court granted defendant’s post-verdict motion for a judgment of acquittal on the charge of promoting prison contraband, reasoning that defendant did not “voluntarily” take marijuana into the jail following his arrest because it was concealed on his person when he was arrested. The State appeals the trial court’s ruling. We conclude that the evidence supports the jury’s determination that defendant committed the offense of promoting prison contraband even though he did not “voluntarily” choose to enter the correctional facility. Therefore, we reverse the judgment of acquittal entered by the trial court and direct the court to reinstate the jury’s guilty verdict.

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

Before entering the jail, the police officer asked defendant if he had any drugs or weapons on him, and warned him that he faced additional charges if he took drugs or weapons into the jail. Defendant responded, “No.” The police officer repeated the question and warning before defendant entered the jail, and defendant again responded, “No.” After defendant was brought into the facility to commence the booking process, a detention officer also asked defendant if he had any weapons

or drugs on him, and defendant "sort of murmured no." The detention officer, however, searched defendant's person and removed a container from one of defendant's pockets, which, when opened, held 790 milligrams of marijuana. Defendant volunteered, "Oh, man, I worked hard for that chronic," a slang term for marijuana....

The judge allowed defendant to argue to the jury that no evidence was offered to show defendant engaged in a voluntary act, and instructed the jury that the State must prove that defendant had committed a voluntary act, [] defining the term as "a bodily movement performed consciously and as a result of effort and determination." The jury convicted defendant of promoting prison contraband, possession of marijuana, and possession of drug paraphernalia.

Defendant [submitted a] motion for judgment of acquittal after trial, relying in his reply on *State v. Tippetts*, 180 Ore. App. 350, 43 P.3d 455, 459-60 (Or. App. 2002), in which the Oregon appellate court reversed a conviction for smuggling contraband into the jail on the ground that the evidence failed to show that the defendant committed the voluntary act necessary for culpability. The judge granted defendant's renewed motion for judgment of acquittal, reasoning that "the facts and the law recited and relied upon in *Tippetts* are virtually identical to the facts and law in this case. The rationale and holding clearly and articulately stated in *Tippetts* are determinative of this case."

....

In *Tippetts*, the Oregon appellate court considered the appeal of a defendant who was convicted of introducing marijuana into the jail under similar circumstances. The marijuana was in defendant's pants pocket when he was arrested. A jail officer asked the defendant if he had drugs or weapons on him before searching him and discovering the marijuana, to which the defendant apparently made no response. On appeal, the defendant argued that proof of a voluntary act was a necessary prerequisite to his conviction, and that such evidence was missing because "once he was arrested, he could not avoid taking the marijuana with him into the jail."

The *Tippetts* court agreed with the defendant that, under the circumstances, he did not "initiate the introduction of the contraband into the jail or cause it to be introduced into the jail," as necessary under its interpretation of the requirement of a "voluntary act." "Rather, the contraband was introduced into the jail only because the police took defendant (and the contraband) there against his will." This is so, the court explained, because the concept of fault implies the ability to choose, and, on these facts, "he cannot be said to have chosen to introduce the marijuana into the jail." The court further explained that the requirement of a voluntary act dictated "that the mere fact that defendant voluntarily possessed the drugs before he was arrested is insufficient to hold him criminally liable for the later act of introducing the drugs into the jail."

....

Courts outside this jurisdiction have split on whether entering a jail involuntarily with drugs in one's possession can form the basis of a conviction for introducing contraband into the jail. Three jurisdictions have followed the reasoning outlined in *Tippetts* to preclude a defendant from being convicted of smuggling drugs into prison if the drugs were simply on his person when he was arrested. See *State v. Cole*, 2007 NMCA 99, 142 N.M. 325, 164 P.3d 1024, 1026-27 (N.M. App. 2007) (agreeing with the reasoning of *Tippetts*, holding that, "to be found guilty of bringing contraband into a jail ... a person must enter the jail voluntarily"); *State v. Sowry*, 155 Ohio App. 3d 742, 2004

Ohio 399, 803 N.E.2d 867, 870, PP 18-19 (Ohio App. 2004) (holding that the defendant could not be held liable for conveying drugs into the detention facility because he had no control over his person once he was arrested); *State v. Eaton*, 143 Wn. App. 155, 160-65, 177 P.3d 157 (Wash. App. 2008) (agreeing with *Tippetts*, reasoning that the legislature “did not intend the unlikely, absurd, or strained consequence of punishing a defendant for his involuntary act”), review granted by *Eaton*, 164 Wn.2d 1013, 195 P.3d 88 (Wash. 2008).

Courts in five jurisdictions, however, have diverged from or rejected the analysis of *Tippetts*, holding that no more than entry into jail knowing that one is carrying contraband is required by the plain terms of the governing statutes. See *People v. Ross*, 162 Cal. App. 4th 1184, 76 Cal. Rptr. 3d 477, 479-82 (App. 2008) (rejecting *Tippetts* on policy grounds in interpreting statute prohibiting bringing weapons into jail, and holding that Fifth Amendment did not protect defendant from the consequences of her lie to the booking officer that she had no weapons on her); *State v. Carr*, 2008 Tenn. Crim. App. LEXIS 753, 2008 WL 4368240 at 5 (Tenn. Crim. App. 2008) (rejecting the reasoning of *Tippetts* as contrary to “sound policy” and the intent of the legislature “in its enactment of this offense”); *State v. Winsor*, 110 S.W.3d 882, 886-88 (Mo. App. 2003) (affirming defendant’s conviction for possessing a controlled substance in jail in face of his argument that he was in jail involuntarily, reasoning that voluntary presence in jail was not an element of the offense, and to hold otherwise would lead to absurd result); *Brown v. State*, 89 S.W.3d 630, 633 (Tex. Crim. App. 2002) (rejecting defendant’s claim that he did not voluntarily bring marijuana into the jail, reasoning that under Texas law, the term “voluntarily” means simply the “absence of an accidental act, omission or possession”); *State v. Canas*, 597 N.W.2d 488, 496-97 (Iowa 1999) (rejecting defendant’s claim that he did not voluntarily bring marijuana into the jail, reasoning that defendant had the option of disclosing the drugs before he entered the jail, and this choice did not impermissibly burden his Fifth Amendment right to remain silent), abrogated in part on other grounds by *State v. Turner*, 630 N.W.2d 601, 606 n.2 (Iowa 2001).

We decline to follow *Tippetts* and its progeny because our supreme court’s interpretation of the requirement of a “voluntary act” and the plain terms and purpose of the statute prohibiting the promotion of contraband dictate a different analysis and conclusion. When construing statutes, we make every effort to give effect to the intent of the legislature. We consider the statutory language the best indicator of that intent, and we go no further to ascertain the intent if the language of the statute is clear and unambiguous. We employ a common sense approach, reading the statute in terms of its stated purpose and the system of related statutes of which it forms a part, taking care, however, to avoid absurd results....

In *State v. Lara*, 183 Ariz. 233, 234-35, 902 P.2d 1337, 1338-39 (1995), our supreme court explained that the requirement that an act be “voluntary” is simply a codification of the common law requirement of *actus reus*, a requirement grounded in the principle that a person cannot be prosecuted for his thoughts alone, and that the voluntary act requirement does not modify the *mens rea* required for the offense. The court therefore concluded that expert testimony that the defendant suffered from a brain disorder that caused him to fly into a rage “as if by reflex” was insufficient to support a voluntary act instruction. *Id.* The court stated that the statutory requirement that the conduct include “a bodily movement performed consciously and as a result of effort and

determination" simply means that the defendant engage in "a determined conscious bodily movement, in contrast to a knee-jerk reflex driven by the autonomic nervous system."

We also find inapposite cases from other jurisdictions that have held that a defendant did not commit the requisite voluntary act under circumstances in which another actor actually controlled defendant's actions that comprised the prohibited *actus reus*. For example, in *Martin v. State*, 31 Ala. App. 334, 17 So. 2d 427 (Ala. App. 1944), the defendant was drinking in his home when police officers arrested him and took him onto the highway, where he became loud and profane. The court reversed his conviction for public drunkenness because the plain terms of the statute, which prohibited a person from appearing in a public place and "manifest[ing] a drunken condition by boisterous or indecent conduct, or loud and profane discourse," presuppose a voluntary appearance in a public place. In Arizona, however, as we have explained, the offense of promoting prison contraband pursuant to § 13-2505(A)(1) does not require that a person voluntarily enter the jail before he may be charged with violating the statute....

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

Discussion Questions and Notes

- 1) Do you agree with the approach of the Oregon court in *Tippets* or the Arizona court in *Alvarado*?
- 2) The Alabama case of *State v. Martin* is an old chestnut in this area and is discussed by the *Alvarado* court despite being from a lower court in another jurisdiction. How does the court distinguish *Martin* from *Alvarado*? Is the distinction persuasive?
- 3) If a person has an epileptic seizure while driving and runs over a small girl, killing her, has the person fulfilled the act requirements of murder or battery? If you are unsure, what other facts would you want to know before reaching a decision?
- 4) If you get a concussion on the way home from school by stumbling into your front door, are you then free to go on a crime spree without fear of criminal liability? If not, why not?

II. Crimes by Omission

In the American criminal justice system, criminal liability generally may not be premised on an omission, a failure to act. An omission will support criminal liability only in the exceptional situation in which the law imposes a duty to act. A legal duty to act may arise from a number of sources.

- 1) Statute: A statute may impose a legal duty to act. State and federal tax codes are a good example where a person might violate criminal law due to a failure to complete the statutory duty of paying taxes owed.
- 2) Contract: A person may have a contractual duty to act. For example, a lifeguard has an obligation to try to rescue a person drowning at the location where the lifeguard is employed.
- 3) Special Relationship: A person may have criminal liability for harm to another if there is a special, usually a caretaking, relationship. Parents or guardians have obligations to feed and care for infants and small children. Other familial relations do not usually create special relationship duties.
- 4) Creation of Danger: If a person creates a dangerous situation, she has a duty to prevent others from being harmed by the creation of that danger.
- 5) Voluntary Rendition of Aid: The United States does not enforce a general obligation to render assistance. However, if a person, in certain situations, agrees to render aid, that person might have an ongoing duty under criminal law to continue to provide aid.

In this California case, the defendant is found guilty of manslaughter because she failed to render medical assistance to the victim. When reading the opinion, be sure to identify what duty or duties the defendant might have violated from the list above.

California v. Oliver, 210 Cal. App. 3d 138 (Ct. App. 1989)

[Judge Strankman]

....

Appellant [("Oliver")] met Cornejo on the afternoon of July 6, 1986, when she was with her boyfriend at a bar in the City of Pleasant Hill. She and her boyfriend purchased jewelry from Cornejo. In the late afternoon, when appellant was leaving the bar to return home, Cornejo got into the car with her, and she drove home with him. At the time, he appeared to be extremely drunk. At her house, he asked her for a spoon and went into the bathroom. She went to the kitchen, got a spoon

and brought it to him. She knew he wanted the spoon to take drugs. She remained in the living room while Cornejo "shot up" in the bathroom. He then came out and collapsed onto the floor in the living room. She tried but was unable to rouse him.

Appellant then called the bartender at the bar where she had met Cornejo. The bartender advised her to leave him and to come back to the bar, which appellant did.

Appellant's daughter returned home at about 5 p.m. that day with two girlfriends. They found Cornejo unconscious on the living room floor. When the girls were unable to wake him, they searched his pockets and found eight dollars. They did not find any wallet or identification. The daughter then called appellant on the telephone. Appellant told her to drag Cornejo outside in case he woke up and became violent. The girls dragged Cornejo outside and put him behind a shed so that he would not be in the view of the neighbors. He was snoring when the girls left him there.

About a half hour later, appellant returned home with her boyfriend. She, the boyfriend, and the girls went outside to look at Cornejo. Appellant told the girls that she had watched him "shoot up" with drugs and then pass out.

The girls went out to eat and then returned to check on Cornejo later that evening. He had a pulse and was snoring.

In the morning, one of the girls heard appellant tell her daughter that Cornejo might be dead. Cornejo was purple and had flies around him. Appellant called the bartender at about 6 a.m. and told her she thought Cornejo had died in her backyard. Appellant then told the girls to call the police and she left for work. The police were called.

Officer Mark Eggold arrived at appellant's house on July 7. After he found Cornejo's body outside, he searched the residence. In the bathroom, he found some tissue stained with blood. In the kitchen, he found a spoon with a blackish-gray residue on it, and a flat rubber strap in a kitchen drawer. He also found a travel case containing drug paraphernalia.

Later that day, appellant complied with a request to answer questions at the police station. After changing her version of events several times, she finally told the police that Cornejo was extremely drunk when she drove him to her home. He went into the bathroom and asked for a spoon, which she gave him. Cornejo "shot up" and then collapsed....

An autopsy revealed that Cornejo died of morphine poisoning. The heroin (which shows up in the blood as morphine) was injected shortly before his death. Cornejo also had a .28 percent blood-alcohol level. The forensic pathologist who testified at trial was reasonably certain that Cornejo's death was not caused by the alcohol....

[T]he prosecution contended that appellant was criminally negligent when she failed to summon medical aid for Cornejo and then abandoned him, when she must have known he needed medical attention....

At the close of the prosecution's case, defense counsel moved for a judgment of acquittal on the involuntary manslaughter charge.... [H]e argued that the evidence failed to establish a duty of care owed by appellant to Cornejo because there was no special relationship between them, and that absent a duty of care there was no negligence.

The trial court ruled that as to the misdemeanor/manslaughter theory, there was ample evidence to support the finding that appellant had intended to facilitate, and therefore had aided and abetted Cornejo's use of drugs; and that as to the criminal negligence theory, there was sufficient evidence of a duty owed. The trial court accordingly denied the motion for judgment of acquittal....

Appellant claims that, regardless of whether her conduct evidenced a disregard for Cornejo's life, she did not cause his condition and therefore as a matter of law did not owe him any duty to seek medical care. She contends the question of whether her conduct amounted to criminal negligence therefore should never have gone to the jury.

Generally, one has no legal duty to rescue or render aid to another in peril, even if the other is in danger of losing his or her life, absent a special relationship which gives rise to such duty. Further, "[t]he fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action." (REST.2D TORTS, § 314.)

....

We conclude that the evidence of the combination of events which occurred between the time appellant left the bar with Cornejo through the time he fell to the floor unconscious, established as a matter of law a relationship which imposed upon appellant a duty to seek medical aid. At the time appellant left the bar with Cornejo, she observed that he was extremely drunk, and drove him to her home. In so doing, she took him from a public place where others might have taken care to prevent him from injuring himself, to a private place – her home – where she alone could provide such care. To a certain, if limited, extent, therefore, she took charge of a person unable to prevent harm to himself. She then allowed Cornejo to use her bathroom, without any objection on her part, to inject himself with narcotics, an act involving the definite potential for fatal consequences. When Cornejo collapsed to the floor, appellant should have known that her conduct had contributed to creating an unreasonable risk of harm for Cornejo – death. At that point, she owed Cornejo a duty to prevent that risk from occurring by summoning aid, even if she had not previously realized that her actions would lead to such risk. Her failure to summon any medical assistance whatsoever and to leave him abandoned outside her house warranted the jury finding a breach of that duty....

We conclude the record supports the trial court's denial of the section 1118.1 motion, and the conviction of involuntary manslaughter on both theories presented to the jury.

Discussion Questions and Notes

- 1) Why isn't Oliver prosecuted using a theory of commission (and not omission) based upon providing Cornejo with the spoon?
- 2) What is the duty violated by Oliver? Is there more than one at issue?
- 3) A critical part of understanding the *Oliver* decision is to focus on timing. At what moment in time does the duty violated attach to Oliver? Is it when she brings Cornejo

to her house? When she provides the spoon? When he is unconscious? When she instructs her daughter on how to deal with Cornejo?

Certain crimes, such as failure to pay child support are by their nature crimes of omission. The prosecution of Fuller pushes the envelope in terms of the scope of the applicable duty. See if you can outline the nature and scope of the duty underlying Fuller's conviction.

United States v. Fuller, 2014 U.S. App. LEXIS 8892 (10th Cir. 2014)

PHILLIPS, Circuit Judge.

A Kansas jury convicted David Fuller of willfully failing to pay more than \$50,000 of past-due child support. Both after the government's case-in-chief and at the close of all evidence, Fuller moved for acquittal. The district court reserved ruling on the motions and then, several weeks after the verdict, issued a single order denying both. On appeal, Fuller challenges the district court's denial of his first motion.... We find that the district court did not rely on the presumption and that the government presented sufficient evidence that Fuller had willfully failed to pay his child-support obligation. Accordingly, we affirm....

In 1976, David Fuller met Delores Jones while they were both working at King Radio, an aviation parts supplier in Ottawa, Kansas. After marrying and divorcing, the two were again married in 1983. Fuller and Ms. Jones had three children—in 1985, 1988, and 1991. The couple argued during the marriage about Fuller's meager earnings as a musician amid the pressing financial realities of raising three children. While Ms. Jones believed that Fuller was a talented musician, she testified that she always thought that once they had children Fuller would help her raise them financially and otherwise. She felt that Fuller had chosen his music over his family because on countless occasions Fuller would not come home after music gigs until the next morning. As a result, she often ran late in getting the children to day care and herself to work.

Tired of Fuller's act, Ms. Jones obtained a divorce in 1994. At the divorce hearing, which Fuller did not attend, Ms. Jones said she didn't believe that Fuller had the means to pay child support due to his lifestyle as a musician. She felt that he maybe could do so if he would work a regular job, but she knew "that wasn't going to happen." By the time of the divorce, she felt that she "couldn't ... support him financially anymore." The divorce court ordered that Fuller pay a total monthly child support obligation of \$347.

Over the years after the divorce, Fuller played music and Ms. Jones provided for the children. In August 1996, Ms. Jones sought help in collecting child support from Kansas Social and Rehabilitation Services, but she gave up when told that she needed to hire an attorney. Although Fuller claimed to have paid scattered sums to Ms. Jones in the early years, he failed to pay any child support as ordered by the state court. By the time of his federal trial, he owed \$54,478.36 in unpaid child support.

During its case-in-chief, the government called as witnesses Ms. Jones, business owners who paid Fuller to perform music, and child support personnel who detailed their years-long efforts to locate and collect child support from Fuller. At the close of the government's case, Fuller moved under Federal Rule of Criminal Procedure 29(a) for acquittal. He argued that the government had presented insufficient evidence of his ability to pay child support to allow the jury to continue to hear the case. At most, he said the government's evidence showed that he had earned a total of just \$5,200 over the 17 years in which the support order was in effect. From this, he argued that there wasn't "enough evidence that if it were submitted to any reasonable jury in the light most favorable to the government that they could come back with a verdict of guilty." In short, he argued that his actual earnings controlled whether he had an ability to pay child support. The district court took this motion under advisement, along with Fuller's later motion for acquittal following the close of all evidence. Two months after Fuller's conviction, it issued a single order denying both motions to acquit. The district court sentenced Fuller to five years of probation and ordered that he pay Ms. Jones restitution of \$53,778.36 in care of the Kansas Payment Center....

In 1998, Congress amended the Child Support Recovery Act of 1992 by passing the Deadbeat Parents Punishment Act of 1998. The 1992 Act punished as a misdemeanor the first-time offender who "willfully fails to pay a past due support obligation with respect to a child who resides in another State." The 1998 Act increased the penalty to a felony for offenders who "willfully fail[] to pay a support obligation with respect to a child who resides in another State, if such obligation has remained unpaid for a period longer than 2 years, or is greater than \$10,000. It also added a presumption saying that "[t]he existence of a support obligation that was in effect for the time period charged in the indictment or information creates a rebuttable presumption that the obligor has the ability to pay the support obligation for that time period....

The district court proceeded to find sufficient evidence to support conviction based on Fuller's willful underemployment—not on the statutory presumption of "ability to pay."

As discussed at length below, we believe the government may prove willful failure to pay child support under this theory—which looks beyond a defendant's actual earnings. Because the district court did not rely on the presumption at 18 U.S.C. § 228(b), we need not decide its constitutionality....

Fuller next argues that, without the benefit of the presumption at § 228(b), the government's evidence was insufficient to prove that his failure to pay child support was willful....

[W]e conclude that possession of sufficient funds is just one way the government can prove willful failure to pay under 18 U.S.C. § 228(a). Willfulness can also exist if the defendant lacks sufficient funds, so long as the defendant's financial circumstances result from his own intentional acts. If the government proceeds under this latter theory, it need not prove that the defendant deprived himself of earnings with a motive to deprive his children of support....

When the government rested its case-in-chief, the record contained sufficient evidence to support the district court's denial of Fuller's motion to acquit. True, the evidence did not show that Fuller made much money. But even if Fuller lacked the ability to pay any of his owed child support with his actual earnings, the evidence still shows that failure to pay was willful.

The evidence shows that Ms. Jones met Fuller when they both were working at an aviation parts business. She obviously continued to think that he was capable of working a regular job because she

argued with him during the marriage about his failure to do so. The evidence also shows that Fuller ably satisfied all employment-related demands of the businesses that hired him to play music. He displayed all the myriad of job skills necessary to secure musical gigs and then succeeded in following through with performances, even gaining acclaim in certain musical circles. Giving the government the benefit of all inferences, as we must, we conclude that the jury could have found beyond a reasonable doubt at the close of the government's case that Fuller's inability to pay any court-ordered child support resulted directly from his own intentional acts. In short, there was sufficient evidence of willful underemployment to convict...

Because we conclude that the district court did not rely upon the statutory presumption to deny Fuller's first (or second) motion to acquit, but instead relied upon his intentional underemployment, we need not address further or decide the constitutionality of the rebuttable presumption found at 18 U.S.C. § 228(b). Looking at the government's case-in-chief, we agree with the district court that "the evidence supports a jury finding that defendant voluntarily chose to earn a minimal amount of money while working part-time playing music even though he could have substantially more."

We affirm the district court's order.

Discussion Questions and Notes

- 1) How would you characterize the criminal omission(s) by Fuller?
- 2) What is the duty violated by Fuller? Was there more than one?
- 3) Can you define the scope of the duty (or duties) at issue?
- 4) What do you think of the jury's finding that the "defendant voluntarily chose to earn a minimal amount of money?"

Review Exercise 1

Watch [this film clip](#) and answer these questions:

Does anyone have a duty under criminal law to care for the found baby? If a duty exists, what is the scope of that duty? If the baby died due to lack of water, would any of the men in the scene be criminally liable for homicide?

III. Crimes by Possession

An important development in the Twentieth Century, particularly as a result of the War on Drugs, was that American jurisdictions increasingly criminalized mere possession of

contraband. Among items that it is illegal to possess in the United States are cocaine, nuclear weapons, child pornography, certain automatic firearms, and fake passports. Although it is usually the case that someone who has come to possess contraband has done so through the act of acquisition, the prosecution does not actually have to prove a defendant took any affirmative act to come into possession of an illegal item if the crime is defined only by the act of possession. Although this distinction might seem trivial, it turns out to be very important in certain cases. Further, the difference between possession and other types of acts is important to understand because possession crimes constitute many of the most prosecuted crimes.

The Second Circuit, in *United States v. Sabhnani*, 599 F.3d 215, 238 (2d Cir. 2010), described the differences between possession crimes and crimes predicated on an affirmative act as well as crimes by omission:

Under this definition of [] possession, one could violate [the law] by forming the specific intent to possess the [illegal item] of another while having knowing control over them—in theory, without taking any affirmative act. Even accounting for this possibility, however, possessory offenses do not expressly impose affirmative duties to act in the manner of traditional omissions statutes, which, in effect, require affirmative conduct to be taken to avoid commission of the crime.

Possession crimes are often very easy for the government to prove in large part because criminal possession is more expansive than the lay use of the term “possession.” The case below shows a less controversial extension of the scope of possession under criminal law.

United States v. Barron-Rivera, 922 F.2d 549 (9th Cir. 1991)

BOOCHEVER, Circuit Judge

Noel Barron-Rivera appeals his convictions for being an illegal alien in possession of a firearm and for being a felon in possession of a firearm... Finding no errors, we affirm....

Barron-Rivera, a citizen and national of Mexico, was deported from the United States on April 11, 1989, after his arrest for possession of a firearm. He had previously been convicted of three felonies in Washington. Subsequent to his deportation, Barron-Rivera unlawfully re-entered the United States and was found living in Yakima, Washington on October 19, 1989. During a search of his residence, federal agents discovered a .32 caliber Colt pistol and ammunition under the mattress of Barron-Rivera's bed. He was indicted for (1) being an alien unlawfully in the United States after deportation, in violation of 8 U.S.C. § 1326; (2) being an illegal alien in possession of a firearm, in violation of 18 U.S.C. § 922(g)(5); and, (3) being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1).

Barron-Rivera waived his right to a jury trial and stipulated to nearly all the facts.... Barron-Rivera argued that the gun was in his wife's residence at the time he re-entered the United States and moved back into that residence. Accepting that contention, the district court, nonetheless, found that

Barron-Rivera's possession of the firearm was voluntary because he permitted the firearm to remain in the house after he acquired knowledge of its presence.

Barron-Rivera was found guilty on all three counts, and was sentenced to three concurrent eighteen-month terms and a two-year term of supervised release....

Barron-Rivera argues that ... he did not ... voluntarily possess the firearm which was found underneath his mattress. Barron-Rivera's theory is that because the gun was present at his residence prior to his arrival, he cannot be charged with ... voluntary possession.

...[T]he district judge found that, by failing to dispose of the gun once he learned of its presence, Barron-Rivera had[,] ... by continuing to reside in the apartment in which the gun was located, ... voluntarily and knowingly possessed the gun.

The requisite showing of possession may be made by proof of actual or constructive possession. In *United States v. Shirley*, 884 F.2d 1130, 1134 (9th Cir. 1989) (citations omitted), this court acknowledged that constructive possession may be shown by evidence of "ownership, dominion, or control over the contraband itself or the premises or vehicle in which contraband is concealed." Here, Barron-Rivera conceded ownership of the gun. That alone is a sufficient indicium of constructive possession. Moreover, he lived in the bedroom in which the gun was found, and even directed the agents to the room in which it was kept....

Because Barron-Rivera owned the gun, lived in the apartment in which it was found, and knew where it was kept, a rational fact-finder could conclude that the element of knowing possession was met beyond a reasonable doubt.¹⁴ Therefore, the trial judge, as fact-finder, did not err.

Discussion Questions and Notes

- 1) Based upon your reading of the case, does ownership always create possession? Is it a necessary element of possession? Is it a sufficient one?
- 2) Do you agree with the court's broad reading of possession such that includes situations where a defendant does not possess contraband on her person?
- 3) If possession crimes were limited to situations where a person had to have the contraband on their person, what worries would we have?

¹⁴ Barron-Rivera argues that the guilty verdict must be reversed because he could not have disposed of the gun without exerting dominion and control over it, which would have made him criminally liable under § 922(g)(1) & (5). Such reasoning would require, for example, a homeowner in whose house illegal drugs were being used to acquiesce to their use for fear that if he ordered their removal he would be guilty of possession for having exercised dominion and control. Moreover, even if he were correct, he was free to live elsewhere, at least until the gun was removed.

- 4) If an illegal gun is on the table in the center of a crowded room and there is no known owner of the gun, how do we determine who possesses the weapon?

That ownership is enough to prove possession is not particularly controversial. However, this next case illustrates how broad constructive possession might be in certain situations.



Figure 15: Hi-Point 995 Carbine 9mm Semi-Automatic Rifle

United States v. King, 632 F.3d 646 (10th Cir. 2011)

HOLMES, Circuit Judge.

A jury found Jerrel Montel King guilty of one count of possession of marijuana with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(D), and one count of possession of a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A)(i). He now appeals his conviction only as to the firearms count, arguing that the government presented insufficient evidence to show ... that he “possessed” the firearm... [W]e conclude that sufficient evidence was presented to support the jury’s verdict. Accordingly, we affirm Mr. King’s conviction....

Shortly after 11:00 p.m. on May 27, 2009, police were dispatched to the South Glen Apartments in Tulsa, Oklahoma, to address a reported disturbance involving a man with a gun. Upon her arrival at the scene, Officer Aubrie Thompson saw a number of people milling about outside two of the buildings in the apartment complex. After questioning a group of individuals gathered outside an open apartment, Officer Thompson turned her attention to two men, Mr. King and Shawnte Bryant, whom she spotted loitering between the two buildings.

As Officer Thompson questioned the two men about the disturbance, she noticed that Mr. King was “very agitated” and was being very uncooperative. She also observed that Mr. Bryant was making circles during the course of their conversation and was “frantically looking [for something] on the ground.” Finding this behavior odd, Officer Thompson shined her light on the area where Mr. Bryant was searching and observed a pistol lying on the ground about four inches away from Mr. King’s foot. During this time, the two men were joined by Leginia Washington, a female companion of Mr. King, who previously had been sitting in a nearby parked car. Officer Thompson drew her weapon and told the two men and Ms. Washington to back away from the pistol. She then radioed dispatch, asking for additional units to be sent to the scene. Backup arrived shortly thereafter, and the police secured the gun – a chamber-loaded Hi-Point nine-millimeter semi-automatic pistol.

The police then took Mr. King, Mr. Bryant, and Ms. Washington into investigative detention, and Mr. King was patted down for weapons. The frisking policeman, Officer Robert Johnson, discovered more than \$500 in cash and a set of digital scales with marijuana residue in Mr. King's pockets. Mr. King also had a cell phone on his person which, upon inspection, revealed several text messages that appeared to be drug-related and a photograph showing a Hi-Point rifle with an extended magazine.

Also present at the scene was Officer Todd Taylor. While assisting in the investigation, Officer Taylor received information from another officer that a car parked in the complex parking lot might contain contraband. Ms. Washington was identified as the owner of the vehicle, and Officer Taylor obtained her permission to search it. In the vehicle, he discovered a chamber-loaded Stoege .40 caliber semi-automatic pistol on the passenger-side front floorboard, as well as a "blunt" in the front passenger seat. A search of the trunk further revealed two large "bricks" of marijuana—one weighing 1119.53 grams and the other 1522.19 grams—and a loaded Hi-Point nine-millimeter rifle with an extended magazine.

Following this discovery, Officer Taylor took Mr. King into custody and advised him of his Miranda rights. Mr. King indicated at that time that all of the contraband found in the car was his, telling Officer Taylor, "it's all mine[;] I'll take it as long as my baby's mama don't go to jail." Later, he repeated this admission during the intake process at the police station. Mr. King ultimately disclaimed ownership of the Stoege pistol, however, after Officer Taylor warned him that he "d[id]n't want [him] to claim anything that is not [his]." Yet, when the officer held up the Hi-Point pistol, Mr. King stated, "yeah, that one is mine." He also claimed ownership of both the rifle and the marijuana again, reiterating that "it's all mine, as long as ... my baby's mama don't go to jail." Nevertheless, when Officer Johnson asked Mr. King to write a statement detailing these facts, Mr. King refused to do so.

Mr. King was subsequently charged in a two-count indictment with possessing marijuana with the intent to distribute and possession of all three firearms in furtherance of a drug-trafficking crime. At trial, the government based its case primarily on the testimony of Officers Thompson, Taylor, and Johnson, who all detailed their roles in Mr. King's arrest. It also introduced the photograph found on Mr. King's phone of a rifle with an extended magazine, which Officer Taylor testified "appear[ed] to be" the weapon seized from the trunk of Ms. Washington's car. Officer Taylor also read several text messages to the jury from Mr. King's cell phone that the officer believed related to drug trafficking. Officer Taylor admitted, however, that he did not observe Mr. King dealing drugs or physically possessing a weapon....

Finally, the government offered testimony from the manager of the Tulsa Police Department's forensic laboratory. The manager was responsible for processing the three firearms recovered during Mr. King's arrest and checking the weapons for latent fingerprints. He admitted that the one latent fingerprint found on the weapons did not match the fingerprint sample that Mr. King provided, but stated that this did not foreclose the possibility that Mr. King had handled the firearms. More specifically, he described how the "human factor"—i.e., the variable conditions of people's fingers and palms—can often make finding latent fingerprints a difficult endeavor.

At the close of the government's case, Mr. King moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29, citing insufficient evidence for a jury to infer either that the marijuana in the car was his or that he possessed the firearms in question. After the government withdrew its claim as to the Stoege pistol, the district court denied Mr. King's motion, finding that there was

"more than sufficient evidence from which a reasonable jury could infer that the Defendant possessed marijuana with the intent to distribute and possessed the two remaining firearms in connection with a drug trafficking crime." The defense then rested without presenting any additional evidence.

The jury eventually convicted Mr. King on the drug-trafficking count and on the firearm count, but only with respect to the Hi-Point rifle found alongside the marijuana in the trunk of Ms. Washington's car. Thereafter, Mr. King was sentenced to seventy-five months' imprisonment—fifteen months for possession with intent to distribute and the mandatory sixty months for possession of a firearm in furtherance of a drug-trafficking crime, to be served consecutively. This timely appeal followed....

On appeal, Mr. King challenges the sufficiency of the evidence supporting his conviction under this statutory provision, contending that the evidence adduced at trial failed to show ... he "possessed" the Hi-Point rifle found in Ms. Washington's trunk... Mr. King does not, however, challenge his conviction for possession of marijuana with intent to distribute....

Mr. King first challenges his conviction by claiming that the government failed to produce sufficient evidence to allow a reasonable jury to conclude that he "possessed" the weapon of conviction. "Possession of a firearm can be either actual or constructive." Mr. King asserts—and the government rightfully concedes—that he did not have "actual possession" of the Hi-Point rifle. The government maintains, however, that it "presented ample evidence showing that [Mr.] King constructively possessed the rifle found in the trunk of [Ms. Washington's] car." We agree.

Constructive possession of a firearm exists when an individual "knowingly hold[s] the power and ability to exercise dominion and control over it." Constructive possession is often found where an individual has "ownership, dominion, or control" over the premises wherein the firearm was found. This inference of knowing dominion over or control of a firearm is appropriate where the defendant has exclusive possession over the premises. In contrast, in situations of joint occupancy, "where the government seeks to prove constructive possession by circumstantial evidence, it must present evidence to show some connection or nexus between the defendant and the firearm." "This requires the government to point to evidence plausibly supporting the inference that the defendant had knowledge of and access to the firearm."

Mr. King argues that the government failed to present "any evidence establishing that [he] constructively possessed the [charged weapon] other than a picture of a rifle found on his cell phone," which he claims is insufficient to demonstrate either dominion or control over the firearm. More specifically, he claims that the government failed to present evidence suggesting access to the vehicle, noting that keys to the car were not found on Mr. King's person, nor were any of his personal effects found in the car. He contends that this is a case where we need not even reach the nexus inquiry as "there [i]s no evidence ... that [he] was ever 'present' or 'occupied' the car where the rifle was found in the trunk," and thus there was no showing of joint occupancy, which he reads as a requirement on these facts for constructive possession.

Although we recognize that control over the premises where the firearm is found can be a strong indicator of constructive possession, we have categorically rejected Mr. King's assertion that it is a prerequisite to our determination of constructive possession. Instead, we have held that "constructive possession exists where the defendant has the power to exercise control or dominion over the item."

Put another way, what matters is whether the defendant has an “appreciable ability” (i.e., the power) to exercise dominion or control over the contraband.

We also have recognized that a defendant may exercise this ability or power personally or through others who have an adequate tie to the defendant.

Guided by these principles, we conclude that the evidence presented at trial was sufficient in this case to allow a reasonable jury to infer that Mr. King had the ability (i.e., the power) to exercise dominion or control over the Hi-Point rifle. By Mr. King’s own admission, he had been in an intimate relationship with Ms. Washington (i.e., his “baby’s mama”), and there was no evidence to suggest that this relationship was not ongoing at the time of the offense. Although Mr. King did not have a key to the vehicle on his person, Ms. Washington most certainly did, and a reasonable jury could infer from their relationship that Mr. King could have accessed the rifle in the trunk at any time simply by asking Ms. Washington for the key. To be sure, the jury was not obliged to draw that conclusion from Mr. King’s intimate relationship with Ms. Washington. We only hold that it reasonably could do so. Furthermore, we do not intend to suggest that access to contraband through another will necessarily equate with the ability to exercise dominion or control over the contraband. However, on these facts, we are confident that a reasonable jury could have determined that Mr. King’s access to the vehicle’s trunk through Ms. Washington gave him the ability to exercise dominion or control over the Hi-Point rifle stored therein. In particular, we note that Mr. King acknowledged owning the rifle. Possession and ownership are distinct concepts and the statute at issue punishes possession, not ownership. But a defendant’s ownership of a firearm “may be highly relevant where the authority to exercise control is disputed.” A reasonable jury could have easily inferred that if Mr. King owned the firearm and had access to it through Ms. Washington that he had the ability (i.e., the power) to exercise dominion or control over it....

For the foregoing reasons, we AFFIRM Mr. King’s conviction.

Discussion Questions and Notes

- 1) What are all the pieces of evidence that indicate King’s possession of the Hi-Point rifle? Do you think the evidence was sufficient to prove King’s possession?
- 2) Since constructive possession is “the power to exercise control or dominion over the item,” is there any limit to the number of persons that might constructively possess the same item?

The following case largely concerns procedural issues beyond the scope of this course. Nonetheless, its underlying facts provide a helpful illustration for distinguishing crimes of possession from crimes of omission. The defendant was charged with embezzlement, which

is not a possession crime. However, the portion excerpted below illustrates another example of how legal possession can occur through wholly passive conduct by a defendant.

United States v. Smith, 373 F.3d 561 (4th Cir. 2004)

PER CURIAM:

On January 24, 2003, a Grand Jury returned a one-count indictment against Smith, charging:

Estelle Smith died on February 4, 1994. The defendant, ALFRED SMITH did not report the death of Estelle Smith to the Social Security Administration and continued on a monthly basis to receive Estelle Smith's monthly Social Security benefits until February 3, 1998. Beginning in or about March 1994, and continuing until in or about February 1998, in the Eastern District of Virginia and elsewhere, the defendant ALFRED SMITH, did knowingly, intentionally and willfully embezzle, steal, purloin and convert to his own use, on a recurring basis, a record, voucher, money and thing of value belonging to the Social Security Administration, to wit: Social Security Administration benefits issued to Estelle Smith, totaling approximately \$26,336.00....

From March 1994 through February 1998, 48 payments were electronically deposited into Smith's joint account with his mother; each deposit was between \$525 and \$583. In all, Smith received approximately \$26,336 after his mother's death....

As a joint owner of the checking account, Smith had legal control over the funds therein, including the ability to withdraw the full amount of such funds. *See* VA.CODE ANN. § 6.1-125.9 (Michie 1999). As such, when the government voluntarily placed these funds into the account, they came into his lawful control, i.e., his lawful possession. But that he had lawful possession of the funds — the issue disputed by Smith in his reply memorandum below — did not give him the right to appropriate them for his own purposes. Thus, it was his lack of legal entitlement to own the funds that renders his misappropriation of them after their deposit embezzlement.

Smith's lawful right to control the funds after their initial deposit in his account distinguishes his possession from that which follows a common-law larceny, in that Smith's possession did not require a "trespass in the taking"; rather, the government voluntarily, though incorrectly, continued to deposit his mother's Social Security benefits into their jointly owned checking account after her death. *See* LAFAVE, *supra*, §§ 19.2, 19.6 (explaining this distinction between larceny and embezzlement); *Moore*, 160 U.S. at 269-70, 16 S. Ct. 294 ("[Embezzlement] differs from larceny in the fact that [with embezzlement] the original taking of the property was lawful, or with the consent of the owner...."). In the present case, however, the indictment can be fairly construed to aver a charge of embezzlement that could be proven, without surprise to Smith, by evidence showing that Smith, having legal possession of the funds as they were initially deposited into his account, then, after realizing that his continued possession was improper, willfully retained the funds for his own use, and maintained that recurring, automatic scheme of embezzlement during the charged period....

For the reasons discussed above, we conclude that Smith's conduct constituted a single continuous scheme to embezzle government funds and was of a nature that Congress must have intended that it be treated as a continuing offense. Accordingly, the judgment of the district court is

AFFIRMED.

[Dissenting opinion by Judge Michael omitted]

Discussion Questions and Notes

- 1) If Smith were charged under the following statute, would he have committed the requisite *actus reus*?

18 U.S. Code § 2315 – Whoever receives, possesses, conceals, stores, barter, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of \$5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of \$500 or more, which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted, or taken...

CHAPTER 4: *MENS REA* REQUIREMENTS

Mens rea is the second major component of criminal statutes. *Mens rea* requirements are in the large majority of criminal statutes. However, unlike act requirements, there are some statutes that do not require *mens rea*. Instead, the absence of *mens rea* makes the statutes "strict liability." The presumption, in American law, is against strict liability.

Defining *mens rea* with precision is a difficult endeavor. George Fletcher noted: "There is no term fraught with greater ambiguity than that venerable Latin phrase that haunts the Anglo-American criminal law: *mens rea*."¹ "*Mens rea*" is sometimes used interchangeably with the terms "scienter" and "culpability."

Ultimately, *mens rea* is a concept that, like many others in criminal law, is best defined through example. At a minimum, *mens rea* pertains to a person's thought process at the time the alleged criminal acts were committed. However, what differentiates legal thoughts from criminal thoughts varies depending upon the charged crime and jurisdiction.

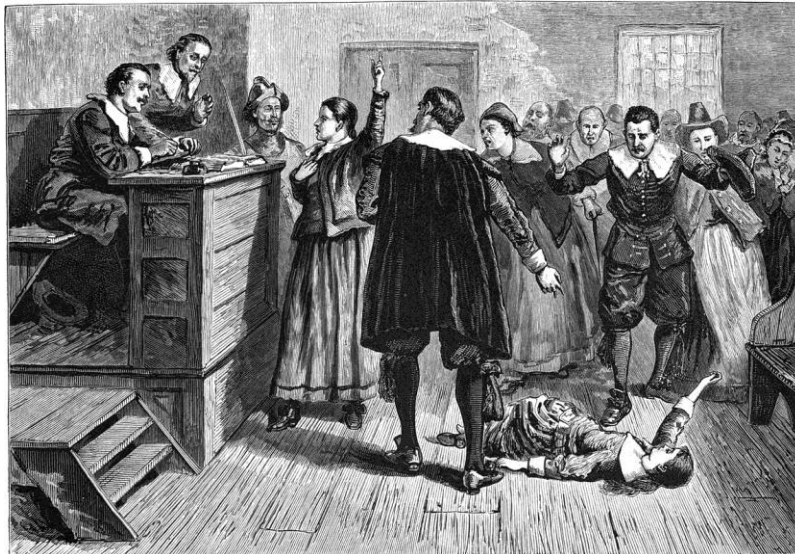


Figure 16: Witchcraft at Salem Village

I. Foundations of *Mens Rea*

There are two major approaches to *mens rea*: traditional common law and the MPC. About half of the states and the federal criminal justice system utilize *mens rea* rules derived from traditional common law. There is little doubt that common law *mens rea* is

¹ GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 398 (1978).

more complicated, confusing, and difficult than *mens rea* under the MPC. Before turning to the differences between those two perspectives, let's read what is most likely the most detailed court opinion concerning the history and modern state of *mens rea*.

United States v. Cordoba-Hincapie, 825 F. Supp. 485 (E.D.N.Y. 1993)

WEINSTEIN, J.:

....

The term, "*mens rea*," meaning "a guilty mind; a guilty or wrongful purpose; a criminal intent," BLACK'S LAW DICTIONARY 1137 (4th ed. 1968), is shorthand for a broad network of concepts encompassing much of the relationship between the individual and the criminal law. See SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 217 (1989) ("A common usage is to express all ... qualifications to liability in terms of the requirement of *mens rea*"). These doctrines of criminal responsibility and the theories that support them are deeply rooted in our legal tradition as one of our first principles of law. To understand its import, it is necessary to unpeel the terse Latin.

Origins

Western civilized nations have long looked to the wrongdoer's mind to determine both the propriety and the grading of punishment. See, e.g., *Morissette v. United States*, 342 U.S. 246, 250, n.4 96 L. Ed. 288, 72 S. Ct. 240 (1952) ("For a brief history and philosophy of this concept in Biblical, Greek, Roman, Continental and Anglo-American law, see Radin, *Intent, Criminal*, 8 ENCYC. SOC. SCI. 126."). "For hundreds of years the books have repeated with unbroken cadence that *Actus non facit reum nisi mens sit rea*." Francis Bowes Sayre, *Mens rea*, 45 HARV. L. REV. 974, 974 (1932) [hereinafter Sayre, *Mens rea*]; see also BLACK'S LAW DICTIONARY 55 (4th ed. 1968) (defining the actus non rule: "An act does not make [the doer of it] guilty, unless the mind be guilty; that is, unless the intent be criminal."). This is the criminal law's mantra.

In his dialogues in *Laws*, Plato attempts to construct an ideal criminal code. He rejects the then-prevailing distinction between voluntary and involuntary acts in favor of gradation of crimes based upon levels of intent. A.E. TAYLOR, INTRODUCTION, IN *THE LAWS OF PLATO* xlix-1 (A.E. Taylor trans., 1934). Plato's "Visitor from Athens" explains:

What the legislator has to ask himself is whether the agent of the beneficial or detrimental act is acting with a rightful spirit and in a rightful manner.... He must aim throughout his legislation at reconciling the minds of the authors and sufferers of the various forms of detriment by award of compensation, and converting their difference into friendship.... And then as to wrongful detriment – or gain, either, in the case that a man should cause another to profit by a wrongful act – such things, as we know, are maladies of the soul, and we must cure them whenever they are curable.... And so, if we can but bring a man to this – to hatred of iniquity, and love of right or even acquiescence in right – by acts we do or words we utter, through pleasure or through pain, through

honour bestowed or disgrace inflicted, in a word, whatever the means we take, thus and only thus is the work of a perfect law effected.

Id. at 250-51 (emphasis in original). Plato then proceeds to lay out a nuanced criminal code that permits defenses based upon insanity, infancy and other forms of incapacity, that punishes premeditated murder more severely than homicide committed in the heat of passion and that absolves those who act unintentionally. *Id.* at 253-73 ("If a man unintentionally cause the death of a person ... he shall, on accomplishing such purifications as may be directed by a law for these cases received from Delphi, be esteemed clear of pollution.").

The ancient English law tended towards strict liability for acts. But-for causation was considered the essential prerequisite to criminal fault. II FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW* 470-71 (2d ed. 1968) ("If once it be granted that a man's death was caused by the act of another, then that other is liable, no matter what may have been his intentions or his motives."); *see also* Sayre, *Mens rea*, *supra*, at 975-80. The "most primitive laws," according to Pollock and Maitland, held men liable for "acts" done by their slaves, beasts and even their possessions. II POLLOCK & MAITLAND, *supra*, at 472-73 ("If his sword kills, he will have great difficulty in swearing that he did nothing whereby the dead man was 'further from life or nearer to death.'"). Pollock and Maitland explain that the early law was hostile to the notion of examining an individual's mental state:

It is hard for us to acquit the ancient law of that unreasoning instinct that impels the civilised man to kick, or consign to eternal perdition, the chair over which he has stumbled. But law which would not confess to sanctioning this instinct still finds grave difficulties in its way if it endeavors to detect and appreciate the psychical element in guilt and innocence. "The thought of man shall not be tried, for the devil himself knoweth not the thought of man": thus at the end of the middle ages spoke Brian C.J. in words that might well be the motto for the early history of the criminal law.

Id. at 474-75. While "up to the twelfth century the conception of *mens rea* in anything like its modern sense was non-existent," Sayre, *Mens rea*, *supra*, at 981, it should be remembered that the very nature of most offenses rendered them unlikely or impossible of commission without some level of intent and that state of mind "seems to have been a material factor, even from the very earliest of times, in determining the extent of punishment." *Id.*

Toward the end of the Middle Ages, the modern focus on the criminal's state of mind gradually began to evolve. "The history of the recognition of culpable states of mind should be viewed as a continuing process of self-civilization." Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815, 850 (1980) (describing evolution of culpability distinctions from ninth century to present). By the end of the twelfth century, the Roman law, with its concept of culpa, and the canon law, with its emphasis on moral guilt, began to influence the development of doctrines of culpability. Sayre, *Mens rea*, *supra*, at 982-83. Holdsworth explains,

As the idea grew up that to constitute a crime there must be some sort of a *mens rea* on the part of the accused, it came to look unjust to accuse a man of theft merely because he happened to be in possession of goods to which another had a better right.

III A.W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 322 (1927). The book of Leges of Henry I, which tends toward more primitive concepts of strict liability, recites in connection with the offense of perjury, "*reum non facit nisi mens rea*." Sayre, *Mens rea*, *supra*, at 983. It was inevitable that the

development of the criminal law, based as it is upon general and evolving societal mores, would track the development of prevailing views about moral wrongdoing. "The early felonies were roughly the external manifestations of the heinous sins of the day." *Id.* at 989. The word "felon" itself is a derivative of a Latin term meaning one who is "full of bitterness or venom" and who is "cruel, fierce, wicked, base." II POLLOCK & MAITLAND, *supra*, at 465.

"The requirement of a guilty state of mind (at least for the more serious crimes) had been developed by the time of Coke." GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 30 (2d ed. 1961). Coke, writing in the seventeenth century, described the crime of treason as follows:

So as there must be a compassing or imagination, for an act done per infatunium, without compassing, intent, or imagination, is not within this act, as it appeareth by the expressed words thereof. Et actus non facit reum, nisi mens sit rea.... This compassing, intent, or imagination, though secret, is to be tryed by the peers, and to be discovered by circumstances precedent, concomitant, and subsequent, with all endeavour evermore for the safety of the king.

EDWARD COKE, THIRD INSTITUTE 6 (London, W. Clarke & Sons 1817).

In discussing larceny and theft, he declared,

First it must be felonious, id est, cum anima furandi, as hath been sa^d. Actus non facit reum, nisi mens sit rea. And this intent to steale must be when it cometh to his hands or possessions: for if he hath the possession of it once lawfully, though he hath animum furandi afterward, and carrieth it away, it is no larceny....

Id. at 107.

Once the "exceedingly vague" concept of moral blameworthiness, Sayre, *Mens rea*, *supra*, at 994, was recognized the law embarked upon the long journey of refinement and development of culpability distinctions that continues to this day. *Id.* at 994-1004. Increasing precision in the law of excuses and defenses was partly a cause and partly an effect of the firmness with which the *mens rea* principle came to be held. VIII A.W. HOLDSWORTH, *supra*, at 433. After the twelfth century, defenses such as insanity, infancy or compulsion began to be recognized as negating guilt. Sayre, *Mens rea*, *supra*, at 1004-06. Mistake of fact did not become a well-recognized defense until the seventeenth century. *Id.* at 1014; see also VIII A.W. HOLDSWORTH, *supra*, at 434. Holdsworth, in a chapter covering the fourteenth and fifteenth centuries, writes,

The law has left far behind old rules which look merely at the act and neglect the intent; but it has not therefore swallowed whole the canonist's theory that moral guilt should be chiefly regarded. A formed intent not manifested by any overt act, even a frustrated attempt, will not amount to a felony.

II A.W. HOLDSWORTH, *supra*, at 452.

By the time Blackstone came to write his Commentaries in the middle of the eighteenth century, he was able to summarize the English criminal law as follows:

All the several pleas and excuses which protect the committer of a forbidden act from the punishment which is otherwise annexed thereto, may be reduced to this single consideration, the want or defect of will. An involuntary act, as it has no claim to merit, so neither can it induce any guilt: the concurrence of the will, when it has its choice either to do or to avoid the fact in question, being the only thing that renders human action either praiseworthy or culpable. Indeed, to make a complete crime cognizable by human laws,

there must be both a will and an act.... As no temporal tribunal can search the heart, or fathom the intentions of the mind, otherwise then as they are demonstrated by outward actions, it therefore cannot punish for what it cannot know.... And, as a vicious will without a vicious act is no civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all. So that to constitute a crime against human laws, there must be, first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will.

II WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *20-21 (emphasis in original).

2. Modern View

a. Theory

Two general statements can be made with some confidence about the status of *mens rea* in the modern criminal law. First, "when it comes to attaching a precise meaning to *mens rea*, courts and writers are in hopeless disagreement." Sayre, *Mens rea, supra*, at 974; *see also* Leo Katz, *Bad Acts and Guilty Minds* 165-209 (1987) (exploring, through hypotheticals, the complexity of the *mens rea* principle); Gary v. Dubin, *Mens rea Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility*, 18 STAN. L. REV. 322, 325 (1966) ("In sharp contrast to its nearly defied legal status, [*mens rea*] has for centuries remained anomalously and bafflingly elusive."). Second, *mens rea* in some form remains a defining and irreducible characteristic of the criminal law. Glanville Williams, one of this century's most astute commentators on the criminal law, put the matter succinctly:

It may be said that any theory of criminal punishment leads to a requirement of some kind of *mens rea*. The deterrent theory is workable only if the culprit has knowledge of the legal sanction; and if a man does not foresee the consequences of his act he cannot appreciate that punishment lies in store if he does it. The retributive theory presupposes moral guilt; incapacitation supposes social danger; and the reformation aim is out of place if the offender's sense of values is not warped.

GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 30 (2d ed. 1961); *see also* Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 109 (1962) (to punish without reference to the actor's state of mind has no deterrence value and cannot be justified on retributive grounds since the actor is not morally blameworthy). Stephen, in summarizing the development of the English law, captures the relationship between these two general observations:

The maxim, "Actus non facit reum nisi mens sit rea," is sometimes said to be the fundamental maxim of the whole criminal law; but I think that, like many other Latin sentences supposed to form a part of the Roman law, the maxim not only looks more instructive than it really is, but suggests fallacies which it does not precisely state.... The truth is that the maxim about "*mens rea*" means no more than that the definition of all or nearly all crimes contains not only an outward and visible element, but a mental element, varying according to the different nature of the different crimes.

SIR JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 94-95 (1883); *see also* Williams, *supra*, at 32-33 (recognizing that *mens rea* requirement has been modified where

necessary, permitting liability based upon negligence and even ("a more dubious development") without regard to fault).

A host of other modern authorities have stated the importance of the mental element in crime, though describing and justifying it variously. Bentham's utilitarian theories portrayed culpability requirements as essential to ensuring the "economy" of punishment. Proportionality and deterrence were, for Bentham, the most essential principles of the criminal law. "Every particle of real punishment that is produced, more than what is necessary for the production of the requisite quantity of apparent punishment," he wrote, "is just so much misery run to waste." JEREMY BENTHAM, PRINCIPLES OF PENAL LAW, in 1 THE WORKS OF JEREMY BENTHAM 398 (John Bowring ed., 1962). In his utilitarian approach to punishment, Bentham sought to promote deterrence. To that end, a rational actor with full knowledge of the relevant facts was required. Punishment will be ineffective and, therefore, wasteful if the violation is of an *ex post facto* law or the actor does not otherwise have notice of the law, if the actor is insane, an infant or intoxicated, or if the actor labors under a mistake of fact or in response to duress or physical compulsion. *Id.* at 397.

Holmes also analyzed the problem of *mens rea* from a utilitarian perspective. For Holmes, though deterrence is the "chief and only purpose of punishment," OLIVER WENDELL HOLMES, THE COMMON LAW 46 (1881), retribution is also a justifiable goal:

It may be said, not only that the law does, but that it ought to, make the gratification of revenge an object.... The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong. If people would gratify the passion of revenge outside of the law, if the law did not help them, the law has no choice but to satisfy the craving itself, and thus avoid the greater evil of private retribution.

Id. at 41-42. Both the deterrent and retributive objectives were justifiable, according to Holmes, because "no society has ever admitted that it could not sacrifice individual welfare to its own existence." *Id.* at 43. As with Bentham, even though there would be no moral objection to punishing the unwitting actor in order to improve society as a whole, some form of culpability is required to ensure the effectiveness of penal sanctions. "[A] law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear." *Id.* at 50.

The most salient aspect of Holmes' analysis, however, is his ready admission of negligence as satisfying the *mens rea* principle. According to Holmes, the criminal law, like tort law, should serve to compel individuals to bring their conduct within the parameters of what society deems reasonable. *Id.* The test for culpability should be primarily an "external" one and the *mens rea* requirement is satisfied as long as the actor is aware of circumstances "in which [his or her acts] will probably cause some harm which the law seeks to prevent." *Id.* at 75. Not only must the individual "find out at his peril things which a reasonable and prudent man would have inferred from the things actually known," *Id.*, but strict liability is also implicitly permissible on his account since there will be instances in which the individual "must go even further, and, when he knows certain facts, must find out at his peril whether the other facts are present which would make the act criminal." *Id.* In general, strict liability has been limited to civil cases. Modern law has been reluctant to extend the concept to criminal *malum in se* offenses – the category into which drug dealing has been placed, even if only recently, by our society and legislatures.

While recognizing that "legal history shows a continual movement back and forth between extreme solicitude for the general security and extreme solicitude for the individual life," Roscoe Pound described the *mens rea* principle as fundamental:

It remains true that our legal treatment of delinquents is not preventive but is punitive in its whole conception and administration. Historically, our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong. It assumes that the social interest in the general security and the social interest in the general morals are to be maintained by imposing upon him a penalty corresponding exactly to the gravity of his offense. It is enforced by an elaborate machinery of execution of the appointed sentence.

Roscoe Pound, *Introduction*, in FRANCIS BOWES SAYRE, A SELECTION OF CASES ON CRIMINAL LAW xxxiv-xxxvii (1927).

The leading modern texts have taught the importance of *mens rea* in the criminal law. *See, e.g.*, Sanford H. Kadish & Stephen J. Schulhofer, Criminal Law and its Processes 217-18 (1989); Williams, *supra*, at 30-33. In his classic treatise, Bishop reports, "Prompting the act, there must be an evil intent.... An act and evil intent must combine to constitute a crime." 1 JOEL PRENTISS BISHOP, BISHOP ON CRIMINAL LAW §§ 205-06 (9th ed. 1923); *see also* Edwin R. Keedy, *Ignorance and Mistake in the Criminal Law*, 22 HARV. L. REV. 75, 81 (1908) ("It is a fundamental principle of the criminal law, for which no authorities need be cited, that the doer of a criminal act shall not be punished unless he has a criminal mind."). "Neither in philosophical speculation, nor in religious or moral sentiment," Bishop writes, "would any people in any age allow that a man should be deemed guilty unless his mind was so." 1 Bishop, *supra*, § 287. Bishop counsels vigilance against erosion of this principle:

The calm judgment of mankind keeps this doctrine among its jewels. In times of excitement, when vengeance takes the place of justice, every guard around the innocent is cast down. But with the return of reason comes the consciousness that where the mind is pure, he who differs in act from his neighbors does not offend.

Id. § 289.

Jerome Hall, in his treatise, expresses a similar view:

The distinctions concerning intention, recklessness and negligence ... are warranted on ethical grounds. The relevant ethical principle expressed in terms of *mens rea*, that penal liability should be limited to voluntary (intentional or reckless) commission of harms forbidden by penal law, represents not only the perennial view of moral culpability, but also the plain man's morality. It is a necessary principle if punishment is to be distinguished from other sanctions.

JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 133-34 (2d ed. 1960). The leading current treatise is in accord. *See* 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, SUBSTANTIVE CRIMINAL LAW 270 (1986) (A "basic premise" of the criminal law "is that conduct, to be criminal, must consist of something more than mere action ... some sort of bad state of mind is required as well.").

Perhaps the most important modern work on criminal culpability is H.L.A. HART'S PUNISHMENT AND RESPONSIBILITY (1968). This is a landmark collection of essays that vigorously defend the *mens rea* principle. Proceeding from the premise that

it is characteristic of our own and all advanced legal systems that the individual's liability to punishment, at any rate for serious crimes carrying severe penalties, is made by law to depend, among other things, on certain mental conditions,

Id. at 28, Hart seeks the philosophical source of the culpability requirement. He rejects Bentham's utilitarian justifications as inadequate. If deterrence were the only objective of the criminal law and sacrifice of the individual were not a concern, strict liability would be permissible since punishment of those "who act unintentionally or in some other normally excusing manner may have a utilitarian value in its effect on others." *Id.* at 20; *see also Id.* at 42-43, 179. To the contrary, if strict liability is admitted, Hart says, it is done "with the sense that some other principle has been overridden." *Id.* at 20.

Holmes' theory of "objective liability" also fails in Hart's view. *Id.* at 38. Holmes erroneously poses a choice between a system in which mental conditions are used only to find moral culpability and one in which mental conditions are not considered at all. *Id.* Hart finds no such dilemma. "There are independent reasons, apart from the question of moral guilt, why a legal system should require a voluntary act as a condition of responsibility." *Id.* Hart distinguishes between two "moral" questions. First is the question, for the consideration of the legislature, whether enforcement of a given law produces more good than evil. If good outweighs evil, then the law is morally permissible. Second is the question, for consideration at the judicial stage, whether the particular person accused should be excused on account of his or her mental condition because that person "could not have helped" doing the act and, therefore, punishment would be unjust. *Id.* at 39. Hart characterizes this *mens rea* principle as follows:

The need to inquire into the "inner facts" is dictated not by the moral principle that only the doing of an immoral act may be legally punished, but by the moral principle that no one should be punished who could not help doing what he did.

Id. (emphasis in original).

The *mens rea* principle, for Hart, flows from our society's commitment to individual choice. "[W]e look on excusing conditions as something that protects the individual against the claims of the rest of society." *Id.* at 44. The existence of the panoply of excuses and culpability requirements in the criminal law allows the individual to exercise choice with respect to violation of the law. *Id.* at 44-45. Hart summarizes his analysis as follows:

On this view excusing conditions are accepted as something that may conflict with the social utility of the law's threats; they are regarded as of moral importance because they provide for all individuals alike the satisfactions of a choosing system.... In this way the criminal law respects the claims of the individual as such, or at least as a choosing being, and distributes its coercive sanctions in a way that reflects this respect for the individual.

Id. at 49 (emphasis in original); *see also* ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 128-29 (1991) (contrasting deterrence-based utilitarian theories with "liberal" theories, which "regard respect for the autonomy of each individual citizen as capable of overriding general calculations of social utility").

Henry Hart's thoughtful analysis of the criminal law led him to a destination quite close to H.L.A. Hart's. For Henry Hart, it is not just the *mens rea* principle but the whole of the criminal law

that reflects the primacy of individual freedom and the individual's relationship to the community as fundamental organizing principles of our society. He writes,

Man realizes his potentialities most significantly ... by making himself a functioning and participating member of his community, contributing to as well as drawing from it.

What is crucial in this process is the enlargement of each individual's capacity for effectual and responsible decision. For it is only through personal, self-reliant participation, by trial and error, in the problems of existence, both personal and social, that the capacity to participate effectively can grow. Man learns wisdom in choosing by being confronted with choices and by being made aware that he must abide the consequences of his choice....

Seen in this light, the criminal law has an obviously significant and, indeed, a fundamental role to play in the effort to create a good society. For it is the criminal law which defines the minimum conditions of man's responsibility to his fellows and holds him to that responsibility.

Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 410 (1958).

The conclusion that *mens rea* has a primacy in modern criminal law was central to the magisterial analysis of Professors Jerome Michael and Herbert Wechsler in their two-part work *A Rationale of the Law of Homicide*, 37 COLUM. L. REV. 701, 1261 (1937). This work and those already referred to were foundational in the approach taken by the American Law Institute's MODEL PENAL CODE (OFFICIAL DRAFT AND REV. COMM. 1985) (the Code), for which Professor Wechsler was reporter. The Code was the basis of extensive state modifications of criminal laws.

b. Exceptions

As the work of these leading authorities illustrates, the *mens rea* principle remains, in the modern criminal law, a fundamental requirement. Whatever the current application of the *mens rea* history, this brief recapitulation establishes a critical constitutional baseline. By the time the right to a jury trial and due process was embedded in the first amendments to the Constitution, *mens rea* constituted a fundamental protection against abuse of criminal sanctions by the state. It is a general rule of law that guards beliefs deeply held within our traditions of individual freedom, responsibility and duty. Like most ancient doctrines, however, it has grown far more sophisticated and nuanced than it once was. It can no longer simply be invoked. Its application must be carefully explained and its many distinctions must be considered. Not only has the law developed an appreciation of gradations in mental states, but it now also openly recognizes limited exceptions to a rule once characterized as admitting no compromise....

c. Model Penal Code

A tour of virtually any aspect of modern criminal law doctrine inevitably includes the Model Penal Code. See American Law Institute, MODEL PENAL CODE (OFFICIAL DRAFT AND REV. COMM. 1985). No single body of work has had a greater influence on the American criminal law as it now stands. See generally *Symposium, The 25th Anniversary of the Model Penal Code*, 19 RUTGERS L.J. 519

(1988); *see also* Norman Silber & Geoffrey Miller, *Toward Neutral Principles in the Law: Selections from the Oral History of Herbert Wechsler*, 93 COLUM. L. REV. 854, 917-20 (1993) (discussion with Professor Herbert Wechsler, reporter on the Code, about his role and the influence of the project). The Code represents a unique blend of sophisticated theory and careful, practical drafting. The success of its scheme remains a reminder of the importance of a unified, coherent approach to the application of criminal statutes and the dangers in patchwork criminal codes and decisions that lack internal consistency and leave basic questions and problems unaddressed.

The Code's treatment of *mens rea* is direct, yet it manages to effectuate the sophisticated modern understanding of the principle while applying it with considerable force. Section 2.02 establishes a general requirement of *mens rea*, captures the modern understanding of gradations of mental states and recognizes that *mens rea* requirements must be considered with respect to each element of an offense:

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

MODEL PENAL CODE § 2.02(1). Subsection 2.02(3) establishes a presumption that these *mens rea* requirements apply to statutes that are silent with respect to required mental states. Subsection 2.02(4) states that a law's culpability requirement is presumed to apply to all of its elements. The drafters explain that § 2.02 "expresses the Code's basic requirement that unless some element of mental culpability is proved with respect to each material element of the offense, no valid criminal conviction may be obtained." *Id.* § 2.02 Comment at 229. A primary purpose in enacting § 2.02 was "to dispel the obscurity with which the culpability requirement is often treated when such concepts as 'general criminal intent,' '*mens rea*,' 'presumed intent,' 'malice,' 'wilfulness,' 'scienter,' and the like have been employed." *Id.* § 2.02 Comment at 230.

Section 2.05 includes the Code's sole exception to its insistence upon *mens rea* requirements. It is a narrow one:

(1) The requirements of culpability prescribed by Sections 2.01 and 2.02 do not apply to:

(a) offenses that constitute violations, unless the requirement involved is included in the definition of the offense or the Court determines that its application is consistent with effective enforcement of the law defining the offense; or

(b) offenses defined by statutes other than the Code, insofar as a legislative purpose to impose absolute liability for such offenses or with respect to any material element thereof plainly appears.

"Violations," as defined by the Code, do not constitute crimes, do not carry the collateral consequences of crimes and may not be punished except by suspended sentence, fine or other civil penalty. *Id.* §§ 1.04(5) and 6.02(4). The drafters characterize § 2.05 as "a frontal attack on absolute or strict liability." *Id.* § 2.05 Comment at 282. They describe as "too fundamental to be compromised" the principle that "crime does and should mean condemnation and no court should have to pass that judgment unless it can declare that the defendant's act was culpable." *Id.* § 2.05 Comment at 283. It should be emphasized that § 2.05 requires that a legislative intent to impose strict liability "plainly appear."

The Code permits liability based upon negligence on much the same grounds as developed by the commentators discussed above.

Section 2.02(2)(d) defines negligence as follows:

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

While this is arguably an "objective" standard of liability, it contains heightened protections for the individual that are clearly tailored for the criminal law. It speaks of "a substantial and unjustifiable risk" and "a gross deviation," and it focuses on the reasonable person "in the actor's situation." The drafters justify liability based upon a strong form of negligence as follows:

When people have knowledge that conviction and sentence, not to speak of punishment, may follow conduct that inadvertently creates improper risk, they are supplied with an additional motive to take care before acting, to use their faculties and draw on their experience in gauging the potentialities of contemplated conduct. To some extent, at least, this motive may promote awareness and thus be effective as a measure of control. Moreover, moral defect can properly be imputed to instances where the defendant acts out of insensitivity to the interests of other people, and not merely out of an intellectual failure to grasp them.

Id. § 2.02 Comment at 243. These comments explain why – on the argument that it has the benefit of inducing caution – strict liability is overbroad. A properly calibrated negligence standard that makes allowance for the truly faultless person accomplishes the same result without sweeping in those upon whom the law can have no effect.

The Code's treatment of mistakes of fact is particularly relevant and important. Section 2.04 of the Code illustrates how the *mens rea* principle can be adhered to without compromising the practical needs and objectives of the penal law. It states,

(1) Ignorance or mistake as to a matter of fact or law is a defense if:

(a) the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense; or

(b) the law provides that the state of mind established by such ignorance or mistake constitutes a defense.

(2) Although ignorance or mistake would otherwise afford a defense to the offense charged, the defense is not available if the defendant would be guilty of another offense had the situation been as he supposed.

Id. § 2.02.

Particularly relevant to the cases at hand is the second sentence of § 2.04(2). It would make the defendants responsible for, and punishable for, cocaine not heroin. It reads:

In such case, however, the ignorance or mistake of the defendant shall reduce the grade and degree of the offense of which he may be convicted to those of the offense of which he would be guilty had the situation been as he supposed.

Id. § 2.04(2).

The remainder of § 2.04 denies the defense of mistake of law, except in limited circumstances. *Id.* § 2.04(3). As the drafters themselves point out, § 2.04 (at least subsection (1)) is largely superfluous since the culpability requirements of § 2.02 alone preclude conviction in cases of mistake. *Id.* § 2.04 Comment at 270. They explain that “ignorance or mistake has only evidential import; it is significant whenever it is logically relevant....” *Id.* § 2.04 Comment at 269.

Notice that subsection 2.04(2) insists upon full and consistent adherence to the *mens rea* principle. The Code flatly rejects the view, expressed in a similar form as early as the Prince case (discussed above) and readily accepted by many federal courts today (as will be described below) that once one commits some crime with some *mens rea*, one is liable for all criminal actions that result regardless of *mens rea*. The Code holds the actor liable only for the crime the actor believed he or she was committing. The drafters thoughtful explanation of § 2.04(2) merits lengthy quotation:

If the [mistake-of-fact] defense were denied altogether, an actor culpable in respect to one offense could be convicted of a much more serious offense. On the other hand, the defendant should not go free, for on either view – the facts as they occurred or as the defendant believed them to be – a criminal offense was committed.

The offense of burglary will illustrate the problem. Burglary is defined generally by Section 221.1 to include entry into any building or occupied structure for the purpose of committing a crime therein, and is graded normally as a felony of the third degree. It is a felony of the second degree, however, if the building is a dwelling of another and the entry is at night. Assume that a defendant enters a building at night for the requisite purpose, and that the building is a dwelling house. If the defendant believed, and formed his belief in a manner that could not be characterized as reckless, that the building was a store, he could be convicted only of a third degree felony.

To deny the relevance of the defense of mistake in this situation would be in effect to recharacterize, for this special purpose, the culpability level normally required by the Code for the material element of the more serious offense. Presumably a considered judgment led to the inclusion as a material element the requirement that a building be a dwelling in order to aggravate the offense to a second degree felony; measuring the defendant’s culpability toward that element should be an important exercise in grading the extent of the criminality involved. The doctrine that when one intends a lesser crime he may be convicted of a graver offense committed inadvertently leads to anomalous results if it is generally applied in the penal law; and while the principle obtains to some extent in homicide, its generality has rightly been denied.

Id. § 2.04 Comment at 272-73.

It is important to understand that the Code’s analysis in this respect explicitly applies not only to mistakes as to the type of offense, but also to mistakes implicating the grading of offenses. See *Id.* §§ 1.13(10) (defining “material element” to include all elements not relating to “statute of limitations, jurisdiction, venue” or other matters not related to the harm sought to be prevented or to justifications and excuses) and 2.02 Explanatory Note at 227 (similarly explaining “material element”); see also *Id.* § 2.04 Explanatory Note at 268 (“The defendant ... cannot be convicted of a grade or degree of offense higher than the offense of which he could have been convicted had the situation been as he supposed.” (emphasis added)); Peter W. Low, *The Model Penal Code, The Common Law, and Mistakes of Fact: Recklessness, Negligence or Strict Liability?*, 19 RUTGERS L.J.

539, 546-47 (1988) (While "the general position of the common law is almost certainly to the contrary," under the Code "the culpability structure of Section 2.02 is meant to apply to grading criteria as well as to the formal elements of Model Penal Code offenses.").

As LaFave and Scott explain, many courts, especially in cases involving statutory rape, have proceeded on the theory that a mistake-of-fact defense should not be available to the defendant who would have been engaged in "wrongful" conduct even if the facts had been as he or she believed them to be. LaFave and Scott, like the Code, reject this argument:

The lesser wrong and moral wrong theories ... are grounded upon the proposition that a 'guilty mind,' in a very general sense, should suffice for the imposition of penal sanctions even when the defendant did not intentionally, knowingly, recklessly or even negligently engage in the acts described in the statute.... That position is unsound, and has no place in a rational system of substantive criminal law.... It is generally true that crimes defined in terms of causing a certain bad result require mental fault of the same kind and intensity, and mental fault sufficient for some other kind of crime will not suffice.... This is because considerations of deterrence, correction, and just condemnation of the actor's conduct all focus attention upon the harm intended rather than the harm actually caused.

WAYNE R. LAFAVE & AUSTIN W. SCOTT, SUBSTANTIVE CRIMINAL LAW 581-83 (1986); *see also State v. Elton*, 680 P.2d 727, 730-31 (Utah Sup. Ct. 1984) ("To hold one liable for a greater crime which he actually sought to avoid committing on the ground that he committed a lesser crime turns the doctrine of lesser included offenses on its head and raises fundamental questions which may have constitutional implications."); *cf.* Edwin R. Keedy, *Ignorance and Mistake in the Criminal Law*, 22 HARV. L. REV. 75, 84 (1908) ("If the defendant, being mistaken as to material facts, is to be punished because his mistake is one which an average man would not make, punishment will sometimes be inflicted when the criminal mind does not exist. Such a result is contrary to fundamental principles, and is plainly unjust, for a man should not be held criminal because of lack of intelligence.").

d. Current Trends

The seemingly elemental concept of "*mens rea*," received wisdom for lawyers from the first year of law school, proves exceedingly difficult to tie together neatly once unpacked. Its history has been marked by development, change and shifting attitudes. These problems no doubt will persist. *See* Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815, 853 (1980) ("The long-range view of history illustrates the irresistible momentum of development.... As the people of 844 recognized only two [culpability distinctions], the people of 2548 may feel justice cannot be done with less than eight.").

Three observations about current trends can be made with some confidence. First, appreciation by the modern criminal law of nuances in mental states continues to increase. *See Sayre, Mens rea, supra*, at 1019 (canonists' concern with evil motive has gradually been replaced with requirement of specific forms of intent of each felony); *see also* MODEL PENAL CODE § 2.02; *see generally* Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463 (1992) (developing proposal for new framework of mental states based upon distinctions among "culpable-desire"

states, "culpable-belief" states and culpable conduct); Gary v. Dubin, *Mens rea Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility*, 18 STAN. L. REV. 322 (1966) (reformulating *mens rea* into principles of proscription, conformity and function).

Second, the *mens rea* principle is no longer the sharp-edged canon that the old volumes once described. As society has shifted from punishing moral wrongdoing to "protecting social and public interests," the *mens rea* principle "is coming to mean, not so much a mind bent on evil-doing as an intent to do that which unduly endangers social or public interests." Sayre, *Mens rea*, *supra*, at 1017. It may be true that "the hard core of the criminal law is ... riddled with exceptions to the [*mens rea*] principle" and that "the allegedly pervasive principle of *mens rea* is not pervasive at all." Herbert L. Packer, *Mens rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 138 (1962). Yet this erosion is not decisive in addressing new problems of the criminal law.

Third, when dealing with an interpretation that may seriously undermine the traditional *mens rea* protections, the conceptions of the late eighteenth century have substantial relevance. Congress can be assumed to want to stay safely within traditional protections of *mens rea* doctrine to avoid unconstitutionality. Absent a clear statement to the contrary this intent can be read into both statutes and Guidelines promulgated by the United States Sentencing Commission (Commission). *Mens rea* remains a fundamental element of crimes. Virtually no one advocates its abandonment. Even Lady Barbara Wootton, *see* CRIME AND THE CRIMINAL LAW (1963) 51-63, arguing for a new approach to criminal law under which *mens rea* would be irrelevant at the conviction stage, insists that it should be largely determinative of the appropriate sentence. Her approach would lead to the same result in the instant cases as that of the more traditional *mens rea* theorists.

A survey of the principle's history and its treatment by the leading criminal-law minds of this century reveals that *mens rea* remains a reflection of deep commitments within our culture regarding individual freedom and autonomy and the individual's relationship to the community. Leaving aside the Model Penal Code, the strength of these observations has some tendency to dissipate when we descend from theory into the practical application of the criminal law....

In 1952, the Supreme Court issued what is perhaps the most influential court opinion regarding *mens rea* in criminal law. Justice Robert Jackson, who had extensive experience in criminal law, wrote the majority opinion for the court.



Figure 17: Justice Robert H. Jackson as the Chief Prosecutor at the Nuremberg Court

Morissette v. United States, 342 U.S. 246 (1952)

MR. JUSTICE JACKSON delivered the opinion of the Court.

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

On a large tract of uninhabited and untilled land in a wooded and sparsely populated area of Michigan, the Government established a practice bombing range over which the Air Force dropped simulated bombs at ground targets. These bombs consisted of a metal cylinder about forty inches long and eight inches across, filled with sand and enough black powder to cause a smoke puff by which the strike could be located. At various places about the range signs read "Danger – Keep Out – Bombing Range." Nevertheless, the range was known as good deer country and was extensively hunted.

Spent bomb casings were cleared from the targets and thrown into piles "so that they will be out of the way." They were not stacked or piled in any order but were dumped in heaps, some of which had been accumulating for four years or upwards, were exposed to the weather and rusting away.

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

Morissette, by occupation, is a fruit stand operator in summer and a trucker and scrap iron collector in winter. An honorably discharged veteran of World War II, he enjoys a good name

among his neighbors and has had no blemish on his record more disreputable than a conviction for reckless driving.

The loading, crushing and transporting of these casings were all in broad daylight, in full view of passers-by, without the slightest effort at concealment. When an investigation was started, Morissette voluntarily, promptly and candidly told the whole story to the authorities, saying that he had no intention of stealing but thought the property was abandoned, unwanted and considered of no value to the Government. He was indicted, however, on the charge that he "did unlawfully, wilfully and knowingly steal and convert" property of the United States of the value of \$84, in violation of 18 U. S. C. § 641, which provides that "whoever embezzles, steals, purloins, or knowingly converts" government property is punishable by fine and imprisonment. Morissette was convicted and sentenced to imprisonment for two months or to pay a fine of \$200. The Court of Appeals affirmed, one judge dissenting.

On his trial, Morissette, as he had at all times told investigating officers, testified that from appearances he believed the casings were cast-off and abandoned, that he did not intend to steal the property, and took it with no wrongful or criminal intent. The trial court, however, was unimpressed, and ruled: "He took it because he thought it was abandoned and he knew he was on government property.... That is no defense.... I don't think anybody can have the defense they thought the property was abandoned on another man's piece of property." The court stated: "I will not permit you to show this man thought it was abandoned.... I hold in this case that there is no question of abandoned property." The court refused to submit or to allow counsel to argue to the jury whether Morissette acted with innocent intention....

Petitioner's counsel contended, "But the taking must have been with a felonious intent." The court ruled, however: "That is presumed by his own act."

The Court of Appeals suggested that "greater restraint in expression should have been exercised," but affirmed the conviction because, "As we have interpreted the statute, appellant was guilty of its violation beyond a shadow of doubt, as evidenced even by his own admissions."

....

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a "vicious will." Common-law commentators of the Nineteenth Century early pronounced the same principle, although a few exceptions not relevant to our present problem came to be recognized.

Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil. As the states codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify

disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation. Courts, with little hesitation or division, found an implication of the requirement as to offenses that were taken over from the common law. The unanimity with which they have adhered to the central thought that wrongdoing must be conscious to be criminal is emphasized by the variety, disparity and confusion of their definitions of the requisite but elusive mental element. However, courts of various jurisdictions, and for the purposes of different offenses, have devised working formulae, if not scientific ones, for the instruction of juries around such terms as "felonious intent," "criminal intent," "malice aforethought," "guilty knowledge," "fraudulent intent," "wilfulness," "scienter," to denote guilty knowledge, or "*mens rea*," to signify an evil purpose or mental culpability. By use or combination of these various tokens, they have sought to protect those who were not blameworthy in mind from conviction of infamous common-law crimes....

Neither this Court nor, so far as we are aware, any other has undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not. We attempt no closed definition, for the law on the subject is neither settled nor static....

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

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

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

The spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute. And where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the

meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

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

Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury....

The [trial] court thought the only question was, "Did he intend to take the property?" That the removal of them was a conscious and intentional act was admitted. But that isolated fact is not an adequate basis on which the jury should find the criminal intent to steal or knowingly convert, that is, wrongfully to deprive another of possession of property. Whether that intent existed, the jury must determine, not only from the act of taking, but from that together with defendant's testimony and all of the surrounding circumstances.

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

Reversed.

Discussion Questions and Notes

- 1) Is there anything that would have prevented the Court from holding the statute as strict liability or did the Court have complete discretion on the issue?
- 2) How do the warning signs factor into the case and Morissette's *mens rea*?
- 3) In the analysis, should it matter if the area was commonly used for hunting?
- 4) What are the factors that Justice Jackson considers in reaching the Court's determination of the appropriate *mens rea* level for the statute?

The following opinion, by then-Judge Sonia Sotomayor, includes a very careful consideration of the appropriate *mens rea* standard for a federal criminal immigration

statute. It illustrates how the imprecision of words and ambiguity of statutory grammar create situations where multiple interpretations of *mens rea* must be considered.

United States v. Figueroa, 165 F.3d 111 (2nd Cir. 1998)

SOTOMAYOR, Circuit Judge:

Defendant-appellant Ancelmo Figueroa appeals from a judgment of conviction after a jury trial in the United States District Court for the Eastern District of New York (Nickerson, J.). Figueroa was convicted of: [among other crimes] ... conspiring to permit Ramon Emelio Garcia, an alien excludable under 8 U.S.C. § 1182(a)(2) for a prior aggravated felony conviction, to enter the United States in violation of 8 U.S.C. § 1327... Figueroa appeals...

The dispute at issue in this appeal turns on competing interpretations of the terms of § 1327. The then-enacted provision sets forth increased criminal penalties for "any person who knowingly aids or assists any alien excludable under Section 1182(a)(2) ... (insofar as an alien excludable under such section has been convicted of an aggravated felony) ... to enter the United States," and for "any person who ... conspires with any person or persons to ... permit any such alien to enter the United States." Figueroa reads these provisions as permitting a conviction only when a defendant assists or conspires to permit the entry of an alien who he knows to be excludable because of a prior aggravated felony conviction.... The Government maintains, and the district court agreed, however, that it is sufficient to sustain a § 1327 conviction for a defendant to know only that an alien is excludable. We agree with the district court's conclusion and we affirm the judgment of conviction....

The following facts are limited to the events pertinent to this appeal. Sometime prior to August 1995, government agents were advised that Ramon Emelio Garcia was planning to enter the United States illegally on a specified American Airlines flight. After having served nearly three years of imprisonment for a New York State kidnapping conviction, Garcia had been deported to the Dominican Republic. This conviction rendered Garcia excludable from the United States under 8 U.S.C. § 1182(a)(2). In order to prevent his entry, the agents conducted a surveillance of the Immigration and Naturalization Service ("INS") inspection area on August 26, 1995, the day that Garcia was to arrive.

Shortly after his landing at the John F. Kennedy International Airport, the agents observed Garcia looking for inspection booth number eleven. Figueroa, an INS inspector, manned this booth. The agents saw Figueroa remove his cap and signal to Garcia "like it's all right." When Garcia reached the booth, Figueroa allowed him through without substantive questioning, although Garcia had placed different names on his passport and customs declaration forms. The agents arrested Garcia shortly after he left the inspection area and brought charges against him for illegally entering the United States in violation of 8 U.S.C. § 1326. Figueroa was subsequently arrested and separately indicted.

Garcia cooperated with the Government and testified against Figueroa at trial. Garcia testified that after being deported to the Dominican Republic, he met Geraldo Pereyra, who was also

known as "Arnaldo" and "Rosendo Correa." Pereyra was introduced to Garcia as someone who could help him enter the United States illegally. After obtaining both a passport and a flight ticket for Garcia, Pereyra drove him to the Santa Domingo Airport. Pereyra advised Garcia not to use his real name on his customs declaration form and to look for booth eleven, Figueroa's booth, upon landing. In a videotaped deposition taken from the Dominican Republic, Pereyra testified that his nickname was "Arnaldo," that he and Figueroa had been friends for some time, and that he knew Figueroa was an INS inspector. Pereyra further testified that the two men had met with one another two or three times per year for the last several years. No evidence was presented at trial to suggest that either Pereyra or Figueroa knew exactly why Garcia was excludable from the United States....

This appeal involves the question of what mental state a defendant must have in order to be convicted under 8 U.S.C. § 1327. The then-enacted statute provides that:

Any person who knowingly aids or assists any alien excludable under section 1182(a)(2) of this title (insofar as an alien excludable under such section has been convicted of an aggravated felony) or 1182(a)(3) of this title (other than subparagraph (E) thereof) of this title to enter the United States, or who connives or conspires with any person or persons to allow, procure, or permit any such alien to enter the United States, shall be fined under Title 18, or imprisoned not more than 10 years, or both.

Because Figueroa was convicted under the part of the statute dealing with aliens previously convicted of aggravated felonies, the precise issue in this case is how much a defendant must know in order to be convicted.

The question of what mental state is required for a § 1327 conviction turns on "construction of the statute and ... inference of the intent of Congress." *United States v. Balint*, 258 U.S. 250, 253, 66 L. Ed. 604, 42 S. Ct. 301 (1922)...

By using the word "knowingly," Congress chose to include some knowledge requirement for a conviction under § 1327. Unfortunately, the language of § 1327 does little to clarify just how far Congress intended this knowledge requirement to go. For example, § 1327 does not indicate whether the word "knowingly" was meant to modify only the verbs "aid or assist" or some or all of the characteristics of the alien described in the statute. With regard to the part of the statute at issue, the knowledge requirement might therefore plausibly be read to extend to any one or more of the following characteristics: that the person aided is (1) an alien, (2) an excludable alien, (3) an alien who is excludable under § 1182(a)(2), or (4) an alien who is excludable under §§ 1182(a)(2) by virtue of an aggravated felony conviction. The language of this section also does little to suggest whether knowledge of excludability, if relevant, should be understood as knowledge of the facts or circumstances that make a given alien excludable, or as extending further to knowledge that those circumstances serve as grounds for exclusion under the law.

Figueroa argues that the term "knowingly" should be read to modify all the elements of the crime, including the precise nature of the alien's excludable status, because such a reading "comports with the 'most natural grammatical reading'" of the statute given its punctuation. *Brief for Appellant* at 15 (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 68, 130 L. Ed. 2d 372, 115 S. Ct. 464 (1994)). There are certainly cases in which grammar and punctuation suggest a clear answer to a question of statutory interpretation. In the case of statutes like this, however, where a mental state adverb can modify some or all of the remaining words in a sentence, neither

grammar nor punctuation resolves the question of how much knowledge Congress intended to be sufficient for a conviction. See *United States v. Morris*, 928 F.2d 504, 507 (2d Cir. 1991) ("We have been advised that punctuation is not necessarily decisive in construing statutes ... and with many statutes, a mental state adverb adjacent to initial words has been applied to phrases or clauses appearing later in the statute without regard to the punctuation or structure of the statute.") (citations omitted).

In approaching statutes like this, courts often discern congressional intent by reading the text in light of the legal principles that operate in the relevant area of the law. See *United States v. United States Gypsum Co.*, 438 U.S. 422, 437, 57 L. Ed. 2d 854, 98 S. Ct. 2864 (1978) ("Congress will be presumed to have legislated against the background of our traditional legal concepts."); *Morrisette v. United States*, 342 U.S. 246, 263, 96 L. Ed. 288, 72 S. Ct. 240 (1952) ("Absence of contrary [congressional] direction may be taken as [expressing Congress's] satisfaction with widely accepted definitions, not as a departure from them."). In the criminal arena, there is, for example, a very strong presumption that some mental state is required for culpability. This requirement, which distinguishes those who perform acts knowingly, intentionally, or recklessly from those who perform them by accident or by mistake, 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." *Morrisette*, 342 U.S. at 250.

Equally strong in this area is the presumption that for knowledge to suffice for criminal culpability, it should, at minimum, be extensive enough to attribute to the knower a "guilty mind," or knowledge that he or she is performing a wrongful act. See *Staples*, 511 U.S. at 614-15 (rejecting the Government's position when "the Government's construction of the statute potentially would impose criminal sanctions on a class of persons whose mental state - ignorance of the characteristics of weapons in their possession - makes their actions entirely innocent"). Absent clear congressional intent to the contrary, statutes defining federal crimes are thus normally read to contain a *mens rea* requirement that attaches to enough elements of the crime that together would be sufficient to constitute an act in violation of the law. See *id.* at 608-16; see also *Liparota*, 471 U.S. at 426 ("This construction is particularly appropriate where, as here, to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct.")

This principle of construction can be used to set a presumed floor to the knowledge requirement in § 1327. In many, if not most, circumstances, it is perfectly innocent to aid persons in entering the United States. It is also perfectly innocent to assist many aliens, such as lawful permanent residents. Because criminal statutes should be presumed to criminalize only conduct that is accompanied by a non-innocent state of mind, the knowledge requirement in § 1327 must extend beyond the fact that the person aided is an alien.

The Government maintains that knowledge of an alien's excludability should be sufficient under § 1327, and cites for this proposition a long line of cases that determine the mental states required to violate "regulatory" or "public welfare" statutes. The Supreme Court discussed these statutes in *United States v. Freed*, 401 U.S. 601, 28 L. Ed. 2d 356, 91 S. Ct. 1112 (1971), a case that involved the question of what knowledge is required for conviction under a statute that made it unlawful for any person "'to receive or possess a firearm which is not registered to him.'" *Id.* at 607 (quoting 26 U.S.C. § 5861(d)). At issue in *Freed* was whether a defendant could be convicted with only the knowledge that he possessed a grenade (which was defined as a "firearm" under the

Act) or whether the defendant must also know that the grenade was not registered to him. The Court reasoned that because hand grenades are "highly dangerous offensive weapons," "one would hardly be surprised to learn that possession of hand grenades is not an innocent act." *Id.* at 609. The Court therefore held that a conviction under § 5861(d) required a defendant's knowledge that he or she possessed a grenade but not an unregistered grenade.

Later, in *Staples*, 511 U.S. at 600, the Supreme Court interpreted the very same statute with the aid of the public welfare doctrine and clarified that notice, rather than danger, is the touchstone of its analysis. This time, the Court confronted a situation in which the defendant knew that he was handling a gun, but lacked knowledge of the specific characteristics of the weapon that made it an automatic weapon. Under the Act, automatic weapons qualified as "firearms," and so were subject to the registration requirement, while non- or semi-automatic weapons did not so qualify. Rather than treating guns like the hand grenades addressed under the same statute in *Freed*, however, the Court noted that "there is a long tradition of widespread lawful gun ownership by private individuals in this country." *Id.* at 610. The Court also pointed out that "even dangerous items can, in some cases, be so commonplace and generally available that we would not consider them to alert individuals to the likelihood of strict regulation." *Id.* at 611. Because of the "common experience that owning a gun is usually licit and blameless conduct," *Id.* at 613, the Court held that the conviction before it could not stand absent a showing that the defendant knew of the modifications on his gun that rendered it an automatic weapon, see *Id.* at 619-20.

These Supreme Court cases stand for the proposition that absent congressional intent to the contrary, statutes defining public welfare offenses should be read to require only so much knowledge as is necessary to provide defendants with reasonable notification that their actions are subject to strict regulation. In such cases, Congress is presumed to have placed the burden on defendants who have received such notice to "ascertain at [their] peril whether [their conduct] comes within the inhibition of the statute." *Balint*, 258 U.S. at 254; *cf. also United States v. Chin*, 299 U.S. App. D.C. 73, 981 F.2d 1275, 1280 (D.C. Cir. 1992) (Ginsburg, J.) ("Congress meant to impose on the drug dealer the burden of inquiry and the risk of misjudgment.").

Figueroa points out that the Supreme Court originally formulated the public welfare doctrine in the context of items that were inherently dangerous, see, e.g., *Freed*, 401 U.S. at 609 (hand grenades); *United States v. Dotterweich*, 320 U.S. 277, 282-83, 88 L. Ed. 48, 64 S. Ct. 134 (1943) (misbranded and adulterated drugs); *Balint*, 258 U.S. at 254 (narcotics), and he argues that aliens, even if excludable, are human beings and should not be compared with the sorts of noxious substances that gave rise to the public welfare doctrine. Although this position has some intuitive appeal, it fails to account for recent developments in the law.

The Supreme Court has recently applied the interpretive principles employed in the case of public welfare crimes to a broader class of federal criminal statutes. In *X-Citement Video*, 513 U.S. at 64, for example, the Court examined the scienter requirement for a conviction under 18 U.S.C. § 2252, which provided in relevant part that:

- (a) Any person who—
 - (1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if—
 - (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct; ...
shall be punished as provided in subsection (b) of this section.

The Court addressed the question of whether the term “knowingly” in subsection (1) modifies only the verbs “transports” and “ships” from that same subsection, or also the phrase “the use of a minor,” which appears in subsection (1)(A). *See X-Citement Video*, 513 U.S. at 68. Although the Court found that “§ P2252 is not a public welfare offense,” it did not reject the proposition that scienter requirements should be presumed to stop once a defendant is put on notice that he is committing a non-innocent act. *Id.* at 71. Rather, the Court held that “Morissette, reinforced by *Staples*, instructs that the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct.” *Id.* at 72. The Court thus determined the mental state required for a § 2252 conviction by finding “the crucial element separating legal innocence from wrongful conduct,” *Id.* at 73, and held that this element was the age of the person depicted because “one would reasonably expect to be free from regulation when trafficking in [non-obscene] sexually explicit ... materials involving adults,” but not in sexually explicit materials involving minors, *Id.*

This Circuit has, in fact, adopted this same approach when interpreting federal criminal statutes that deal with non-dangerous substances. In *United States v. LaPorta*, 46 F.3d 152 (2d Cir. 1994), for example, we examined 18 U.S.C. § 1361, a statute that provided criminal penalties for anyone who “willfully injured or committed any depredation against any property of the United States.” The question arose in this case as to whether conviction under that statute required a showing that the defendant’s relevant mental state extended to the fact that the property he burned was owned by the government. After acknowledging the existence of *Morissette*’s principle favoring a scienter requirement, we held that this principle failed to raise a presumption that defendants should have specific knowledge of the government’s ownership because “arson is hardly ‘otherwise innocent conduct’” and because “no one harbors settled expectations that he is free to burn the property of others.” *La Porta*, 46 F.3d at 158.

Similarly, in *United States v. Cook*, 76 F.3d 596 (4th Cir. 1996), the Fourth Circuit examined 21 U.S.C. § 861 (a), which stated in relevant part:

It shall be unlawful for any person at least eighteen years of age to knowingly and intentionally- ...

(2) employ, hire, [or] use ... a person under eighteen years of age to assist in avoiding detection or apprehension for any offense of this subchapter or subchapter II of this chapter by any Federal, State or local law enforcement official; or

(3) receive a controlled substance from a person under 18 years of age, other than an immediate family member, in violation of this subchapter or subchapter II of this chapter.

The defendant argued that his conviction should be vacated because he was convicted without a showing that he knew the age of the person from whom he received illicit substances. The court rejected this contention, explaining in relevant part that “there is no reason to apply the presumption in favor of a knowledge requirement in this case to protect otherwise innocent conduct for the obvious reason that receiving illegal drugs is not otherwise innocent conduct.” *Cook*, 76 F.3d at 601. Because § 861(a) is not now before us, we express no opinion as to whether the Fourth Circuit’s final interpretation of § 861(a) was correct in light of its language, legislative history, and larger statutory context. The Fourth Circuit’s approach is, nevertheless, instructive.

In fact, even before the Supreme Court's decision in *X-Citement Video*, the Third Circuit in *United States v. Hamilton*, 456 F.2d 171 (3d Cir. 1972) employed similar reasoning in examining 18 U.S.C. § 2423, which read in relevant part:

Whoever knowingly persuades, induces, entices, or coerces any woman or girl who has not attained her eighteenth birthday, to go from one place to another by common carrier, in interstate commerce ... with intent that she be induced or coerced to engage in prostitution, debauchery or other immoral practice, shall be fined not more than \$ 10,000 or imprisoned not more than ten years, or both.

The court read this statute against 18 U.S.C. §§ 2421 and 2422, which provided somewhat lesser penalties for defendants who knowingly transported persons of any age in order to engage in these kinds of practices. *See Hamilton*, 456 F.2d at 172-73. Because these other provisions made it non-innocent to engage in the same sorts of practices, regardless of the transportees' ages, the court read § 2423 as generating increased penalties if the person transported happened to be under eighteen. The court thus held that "knowledge that [a] girl is under eighteen years of age is not part of the proof requisite by the Government in order to sustain a conviction" *Id.* at 173.

Applying the principle of construction discussed to the statute at hand, defendants can be found guilty under § 1327 provided they have sufficient knowledge to recognize that they have done something culpable. The district court instructed the jury that it could find Figueroa guilty if Garcia was an alien excludable under § 1182(a)(2) because of an aggravated felony conviction, if Figueroa aided Garcia's entry into the country, and if Figueroa knew Garcia was excludable. This charge was consistent with the law because knowledge that an alien is excludable should put any reasonable person on notice that it would be illegal to aid that person's entry into the country.

Section 1324 imposes up to five years' imprisonment for any person who "encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of the law" 8 U.S.C. § 1324(1)(A)(iv). Read in light of its larger statutory scheme, § 1327 thus places persons who would otherwise violate § 1324 at an increased risk if they happen to aid an alien who is excludable because of a conviction for an aggravated felony. *Cf. Chin*, 981 F.2d at 1280 (warning against readings that would "invite blindness" by criminal actors to the specific features of the more serious crimes they might be committing). Section 1327 thereby generates incentives for § 1324 violators to find out whether they are assisting an alien felon into the country and to avoid aiding aliens in this narrow class.

Of course, the above conclusions were derived from presumptions inherent in the criminal law, and these presumptions should only be used to determine legislative intent when Congress has been either silent or at least sufficiently unclear about the required *mens rea* that departure from these principles would be unwarranted. *See Morissette*, 342 U.S. at 263. Figueroa argues that a close examination of the legislative history surrounding § 1327 suggests that Congress intended to depart from these principles by establishing a more specific knowledge requirement. Figueroa's main support for this contention is Senator Chiles's suggestion that the amendment to § 1327 at issue here was "directed at those persons in the United States - citizens or noncitizens - who actually recruit aliens in foreign countries for the purpose of dealing drugs in the United States and/or to assist such aliens in gaining illegal entry into this country." 133 Cong. Rec. 8772 (daily ed. Apr. 9, 1987) (statement of Sen. Chiles). One other Senator made a similar remark. The classes

of aided aliens to which the statute applies are, however, both over- and under-inclusive when compared to those discussed by Senator Chiles because § 1327 allows for the entry of aliens recruited for drug dealing purposes, so long as they are not convicted aggravated felons, and excludes such felons, even if they are not entering for the purpose of drug sales or distribution. The principles of construction underlying the criminal law serve as much better signposts to congressional intent in these kinds of circumstances than a statute's sparse and inconsistent legislative history. See *In re Olga Coal Co.*, 159 F.3d 62, 67 (2d Cir. 1998) ("Isolated [floor] remarks are entitled to little or no weight' in statutory interpretation.") (quoting *Murphy v. Empire of Am. FSA*, 746 F.2d 931, 935 (2d Cir. 1984) (second alteration in original)).

Figueroa's reliance on the rule of lenity is, finally, also misplaced. The rule of lenity provides that ambiguities concerning legislative intent in criminal statutes should be resolved in favor of the accused. See *Ratzlaf v. United States*, 510 U.S. 135, 148, 126 L. Ed. 2d 615, 114 S. Ct. 655 (1994). However, "the rule is inapplicable unless 'after a court has seized [on] every thing from which aid can be derived, it is still left with an ambiguity.'" *United States v. Canales*, 91 F.3d 363, 367-68 (2d Cir. 1996) (quoting *Chapman v. United States*, 500 U.S. 453, 463, 114 L. Ed. 2d 524, 111 S. Ct. 1919 (1991) (internal quotation marks and citation omitted) (alterations in original)). In the present case, we have been able to discern Congress's intent by reading § 1327 in light of the background principles that operate in the criminal law. These principles leave none of the interpretive issues in this case open, and the rule of lenity is therefore inapplicable to our inquiry. See *Id.*...

For the reasons discussed, we hold that a defendant can be convicted under § 1327 for aiding an alien who is excludable because of a prior aggravated felony conviction if the defendant knows only that the alien is excludable. Therefore, the district court's charge to the jury was sufficient, and we affirm Figueroa's judgment of conviction.

Discussion Questions and Notes

- 1) What are all of the different factors that Judge Sotomayor considers in identifying the *mens rea* standard?
- 2) Do you agree with the assessment that a legislature's intent can be inferred from the background criminal law principles at the time the statute was enacted?

II. Common Law *Mens Rea*

For common law *mens rea*, you need to become familiar with three basic concepts: specific intent, general intent, and strict liability. Do not try to understand specific and general intent based upon the words "specific" and "general." That will likely lead you astray. It is far more helpful to simply think of them as two categories (you could simply

think of them as “green” and “purple” intent if that helps) that necessitate different instructions to the jury. If a common law statute is not strict liability then it must either be specific or general intent. Unfortunately, legislatures do not ordinarily categorize the statutes as such. That job is left to the courts who must decide whether a specific or general intent standard makes the most sense.

For specific intent crimes, a prosecutor must prove beyond a reasonable doubt that a defendant was not honestly factually mistaken in committing her criminal acts. For general intent crimes, a prosecutor must prove beyond a reasonable doubt that a defendant was not honestly factually mistaken in committing his criminal acts or the defendant’s mistake was not reasonable. Specific intent is more defendant friendly because the prosecutor has only one route to a guilty verdict. In contrast, general intent affords the prosecutor two different means of convincing a jury or judge that the defendant had the requisite *mens rea*.

Another significant difference in application between general and specific intent is whether a defendant’s intoxication negates the alleged *mens rea*. Some, but not all, common law jurisdictions allow defendants to argue when charged with specific (but not general) intent crimes that they were so intoxicated that they could not form the requisite *mens rea*. Thus, specific intent is defendant friendly in the context of a defendant’s intoxication as well.

Strict liability means that a prosecutor does not need to prove any *mens rea*. Merely establishing that the defendant committed the requisite criminal acts is sufficient. Strict liability is the exception and American criminal law has a strong presumption against it. Nonetheless, there is one type of crime, a “public welfare” offense, which is always strict liability.

So, in analyzing a common law *mens rea* statute, you should not assume that the *mens rea* words mean what you think they mean. You should also not assume that the absence of *mens rea* words indicates that a statute is strict liability. Instead, you need to first decide whether the defendant was mistaken about some relevant fact when committing her criminal acts. Then, you must decide if the jury or judge should assess the defendant’s *mens rea* using a specific or general intent instruction. Unfortunately, the distinction between and meaning of “general” and “specific” intent is far from clear.

Despite the ongoing problems with the distinction between general and specific intent, we can identify some basic rules and patterns which can be used to determine if a particular crime should be classified as general or specific intent. Using the same method as Justice Jackson used in *Morrisette*, let’s look at how other courts have determined the appropriate *mens rea* rule for different statutes.

Green v. Texas, 221 S.W.2d 612 (Texas Crim. App. 1949)

[Judge Davidson]

The defense of a mistake of fact – that is, that appellant believed the hogs taken belonged to him – was raised by appellant's testimony. The trial court so recognized, and gave the following instruction relative thereto, viz.:

"You are charged that if you believe the defendant, Mose Green, took the two head of hogs belonging to W. W. Minter, if you find that he so acted under a mistaken belief that they were his hogs, in good faith, believing the two head of hogs were his own property, and such belief did not arise from want of proper care on his part, or if you have a reasonable doubt as to whether or not he acted under such mistaken, you will acquit the defendant and say by your verdict 'not guilty.'"

The charge was predicated upon the provisions of Art. 41, P.C., which reads as follows:

"If a person laboring under a mistake as to a particular fact shall do an act which would otherwise be criminal he is guilty of no offense, but the mistake of fact which will excuse must be such that the person so acting under a mistake would have been excusable had his conjecture as to the fact been correct, and it must be such mistake as does not arise from a want of proper care on the part of the person so acting."

It is appellant's contention that the provision of said article requiring that the mistake of fact "not arise from a want of proper care" does not apply in cases of theft where the mistake of fact relied upon as a defense is that of belief of ownership, as here presented. In keeping with that contention, appellant excepted to the charge above set out as placing a greater burden upon him than required by law.

It was appellant's further contention that he was entitled to have the jury instructed to the effect that if he in good faith believed the hogs belonged to him at the time they were killed he would not be guilty. As supporting these contentions, reliance is had upon the cases of *Bray v. State*, 41 Tex. 203, *Neely v. State*, 8 Tex. App. 64, and *Fields v. State*, 124 S.W. 652.

The decision in Bray's case was by the supreme court of this state at a time when that court had appellate jurisdiction in criminal cases. In that case, Bray was convicted of stealing the cow of Hamner. His defense was that he believed the cow belonged to his father and was taken with that belief. In accordance with that defense, Bray asked that the jury be instructed to acquit if the cow was taken under an honest belief that she belonged to his father. This charge the trial court refused. Instead, the trial court instructed the jury in accordance with statutes then in effect – in all material aspects the same as our present Arts. 41 and 42, P.C. – that the defense of mistake on Bray's part was not availing if he "did not act with proper care in ascertaining the true ownership of the cow."

The hogs which appellant and his nephew were charged with having stolen, by shooting them, were at the time running at large upon the open range. According to appellant's contention, he had hogs running in the same vicinity or range, in connection with which fact we note that he testified as follows:

"I did not have any intention or purpose to steal or appropriate anyone else's hogs to my own use and benefit at this particular time. When these hogs were shot I sure did think they were my hogs. I would not have instructed Homer to shoot them, and if I did not have a claim for hogs there I would not have been hunting them."

We think that appellant has brought himself within the rule of law above stated and that he was entitled to have the jury instructed in accordance therewith, to the effect that if he acted under a mistaken claim of right, in good faith believing that the hogs belonged to him, he would not be guilty – and this, without reference to whether that belief "did not arise from want of proper care" on his part....

Believing that the charge, as given, placed upon the appellant a greater burden than that authorized by law, appellant's motion for rehearing is granted, the judgment of affirmance set aside, and the judgment is now reversed and the cause is remanded.

Discussion Questions and Notes

- 1) Do you think Green should have been liable at all under criminal law? After all, he did kill someone else's hogs without their permission.
- 2) Why do you think theft crimes are considered to be specific, and not general, intent?

The following case is focused on whether a crime is specific or general intent to determine if the defendant should have been allowed to argue that his intoxication at least partially negated his *mens rea*.

Frey v. Florida, 708 So. 2d 918 (Fla. 1998)

SHAW, J.

....

Deputy Britt was on uniformed patrol at 11:30 p.m., April 20, 1994, when he saw Thomas Frey acting suspiciously near Earl's Trailer Park. Britt asked Frey for identification, and when a radio check showed an outstanding arrest warrant, Britt attempted to handcuff him. Frey, who was very drunk (his blood alcohol level was .388, or approximately four times the legal limit for driving), said, "I'm not going to jail," and grabbed Britt's throat with both hands, choking him. Britt tried to break free but could not. The deputy kicked and punched Frey, and in a final attempt to free himself, shot Frey in the legs. Both Britt and Frey were treated at the hospital for their injuries.

Frey was charged with aggravated battery on a law enforcement officer and resisting arrest with violence. He was tried before a jury and in closing argument defense counsel argued that Frey had been too drunk to form the specific intent to commit the crimes. The prosecutor, on the other hand, told the jury that while voluntary intoxication is a defense to aggravated battery, it is not a defense to resisting arrest with violence. The judge in his instructions to the jury echoed the prosecutor's statement of the law. Frey was convicted of battery and resisting arrest with violence. The district court affirmed and certified the above question.

Frey argues that resisting arrest with violence is a specific intent crime and that his requested instruction on voluntary intoxication should have been given on this charge. He asserts that the trial court erred not only in denying the instruction but also in instructing the jury that voluntary intoxication is not a defense to resisting arrest with violence. We disagree.

Voluntary intoxication has long been recognized in Florida as a defense to specific intent crimes...

To determine whether resisting arrest with violence is a general intent or specific intent crime, we look to the plain language of the statute:

843.01 Resisting officer with violence to his person.—Whoever knowingly and willfully resists, obstructs, or opposes any officer ... in the lawful execution of any legal duty, by offering or doing violence to the person of such officer ... is guilty of a felony of the third degree

§ 843.01, FLA. STAT. (1993).

The statute's plain language reveals that no heightened or particularized, i.e., no specific, intent is required for the commission of this crime, only a general intent to "knowingly and willfully" impede an officer in the performance of his or her duties. In fact, the statute is similar in format to the statute defining arson, which we held to be a general intent crime.

Based on the foregoing, we answer the certified question in the negative and approve the result in *Frey* as explained herein.

It is so ordered.

HARDING, J., concurring:

In his concurrence, Justice Anstead raises some important concerns regarding the distinction between specific and general intent crimes. I agree with Justice Anstead that this is a very confusing area of the law.... However, this is not the right case to consider abolishing the distinction between specific and general intent crimes. The district court below did not address the possibility of doing away with the distinction and the parties have not had a chance to brief this issue.

If this Court were to ever consider eliminating the distinction between specific and general intent crimes, it should also consider abolishing the defense of voluntary intoxication, except as it applies to first-degree premeditated murder. Voluntary intoxication is not a statutory defense. *See Linehan*, 442 So. 2d at 253. In fact, voluntary intoxication was not even recognized by the English common law, and did not develop in the United States until the nineteenth century. *See Montana*

v. Egelhoff, 518 U.S. 37, 116 S. Ct. 2013, 2018-20, 135 L. Ed. 2d 361 (1996); *see also* Linehan, 442 So. 2d at 252-53. In recent years, a number of states have abandoned the voluntary intoxication defense. *See concurring and dissenting op.* at 7 n. 16 (Anstead, J., concurring in part and dissenting in part) (citing John Gilbeaut, *Sobering Thoughts*, 83 A.B.A. J. 56, 58-59 (May 1997)). In *Montana v. Egelhoff*, 518 U.S. 37, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996), the United States Supreme Court determined that a state may abolish the voluntary intoxication defense and that doing so does not violate due process.

GRIMES, Senior Justice, concurring.

There is much to be said for doing away with the distinction between specific and general intent crimes. I also believe that at some point, either this Court or the legislature might wish to consider eliminating the defense of voluntary intoxication. However, neither of these propositions has been argued in this case, and I concur that the precedent of our Court dictates that resisting arrest without violence is a general intent crime.

ANSTEAD, J., concurring in part and dissenting in part.

This case presents an ideal opportunity for this Court to act on Justice Shaw's cogent observation that "the nebulous distinction between general and specific intent crimes and the defense of voluntary intoxication bear reexamination in a suitable case." *Chestnut v. State*, 538 So. 2d 820, 825 (Fla. 1989) (Shaw, J., specially concurring) (citing *Linehan v. State*, 476 So. 2d 1262, 1266 (Fla. 1985) (Shaw, J., dissenting)). In my view, this is that "suitable case."

I believe that the artificial distinction we have established between general and specific intent, with only specific intent crimes warranting additional defenses such as voluntary intoxication, often leads to incongruous and harsh results. Countless commentators and courts have criticized the lack of a principled and useful basis for maintaining this distinction. As one commentator has noted:

These arcane rules, which relieve the State of its obligation to prove *mens rea* in cases in which the charged offense is characterized as one requiring only general intent, thereby creating a form of strict liability, are illogical. They remove from the criminal proceedings precisely that inquiry which is central to the construction of individual responsibility—the question of whether the defendant was capable of engaging in a process of practical reasoning.

Richard C. Boldt, *The Construction of Responsibility in the Criminal Law*, 140 U. PA. L. REV. 2245, 2307 n. 240 (1992). Another observer similarly finds the terms confusing and of little value:

Since the terms do not clearly delineate for the jury (or anyone else) what blameworthy state of mind must exist in any given situation, it would seem senseless to instruct a jury in these amorphous terms. It would be much better to tell the jury that, for guilt, a defendant must have thought about (or have been reckless concerning) certain definite things. If he did, and also performed the requisite acts, he is to be found guilty. If he did not so contemplate and act, he is to be acquitted.

William Roth, General vs. Specific Intent: A Time for Terminological Understanding in California, 7 PEPP. L. REV. 67, 77-78 (1979).

Consider how Florida courts, including this one, have treated the issue now before us. This Court and the district courts have previously held that resisting arrest with violence is a specific intent crime. See *Colson v. State*, 73 So. 2d 862, 862 (Fla. 1954) (appellant asserted "he was so drunk at the time he did not know what he was doing and, being so, the necessary element of 'knowingly and willfully' resisting the sheriff in the performance of his duty was not present."); *Miller v. State*, 636 So. 2d 144, 151 (Fla. 1st DCA 1994) ("Like battery on a law enforcement officer, resisting arrest with violence is a specific intent crime."); *Gonzales v. State*, 488 So. 2d 610, 610 (Fla. 4th DCA 1986) ("[R]esisting arrest with violence is a specific intent crime."). In essence, we have held that voluntary intoxication may be a defense to resisting arrest with violence. *Colson*, 73 So. 2d at 862 ("Whether or not defendant had enough left to know what he was doing was a question for the jury."). See also *Brown v. State*, 614 So. 2d 12, 12 (Fla. 1st DCA 1993) ("We reverse appellant's convictions and sentences for battery on a law enforcement officer and resisting arrest with violence, because the trial court improperly restricted voir dire of jury venire relating to the defendant's anticipated voluntary intoxication defense."). In the present case, the Second District noted it would have followed *Gonzales* and *Colson* but felt compelled to affirm the conviction based on language in *Linehan*. *Frey v. State*, 679 So. 2d 37, 38 (Fla. 2d DCA 1996). The court aptly noted that "[t]he supreme court has never receded from" *Colson*. *Id.* at 38. Does all this sound confusing?

Since this perplexing division between "general" and "specific" is judicially created, we should seriously consider whether now is the time to revise this ill-conceived framework. Rather than splitting hairs and attempting to draw a bright line through the murky and ill-defined netherworld that separates general from specific intent, our time would be better spent giving effect to the legislative intent behind a particular statute and focusing on the degree of culpability along the lines clearly delineated in the Model Penal Code. Other than the "nebulous distinction" separating general from specific intent crimes, no compelling policy reasons exist which support the availability of additional defenses in Florida to "specific" intent crimes such as first-degree murder, robbery, kidnapping, aggravated assault, battery, aggravated battery, burglary, escape, and theft, while denying the application of such defenses to "general" intent crimes such as resisting a police officer with violence or arson....

In *State v. Stasio*, 78 N.J. 467, 396 A.2d 1129 (N.J. 1979), the New Jersey Supreme Court grappled with the distinction between specific and general intent. Quoting Professor Hall's treatise, the court reasoned:

The current confusion resulting from diverse uses of "general intent" is aggravated by dubious efforts to differentiate that from "specific intent." Each crime ... has its distinctive *mens rea*, e.g., intending to have forced intercourse, intending to break and enter a dwelling-house and to commit a crime there, intending to inflict a battery, and so on. It is evident that there must be as many *mentes rea*e as there are crimes. And whatever else may be said about an intention, an essential characteristic of it is that it is directed toward a definite end. To assert therefore that an intention is "specific" is to employ a superfluous term just as if one were to speak of a "voluntary act."

396 A.2d at 1132-33 (quoting JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 142 (2d ed. 1960)). The New Jersey high court went on to explain that:

[D]istinguishing between specific and general intent gives rise to incongruous results by irrationally allowing intoxication to excuse some crimes but not others. In some instances if the defendant is found incapable of formulating the specific intent necessary for the crime charged, such as assault with intent to rob, he may be convicted of a lesser included general intent crime, such as assault with a deadly weapon. In other cases there may be no related general intent offense so that intoxication would lead to acquittal....

... [W]here the more serious offense requires only a general intent, such as rape, intoxication provides no defense, whereas it would be a defense to an attempt to rape, specific intent being an element of that offense. Yet the same logic and reasoning which impels exculpation due to the failure of specific intent to commit an offense would equally compel the same result when a general intent is an element of the offense.

Stasio, 396 A.2d at 1133-34 (citations omitted). Like the New Jersey Supreme Court, other courts have been equally critical of the nebulous distinction between specific and general intent. The California Supreme Court has stated that "[t]oo often the characterization of a particular crime as one of specific or general intent is determined solely by the presence or absence of words describing psychological phenomena—'intent' or 'malice' for example—in the statutory language of defining the crime." *People v. Hood*, 1 Cal. 3d 444, 462 P.2d 370, 377-78, 82 Cal. Rptr. 618 (Cal. 1969)....

The extreme facts of this case underscore the faulty rationale, if any, for maintaining the irrational division of criminal intent between "general" and "specific." As the majority opinion notes, Mr. Frey had a blood alcohol level of 0.388, approximately four times the legal limit for driving. *Majority op.* at 1. The arresting officer, Deputy Britt, testified that he believed Frey was drunk because he swayed, smelled of alcohol, babbled, could not stand still, and spoke in a loud, slurred and unintelligible voice. An emergency room physician testified that when persons have such a high level of alcohol in their systems, they may suffer blackouts, thus meaning they can do something and not remember it later. Finally, the trial judge commented that he had only seen one person with a higher blood alcohol content than Frey's in three to four years. He noted that emergency medical personnel usually take such severely intoxicated people directly to the hospital since normally "you're going to die on them. And I'm worried about that." By any measure, Mr. Frey was severely intoxicated and a serious question exists as to his capability of forming an intent, general or specific, to commit the crime at issue.

Against this factual backdrop, let us consider the criminal offense involved herein. Section 843.01, FLORIDA STATUTES (1993), provides:

Whoever knowingly and willfully resists, obstructs, or opposes any officer ... in the lawful execution of any legal duty, by offering or doing violence to the person of such officer ... is guilty of a felony of the third degree

The statute defines the prohibited act and the requisite degree of blameworthiness to establish guilt. The statute's language requires that the offender's level of culpability be greater than negligence or recklessness by including a "knowledge" element. It logically follows that if a person is charged with "knowingly and willfully" restricting, obstructing, or opposing a law enforcement officer "in the lawful execution of any legal duty," one element of the crime is that

the alleged offender knew that the person he was resisting was a law enforcement officer. This is precisely the interpretation mandated by our recent holding in *Thompson*, 695 So. 2d at 693. Interestingly enough, it is also the precise conclusion we reached in *Colson*, where we held that "[w]hether or not defendant had enough left to know what he was doing was a question for the jury." 73 So. 2d at 862.

Consistent with the proposals of Professors Scott and LaFare discussed above, the American Law Institute committee has explained that when "purpose" or "knowledge" is an element of a crime, proof of intoxication may logically negate the existence of either. *See State v. Dayon*, 416 A.2d 130, 136 (R.I. 1980) (citing MODEL PENAL CODE, Tent. Draft No. 9 at 2-9 (1959)). To violate section 843.01, it is evident that "knowledge" of the fact that one is obstructing an officer is an element of the crime of resisting arrest with violence. *Thompson, Chicone*. Therefore, under the sensible "element" approach to determining whether voluntary intoxication can negate the mental element of a crime, it is apparent that a defendant would be allowed to put on evidence that his level of intoxication rendered him unable to form the "knowledge" element of the crime of resisting arrest with violence under section 843.01.

I therefore conclude that the trial court should have granted petitioner's request for an instruction on the defense of voluntary intoxication.

KOGAN, C.J., concurs.

Discussion Questions and Notes

- 1) It is unusual that a dissenting opinion is so much longer than the majority. What do you think of the dissenting opinion by Judge Anstead?
- 2) Does it make any sense to allow a defendant's voluntary intoxication to mitigate his *mens rea*? Why or why not?

Here is another case illustrating the problems created by a defendant's intoxication in assessing his *mens rea*.

United States v. Hernandez-Hernandez, 519 F.3d 1236 (10th Cir. 2008)

GORSUCH, Circuit Judge.

At a bar in Palomas, Mexico, Alfredo Hernandez-Hernandez, a Mexican citizen twice deported from the United States, consumed a sufficient amount of alcohol and marijuana to blackout. The next thing he knew, Mr. Hernandez was in the United States without any recollection how he got

there and, in short order, arrested for illegally reentering the country. Today, we are asked to decide whether the district court's decision to exclude from trial evidence of Mr. Hernandez's intoxication and resulting amnesia violated his constitutional right to present a defense. We hold that it did not, and so affirm the district court's judgment.

According to Mr. Hernandez, he consumed more than a fifth of a quart of liquor, as well as some marijuana, at a bar in Palomas and promptly blacked out. When Mr. Hernandez regained his faculties, he found himself in the United States and confronted by a United States Border Patrol Agent. In response to the agent's questions, Mr. Hernandez admitted that he was a Mexican national and acknowledged that he had no documentation allowing him to be legally present in the United States.

Mr. Hernandez was taken to a Border Patrol Station in Columbus, New Mexico, where an agent ran Mr. Hernandez's name through a law enforcement database. This background check revealed a somewhat lengthy criminal history – including convictions stemming from various fights Mr. Hernandez engaged in while intoxicated. As a result of these convictions, Mr. Hernandez already had been twice deported from the United States.

Rather than simply deporting him again, this time authorities indicted Mr. Hernandez for violation of 8 U.S.C. § 1326(a) and (b), and, more specifically, under the provision making it unlawful to be "found in" the United States illegally after a prior deportation.¹ In pre-trial proceedings, the government filed a motion *in limine*, seeking to exclude from trial any evidence that Mr. Hernandez might present regarding his voluntary intoxication. Mr. Hernandez opposed the government's motion, arguing that he should be allowed to show that "he has absolutely no memory of taking any actions to illegally cross the border" and "does not know whether his subsequent presence in the United States was voluntary and knowingly made. If [he] was brought to the United States and dumped on the United States side while he was passed out, clearly such an act would be a viable and acceptable defense to the crime charged." Defendant's Opp. to the Govt's Motion *In Limine* at 2. In aid of this argument, Mr. Hernandez proffered not just his own testimony but also offered Dr. Orrin McCleod, who sought to testify that Mr. Hernandez's history

¹ 8 U.S.C. 1326(a) provides: Subject to subsection (b) of this section, any alien who (1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act, shall be fined under Title 18, or imprisoned not more than 2 years, or both.

Subject to subsection (b) of this section, any alien who (1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act, shall be fined under Title 18, or imprisoned not more than 2 years, or both.

of alcoholism caused him to suffer "intoxicant amnesia" from the consumption of large amounts of alcohol, and Eugenio Vergara-Sosa, a fellow detainee who was prepared to testify that Mr. Hernandez was highly intoxicated and disoriented the day of his arrest.

The district court granted the government's motion and excluded Mr. Hernandez's proffered evidence. The court reasoned that *Section 1326* creates only a "general intent" crime, that as a rule voluntary intoxication is not a defense to such crimes, and that Mr. Hernandez's evidence amounted to little more than an effort to effect an end-run around this rule. Following the district court's ruling, Mr. Hernandez entered a conditional plea of guilty, reserving his right to challenge the district court's evidentiary ruling, and was sentenced to 21 months imprisonment....

Mr. Hernandez [suggests] ... his proffered proof bears on the *mens rea* element of the crime. But the *mens rea* required to secure a *Section 1326* conviction for being unlawfully "found in" the United States is limited. In the past, we admit, the mental elements associated with *Section 1326* were sometimes shrouded by reference to vague concepts like "general" and "specific" intent. See, e.g., *United States v. Martinez-Morel*, 118 F.3d 710, 716 (10th Cir. 1997); *United States v. Miranda-Enriquez*, 842 F.2d 1211, 1212 (10th Cir. 1988); *United States v. Hernandez*, 693 F.2d 996, 1000 (10th Cir. 1982). But in this area, as in many others, see, e.g., *United States v. Zunie*, 444 F.3d 1230, 1233-35 (10th Cir. 2006); *United States v. Teague*, 443 F.3d 1310, 1319 (10th Cir. 2006), we have sought to follow the thrust of modern American jurisprudence and clarify the required *mens rea*, often by reference to the Model Penal Code's helpfully defined terms, rather than persist in employing opaque common law labels that sometimes blur the line between distinct mental elements....

For his part, Mr. Hernandez, although contending that his intoxication has a relationship to the necessary *mens rea*, does not argue that his alcohol- and drug-induced blackout is sufficient to negate the limited *mens rea* required by the statute. To the contrary, he "has maintained since this issue has arisen that the Government is correct that voluntary intoxication is not a defense to this crime," Opening Br. at 13, and that voluntary intoxication provides a defense only when "specific" intent – or, a bit more precisely, an intent to do something more than just the physical act the crime requires – is necessary.

Instead, while the *mens rea* required under *Section 1326* is limited, Mr. Hernandez emphasizes that, under the theory the government pursued in this case, it *does* require at least an intent to undertake the physical act that results in the defendant crossing the border. And Mr. Hernandez argues that, because of his blackout, there is a "complete vacuum in his memory," Opening Br. at 17, so that it is *possible* he was abducted and did not enter the United States of his own volition. Toward this end, Mr. Hernandez highlights our case law holding that "if appellant was drugged and carried across the line, he would not be guilty of the" *mens rea* required by *Section 1326*. *Miranda-Enriquez*, 842 F.2d at 1212 (internal quotation marks and citations omitted).

In approaching this argument, we agree with our sister circuits that an alien's presence in the United States gives rise to a natural, common sense inference that his or her presence was intentional in the very limited, *Section 1326* sense. After all, those crossing the border usually do so intending their own physical actions....

So, Mr. Hernandez was surely entitled to produce evidence making it "more probable" that he was taken across the border against his will. The problem is that Mr. Hernandez's proof in this

case does no such thing. An ordinary intoxication defense, where permissible, is relevant only because it makes it less likely the defendant possessed the mental state the government is required to prove. Here, however, Mr. Hernandez does not seek to argue that his intoxication would have negated the requisite *mens rea* under *Section 1326*. Instead, he wishes to offer his intoxication as evidence that his lack of memory is credible, and it is his lack of memory, Mr. Hernandez submits, that goes to the requisite mental state. Because he cannot remember anything after he blacked out, Mr. Hernandez seems to suggest, anything is possible. Maybe he was kidnapped. Maybe he was dragged across the border by a drinking pal. Maybe someone was playing a practical joke and transported him in a catatonic state into the United States. The difficulty lies in the fact that Mr. Hernandez's lack of memory leaves equally open the possibility that he walked across the border under his own steam. Or hitched a ride. Or paid to be driven. Simply put, Mr. Hernandez's proof does not make it any more or less likely that he was (innocently) carried across the border against his will or (culpably) intended the physical actions that transported him to the United States.

Had Mr. Hernandez's proffer included *any* evidence suggesting that he was taken across the border against his will, that would be one thing. But inviting the jury to guess about the mode of Mr. Hernandez's arrival in the United States based on the absence of proof (a "complete vacuum in his memory") is another, and the district court properly ruled it out of bounds. Relevant evidence does not include the suggestion of speculative possibilities....

The testimony excluded here simply was not relevant to any fact at issue in the defense Mr. Hernandez pursued – making it neither more nor less probably true. Accordingly, the district court's decision to exclude it was appropriate.

Affirmed.

Discussion Questions and Notes

- 1) Do you think the defendant should have been able to present his *mens rea* argument to the jury? What about an involuntary act argument?
- 2) A high percentage of defendants are under the influence at the time of their crimes. Because such intoxication can affect brain function, and therefore *mens rea*, when do you think defendants should be able to argue that their culpability is eliminated by that intoxication?

One type of crime that is always strict liability, as recognized in the *Morrisette* opinion, is a "public welfare offense." The label "public welfare" has changed over time and is now typically associated with minor corporate criminal offenses defined as part of a regulatory regime. The following case helps to illustrate the modern boundaries of "public welfare offenses."

United States v. Austin DeCoster, 828 F.3d 626 (8th Cir. 2016)

MURPHY, Circuit Judge.

Austin “Jack” DeCoster and Peter DeCoster both pled guilty, as “responsible corporate officers” of Quality Egg, LLC, to misdemeanor violations of *21 U.S.C. § 331(a)* for introducing eggs that had been adulterated with salmonella enteritidis into interstate commerce. The district court sentenced Jack and Peter to three months imprisonment. The DeCosters appeal, arguing that their prison sentences and *21 U.S.C. § 333(a)(1)* are unconstitutional, and claiming in the alternative that their prison sentences were procedurally and substantively unreasonable. We affirm.

Jack DeCoster owned Quality Egg, LLC, an Iowa egg production company. Jack’s son Peter DeCoster served as the company’s chief operating officer. Quality Egg operated six farm sites with 73 barns which were filled with five million egg laying hens. It also had 24 barns which were filled with young chickens that had not yet begun to lay eggs. Additionally, the company owned several processing plants where eggs were cleaned, packed, and shipped....

In 2008, salmonella enteritidis (“salmonella”) tests conducted at the Maine facilities came back positive. The DeCosters succeeded in eliminating salmonella from their Maine facilities by following the recommendations of hired consultants, including poultry disease specialist Dr. Charles Hofacre and rodent control expert Dr. Maxcy Nolan.

Periodically the DeCosters also tested the Iowa hens and facilities for salmonella. Some of these tests came back positive in 2006, and the positive test results increased in frequency through the fall of 2010. Until the USDA adopted its new egg safety rule in July 2010, Quality Egg was not legally obligated to conduct salmonella tests of its eggs after receiving positive environmental test results. Nevertheless, Quality Egg tested its eggs in April 2009 after being notified that a Minnesota restaurant purchaser had had a salmonella outbreak. The sample of its eggs tested negative for salmonella.

Other than conducting the single egg test in April 2009, Quality Egg did not test or divert eggs from the market before July 2010 despite receiving multiple positive environmental and hen test results. In 2009 the DeCosters hired Dr. Hofacre and Dr. Nolan to consult on the company’s Iowa operations. The consultants recommended implementing the same measures in Iowa as had been used in Maine. Although the DeCosters claim they adopted all of the recommendations, the precautions implemented by Quality Egg failed to eradicate salmonella. The Centers for Disease Control and Prevention estimated that about 56,000 Americans fell ill with salmonellosis in 2010 after consuming contaminated eggs. In August 2010, federal and state officials determined that the salmonella outbreak had originated at Quality Egg’s facilities. In response Quality Egg recalled eggs that had been shipped from five of its six Iowa farm sites between May and August 2010.

The FDA inspected the Quality Egg operations in Iowa from August 12-30, 2010. Investigators discovered live and dead rodents and frogs in the laying areas, feed areas, conveyer belts, and outside the buildings. They also found holes in the walls and baseboards of the feed and laying buildings. The investigators discovered that some rodent traps were broken, and others had dead rodents in them. In one building near the laying hens, manure was found piled to the rafters; it had pushed a screen out of the door which allowed rodents into the building. Investigators also

observed employees not wearing or changing protective clothing and not cleaning or sanitizing equipment.

The FDA concluded that Quality Egg had failed to comply with its written plans for biosecurity and salmonella prevention. One government expert reported that "there were minimal to no records from the poultry [] barns to indicate that company personnel [had] implemented the written plans [to eliminate salmonella]." The agency also discovered that the company's eggs tested positive for salmonella at a rate of contamination approximately 39 times higher than the current national rate, and that the contamination had spread throughout all of the Quality Egg facilities. In October 2010 the FDA instructed Quality Egg to euthanize every hen, remove the manure, repair its facilities, and disinfect its barns to prevent the risk of another outbreak.

The government then began a criminal investigation of the company's food safety practices and ultimately filed a criminal information against Quality Egg and both of the DeCosters. The investigation revealed that Quality Egg previously had falsified records about food safety measures and had lied to auditors for several years about pest control measures and sanitation practices. Although its food safety plan stated that Quality Egg performed flock testing to identify and control salmonella, no flock testing was ever done. Quality Egg employees had also bribed a USDA inspector in 2010 to release eggs for sale which had been retained or "red tagged" for failing to meet minimum quality grade standards. Quality Egg also misled state regulators and retail customers by changing the packing dates of its eggs and selling the misbranded eggs into interstate commerce. The parties additionally stipulated that one Quality Egg employee was prepared to testify at trial that Jack DeCoster had once reprimanded him because he had not moved a pallet of eggs in time to avoid inspection by the USDA. The investigation also revealed that in 2008 Peter DeCoster had made inaccurate statements to Walmart about Quality Egg's food safety and sanitation practices.

Quality Egg pled guilty to: (1) a felony violation of *18 U.S.C. § 201(b)(1)* for bribing a USDA inspector, (2) a felony violation of *21 U.S.C. § 331(a)* for introducing misbranded eggs into interstate commerce with intent to defraud and mislead, and (3) a misdemeanor violation of *21 U.S.C. § 331(a)* for introducing adulterated eggs into interstate commerce. Jack and Peter each pled guilty to misdemeanor violations of *21 U.S.C. § 331(a)* as responsible corporate officers under the Food Drug & Cosmetic Act (FDCA). In their plea agreements, the DeCosters stated that they had not known that the eggs were contaminated at the time of shipment, but stipulated that they were in positions of sufficient authority to detect, prevent, and correct the sale of contaminated eggs had they known about the contamination. The parties also stipulated that the DeCosters' advisory guideline range was 0 to 6 months imprisonment, and both defendants agreed to be sentenced based on facts the sentencing judge found by a preponderance of the evidence.

Before sentencing, the DeCosters argued that sentences of incarceration would be unconstitutional because they had not known that the eggs were contaminated at the time they were shipped. The district court denied the motions, imposed \$100,000 fines on both Jack and Peter DeCoster and sentenced them to three months imprisonment. *See 21 U.S.C. § 333(a)(1)* (explaining that anyone who violates *section 331* "shall be imprisoned for not more than one year or fined not more than \$1,000, or both"); *18 U.S.C. § 3571(b)(5)* (setting maximum fine of \$100,000 for class A misdemeanor not resulting in death). The court determined that although nothing in the record indicated that Peter and Jack had actual knowledge that the eggs they sold were

infected with salmonella, the record demonstrated that their safety and sanitation procedures were "egregious," that they ignored the positive salmonella environmental test results before July 2010 by not testing their eggs, and that they knew that their employees had deceived and bribed USDA inspectors. The district court explained that the record supported the inference that the DeCosters had "created a work environment where employees not only felt comfortable disregarding regulations and bribing USDA officials, but may have even felt pressure to do so." The district court accordingly concluded that this was not a case involving "a mere unaware corporate executive."

....

Under the FDCA responsible corporate officer concept, individuals who "by reason of [their] position in the corporation [have the] responsibility and authority" to take necessary measures to prevent or remedy violations of the FDCA and fail to do so, may be held criminally liable as "responsible corporate agents," regardless of whether they were aware of or intended to cause the violation. *United States v. Park*, 421 U.S. 658, 673-74, 95 S. Ct. 1903, 44 L. Ed. 2d 489 (1975)....

Here, as owner of Quality Egg, Jack decided which barns were subject to salmonella environmental testing, and as chief operating officer, Peter coordinated many of the company's salmonella prevention and rodent control efforts. Neither of the DeCosters claim to have been "powerless" to prevent Quality Egg from violating the FDCA. See *id.* Despite their familiarity with the conditions in the Iowa facilities, they failed to take sufficient measures to improve them. On this record, the district court reasonably found that "the defendants 'knew or should have known,' of the risks posed by the insanitary conditions at Quality Egg in Iowa, 'knew or should have known' that additional testing needed to be performed before the suspected shell eggs were distributed to consumers, and 'knew or should have known' of [] proper remedial and preventative measures to reduce the presence of [salmonella]." The FDCA "punishes neglect where the law requires care." *id.* at 671 (internal quotation marks omitted). We conclude that the record here shows that the DeCosters are liable for negligently failing to prevent the salmonella outbreak. See *id.* at 678-79 (Stewart, J., dissenting) (reading majority opinion in *Park* as establishing a negligence standard).

The DeCosters argue that their prison sentences also violate the *Due Process Clause* because they did not know that the eggs the company distributed had salmonella. We have explained that "the imposition of severe penalties, especially a felony conviction, for the commission of a morally innocent act may violate" due process. See *United States v. Enoch*, 857 F.2d 491, 494 n.2 (8th Cir. 1988). The elimination of a *mens rea* requirement does not violate the *Due Process Clause* for a public welfare offense where the penalty is "relatively small," the conviction does not gravely damage the defendant's reputation, and congressional intent supports the imposition of the penalty. See *Staples v. United States*, 511 U.S. 600, 617, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994) (citing *Morissette v. United States*, 342 U.S. 246, 256, 72 S. Ct. 240, 96 L. Ed. 288 (1952)); *Holdridge v. United States*, 282 F.2d 302, 309-10 (8th Cir. 1960).

The three month prison sentences the DeCosters received were relatively short. See *Staples*, 511 U.S. at 617. We have previously determined that even a maximum statutory penalty of one year imprisonment for a misdemeanor offense is "relatively small" and does not violate due process. See *United States v. Flum*, 518 F.2d 39, 43-45 (8th Cir. 1975) (en banc), cert. denied, 423 U.S. 1018, 96 S. Ct. 454, 46 L. Ed. 2d 390 (1975); 21 U.S.C. § 333(a)(1); cf. *United States v. Wulff*, 758

F.2d 1121, 1125 (6th Cir. 1985) (concluding that a felony conviction which carried a penalty of a maximum of two years imprisonment was not relatively small)....

The dissent argues that we must treat the FDCA, *21 U.S.C. §§ 331(a), 333(a)(1)*, as requiring a defendant to know he violated the statute in order to be subject to its penalties because the statute has "no express congressional statement" to omit a *mens rea* requirement. We rely however "on the nature of the statute and the particular character of the items regulated to determine whether congressional silence concerning the mental element of the offense should be interpreted as dispensing with conventional *mens rea* requirements." *Staples*, 511 U.S. at 607. The FDCA regulates services and products which affect the health and well being of the public. For this reason, Congress has not required "awareness of some wrongdoing" in order to hold responsible corporate agents accountable for violating the statute. *Park*, 421 U.S. at 672-73 (internal quotation marks omitted). Although the "requirements of foresight and vigilance imposed on responsible corporate agents [in *21 U.S.C. § 331(a)*] are beyond question demanding, and perhaps onerous, [] they are no more stringent" than required to protect the unknowing public from consuming hazardous food, such as salmonella infected eggs. *id.* at 672. The language in the FDCA and Supreme Court precedent interpreting the statute support the conclusion that defendants are not required to have known that they violated the FDCA to be subject to the statutory penalties.

As the Third Circuit explained in *United States v. Greenbaum*, "[t]he constitutional requirement of due process is not violated merely because *mens rea* is not a required element of a prescribed crime." 138 F.2d 437, 438 (3d Cir. 1943). In *Greenbaum*, the court affirmed a corporate president's three month prison sentence for introducing adulterated eggs into interstate commerce in violation of the same statute at issue in this case. *id.* at 439. The *Greenbaum* court explained that "the legislative intent to dispense with *mens rea* as an element of [a misdemeanor FDCA] offense has a justifiable basis" because such offenses "are capable of inflicting widespread injury, and [] the requirement of proof of the offender's guilty knowledge and wrongful intent would render enforcement of the prohibition difficult if not impossible." *id.* at 438. For the same reasons, we conclude that the DeCosters' sentences do not violate the *Due Process Clause* even though *mens rea* was not an element of their misdemeanor offenses....

For these reasons the judgments of the district court are affirmed.

BEAM, Circuit Judge, dissenting.

On the record and the stipulated facts, it is ... clear that the DeCosters lacked the necessary *mens rea* or "guilty mind," that is "[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime," *Mens rea*, BLACK'S LAW DICTIONARY (10th ed. 2014). This *mens rea* requirement is especially applicable when the crime, as here, is punished by imprisonment. Although *§ 333(a)(1)* purports to authorize a criminal misdemeanor sentence of "imprison[ment] for not more than one year," the DeCosters' presentence motions to preclude any such sentence of imprisonment based upon the vicarious-liability standard the district court applied should have been granted.

The *Fifth Amendment Due Process Clause* forbids the government from depriving any person of liberty without due process of law. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001). Such a due process violation as attends the DeCosters' prison sentence is well illustrated in *Staples v. United States*, 511 U.S. 600, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994). Under the National Firearms Act, 26 U.S.C. §§ 5801-5872, any fully automatic weapon is a "firearm" within the meaning of the statute. *Staples*, 511 U.S. at 602. The Act, in turn, makes it a crime to possess a firearm that is not registered. *id.* at 602-03. Staples possessed an unregistered semi-automatic rifle that, unbeknownst to him, had been modified to permit automatic firing. *id.* at 603. Upon prosecution under the Act, the district court ruled that the government did not have to prove that Staples knew the weapon fired automatically because of the modification by someone else. *id.* at 604. He was convicted and sentenced to prison. *Id.*

On appeal, the Supreme Court reversed, saying "we must construe [an imprisonment] statute in light of the background rules of the common law in which the requirement of some *mens rea* for a crime is firmly embedded." *Id.* at 605 (citation omitted). While the government argued, as it does in this case, that a presumption of the need for a finding of *mens rea* did not apply in *Staples*, the Supreme Court rejected the argument and reversed, holding that Staples's lack of knowledge of the weapon's capability of automatic fire prohibited his conviction and prison sentence. *id.* at 619. And, the Supreme Court's more recent and perhaps more forceful iteration of this state-of-mind requirement came in *Torres v. Lynch*, 136 S. Ct. 1619, 194 L. Ed. 2d 737 (2016). The Court, amplifying on *Staples*, stated:

Consider the law respecting *mens rea*. In general, courts interpret criminal statutes to require that a defendant possess a *mens rea*, or guilty mind, as to every element of an offense. That is so even when the "statute by its terms does not contain" any demand of that kind. In such cases, courts read the statute against a "background rule" that the defendant must know each fact making his conduct illegal. Or otherwise said, they infer, absent an express indication to the contrary, that Congress intended such a mental-state requirement.

Torres, 136 S. Ct. at 1630-31 (citations omitted) (first quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994); next quoting *Staples*, 511 U.S. at 619).

There is, of course, no express congressional statement to the contrary contained in § 331(a) or § 333(a)(1). While it might be possible to concoct an actionable interpretation of § 333(a)(1) that omits a *mens rea* requirement, Congress has no power to enact a federal statute that violates the *Fifth Amendment Due Process Clause*....

In fashioning sentences or affirmances of such sentences today, the court and the district court opinions complain at length that Quality Egg between 2006 and 2010 failed to sufficiently test eggs for salmonella and perform other corporate activities in connection with its consumption-egg production and marketing. But, the government's individual criminal-activity allegations at issue here are bottomed upon acts occurring only in late July and early August of 2010....

Thus, the court validates the district court's prison sentence based upon the DeCosters' supposed negligence in performing executive functions on behalf of Quality Egg. However, there

is no precedent that supports imprisonment without establishing some measure of a guilty mind on the part of these two individuals, and none is established in this case. The government concedes in the DeCosters' plea agreements that they did not know that any eggs distributed by Quality Egg at any relevant times "were, in fact, contaminated with *Salmonella* [*Enteritidis*]." Indeed, the plea agreements explicated above further concede that no person associated with Quality Egg had knowledge of salmonella contamination at any relevant time. And when first alerted to the problem by the FDA in August of 2010, Quality Egg immediately, and at great expense, voluntarily recalled "hundreds of millions of shell eggs produced at Quality Egg's facilities." This is hardly the stuff of "guilty minds."

Finally, I concede that the court cites two cases in which individual prison sentences were imposed for violations of § 331(a) and § 333(a)(1). They are *United States v. Greenbaum*, 138 F.2d 437 (3d Cir. 1943), and *United States v. Higgins*, No. 09-403-4, 2011 U.S. Dist. LEXIS 140343, 2011 WL 6088576 (E.D. Pa. Dec. 7, 2011). Neither case is apposite here for reasons of fact or law. *Greenbaum* is clearly wrong given Supreme Court precedent established since 1943, especially that found in *Zadvydas*, *Staples*, and *Torres*. And defendant Higgins, contrary to the DeCosters, "personally participated in the decisions to proceed with unauthorized clinical trials to test the safety and efficacy of [adulterated compounds] on humans." *Higgins*, 2011 U.S. Dist. LEXIS 140343, 2011 WL 6088576, at *13.

There is no proof that the DeCosters, as individuals, were infected with a "guilty mind" or, perhaps, even with negligence. Clearly, the improvident prison sentences imposed in this case were due process violations.

I respectfully dissent.

[Separate opinion by judge Gruender omitted]

Discussion Questions and Notes

- 1) Do you think there is a sound rationale for there being strict liability crimes designated as "public welfare offenses?"
- 2) Do you think the defendants should have been found criminally liable?
- 3) Do you think the defendants would have been found criminally liable if the government had to meet a specific or general intent standard?

Review Exercise 1

Watch [this film clip](#) and apply this statute:

NRS § 201.160(2) – If a married person marries any other person while the former husband or wife is alive, the person so offending is guilty of a category D felony.

III. Model Penal Code *Mens Rea*

The Model Penal Code's *mens rea* rules have been very influential throughout the United States. The following excerpt is from the Pennsylvania criminal code which is representative of the MPC approach.

18 PA.C.S. § 302 (2016)

General requirements of culpability.

(a) Minimum requirements of culpability. – Except as provided in section 305 of this title (relating to limitations on scope of culpability requirements), a person is not guilty of an offense unless he acted intentionally, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.

(b) Kinds of culpability defined.

(1) A person acts intentionally 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.

(2) 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.

(3) 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 intent of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation.

(4) A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and intent 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.

(c) Culpability required unless otherwise provided. – When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts intentionally, knowingly or recklessly with respect thereto.

(d) Prescribed culpability requirement applies to all material elements. – When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.

(e) Substitutes for negligence, recklessness and knowledge. – When the law provides that negligence suffices to establish an element of an offense, such element also is established if a person acts intentionally or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts intentionally.

The Pennsylvania statute uses “intentionally” as the label for the highest level of *mens rea*. However, the MPC drafters used the word “purposely” with the same definition. In MPC jurisdictions, the words “purposely” and “intentionally” are used interchangeably.

Review the following case to try to understand the differences between “purpose” and “knowing” in the MPC *mens rea* scheme.

Vermont v. Jackowski, 915 A.2d 767 (Vt. 2006)

JOHNSON, J.

Defendant Rosemarie Jackowski appeals her conviction for disorderly conduct. Defendant argues that the trial court improperly instructed the jury to consider whether defendant was “practically certain” that her conduct would cause public inconvenience or annoyance, when she was charged with intentionally causing public inconvenience or annoyance....

Defendant was arrested on March 20, 2003, during an anti-war demonstration at the intersection of Routes 7 and 9 in Bennington. During the demonstration, protesters blocked traffic at the intersection for approximately fifteen minutes. Defendant stood in the intersection, praying and holding a sign bearing anti-war slogans and newspaper clippings, including an article accompanied by a photograph of a wounded Iraqi child. Police officers repeatedly asked defendant to leave the intersection, and when she refused, she was arrested, along with eleven other protesters. The State charged them with disorderly conduct, alleging that defendant and the other protesters, “with intent to cause public inconvenience and annoyance, obstructed vehicular traffic, in violation of 13 V.S.A. § 1026(5).”

Defendant’s intent was the only issue contested during her one-day jury trial. After several police officers testified for the State, defendant took the stand, admitting to blocking traffic, but stating that her only intention in doing so was to protest the war in Iraq, not to cause public inconvenience or annoyance. In response to the State’s motion *in limine* to exclude defendant’s protest sign, the trial court allowed defendant to display the sign to the jury and demonstrate how she was carrying it, but refused to admit it into evidence and allow it into the jury room. At

the conclusion of the trial, the court instructed the jury on the issue of intent. The court first instructed the jury that the State could establish defendant's intent to cause public inconvenience or annoyance by proving beyond a reasonable doubt that she acted "with the conscious object of bothering, disturbing, irritating, or harassing some other person or persons." The court then added, "This intent may also be shown if the State proves beyond a reasonable doubt that the defendant was practically certain that another person or persons ... would be bothered, disturbed, irritated, or harassed." The jury convicted defendant of disorderly conduct. Defendant appeals....

Defendant relies on *State v. Trombley* to draw a distinction between offenses that require purposeful or intentional misconduct and those that require only knowing misconduct. 174 Vt. 459, 462, 807 A.2d 400, 404-05 (2002) (mem.). In *Trombley*, we held that it was error for the trial court to instruct the jury to consider whether the defendant in an aggravated assault case acted "knowingly" or "purposely," when he was charged with "purposely" causing serious bodily injury. *Id.* The aggravated assault statute in *Trombley*, 13 V.S.A. § 1024(a)(1), had been amended in 1972 to adopt the Model Penal Code's approach to *mens rea*, which distinguishes among crimes that are committed "purposely," "knowingly," and "recklessly." *id.* at 461, 807 A.2d at 404. Under this approach, a person acts "purposely" when "it is his conscious object to engage in conduct of that nature or to cause such a result." MPC § 2.02(2)(a)(i). A person acts "knowingly" when "he is aware that it is practically certain that his conduct will cause such a result." MPC § 2.02(2)(b)(ii). While the Code's provisions are not binding on this Court, they are "indicative of what the General Assembly intended in adopting the legislation modeled on the Code." *Trombley*, 174 Vt. at 461, 807 A.2d at 404. Thus, the trial court in *Trombley* erred in instructing the jury that it could find that the defendant acted "purposely" if "he was practically certain that his conduct would cause serious bodily injury." *id.* at 460, 807 A.2d at 403.

Defendant argues that *Trombley* controls here, as the trial court used a similarly worded jury charge, and the disorderly conduct statute was amended at the same time, and for the same reasons, as the aggravated assault statute in *Trombley*. The State attempts to distinguish *Trombley* based on differences in the language of the aggravated assault and disorderly conduct statutes. Unlike the aggravated assault statute, the disorderly conduct statute contains the words "with intent" and not "purposely." Compare 13 V.S.A. § 1026 (establishing *mens rea* for disorderly conduct as "with intent to cause public inconvenience, or annoyance or recklessly creating a risk thereof") with 13 V.S.A. § 1024(a)(1) (listing "purposely," "knowingly," and "recklessly" as culpable states of mind for aggravated assault). This is a purely semantic distinction, and it does not indicate a departure from the Code's approach to *mens rea*, the adoption of which was "the major statutory change" accomplished by the Legislature's 1972 amendments. *Read*, 165 Vt. at 147, 680 A.2d at 948. The Code does not differentiate between "with intent" and "purposely"; instead, it uses the two terms interchangeably, explaining in its definitions that "'intentionally' or 'with intent' means purposely." MPC § 1.13(12). There is no indication that the Legislature used the phrase "with intent" to register disagreement with the Code's approach to disorderly conduct, and such disagreement seems unlikely in the context of an otherwise unqualified adoption of the Code's approach.

The State cites several cases supporting the proposition that both "purposely" and "knowingly" causing harm involve some element of "intent," and thus, that *Trombley's* distinction between "purposely" and "knowingly" is illusory. These cases provide no basis for distinguishing or limiting

Trombley here. It was therefore error for the trial court to charge the jury to consider whether defendant was "practically certain" that her actions would cause public annoyance or inconvenience.

The State contends that the trial court's error was harmless and does not require reversal. Under the harmless error standard, we may find a constitutional or nonconstitutional error harmless only if we can state a belief that the error was harmless beyond a reasonable doubt. *State v. Carter*, 164 Vt. 545, 553-55, 674 A.2d 1258, 1264-66 (1996).... The dissent concedes that the jury instruction was erroneous, but posits that the intent issue was "practically uncontested" at trial. Post, P 23 This logically leads the dissent to conclude that *Neder v. United States* applies to the facts of this case. 527 U.S. 1, 17, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (holding that harmless error is found "where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error") (emphasis added). Our review of the record and briefings, however, shows that defendant did in fact deny intending to annoy or inconvenience the public and further testified at trial that her only intent was to educate the public and build support for a mass movement against the war. Whether or not defendant was credible in presenting that evidence is for a jury to decide; however, in reaching its conclusion, the dissent necessarily makes that credibility determination on appellate review. Despite defendant's legally sufficient argument to the contrary, the dissent stands in the shoes of the jury and determines, based on circumstantial evidence, that defendant had the requisite intent to be convicted. Thus, we disagree with the dissent because, as Justice Scalia noted in his dissent to *Neder*, "[t]he right to render the verdict in criminal prosecutions belongs exclusively to the jury; reviewing it belongs to the appellate court." *id.* at 38.

Where, as here, intent is the central-and only-issue, and the defendant presents minimally sufficient evidence rebutting intent, we cannot say that an erroneous jury instruction on that issue amounts to harmless error. This view of the harmless-error analysis is well supported by our case law and that of states across the country.... Our difference with the dissent is over who decides defendant's guilt, not what the result should be. Affirming defendant's conviction on the basis of harmless error is therefore inappropriate, regardless of the weight of the State's evidence and the likelihood of a guilty verdict had the error not been made....

Reversed and remanded for further proceedings consistent with the views expressed herein.

BURGESS, J., dissenting.

Confident that the trial court's misdescription of the intent element in this particular case was harmless beyond a reasonable doubt, I respectfully dissent. The majority is correct that the trial court erred in allowing the jury the option to find defendant guilty of disorderly conduct by acting either "with the conscious object," that is "with intent," to cause public inconvenience or annoyance, or by acting with "practical certainty," or "knowingly," that public inconvenience or annoyance would result from her actions. Ante, 7. The majority is also correct that, since *State v. Trombley*, 174 Vt. 459, 807 A.2d 400 (2002) (mem.), the element of "intentional" action in a criminal statute derived from the Model Penal Code, such as the disorderly conduct statute, means to act

not “knowingly,” but “purposely.” *Ante*, 7. The State was required to prove, as it expressly charged, that defendant obstructed traffic “with intent to cause,” rather than “knowingly” cause, public inconvenience and annoyance. Nevertheless, given the overwhelming evidence of defendant’s actual intent to cause public inconvenience by obstructing traffic, the error was harmless because “we can say beyond a reasonable doubt that the result would have been the same in the absence of the error.” *State v. Kinney*, 171 Vt. 239, 244, 762 A.2d 833, 838 (2000)....

My difference with the majority is not over who decides or what the verdict should be, but that the same guilty verdict was inevitable given defendant’s admissions. Defendant testified that she elected to continue obstructing traffic after knowing that it was causing public inconvenience and annoyance. At that point of refusing to move, there can be no actual, real-world dispute that defendant acted “with intent,” or “purposely,” to cause the inconvenience and annoyance patently obvious to her and to the jury by deliberately obstructing traffic with a placard. Where it is “clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the [instruction] error,” a finding of harmless error presents no invasion of the jury’s fact finding process. *Neder v. United States*, 527 U.S. 1, 18, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)....

Accordingly, I would affirm the conviction. I am authorized to say that Justice Dooley joins in this dissent.

The next case helps to illustrate the differences between reckless and negligent behavior under the MPC.

Powell v. Kentucky, 189 S.W.3d 535 (Ky. 2006)

JUSTICE COOPER

A Daviess Circuit Court jury convicted Appellant, Franklin Dean Powell, II, of reckless homicide, KRS 507.050, trafficking in methamphetamine, KRS 218A.1435, and tampering with physical evidence, KRS 524.100. He was sentenced to two years in prison for the homicide conviction, five years for the trafficking conviction, and one year for the tampering conviction, all to run consecutively for a total of eight years in prison. The only issue raised by this appeal is whether the trial court erred by not directing a verdict of acquittal on the charge of reckless homicide. For the reasons explained herein, we affirm....

Billie Jolene Bennett, age 21, died at Owensboro Mercy Health Center at 10:00 a.m. on October 30, 1999. Dr. Donna Hunsaker, the pathologist who performed the postmortem examination, testified that the cause of Bennett’s death was methamphetamine intoxication. Mike Ward, the toxicologist who tested Bennett’s blood sample, testified that the methamphetamine level in Bennett’s blood was three milligrams per liter, which he described as a “lethal level.” According to Dr. Hunsaker, methamphetamine will stay in a person’s system and remain effective for six to

fifteen hours after ingestion. If taken intravenously, the maximum concentration can occur within a few hours. One side effect can be a heartbeat so rapid as to lead to arrhythmia. The postmortem examination also revealed damage to Bennett's heart muscle.

Appellant and Bennett were together, either alone or with mutual friends at the residence of Appellant's girlfriend, Holly Mourning, for most of the twenty-four hours immediately preceding Bennett's death. Appellant gave two statements to the police on October 30, 1999, both of which were read to the jury at trial. He also testified at length in his own behalf....

Appellant admitted that Bennett did not ingest any methamphetamine in his presence until approximately 3:30 a.m. on October 30th, when the two were parked alone in his vehicle near a vacant field on the outskirts of Owensboro. Bennett had left Mourning's residence on two occasions earlier that evening for periods of approximately one hour each. Appellant speculated that Bennett visited her boyfriend, David Crowell, during those absences and that Crowell may have injected her with methamphetamine during those visits. Crowell, however, denied injecting Bennett with methamphetamine that night.

Sometime after midnight, Bennett complained that she was not feeling well, so Appellant drove her to a convenience store, ostensibly to purchase a carbonated beverage. Instead, Appellant purchased a bottle of water. Appellant had three packages of methamphetamine stored under the console inside his vehicle. He admitted that he owned the methamphetamine contained in those packages. After driving to the vacant field, Appellant got out of the vehicle to get some fresh air. When he reentered the vehicle, he saw that Bennett had mixed some of his methamphetamine with the water he had purchased at the convenience store and had placed it in a hypodermic syringe preparatory to injecting it into her left arm. Upon inserting the needle into her arm, Bennett complained of a burning sensation. Appellant interpreted that complaint as evidence that Bennett had not inserted the needle into a vein but had simply inserted it under her skin. Appellant knew that if methamphetamine is injected subcutaneously instead of intravenously, "the effect is not like it normally is." Perceiving that Bennett was insufficiently skilled to accomplish an intravenous injection, Appellant "did her a favor" by guiding the needle to a vein on the inside of Bennett's left elbow and pushing the syringe's plunger, thereby injecting the methamphetamine directly into the vein. Shortly thereafter, Appellant and Bennett engaged in sexual intercourse, following which Appellant fell asleep.

When Appellant awoke several hours later, Bennett "didn't look right." She asked him to take her to Crowell's residence. Appellant parked near Crowell's residence and went to sleep, thinking Bennett would go inside the residence. When he awoke about an hour later, Bennett was still seated beside him. He spoke to her, but she did not respond. He touched her arm, but again she did not respond. Appellant then went to Crowell's residence and spent approximately thirty minutes trying to arouse Crowell. Finally, Crowell came out, saw that Bennett was barely breathing, and returned to his residence and telephoned the "911" emergency services operator. The call was received at 8:45 a.m. Appellant removed the remaining methamphetamine and syringes from his vehicle and hid them under a shed in Crowell's back yard. He and Crowell then attempted to perform cardiopulmonary resuscitation (CPR) on Bennett. The emergency medical team arrived at 8:49 a.m. and removed Bennett to the hospital, where she was pronounced dead at 10:00 a.m. When Holly Mourning subsequently asked Appellant why he had not taken Bennett to the

hospital,² Appellant replied that he had seen Bennett that sick once before and she had “pulled through it,” so he thought she would pull through it again this time. From that testimony, the jury could reasonably infer that Appellant knew that Bennett had previously had a severe adverse reaction to the ingestion of methamphetamine.

Appellant claimed that the quantity of methamphetamine that he injected into Bennett’s vein was a less-than-normal amount and not enough to account for the level of methamphetamine subsequently found in her blood. He speculated that Bennett might have self-injected additional methamphetamine after he fell asleep. However, he did not testify that the quantum of methamphetamine hidden under the console in his vehicle had been further depleted; and, although Dr. Hunsaker testified that she found five needle marks on the inside of Bennett’s right elbow and two more on the inside of her left elbow, her microscopic examination revealed that only one needle mark on the left elbow appeared to be a fresh wound. Although Dr. Hunsaker did not know if the methamphetamine injected by Appellant caused Bennett’s death, she testified that “if that was the only exposure she had within the half-life [six to fifteen hours prior to death], then that was the true cause of that methamphetamine level,” i.e., three milligrams per liter of Bennett’s blood.

Appellant was convicted of reckless homicide, i.e., causing Bennett’s death while acting recklessly. KRS 507.050. The penal code defines “recklessly” as follows:

A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

KRS 501.020(4)....

Appellant admitted injecting methamphetamine into Bennett’s vein and there was no evidence that Bennett ingested any other quantity of methamphetamine during the six to fifteen hours prior to her death. Further, Bennett began acting strangely within a few hours of the injection, consistent with Dr. Hunsaker’s testimony that the maximum concentration of methamphetamine in the blood can occur within a few hours if taken intravenously. The jury was entitled to disbelieve Appellant’s testimony as to the amount of methamphetamine that he injected into Bennett’s vein....

In addition to proving the toxic qualities of methamphetamine and that the victim died of methamphetamine intoxication, the Commonwealth introduced evidence here that (1) both the methamphetamine and the water used to dissolve it into liquid form suitable for injection belonged to Appellant; (2) Appellant actually injected the methamphetamine into Bennett’s vein – knowing that the effect would be “different” than if only injected subcutaneously as Bennett, herself, had done; (3) Appellant knew Bennett had suffered a severe adverse reaction from ingesting methamphetamine on a previous occasion though she “had pulled through it;” and (4)

² There was no evidence that Bennett would have survived if she had reached the hospital sooner. Nor did the indictment or the trial court’s instructions purport to premise Appellant’s criminal liability on the failure to seek medical treatment.

the amount of methamphetamine found in Bennett's blood during the postmortem examination was sufficient to be "lethal."

....

[I]t was for the jury to determine whether Appellant injected a larger amount of methamphetamine into Bennett's vein consistent with the amount found during the postmortem examination, perhaps intending to induce sufficient intoxication to erode any resistance by Bennett to his subsequent sexual advances; that he did so knowing that an intravenous injection would cause greater intoxication than the subcutaneous injection Bennett allegedly administered to herself; and that he did so knowing that Bennett had previously suffered a severe adverse reaction to methamphetamine, making it reasonably foreseeable that an intravenous injection of a substantial amount of methamphetamine on this occasion would cause a similar reaction from which she might not "pull through." A reasonable jury could well conclude beyond a reasonable doubt that Appellant's failure to perceive that risk constituted a gross deviation from the standard of care that a reasonable person would observe in the situation. KRS 501.020(4).

Accordingly, the judgment of convictions and the sentences imposed by the Daviess Circuit Court are affirmed.

DISSENTING OPINION BY JUSTICE JOHNSTONE

Because I believe that the elements of reckless homicide were not established in this case, I must dissent.

As noted by the majority, a person acts recklessly with respect to a result or to a circumstance when he or she "fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists." KRS 501.020(4). The majority opinion further acknowledges that the element of recklessness is "not established if the actual result is not within the risk of which the actor is aware or, in the case of recklessness, of which he should be aware" KRS 501.060(3). Thus, to support a conviction for reckless homicide in this case, the jury was required to believe that Appellant acted recklessly in failing to perceive the risk of Ms. Bennett's death when he injected her with methamphetamine.

At trial, the defense questioned the Daviess County deputy coroner concerning the risk of overdose by methamphetamine. The deputy coroner testified that Daviess County had been compiling statistics on cases of methamphetamine overdoses since 1986, thirteen years prior to Ms. Bennett's death. In those thirteen years, there had been a single case of death by methamphetamine overdose in Daviess County. Moreover, Appellant himself testified that he had never seen anyone overdose on methamphetamine before Ms. Bennett.

Because no evidence was presented that the risk of death by methamphetamine overdose is substantial or unjustifiable, I believe that Appellant was entitled to a directed verdict. A "substantial" risk is one that is significant, ample, considerable, and real. The sole testimony at trial concerning this risk indicated that the occurrence of deadly methamphetamine overdose is actually an exceedingly rare occurrence. While the jury could believe that death by methamphetamine overdose is possible based on this testimony, there was no evidence

presented that the risk of such death was "substantial." It defies any sense of logic to charge Appellant with reckless behavior based on his failure to perceive a risk that is, in reality, marginal.

Discussion Questions and Notes

- 1) Having now read the two previous cases, what are the key differences between the four levels of *mens rea* defined under the MPC approach?
- 2) Do you think the appellate courts correctly applied the definitions of "purpose," "knowing," "reckless," and "negligence" to the facts of both cases?

Review Exercise 1

Watch [this film clip](#) involving the following crime and consider how the statute would be applied under a common law and MPC approach:

18 U.S.C. § 1591(a): Whoever knowingly ... recruits, entices, harbors, transports, provides, or obtains by any means a person ... knowing that force, fraud, or coercion ... will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

Review Exercise 2

Watch [this film clip](#) and consider these two charging scenarios:

Charged in MPC jurisdiction with theft in the third degree which requires "purposeful" theft of property exceeding value of \$30,000.

Charged in common law jurisdiction with grand theft which requires "intentional and felonious" theft of property exceeding value of \$30,000.

Review Exercise 3

Watch [this film clip](#) involving a mentally ill person breaking into a building to retrieve what he believes to be the Holy Grail (which he believes is stolen). You should apply the following statute in both an MPC and common law jurisdiction:

A.C.A. § 5-39-202: A person commits the offense of breaking or entering if for the purpose of committing a theft or felony he or she breaks or enters into any ... [b]uilding, structure, or vehicle...

IV. Mistakes of Law

You have probably heard some version of the maxim that ignorance of the law is not a defense. Unlike mistakes of fact, mistakes of law almost never give the defendant a viable argument against *mens rea*. Under the traditional common law approach, mistakes of criminal law never invalidate *mens rea* and juries are not instructed to consider them. Even in MPC jurisdictions, mistakes of law are only viable in very narrow circumstances. To appreciate the application of the rule barring mistakes of law from being considered by juries, it is helpful to start with cases applying the unforgiving traditional common law rule.

Hopkins v. Maryland, 69 A.2d 456 (Md. 1949)

[Judge Delaplaine]

This appeal was taken by the Rev. William F. Hopkins, of Elkton, from the judgment of conviction entered upon the verdict of a jury in the Circuit Court for Cecil County for violation of the statute making it unlawful to erect or maintain any sign intended to aid in the solicitation or performance of marriages.

The State charged that on September 1, 1947, defendant maintained a sign at the entrance to his home at 148 East Main Street in Elkton, and also a sign along a highway leading into the town, to aid in the solicitation and performance of marriages. Four photographs were admitted in evidence. One photograph, taken on an afternoon in September, 1947, shows the sign in Elkton containing the name "Rev. W. F. Hopkins." Another, taken at night shows the same sign illuminated at night by electricity. The third shows the other sign along the highway containing the words, "W. F. Hopkins, Notary Public, Information." The fourth shows this sign illuminated at night....

The Act of 1943, now under consideration, was passed by the Legislature of Maryland to curb the thriving businesses which unethical ministers had built up as a result of the tremendous increase in the number of couples coming into the State to be married following the passage of stringent marriage laws in nearby States. The first measure passed by the Legislature to suppress these unethical practices was the Act of 1922 making it unlawful for any minister to give or offer to give any money, present or reward to any hotel porter, railroad porter, or any other person as an inducement to direct to said minister any person contemplating matrimony. LAWS OF 1922, CH. 110, CODE 1939, ART. 27, SEC. 444. In 1937 the Legislature directed that no marriage license shall be delivered by the Clerk of the Court until after the expiration of 48 hours from the time the application is made therefor, provided that any Judge, for good and sufficient cause, may authorize the Clerk to deliver such license at any time after the application. LAWS OF 1937, CH. 91, CODE, ART. 62 SEC. 5. The Legislature subsequently directed that no such order shall be signed by the Judge unless one or both of the contracting parties are bona fide residents of Maryland, except

where one of the contracting parties is a member of the armed forces of the United States. LAWS OF 1941, CH. 529, LAWS OF 1943, CH. 718, CODE SUPP. 1947, ART. 62, SEC. 5.

After the passage of these restrictive Acts, there were still signs in Elkton and along the highways offering information to couples contemplating matrimony. Accordingly in 1943 the Legislature passed the Act, which is now before us, to prohibit billboards, signs, posters or display advertising of any kind, or information booths, intended to aid in the solicitation or performance of marriages. In 1944 this Court in *State v. Clay*, 182 Md. 639, 35 A. 2d 821, held that the Act was a proper exercise of legislative power....

[Hopkins] argued that there was no reason to believe that any marriage was solicited by the sign at the entrance to his home merely because the title "Rev." appeared on the sign....

Defendant contended that the judge erred in excluding testimony offered to show that the State's Attorney advised him in 1944 before he erected the signs, that they would not violate the law. It is generally held that the advice of counsel, even though followed in good faith, furnishes no excuse to a person for violating the law and cannot be relied upon as a defense in a criminal action. Moreover, advice given by a public official, even a State's Attorney, that a contemplated act is not criminal will not excuse an offender if, as a matter of law, the act performed did amount to a violation of the law. These rules are founded upon the maxim that ignorance of the law will not excuse its violation. If an accused could be exempted from punishment for crime by reason of the advice of counsel, such advice would become paramount to the law.

If there was any mistake, it was a mistake of law and not of fact. If the right of a person to erect a sign of a certain type and size depends upon the construction and application of a penal statute, and the right is somewhat doubtful, he erects the sign at his peril. In other words, a person who commits an act which the law declares to be criminal cannot be excused from punishment upon the theory that he misconstrued or misapplied the law. For these reasons the exclusion of the testimony offered to show that defendant had sought and received advice from the State's Attorney was not prejudicial error....

Judgment affirmed, with costs.

Discussion Questions and Notes

- 1) In your opinion, did Hopkins' signs advertise marriage services?
- 2) Does the Maryland court offer Hopkins any method of reliably complying with the law in the future?
- 3) How would justify this result as the "right" outcome?

Similarly, the Iowa Supreme Court was unsympathetic to the defendant in this early Twentieth Century case:

Iowa v. Striggles, 210 N.W. 137 (Iowa 1927)

ALBERT, J.

We gather from the record and arguments of counsel the following history of the case at bar: It appears that in the early part of 1923 there was installed in several places of business in the city of Des Moines a gum or mint vending machine. The machine and its workings are fully set out in the opinion in the case of *State v. Ellis*, 200 Iowa 1228, 206 N.W. 105. In that opinion it was judicially determined that such machine was a gambling device, within the inhibition of the statute.

On August 1, 1923, in several proceedings then pending in the municipal court of the city of Des Moines, a decision was rendered holding that such machine was not a gambling device. The distributors of the machine in question thereupon secured a certified copy of said decree, and equipped themselves with a letter from the county attorney's office, and also one from the mayor of the city, which stated that such machine was not a gambling device. Thus equipped, they presented themselves to appellant, Striggles, who conducted a restaurant in the city of Des Moines, and induced him to allow them to install a machine in his place of business.

Subsequent thereto, in the early part of 1925, the Polk County grand jury returned an indictment against appellant, in which it charged that he did "willfully and unlawfully keep a house, shop, and place * * * resorted to for the purpose of gambling, and he, * * * did then and there willfully and unlawfully permit and suffer divers persons, * * * in said house, shop, and place * * * to play a certain machine * * * being then and there a gambling device." On entering a plea of not guilty, the appellant was put on trial. He offered in evidence the aforesaid certified copy of the judgment decree of the court, and the letters from the county attorney and the mayor, which were promptly objected to, and the objection sustained. The appellant, while testifying, was permitted by the court to say that the exhibits had been presented to him before he permitted the machine to be installed. He was then asked by his counsel whether he relied on the contents of the papers when he gave his permission for installation of the machine. Objection to this line of testimony was sustained. He was also asked whether he would have permitted the machine to be installed, had he believed it to be a gambling device. He was not permitted to answer this question.

It is first urged in this case that the certified copy of the judgment from the municipal court was admissible in evidence, on the strength of the case of *State v. O'Neil*, 147 Iowa 513, 126 N.W. 454. A careful reading of the case, however, shows that it has no application to the case at bar....

Cases cited from other jurisdictions in appellant's argument are in line with the O'Neil case. There is no case cited, nor can we find one, on diligent search, holding that the decision of an inferior court can be relied upon to justify the defendant in a criminal case in the commission of the act which is alleged to be a crime. We are disposed to hold with the O'Neil case, that, when the court of highest jurisdiction passes on any given proposition, all citizens are entitled to rely upon such decision; but we refuse to hold that the decisions of any court below, inferior to the Supreme Court, are available as a defense, under similar circumstances....

One other question is referred to, but not discussed in the argument of appellant. It is a complaint lodged against the county attorney's argument to the jury. We have given it attention, but find no error in the ruling of the court thereon. We might say, in passing, however, that, had

the county attorney, when he was confronted with the facts, made a motion to dismiss the case, thus exercising his discretion, and the case had been dismissed, his action in so doing would not be subject to criticism.

The matters of which complaint is made should have been taken into consideration by the district court in passing sentence on a verdict of guilty, and this was apparently done in this case, as the fine assessed was the minimum.—Affirmed.

EVANS, STEVENS, FAVILLE, and MORLING, JJ., concur.

You might wonder how a mint or gum dispensing machine might be considered a “gambling device.” The explanation can be found in the Iowa Supreme Court’s previous decision in the cited *Ellis* case:

Iowa v. Ellis, 206 N.W. 105 (Iowa 1925)

EVANS, J.

....

The fighting point in the case is whether the machine seized is a gambling device, within the meaning of the law....

The machine in question purported to be used for the sale of mints in packages. These packages were retailed at five cents each, through the use of the machine. It is a slot machine. The nickel goes into the slot, and the purchaser pulls a lever, whereby the mint package is delivered into the hand of the purchaser. This result is invariable. In addition to the package of mints, “chips” are sometimes delivered also. These “chips” are metal discs, which are stamped as being “good for five cents in trade.” These “chips” furnish the allurements of the game. In order to avoid the appearance of chance in the game, an indicator is provided with this machine, which indicates to the purchaser in advance just what he will receive by a pull of the lever and a deposit of a nickel. At the first pull of the lever, the purchaser is usually advised by the indicator that he will receive nothing but a package of mints. The first pull of the lever sets the indicator, however, for the next pull. It may indicate that for the second pull of the lever the purchaser will receive a specified number of “chips” in addition to the mint package; or it may indicate that only a package of mints will be received. It is a question of chance at this point. If the indicator fails to promise “chips” for the second pull, such promise may be there when it is set for the third pull. The promise is sure to come if the lever is pulled and the nickel dropped a few times successively....

The argument of the defendant is that, because the indicator always indicates to the player just what the next pull of the lever will produce, then the element of chance is entirely eliminated, and the player gets what he knew he would get before he put his nickel in the slot. The argument

is very plausible, and illustrates the ingenuity of the invention. Its appeal to the gambling instinct is a very subtle one, and involves a continuing denial that the player is gambling at all. In order to support his argument, the defendant must address it and confine it to one deposit and to one pull of the lever. If a player were necessarily confined to one deposit and one pull of the lever, the argument could be accepted. But under such a rule, the game would lose its appeal. Nobody would care to play except when the indicator was set to promise "chips" in addition to the mints. The player is not so much seeking the package of mints that is promised him on the first play as he is the set of the indicator for the second play. If, after the first pull of the lever, the indicator still promises only a package of mints, the player may risk a third or fourth or fifth play. But whenever the prize is promised by the indicator, the player naturally claims it with another nickel and another pull. The set of the indicator as left for the next player usually promises no prize.

This is perhaps a sufficient description and indication of the lure that is hidden in the operation of this device. The player pulls the lever, not simply for the package of mints promised him by the indicator, but for his supposed option on the next pull, if the set of the indicator promises a prize....

Substantially the same thought was expressed by the Supreme Court of Missouri in *City of Moberly v. Deskin*, 169 Mo. App. 672 (155 S.W. 842)...

Machines of this character have been considered by the courts of last resort of many of our states. Without exception, they have been held to be gambling devices. The brief for the State cites decisions to that effect from the Supreme Courts of twenty-two states. It does not appear that any court of last resort has ever held otherwise. The defendant brings to our attention a contrary opinion by a nisi prius court in the state of Ohio. We deem the opinion clearly unsound.

We are of opinion that the machine in question, as operated, was a gambling device, within the meaning of our statute. We hold, therefore, that the trial court properly condemned the machine in question as a gambling device.

The judgment below is—Affirmed.

FAVILLE, C. J., and ALBERT and MORLING, JJ., concur.

Discussion Questions and Notes

- 1) Although the Court's reasoning as to whether the particular machine was a gambling device is highly suspect, assume that conclusion is correct for the time being. In that case, what do you think of the rest of the argument that the defendant cannot rely on anything short of the Iowa Supreme Court's opinion in trying to comply with the statute?
- 2) What do you think of a rule that would excuse the defendant in *Striggles* but determine that any future possessor of the machine in violation of the law?
- 3) What is the best argument in favor of the court's reasoning in *Striggles* and *Ellis*?

Despite the harshness of the traditional rule, there is one potential constitutional limitation barring prosecution in every jurisdiction as described in the following Supreme Court opinion.

Lambert v. California, 355 U.S. 225 (1957)

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

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

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

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

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

Appellant, arrested on suspicion of another offense, was charged with a violation of this registration law. The evidence showed that she had been at the time of her arrest a resident of Los Angeles for over seven years. Within that period she had been convicted in Los Angeles of the crime of forgery, an offense which California punishes as a felony. Though convicted of a crime punishable as a felony, she had not at the time of her arrest registered under the Municipal Code. At the trial, appellant asserted that § 52.39 of the Code denies her due process of law and other rights under the Federal Constitution, unnecessary to enumerate. The trial court denied this objection. The case was tried to a jury which found appellant guilty. The court fined her \$250 and placed her on probation for three years. Appellant, renewing her constitutional objection, moved for arrest of judgment and a new trial. This motion was denied. On appeal the constitutionality of the Code was again challenged. The Appellate Department of the Superior Court affirmed the judgment, holding there was no merit to the claim that the ordinance was unconstitutional. The case is here on appeal. 28 U. S. C. § 1257 (2).... The case having been argued and reargued, we now hold that the registration provisions of the Code as sought to be applied here violate the Due Process requirement of the Fourteenth Amendment....

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

The rule that "ignorance of the law will not excuse" is deep in our law, as is the principle that of all the powers of local government, the police power is "one of the least limitable." *District of Columbia v. Brooke*, 214 U.S. 138, 149. On the other hand, due process places some limits on its exercise. Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act.... These cases involved only property interests in civil litigation. But the principle is equally appropriate where a person, wholly passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case.

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

Reversed.

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

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE HARLAN and MR. JUSTICE WHITTAKER join, dissenting.

The present laws of the United States and of the forty-eight States are thick with provisions that command that some things not be done and others be done, although persons convicted under such provisions may have had no awareness of what the law required or that what they did was wrongdoing. The body of decisions sustaining such legislation, including innumerable registration laws, is almost as voluminous as the legislation itself. The matter is summarized in *United States v. Balint*, 258 U.S. 250, 252: "Many instances of this are to be found in regulatory

measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of mala in se.”

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

But what the Court here does is to draw a constitutional line between a State’s requirement of doing and not doing....

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

Discussion Questions and Notes

- 1) Who do you think has the better argument? The majority? The dissent?
- 2) Justice Frankfurter’s prediction that the *Lambert* opinion would merely be an “isolated deviation” might be correct. As you probably know, every state has sex offender registration statutes that seemingly are at odds with the *Lambert* majority’s holding. How do you think modern courts reconcile sex offender registration statutes with *Lambert*?
- 3) One reason to think that Justice Frankfurter was wrong and that *Lambert* is still “good” law is that courts, including the Supreme Court continue to cite the opinion. Yet, it has been decades since a statute has been struck down on a *Lambert* challenge (and had that judgment upheld on appeal). Can you think of a law that would likely be ruled unconstitutional under *Lambert*?

Unlike the common law, the Model Penal Code does afford defendant's two mistake of law arguments in very narrow circumstances. New Jersey has enacted a mistake-of-law provision very similar to the original MPC.

N.J. Stat. § 2C:2-4(c)

A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when:

(1) The statute defining the offense is not known to the actor and has not been published or otherwise reasonably made available prior to the conduct alleged; or

(2) The actor acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in (a) a statute, (b) judicial decision, opinion, judgment, or rule, (c) an administrative order or grant of permission, or (d) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense...

Would the outcome in the previous cases be different in an MPC jurisdiction?

Review Exercise 1

Watch [this film clip](#) and address the following statute and questions:

Kellogg is charged under 16 U.S. Code § 1538(a): "it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C)..."

Assuming Kellogg was unaware that the Komodo Dragon was an endangered species, has he committed a mistake of law or fact?

Assuming Kellogg was unaware that the transportation of an endangered species violated federal law, has he committed a mistake of law or fact?

Does either answer change under the MPC with MPC *mens rea* of "purpose?"

CHAPTER 5: ATTEMPT

I. Act Requirements for Attempt

This chapter introduces the concept of attempt and other inchoate (incomplete) crimes. The basic line for dividing non-criminal activity and attempts is the difference between mere preparation and attempt. The “overt act” requirement necessitates that a defendant engage in some conduct that proves more than mere preparation. The traditional common law and MPC have radically different tests for what constitutes an overt act.

A. Common Law Approach

The common law approach traditionally focused on the danger represented by the defendant’s actions and how close the defendant was to completing the crime. If there was no actual danger, the historical approach would say that the defendant was not guilty. Review this example from the early Twentieth Century showing the conventional wisdom of attempt law at that time:

Walter Wheeler Cook, *Act, Intention, and Motive in the Criminal Law*, 26 YALE L. J. 645 (1917)

In the *Return of Sherlock Holmes* we are told of an attempt to murder Mr. Sherlock Holmes under the following circumstances. Holmes expected that an attempt on his life would be made by Colonel Moran. He therefore prepared a wax figure of himself. This he put in a life-like position in the armchair in his room. The window-shade was pulled down and a strong light placed so as to throw the silhouette of the figure onto the shade. The more completely to carry out the deception, Holmes arranged with his landlady to move the figure from time to time so as to give it an appearance of life, of course keeping herself concealed and out of range of possible bullets. Thus arranged, the figure offered a tempting target. Holmes and the faithful Watson concealed themselves in an empty house across the street and patiently awaited developments. As luck would have it, Colonel Moran chose the same house and room as the place from which to attack Holmes, and fired from a window of the house. The bullet struck the wax figure in the forehead. The Colonel was immediately seized and placed under arrest. The police proposed to prosecute him for the attempted murder of Mr. Sherlock Holmes. Unfortunately for us the culprit was held for the previous murder of another person and was never brought to trial upon the charge of attempt to murder. If this charge had been pressed, upon proof of the facts stated above, could the accused have been convicted of a criminal attempt to murder Holmes? Would it have been

different if the window-shade had been up and the figure itself, instead of the silhouette, had been visible to the Colonel? That there should be any doubt that in both cases Colonel Moran was guilty of a criminal attempt to murder Holmes would probably surprise a layman, but a consideration of the authorities upon attempts – or at least of the opinions of some of the judges and legal authors who have written upon the question – tends to throw doubt upon the matter. Indeed, if we apply tests which have occasionally been suggested it would seem that in the first case the accused was guilty, but that in the second case he was not guilty, of a criminal attempt to murder.

The following is a classic case illustrating the limited nature of the common law's use of "proximity tests" for the overt act requirement.

People v. Rizzo, 158 N.E. 888 (N.Y. 1927)

The police of the city of New York did excellent work in this case by preventing the commission of a serious crime. It is a great satisfaction to realize that we have such wide awake guardians of our peace. Whether or not the steps which the defendant had taken up to the time of his arrest amounted to the commission of a crime, as defined by our law, is, however, another matter. He has been convicted of an attempt to commit the crime of robbery in the first degree and sentenced to State's prison. There is no doubt that he had the intention to commit robbery if he got the chance. An examination, however, of the facts is necessary to determine whether his acts were in preparation to commit the crime if the opportunity offered, or constituted a crime in itself, known to our law as an attempt to commit robbery in the first degree. Charles Rizzo, the defendant, appellant, with three others, Anthony J. Dorio, Thomas Milo and John Thomasello, on January 14th planned to rob one Charles Rao of a payroll valued at about \$1,200 which he was to carry from the bank for the United Lathing Company. These defendants, two of whom had firearms, started out in an automobile, looking for Rao or the man who had the payroll on that day. Rizzo claimed to be able to identify the man and was to point him out to the others who were to do the actual holding up. The four rode about in their car looking for Rao. They went to the bank from which he was supposed to get the money and to various buildings being constructed by the United Lathing Company. At last they came to One Hundred and Eightieth street and Morris Park avenue. By this time they were watched and followed by two police officers. As Rizzo jumped out of the car and ran into the building all four were arrested. The defendant was taken out from the building in which he was hiding. Neither Rao nor a man named Previti, who was also supposed to carry a payroll, were at the place at the time of the arrest. The defendants had not found or seen the man they intended to rob; no person with a payroll was at any of the places where they had stopped and no one had been pointed out or identified by Rizzo. The four men intended to rob the payroll man, whoever he was; they were looking for him, but they had not seen or discovered him up to the time they were arrested.

Does this constitute the crime of an attempt to commit robbery in the first degree? The Penal Law, section 2, prescribes, "An act, done with intent to commit a crime, and tending but failing to effect its commission, is 'an attempt to commit that crime.'" The word "tending" is very indefinite. It is perfectly evident that there will arise differences of opinion as to whether an act in a given case is one tending to commit a crime. "Tending" means to exert activity in a particular direction. Any act in preparation to commit a crime may be said to have a tendency towards its accomplishment. The procuring of the automobile, searching the streets looking for the desired victim, were in reality acts tending toward the commission of the proposed crime. The law, however, has recognized that many acts in the way of preparation are too remote to constitute the crime of attempt. The line has been drawn between those acts which are remote and those which are proximate and near to the consummation. The law must be practical, and, therefore, considers those acts only as tending to the commission of the crime which are so near to its accomplishment that in all reasonable probability the crime itself would have been committed but for timely interference. The cases which have been before the courts express this idea in different language, but the idea remains the same. The act or acts must come or advance very near to the accomplishment of the intended crime. In *People v. Mills* (178 N. Y. 274, 284) it was said: "Felonious intent alone is not enough, but there must be an overt act shown in order to establish even an attempt. An overt act is one done to carry out the intention, and it must be such as would naturally effect that result, unless prevented by some extraneous cause." In *Hyde v. U. S.* (225 U.S. 347) it was stated that the act amounts to an attempt when it is so near to the result that the danger of success is very great. "There must be dangerous proximity to success." Halsbury in his "Laws of England" (Vol. IX, p. 259) says: "An act, in order to be a criminal attempt, must be immediately, and not remotely, connected with and directly tending to the commission of an offence." *Commonwealth v. Peaslee* (177 Mass. 267) refers to the acts constituting an attempt as coming very near to the accomplishment of the crime.

The method of committing or attempting crime varies in each case so that the difficulty, if any, is not with this rule of law regarding an attempt, which is well understood, but with its application to the facts. As I have said before, minds differ over proximity and the nearness of the approach....

How shall we apply this rule of immediate nearness to this case? The defendants were looking for the payroll man to rob him of his money. This is the charge in the indictment. Robbery is defined in section 2120 of the Penal Law as "the unlawful taking of personal property, from the person or in the presence of another, against his will, by means of force, or violence, or fear of injury, immediate or future, to his person;" and it is made robbery in the first degree by section 2124 when committed by a person aided by accomplices actually present. To constitute the crime of robbery the money must have been taken from Rao by means of force or violence, or through fear. The crime of attempt to commit robbery was committed if these defendants did an act tending to the commission of this robbery. Did the acts above describe come dangerously near to the taking of Rao's property? Did the acts come so near the commission of robbery that there was reasonable likelihood of its accomplishment but for the interference? Rao was not found; the defendants were still looking for him; no attempt to rob him could be made, at least until he came in sight; he was not in the building at One Hundred and Eightieth street and Morris Park avenue. There was no man there with the payroll for the United Lathing Company whom these defendants could rob. Apparently no money had been drawn from the bank for the payroll by anybody at the

time of the arrest. In a word, these defendants had planned to commit a crime and were looking around the city for an opportunity to commit it, but the opportunity fortunately never came. Men would not be guilty of an attempt at burglary if they had planned to break into a building and were arrested while they were hunting about the streets for the building not knowing where it was. Neither would a man be guilty of an attempt to commit murder if he armed himself and started out to find the person whom he had planned to kill but could not find him. So here these defendants were not guilty of an attempt to commit robbery in the first degree when they had not found or reached the presence of the person they intended to rob....

For these reasons, the judgment of conviction of this defendant, appellant, must be reversed and a new trial granted.

Discussion Questions and Notes

- 1) What actions did Rizzo take toward robbing Charles Rao? What more remained to be done?
- 2) The legal test the court uses in assessing the sufficiency of Rizzo's actions is referred to as the dangerous proximity of success test ("proximity test"). Why is that test not satisfied on the facts here? According to the court, what must have happened for there to be an attempted robbery here? Does the language of the statute compel adoption of the legal standard the court employs and/or the result the court reaches? Do the theories of criminal punishment point us toward using the test?
- 3) The court states: "The police of the city of New York did excellent work in this case by preventing the commission of a serious crime. It is a great satisfaction to realize that we have such wide awake guardians of our peace." Should we be satisfied that the police were able to act as "wide-awake guardian[s] of our peace"?
- 4) If a man pays an undercover police officer to kill his wife, meets another police officer pretending to be a hitman, purchases a new life insurance policy on his wife, and instructs the hitman where he can find his wife to kill her, has he attempted murder using a proximity test of "dangerously close?"

Despite the shortcomings of the common law approach exhibited in *Rizzo*, it remains in force in many jurisdictions today. However, the following case illustrates how many modern courts have softened proximity tests to make attempt easier to prove.

Illinois v. Sweigart, 985 N.E.2d 1068 (Ill. App. Ct. 2013)

OPINION

Stephen Sweigart, appeals from his conviction of child abduction. He was charged with attempting to lure a child to his home from a grocery store. Defendant contends that the evidence was insufficient to prove him guilty beyond a reasonable doubt, because there was not a "dangerous proximity of success" when the child's family was nearby and defendant's vehicle was in the parking lot. We affirm....

Defendant was charged on April 29, 2010, in connection with a December 26, 2009, conversation he had with O.W., who was referred to at trial as "Eddie" and who was eight years old at the time. Defendant was also charged with other offenses related to items found in his van. He pleaded guilty to some of those charges, and others were dismissed by the State. On May 25, 2011, a bench trial was held on the child abduction charge.

At trial, Eddie testified that, on December 26, 2009, defendant approached him in a grocery store. Eddie was sitting on a bench near the self-checkout line and was playing with action figures he had gotten for Christmas. His mother was approximately 10 feet away at the self-checkout with Eddie's sister, Mikayla.

According to Eddie, defendant approached him and said, "do you want to come to my house and play with jets or choo-choo trains?" Eddie said "no," and defendant replied, "why not, it is going to be fun." Eddie then heard his mother tell Mikayla to go check on him, and defendant "scurried off away," leaving the store. Mikayla came over to Eddie, but he was scared and unable to talk to her. Defendant never touched Eddie and made no gestures with his hands. Mikayla testified that she saw defendant talking to Eddie, that her mother asked her to see what was wrong, and that Eddie did not answer her.

Eddie told his mother what defendant had said. After speaking to store employees, who took down the [license] plate number of defendant's van, the family left the store in order to take medicine to a sick relative. The police spoke to the family at their home later that evening. The next day, a television news reporter came to their house, and Eddie said that he found it exciting to talk to the reporter.

Eddie's mother testified that the family was at the store buying Gatorade for a sick relative. She was unable to hear what defendant said to Eddie, but he spoke to Eddie for 30 to 40 seconds, and Eddie looked scared, so she asked Mikayla to go over to him. When Mikayla started to move toward Eddie, defendant walked out the door. Eddie would not say what happened until he was asked five or six times. Eddie's mother did not give defendant permission to ask Eddie to go anywhere with him.

The State played a surveillance DVD of the grocery store. The video showed that Mikayla did not walk all the way up to Eddie. Instead, she walked to the end of the checkout counter, which was a few feet from where Eddie and defendant were located.

The police were called, but the family did not wait for them to come to the store, because they wanted to get back to their sick relative. They waited for defendant to leave the area, but he did

not, so store employees escorted them to their car. Eddie's mother said that, while she was driving home, she spoke to Officer Stacey Snyder and told Snyder that she wanted to fill out a police report, but Snyder said that a report could not be made because it was a "he said, she said" situation. The next day, Eddie's mother met with Detective Edward Corral and filled out a police report.

Snyder testified that she was the first responding officer, that she spoke to Eddie's mother by telephone, and that Eddie's mother said she did not want to fill out a report, did not want to come back to the store, and did not want Snyder to come to her home. However, Snyder later went to the family's home and spoke to Eddie and his mother. Snyder testified that Eddie's mother did not want to sign a written statement and indicated that Eddie either had said that nothing happened or had said nothing when Mikayla had asked him what had happened.

Officer Lee Catavau also responded to the call and stopped defendant's van. Catavau said that defendant appeared nervous and shaky. Defendant acknowledged being at the grocery store, but said that he talked to a child in the toy aisle and that he mentioned having some fireman toys at his house. Catavau noticed that the van smelled of cannabis and was littered with items. Defendant gave permission to search his van and, among other items, officers found a loaded handgun, an unloaded handgun, 10 throwing stars, a machete, a cannabis pipe, children's toys, lingerie, wigs, and sex toys, including restraint devices. Defendant's home was approximately 2 1/2 miles away from the grocery store. There, the police recovered two handguns, ammunition, and more throwing stars.

Corral and another detective interrogated defendant. Defendant said that he had talked to a boy in the toy aisle. When Corral asked if that was the same boy defendant talked to near the exit, defendant hesitated and did not respond. Defendant denied asking Eddie to come home with him and said that he told Eddie, "I have a futuristic fire truck at my house and I really want a choo-choo." When Corral pressed defendant for information, defendant changed the subject and talked about irrelevant matters.

When asked if he was attracted to little boys, defendant paused for a couple of seconds, made a noise similar to "uh, uh, uh," and said "I don't think so." Defendant said he was attracted to young girls because of the way they "blossom," "flower," and "put their stuff out there." Defendant was not asked to provide his definition of "young."

The court found defendant guilty. The court noted that there were inconsistencies in the evidence, stating that Eddie's mother did not look particularly alarmed in the video and that Mikayla did not walk all the way up to Eddie as was claimed. However, the court found Eddie to be focused, articulate, and credible. The court found that the video showed that defendant talked to Eddie near the exit, not in the toy aisle as he claimed, and that defendant's van would have been easily accessible from the exit. The court also noted significant circumstantial evidence based on the incriminating items in the van. Thus, the court found that defendant's contact with Eddie was more than just an innocuous wave, gesture, or comment and was affirmative conduct evincing an intent to lure Eddie out of the store.

Defendant[] ... was sentenced to three years' incarceration. He appeals....

Defendant contends that the evidence was insufficient to convict him. Specifically, he argues that the State failed to prove that his conduct brought him in "dangerous proximity of success" for child abduction.

"A criminal conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." On a challenge to the sufficiency of the evidence, it is not the function of this court to retry the defendant. Rather, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Under this standard, a court of review must view in the State's favor all reasonable inferences drawn from the record. The trier of fact is responsible for determining the witnesses' credibility, weighing their testimony, and deciding on the reasonable inferences to be drawn from the evidence.

A person commits child abduction when he or she "[i]ntentionally lures or attempts to lure a child under the age of 16 into a motor vehicle, building, house trailer, or dwelling place without the consent of the parent or lawful custodian of the child for other than a lawful purpose." ...

A person is guilty of attempt when "with intent to commit a specific offense, he [or she] does any act that constitutes a substantial step toward the commission of that offense." The accused need not have completed the last proximate act to actual commission of a crime, and the defendant's subsequent abandonment of his criminal purpose is no defense. However, mere preparation is not enough. "The child abduction statute criminalizes the act of luring a child, whether or not the act is successful, in order to protect children from further acts of violence." Under the statute, there is no requirement that a defendant must actually touch or harm the child in order to be guilty of child abduction.

This court has looked to section 5.01 of the Model Penal Code for assistance in determining the types of behavior that constitute an attempt. Under the Model Penal Code, as under section 8-4(a), an attempt has occurred when a person, acting with the required intent, "purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime."

The Model Penal Code lists types of conduct that shall not, as a matter of law, be held insufficient to support an attempt conviction, so long as the act is strongly corroborative of the actor's criminal purpose, including:

- "(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; [and]
- (d) unlawful entry of a structure, vehicle[,] or enclosure in which it is contemplated that the crime will be committed[.]"

MODEL PENAL CODE § 5.01(2)(a)-(d) (1985).

This list demonstrates the Model Penal Code's emphasis on the nature of steps taken, rather than on what remains to be done to commit a crime. "Precisely what is a substantial step must be determined by evaluating the facts and circumstances of each particular case."

Without some affirmative conduct evincing an intent to lure a child into a building or vehicle, merely waving at a child is insufficient to show an attempt at luring the child....

Here, the trial court was entitled to credit Eddie's testimony that defendant asked him if he wanted to come to defendant's home. This was clearly an attempt to lure Eddie to his home.... Defendant quickly left the scene when Eddie refused and his sister approached, and he lied to the police about where he spoke to Eddie in the store. Further, the items in his vehicle provided circumstantial evidence of his intent.

Defendant contends that the evidence was insufficient because the State did not show that he was in "dangerous proximity of success[.]" It has been said that an attempt requires the defendant to perform acts bringing him in "dangerous proximity" to success in carrying out his intent. This language originates from the dissent of Justice Holmes in *Hyde v. United States*, where he wrote:

"An attempt, in the strictest sense, is an act expected to bring about a substantive wrong by the forces of nature. With it is classed the kindred offence where the act and the natural conditions present or supposed to be present are not enough to do the harm without a further act, but where it is so near to the result that, if coupled with an intent to produce that result, the danger is very great. But combination, intention, and overt act may all be present without amounting to a criminal attempt—as if all that were done should be an agreement to murder a man fifty miles away and the purchase of a pistol for the purpose. There must be dangerous proximity to success. But when that exists the overt act is the essence of the offence."

That principle is not wholly inconsistent with the modern rule, reflected in the Model Penal Code, that a substantial step is required in order to prove an attempt. As our supreme court has stated, "[m]ere preparation to commit a crime, of course, does not constitute an attempt to commit it. We feel however that an attempt does exist where a person, with intent to commit a specific offense, performs acts which constitute substantial steps toward the commission of that offense."

"By shifting the emphasis from what remains to be done to what the actor has already done, the Model Penal Code standards enable a trier of fact to find a 'substantial step' even where the commission of the crime still requires several major steps to be taken. The standards thus broaden the scope of criminal liability beyond that under the 'dangerous proximity' test." "The *** adoption of the expanded scope of 'substantial step' as provided by the Model Penal Code did not abrogate the general rule that mere preparation does not bring a defendant in 'dangerous proximity to success.' Rather, only clearly specific conduct which can only be directed at the specific identified victim or crime if 'strongly corroborative of the actor's criminal purpose' may be held a 'substantial step.'"

Here, defendant seeks to require a strong probability of physical success under the "dangerous proximity" test. But the law does not require such a strong probability of success. Instead, the law requires a "substantial step," and enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission is a sufficient act to constitute a substantial step. MODEL PENAL CODE § 5.01(2)(b) (1985). Defendant did that when he asked Eddie if he wanted to come to his home to play.

Even if we were to ignore the guidance from the Model Penal Code and apply a "dangerous proximity" test, our determination would be the same. As the trial court noted, defendant

approached Eddie near the exit of the store. Although his van was outside in the parking lot, it was easily accessible. Further, although Eddie's family was nearby, they were not in earshot. The evidence permits the conclusion that defendant would have successfully abducted Eddie if Eddie had simply agreed to follow him. This readily strikes us as "dangerous proximity."

The evidence was sufficient to prove defendant guilty beyond a reasonable doubt. Accordingly, the judgment of the circuit court of Kane County is affirmed.

Affirmed.

Discussion Questions and Notes

- 1) Notice that the court is operating in a jurisdiction that has not integrated the MPC approach to attempt into its criminal law. Yet, the MPC rule is very significant in the court's reasoning. Why did the court give weight to the MPC?
- 2) The court reasoned that: "Even if we were to ignore the guidance from the Model Penal Code and apply a 'dangerous proximity' test, our determination would be the same." Do you agree?
- 3) There remain a lot of precedents from the early Twentieth Century where defendants had convictions reversed when children had entered the cars of stranger-defendants. Beyond the MPC, what has changed so that modern cases come out differently?

B. MPC Approach

Oklahoma adopted the original MPC approach as follows:

21 Okl. St. § 44

A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:

(a) purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or,

(b) when causing a particular result in an element of the crime, does anything with the purpose of causing or with the belief that it will cause such result, without further conduct on his part.

To distinguish mere preparation from a criminal attempt, jurisdictions following the MPC approach use a "substantial step" test as illustrated in this Connecticut statute:

Conn. Gen. Stat. § 53a-49(b)

Conduct shall not be held to constitute a substantial step ... unless it is strongly corroborative of the actor's criminal purpose. Without negating the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law:

- (1) Lying in wait, searching for or following the contemplated victim of the crime;
- (2) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;
- (3) reconnoitering the place contemplated for the commission of the crime;
- (4) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;
- (5) 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;
- (6) possession, collection or fabrication of materials to be employed in the commission of the crime, 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;
- (7) soliciting an innocent agent to engage in conduct constituting an element of the crime.

In reading the following case, identify the facts that you think are sufficient to constitute a substantial step (individually and collectively).

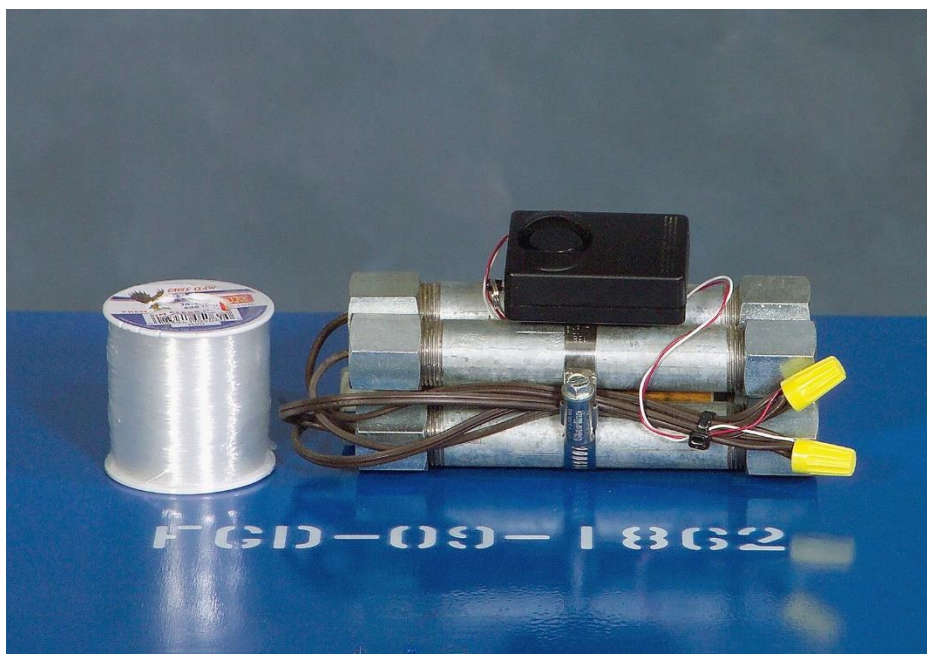


Figure 19: Trip-wire Pipe Bomb (Marlene Thompson, 2005)

Colorado v. Lehnert, 163 P.3d 1111 (Colo. 2007)

EN BANC

JUSTICE COATS delivered the Opinion of the Court....

The People petitioned for review of the court of appeals' judgment reversing the defendant's conviction of attempted first degree murder. The trial court denied the defendant's motion for judgment of acquittal, following the introduction of evidence to the effect that the defendant expressed her intent to kill a particular sheriff's deputy with a pipe bomb; that she admitted learning the victim's address and driving by his house; and that she possessed almost all of the components needed to build a pipe bomb, as well as materials to manufacture false identifications. The court of appeals reversed, finding the evidence insufficient to prove that the defendant took a "substantial step" toward commission of the crime.

Because there was sufficient evidence at trial to reach the jury on all of the elements of attempted first degree murder, the judgment of the court of appeals is reversed, and the case is remanded with directions to reinstate the judgment of conviction....

The defendant, Charity Lehnert, was charged with attempted first degree murder, possession of explosive or incendiary parts, committing a crime of violence, and two less serious offenses of drug possession. She was convicted of all but the drug charges, and she was sentenced to terms of thirty years for attempted murder and six years for possession of explosive devices, to be served concurrently.

Evidence at her trial indicated that in July 2001, the owner of a gun shop contacted the Denver Police Department and reported that a suspicious woman had attempted to buy gunpowder from him but refused to say why she wanted it. He declined to sell the gunpowder to her and instead notified the police. Through the license plate number he gave them, the police were able to identify the defendant.

Days later a friend of the defendant contacted the police, reporting that the defendant told her she was planning to kill two "pigs," using two pipe bombs. One of the officers was a male correctional officer at the Denver Women's Correctional Facility, where the defendant had been an inmate, and the other was a female officer named "Shelly." The friend testified that the defendant had borrowed a drill and made holes in the end caps of the bomb, and had asked for wooden clothespins to serve as a switch and a soldering iron to connect two small wires, saying that she only needed a few more parts to complete the bomb. The friend also testified that the defendant told her that she had learned how to construct bombs while in prison and had written instructions at her home. In addition, she testified that Lehnert had not only found out extensive family information and the home address of the correctional officer, but also had driven past his house numerous times.

The defendant's friend became concerned that the defendant was actually going to carry out the killings, and she called the police. In addition to telling the police about the defendant's

statements and actions, she also told them that she had found in her home a business card for a second gun shop. By inquiring at the second gun shop, the police learned that the defendant had managed to purchase two boxes of shotgun shells.

A search warrant was issued for the defendant's apartment, where police discovered doorbell wire, electrical tape, a nine-volt battery, two metal pipes (which had been scored, weakening them and increasing their destructive potential), two metal end caps (with drilled out center holes), latex gloves, screwdrivers, wire cutters, safety glasses, magnets, two boxes of shotgun shells full of gunpowder, flashlight bulbs (sometimes used as an ignition device for a pipe bomb), and directions to the victim's house. In addition, the police found materials for making false identification cards, the defendant's driver's license, falsified birth certificates, an application for a new social security card, and a falsified high school transcript.

A police detective testified that the materials recovered from the defendant's apartment were explosive parts, capable of being assembled to make a bomb. The detective further testified that the defendant possessed everything required for a pipe bomb except a completed switch and that a switch could probably be made from the wire found at the scene or from a clothespin, which the defendant had tried to acquire from her friend.

At the close of the People's evidence, defense counsel moved for a judgment of acquittal on all counts, arguing that the evidence was insufficient to sustain the attempted first degree murder count because it did not include any evidence from which a reasonable jury could find that the defendant had yet taken a "substantial step" toward committing the murder, as required by the statute. The trial court disagreed and denied the motion. The court of appeals reversed the defendant's conviction for attempted murder, concluding that the evidence was insufficient. Largely because the pipe bombs were not fully assembled and placed in close proximity to the intended victim, the appellate court found that the defendant's conduct did not progress beyond "mere preparation."

A person commits criminal attempt in this jurisdiction if, acting with the kind of culpability otherwise required for commission of a particular crime, he engages in conduct constituting a substantial step toward the commission of that crime. The statute immediately makes clear that by "substantial step" it means any conduct that is strongly corroborative of the actor's criminal objective....

Until 1963, Colorado had not codified the law of attempt in a general statute. In that year, the General Assembly enacted with few modifications the Model Penal Code's proposed codification, including its enumeration of specific kinds of conduct, which would, under certain circumstances, be considered sufficient, as a matter of law, to overcome a motion for judgment of acquittal. In 1971, with the adoption of the Colorado Criminal Code, the unadulterated Model Penal Code approach was abandoned in favor of the approach of the proposed Federal Criminal Code. Although different in certain respects, the 1971 Colorado statute, which remains largely unchanged today, retained a number of key features from the Model Penal Code proposal, most notably its description of the proscribed conduct as some act strongly corroborative of the actor's criminal purpose.

Prior to the enactment of a general criminal attempt statute, the sporadic treatment of attempt by this court focused largely on the dangerousness of the actor's conduct in terms of its proximity

to, or the likelihood that it would result in, a completed crime. Emphasizing that neither preparation alone nor a "mere intention" to commit a crime could constitute criminal attempt, we described an attempt as "any overt act done with the intent to commit the crime, and which, except for the interference of some cause preventing the carrying out of the intent, would have resulted in the commission of the crime." *Lewis v. People*, 124 Colo. 62, 67, 235 P.2d 348, 350 (1951). By also making clear, however, that the overt act required for an attempt need not be the last proximate act necessary to consummate the crime, *see, e.g., Johnson v. People*, 174 Colo. 413, 417, 484 P.2d 110, 111-12 (1971), we implicitly acknowledged that acts in preparation for the last proximate act, at some point attain to criminality themselves. The question of an overt act's proximity to, or remoteness from, completion of the crime therefore remained, without detailed guidance, a matter for individual determination under the facts of each case.

By contrast, the statutory requirement of a "substantial step" signaled a clear shift of focus from the act itself to "the dangerousness of the actor, as a person manifesting a firm disposition to commit a crime." *See* MODEL PENAL CODE § 5.01 cmt. 1 (1985)... While some conduct, in the form of an act, omission, or possession, *see* § 18-2-101(1), is still necessary to avoid criminalizing bad intentions alone; and the notion of "mere preparation" continues to be a useful way of describing conduct falling short of a "substantial step;" the ultimate inquiry under the statutory definition concerns the extent to which the actor's conduct is strongly corroborative of the firmness of his criminal purpose, rather than the proximity of his conduct to consummation of the crime. *See* § 18-2-101(1)....

The question whether particular conduct constitutes a substantial step, of course, remains a matter of degree and can no more be resolved by a mechanical rule, or litmus test, than could the question whether the actor's conduct was too remote or failed to progress beyond mere preparation. The requirement that the defendant's conduct amount to a "substantial step," statutorily defined as it now is, however, provides the fact-finder with a much more specific and *predictable* basis for determining criminality. Rather than leaving to the fact-finder (as well as the court evaluating the sufficiency of evidence) the task of resolving the policy choices inherent in deciding when acts of preparation have become criminal, the statutory requirement of a substantial step simply calls for a determination whether the actor's conduct strongly corroborates a sufficiently firm intent on his part to commit the specific crime he is charged with attempting....

According to this standard, there was evidence at the defendant's trial from which the jury could find that she repeatedly articulated her intent to kill two law enforcement officers with pipe bombs. Unlike many prosecutions for attempt, it was therefore unnecessary for the jury to be able to infer the defendant's criminal intent or purpose from her conduct. The jury need only have been able to find that the defendant committed acts that were strongly corroborative of the firmness of that purpose.

There was also evidence from which the jury could reasonably find that the defendant was determined to make the pipe bombs she needed to implement her plan and that she made substantial efforts and overcame hurdles to do so. Over many days she not only managed to acquire almost all of the materials required to create a bomb but also feloniously altered them to suit her criminal purpose, conduct for which she was separately convicted of possessing explosive or incendiary parts. When rebuffed in her attempt to acquire gunpowder directly from one gun shop, for example, she found a way to do so indirectly from another gun shop. There was

testimony from which the jury could believe that she had eventually succeeded in acquiring all but a few necessary materials and that she had already acquired the drawings and written instructions necessary for final assembly.

Beyond the tenacity exhibited by the defendant in actually fabricating the bombs, her friend testified that she also had gathered significant personal information about one of her intended victims, including his address and information about his children and the car his family drove. There was evidence that she had reconnoitered his house and neighborhood more than once, reportedly being forced to leave on one occasion after being noticed. Finally there was evidence from which the jury could believe that she was simultaneously producing forged documents, which would permit her to assume false identities for purposes including the purchase of additional weapons.

The complexity of some criminal schemes, and the extent and uniqueness of the preparatory acts required to implement them without detection, lend themselves, by their very nature, to corroborating the actor's firmness of purpose. Regardless of the fact that the defendant was arrested before producing operational bombs or placing them within striking range of her victims in this case, there was in fact an abundance of evidence of her determined and sustained efforts to implement her plan, which could be found by reasonable jurors to be strongly corroborative of the firmness of her purpose to commit murder. Nothing more was required....

Therefore, the judgment of the court of appeals is reversed, and the case is remanded with directions to reinstate the judgment of conviction.

Discussion Questions and Notes

- 1) It appears that there was a lot of evidence cited by the court that a substantial step had been taken. How then could the intermediate appellate court have overturned the conviction?
- 2) What would have been the result of this case in a common law jurisdiction with a proximity test using the language "very near?"

II. *Mens Rea* Requirements for Attempt

For every charged attempt, the government must prove the requisite *mens rea*. Because attempted crimes link the attempt statute to a completed substantive offense, there can appear to be a conflict in *mens rea*. For example, in an MPC jurisdiction, the charged substantive offense might allow any of the four defined *mens rea*. However, the attempt *mens rea* (knowledge/purpose) overrides the substantive offense *mens rea*. The same override happens with common law jurisdictions as well.

A. Common Law Approach

For common law, the majority approach is that an attempted crime requires specific intent. That means the government must prove beyond a reasonable doubt that the defendant was not honestly mistaken about an attempted element of a crime. The following case concerns a defendant who was denied a specific intent jury instruction at trial when charged with attempt.

California v. Hanna, 218 Cal. App. 4th 455 (Cal. Ct. App. 2013)

NICHOLSON, Acting P. J.

Defendant George Hanna appeals from his convictions of several crimes. The jury concluded he ... attempted lewd and lascivious conduct with a child under the age of 14 years...

He claims ... the court erred as to the charge of attempted lewd conduct with a child under the age of 14 years by not instructing the jury on the defense of mistake of fact regarding the victim's true age...

We ... affirm the judgment....

A 13-year-old minor lived with her father, D.R. (hereafter father). Acting against her father's rule, the minor maintained an Internet MySpace social network account. After learning of this, father viewed the minor's MySpace page. The minor's profile name or moniker was "Brebre," which was not her actual first name. She falsely stated on her MySpace profile that she was 18 years old. She also had posted a picture of herself wearing a top with spaghetti straps pulled down below her shoulders, which her father would not allow.

While father was viewing the MySpace page, at around midnight, the page indicated the minor had just received an e-mail from someone named "King Jorge" (hereafter King). King asked the minor if she wanted to have oral sex. To dissuade King from any further sexual communications with his daughter, father responded to the message by writing, "I'm 13," is that "okay with you?"

King wrote back by instant message instead of e-mail. He wrote, "Are you a cop?" Father responded, "LOL," meaning "laughing out loud." Father was continuing to play the role of a 13 year old to identify King and possibly arrange a meeting with him. Father then wrote, "Are you a weirdo?"

To father's last question, King wrote, "No. Do you live in Sacramento?" Father responded, "Well, why the fuck wud nbe a pig [sic]," referring to King's earlier question about being a cop. Answering King's next question about where the minor lived, father wrote, "Well, yeh, my profile says that."

King typed back, "This might be a set up." Father responded, "Not very smart," referring to King's question of where the minor lived. Answering the assertion of a setup, father wrote, "Then bye King, if you don't want to chat. L8R."

King responded, "I do. Tell me about yourself." Father wrote, "I go to South Park Middle School. H8TIN life there." South Park Middle School was a fictional name based on the South Park television show. Father also asked King to tell about himself.

King wrote, "I'm a bouncer at a Latin night club." Father asked him, "What [do you] bounce LOL." King responded he was a security guard at a club. He also mentioned the MySpace profile said Brebre was 18. Still acting the part of his daughter, father wrote, "I know but I can[t] see the hot older guys if I don't lie. Foo, get with it."

The dialogue continued, with father trying to keep King communicating with him by making King think he was a real 13-year-old girl who was interested in older men.

At 12:22 a.m., father wrote: "You have a girlfriend? I don't need another dude with a chica."

King: "I don't have a chica."

Father: "Na, you don't want to fuck with a 13 year old. You're playing with me. My last man fucked me a few time but started to get weird on me and stop [sic]. Older guys always do."

Ultimately, father scheduled a place and time to meet King. The two were to meet at a nearby convenience store as soon as possible that morning after the chat ended. King wrote he would be in a white truck that had a broken radiator.

Father wrote, "Hey, you have condoms? I ran out." King wrote, "In a half hour go outside." Father responded, "I can't get preg again," meaning "she" could not get pregnant again. King then wrote, "No, I don't." Father wrote back, "They sell them in the store where I'm about to meet you." Father testified he told King to go inside the store and buy condoms with the hope of getting him recorded on the store's video cameras.

King wrote back, "I'm eating your pussy, right?" Father responded, "Can you get them first, but I want to fuck you."

Father went directly to the convenience store and waited. He also took along his own camera. After waiting a while, he went inside to buy a drink. Walking away from the counter, he looked outside and saw a white truck drive in pretty fast. It had water spilling out underneath it.

Father got his camera ready and walked out of the store. A man exited the truck and began walking towards the store. As father walked up to the man, he raised his camera to take a picture of him. The man asked, "Do I know you?" Father replied, "Yeah, you want to fuck my 13 year old," and then he started taking pictures. The man walked away. As he did, he made a gesture of turning around to get into his truck. Father said, "Don't do it. I'll kill you." The man ran down the street, leaving his truck in the parking lot. In court, father identified defendant as the man he met at the convenience store.

Later that morning, defendant admitted to an investigating police officer that he had been browsing MySpace earlier when someone with the moniker of "Brebre" contacted him. Brebre said she thought he "was fine and wanted to fuck." Defendant said he did not know Brebre was 13. When the officer reminded him he had been told by Brebre she was 13, he said he must not have read that part of their messages. She had told him she was 18 and he thought she looked 18.

He said that after he and Brebre were to meet at the convenience store, they were to go back to her house "to check things out and if it happened, it happened." They never met, he said, because a male approached him and threatened to kill him.

Detectives inspecting defendant's personal computer found that the text of instant messages between "King Jorge" and "Brebre" had been deleted and moved into "unallocated space" on the hard drive. They saved the text of the messages and printed them out as part of their report. In addition, detectives found a digital image of a penis in the hard drive's unallocated space....

Defendant asked the court to instruct the jury on good faith mistake of fact regarding Brebre's age as a defense to the charges, including the charge of attempted lewd conduct with a person under the age of 14 years. The trial court denied the request. It apparently believed the mistake-of-fact defense did not apply to a claim of attempted lewd conduct with a child under the age of 14 years.... It held there was insufficient evidence that defendant reasonably and actually believed Brebre was 18 years old so as to justify instructing on the mistake-of-fact defense.

Defendant claims the court erred by not instructing the jury on his mistake-of-fact defense....

We conclude ... there was sufficient evidence here to justify instructing on the defense. However, we conclude the court's omission of the instruction was not prejudicial error....

""[A]n attempt to commit any crime requires a specific intent to commit that particular offense...."" (*People v. Montes* (2003) 112 Cal.App.4th 1543, 1549 [5 Cal. Rptr. 3d 800].) In this case, "[t]o sustain a conviction of attempted violation of section 288[, subdivision] (a), the prosecution [had] the burden of demonstrating (1) the defendant intended to commit a lewd and lascivious act with a child under 14 years of age, and (2) the defendant took a direct but ineffectual step toward committing a lewd and lascivious act with a child under 14 years of age. [Citation.]" (*People v. Singh* (2011) 198 Cal.App.4th 364, 368 [129 Cal. Rptr. 3d 461].)

To attempt a violation of section 288, subdivision (a), the defendant must have specifically intended to commit a lewd act on a child under 14 years of age. If defendant's intent was to commit a lewd act on an 18 year old, he cannot by definition be guilty of an attempt to commit a lewd act on a 13 year old. If the facts were as he allegedly believed, the commission of the acts he attempted would not have violated section 288, subdivision (a). He would have lacked the specific intent required to commit the attempt crime. Thus, we conclude a mistake-of-fact defense may apply to the crime of attempting to commit a lewd act on a child under 14 years of age....

There was substantial evidence based on which a jury could believe defendant intended to have sexual relations with an 18 year old. Brebre's MySpace profile listed her age as 18. Although father, pretending to be Brebre, digitally "told" defendant "she" was 13 and lied on her profile page, father also depicted Brebre as sexually experienced beyond her years. In father's explicit, masked words, Brebre had already had sex with other older men, run out of her supply of condoms, and had even been pregnant. Defendant told the investigating officer that Brebre said she was 18. This was sufficient evidence to justify giving the mistake-of-fact instruction.

At issue, then, is whether the trial court's error in not instructing the jury on the mistake-of-fact defense was prejudicial. We conclude it was not.

"Error in failing to instruct on the mistake-of-fact defense is subject to the harmless error test set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243]. [Citation.]" (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1431 [51 Cal. Rptr. 3d 263].) Under this standard, a conviction "may

be reversed in consequence of this form of error only if, 'after an examination of the entire cause, including the evidence' (CAL. CONST., ART. VI, § 13), it appears 'reasonably probable' the defendant would have obtained a more favorable outcome had the error not occurred [citation]." (*People v. Breverman*, *supra*, 19 Cal.4th at p. 178, fn. omitted.)

Based on reviewing the entire record, we conclude it was not reasonably probable defendant would have obtained a more favorable outcome had the court instructed on the mistake-of-fact defense. The trial court correctly instructed on the elements of attempted lewd act with a child under 14 years of age. Thus the jury knew it had to determine defendant intended to attempt a lewd act upon a child under 14 years of age.

And the evidence that defendant actually believed Brebre was 13 years old was strong. After being informed she was 13 years old—"I'm 13 and if that's okay with you"—and after being given an opportunity to end the dialogue upon learning she was 13 years old, defendant did not end the conversation. Instead, he said he was interested in continuing to chat, and he asked to know more about Brebre. After being told she attended middle school, he asked about her profile stating she was 18. Once father, digitally responding as Brebre, explained "she" lied in order to be able to speak with older men, defendant was satisfied with her explanation, and he pursued meeting her to engage in sex.

After being told again Brebre was 13 years old, defendant replied that he was interested in her. He complied with her request to forward a photograph of his penis by directing her to a Web site to see the photo, he agreed to meet her as soon as possible, and he confirmed with her that they would engage in oral copulation. Having made these preparations, he drove to the convenience store to meet a girl he clearly understood by then to be 13 years old. It is not reasonably probable that a jury instruction on the mistake-of-fact defense would have changed the verdict under these circumstances. The court thus did not commit prejudicial error when it did not instruct on defendant's defense....

Discussion Questions and Notes

- 1) Do you have any objection to the court finding that there was procedural error when the defendant did not receive the proper jury instruction but still upholding the conviction?
- 2) The defendant in the case is entirely unsympathetic. Yet, the rule of attempt *mens rea* applies not just to potential child molesters. Do you think the rule the court adopts would work well in other cases?

B. MPC Approach

As noted in the excerpt in regards to the act requirements for attempt in the MPC, the required *mens rea* for attempt crimes is a combination of purpose and knowledge. In truth, because of the rarity of circumstance elements and facts differentiating purpose and knowledge, the primary *mens rea* standard applied in the large majority of attempt cases is purpose. The following Nebraska case addresses whether a defendant can be charged with an attempted crime where the underlying substantive offense only requires for reckless *mens rea* (and neither knowledge nor purpose).

Nebraska v. Hemmer, 531 N.W.2d 559 (Neb. Ct. App. 1995)

IRWIN, Judge.

....

The factual background for this case is taken from the factual basis for Hemmer's plea, which was supplied by the Deputy Pierce County Attorney during the district court proceedings. According to the factual basis, on January 15, 1994, a Platte County sheriff's deputy attempted to stop Hemmer for a speeding violation. When Hemmer would not stop, a high-speed chase ensued. The chase continued from Platte County through Madison County and into Pierce County, at which time there were 8 to 10 law enforcement officers from four different law enforcement agencies involved in the chase.

During the chase, Hemmer ran two roadblocks set up by police. One roadblock had been set up by the Pierce County sheriff in the town of Osmond. As Hemmer's vehicle was being chased through Osmond by a State Patrol trooper, the sheriff parked his vehicle in the middle of a street in the path of the pursuit and exited the vehicle. The sheriff then attempted to "flag the Hemmer vehicle down" as it approached, but when Hemmer's vehicle did not stop, the sheriff was forced to "dive into a snowbank" to avoid being struck. Hemmer was later apprehended in a rural area after his vehicle ran out of gas....

Hemmer pled no contest to the charge of attempting to recklessly assault an officer in the second degree....

Criminal attempt is defined by § 28-201 as follows:

- (1) A person shall be guilty of an attempt to commit a crime if he:
 - (a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or
 - (b) Intentionally engages in conduct which, under the circumstances as he believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his commission of the crime.
- (2) When causing a particular result is an element of the crime, a person shall be guilty of an attempt to commit the crime if, acting with the state of mind required to establish

liability with respect to the attendant circumstances specified in the definition of the crime, he intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.

Assault on an officer in the second degree is defined in § 28-930 as follows:

(1) A person commits the offense of assault on an officer in the second degree if he or she:

(a) Intentionally or knowingly causes bodily injury with a dangerous instrument to a peace officer or employee of the Department of Correctional Services while such officer or employee is engaged in the performance of his or her official duties; or

(b) Recklessly causes bodily injury with a dangerous instrument to a peace officer or employee of the Department of Correctional Services while such officer or employee is engaged in the performance of his or her official duties.

(2) Assault on an officer in the second degree shall be a Class III felony.

Under the amended information, Hemmer was only charged with attempt to "recklessly cause bodily injury with a dangerous instrument to a peace officer." See § 28-930(1)(b).

Hemmer claims that it is legally impossible to commit a crime of attempt to recklessly cause bodily injury because the attempt statute requires that the actor intentionally attempt to commit the underlying crime....

The underlying crime, as charged in this case, does not contain an intentional or a knowing state of mind as an element.... As charged in the amended information, the crime is not an intentional or knowing one, but, rather, a reckless one.... [T]he attempt statute only applies to crimes committed knowingly or intentionally. The attempt statute thus does not apply to a crime such as an attempt to recklessly cause bodily injury to a peace officer because the *mens rea* of "reckless" does not rise to the level of "knowing" or "intentional" as required by the attempt statute. See § 28-201. This result reflects the position taken by the Model Penal Code.

The comment to § 5.01 of the Model Penal Code discusses the issue of whether the law of attempt should be applied to cases where the underlying crime contains a reckless *mens rea* and has a result as an element:

Cases will arise where the defendant engaged in conduct that recklessly or negligently created a risk of death, but where the death did not result. Should the law of attempts encompass such cases?

The approach of the Model Code is not to treat such behavior as an attempt. Instead the Code creates a separate crime, a misdemeanor, for recklessly placing another person in danger of death or serious bodily injury. The Institute's judgment was that the scope of the criminal law would be unduly extended if one could be liable for an attempt whenever he recklessly or negligently created a risk of any result whose actual occurrence would lead to criminal responsibility. While it was believed that the reckless creation of risk of death or serious bodily harm was grave enough for general coverage, even for this behavior misdemeanor penalties seemed more apt than the severer sanctions attached to felony attempts.

MODEL PENAL CODE § 5.01, comment at 303-04 (1985).

A majority of other jurisdictions addressing this issue has also held that one cannot commit the crime of attempt where the underlying crime contains only a reckless *mens rea*. See, e.g.,

People v. Foy, 155 Misc. 2d 81, 587 N.Y.S.2d 111 (1992); *Minshew v. State*, 594 So. 2d 703 (Ala. Crim. App. 1991); *State v. Dunbar*, 117 Wash. 2d 587, 817 P.2d 1360 (1991) (en banc); *Wells v. State*, 555 N.E.2d 1366 (Ind. App. 1990); *People v. Coleman*, 131 Ill. App. 3d 76, 475 N.E.2d 565, 86 Ill. Dec. 351 (1985); *State v. Zupetz*, 322 N.W.2d 730 (Minn. 1982); *State v. Smith*, 21 Ore. App. 270, 534 P.2d 1180 (1975); *State v. Melvin*, 49 Wis. 2d 246, 181 N.W.2d 490 (1970). *Cf. State v. Tagaro*, 7 Haw. App. 291, 757 P.2d 1175 (1987). *But, see, People v. Thomas*, 729 P.2d 972 (Colo. 1986) (en banc); *Gentry v. State*, 437 So. 2d 1097 (Fla. 1983).

After reviewing the above authority, we conclude that there is no crime in the State of Nebraska for attempted reckless assault on a peace officer in the second degree. We note, however, that our decision in no way affects the validity of the crimes of attempted intentional or knowing assault on a peace officer in the second degree....

Discussion Questions and Notes

- 1) The only reason that the defendant is not charged with the completed offense of reckless assault of a police officer is the lack of actual injury. Why should the defendant benefit because the officer was fortunate enough to avoid serious bodily harm when the risk created was the same?
- 2) Do you agree with the outcome of this case? Why or why not?

Review Exercise 1

Watch [this film clip](#) and answer the following questions:

Has the defendant attempted homicide in an MPC jurisdiction? A common law jurisdiction? Are there other facts you need?

III. Affirmative Defenses to Attempt

Attempt charges give rise to two viable affirmative defenses (in addition to the general affirmative defenses we will discuss later in this course): abandonment and impossibility. However, the modern trend is against both. Most common law jurisdictions do not have abandonment defenses. The MPC offers one, but most MPC jurisdictions have not adopted it. Impossibility is only a defense under common law. Nonetheless, it is important to be able to apply and understand these defenses in jurisdictions which have them. In either case, the burden is normally on the defendant to prove by a preponderance of evidence that the attempted crime was either abandoned or impossible.

A. Abandonment

The abandonment defense allows defendants who have completed the underlying acts with the requisite *mens rea* to be found not guilty if they voluntarily abandoned the attempt. For failed attempts such as when a defendant fires a gun and misses her intended target, abandonment is no longer possible. Thus, the cases involving abandonment defenses often are about defendants who still have some act left to complete and change their minds. The key factor in deciding whether a defendant is afforded an abandonment jury instruction is typically whether the defendant made the decision to abandon the attempt of her own accord or due to outside circumstances.

New Jersey adopted a modified version of the MPC definition of abandonment (renunciation) in this statute:

N.J. Stat. § 2C:5-1(d)

When the actor's conduct would otherwise constitute an attempt ... it is an affirmative defense which he must prove by a preponderance of the evidence that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

The following two cases show how the requirement that abandonment be voluntary limits the effectiveness of the defense.

Minnesota v. Kocur, 2009 Minn. App. Unpub. LEXIS 1324 (Ct. App. Minn. 2009)

HALBROOKS, Judge

.....

On April 8, 2008, appellant Michael Nicholas Kocur, then 40 years old, left his home with the stated intention of looking for a prostitute to have sex. Kocur saw R.D., a 14-year-old girl, walking on Lyndale Avenue in Minneapolis. Kocur drove by R.D. several times in his car, waited while she went into a convenience store, and eventually pulled over, rolled down his window, and asked her if she wanted a ride. R.D. declined. Kocur offered again, and when R.D. declined again, Kocur drove off. R.D. then called her mother on her cell phone, who advised her to call 911, which R.D. did. While she was on the phone with the dispatcher, she saw Kocur drive by one more time. After talking with police, R.D. went to school.

The police apprehended Kocur shortly thereafter based on the description R.D. had provided. An officer brought R.D. to where Kocur was being held, and R.D. identified him as the person who had offered her a ride. Kocur was arrested and gave a statement to police. In his statement, Kocur

admitted that he was looking for a prostitute before work, that he thought R.D. was 18 or 19 years old and a prostitute, and that he asked her if she wanted a ride and a date. Kocur was charged with attempted third-degree criminal sexual conduct (age difference) in violation of MINN. STAT. § 609.344, subd. 1(b) (Supp. 2007)...

The state notified Kocur that it intended at trial to introduce ... evidence of two past convictions—one for attempted third-degree criminal sexual conduct involving a 15-year-old girl and one for solicitation of prostitution involving a 13-year-old girl.....

The district court allowed the evidence of these prior convictions to be admitted, and Kocur was found guilty by a jury... He now appeals his conviction of attempted third-degree criminal sexual conduct....

Kocur also claims the evidence was insufficient to support the jury's verdict. He makes two sufficiency arguments. First, he alleges that the evidence is insufficient to support a conviction of attempted third-degree criminal sexual conduct because his act of offering R.D. a ride was not a substantial step toward completion of the crime. Second, in his pro se supplemental brief, Kocur contends that the state did not provide sufficient evidence that he did not voluntarily and in good faith abandon his attempt.

In considering a claim of insufficient evidence, this court conducts a "painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction," is sufficient to allow the jurors to reach the verdict that they did. The reviewing court must assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). The reviewing court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

The jury found Kocur guilty of attempted third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1(b). Under this section, it is a crime for any person to "engage[] in sexual penetration with another person ... if ... the complainant is at least 13 but less than 16 years of age and the actor is more than 24 months older than the complainant." If there is more than a ten-year age difference, as here, mistake of age is not a defense. Consent is never a defense. The statute criminalizing attempts provides, "[w]hoever, with intent to commit a crime, does an act which is a substantial step toward, and more than preparation for, the commission of the crime is guilty of an attempt to commit that crime." MINN. STAT. § 609.17, subd. 1.

... Kocur [] argues that there is insufficient evidence to support a jury finding that he was not entitled to the affirmative defense of abandonment. "It is a defense to a charge of attempt that the crime was not committed because the accused desisted voluntarily and in good faith and abandoned the intention to commit the crime." MINN. STAT. § 609.17, subd. 3 (2006). An attempt is not voluntarily abandoned if the defendant refrains from completing the act because of intervening events.

Kocur claims that he immediately left when R.D. refused a ride because he realized that he had made a mistake in thinking that she was a prostitute and because he did not want to scare her. Assuming, as we must, that the jury believed R.D.'s description of the encounter at trial, it was R.D.'s repeated refusal that stopped Kocur from completing the crime and not a voluntary and

good-faith abandonment by Kocur upon realizing his mistake. R.D.'s testimony at trial was that Kocur tried to persuade R.D. to get into the car even after she initially refused. The jury was instructed on the defense of abandonment and chose to believe that any abandonment was not voluntary or in good faith, but rather was caused by an intervening event-R.D.'s refusal to consent. Therefore, there was sufficient evidence to support the jury's verdict that Kocur did not voluntarily and in good faith abandon his attempt.

Affirmed.

Michigan v. Baker, 2006 Mich. App. LEXIS 2119 (Mich. Ct. App. 2006)

PER CURIAM.

....

Complainant testified that she was leaving her place of employment and walking toward her car when defendant approached her, said "give it up," and grabbed her in the upper arms. Complainant recounted screaming, crying and struggling, and falsely telling defendant that the police were present. Complainant stated that in response to the latter, defendant paused, looked around, then resumed the struggle.

A coworker of complainant testified that upon learning that someone was attacking complainant, he went outside and saw defendant grabbing her from behind. When defendant became aware of the coworker's presence, he let go of the complainant and started walking away, ignoring entreaties to stop.

Although complainant testified that in the excitement she could not identify any possession that defendant tried to take from her, an eyewitness testified that defendant approached her and grabbed at her purse while she struggled to hold onto it.

Defendant alleges there was evidence that during the struggle between complainant and himself, part of complainant's key ring broke off and fell to the ground, and that he picked it up, handed it back to her, and then walked away. Defendant was charged with assault with intent to commit unarmed robbery, MCL 750.88. The trial court found defendant guilty of the lesser offenses of attempted larceny from a person, MCL 750.357 (larceny) and MCL 750.92 (attempt), and assault and battery, MCL 750.81....

Conviction of larceny from a person requires proof of (1) the taking of someone else's property without consent, (2) movement of the property, (3) with the intent to steal or permanently deprive the owner of the property, and (4) the property was taken from the person or from the person's immediate area of control or immediate presence. Conviction of attempt requires proof of the actor's specific intent to commit the crime allegedly attempted. Defendant challenges his attempted larceny conviction on the ground that the evidence was not sufficient to prove that he intended to permanently deprive the victim of any property.

We disagree. An actor's intent may be inferred from all of the facts and circumstances, and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. In this case, the evidence that defendant accosted complainant, demanded "give it up," and struggled with her extensively, pulling at her purse strap over her resistance, well supports the intent element behind the trial court's conclusion that defendant was guilty of attempted larceny. Thus, the trial court did not clearly err in convicting defendant of attempted larceny....

Abandonment is an affirmative defense and the burden is on the defendant to establish by a preponderance of the evidence voluntary and complete abandonment of a criminal purpose....

Defendant alternatively challenges his attempted larceny conviction on the ground that the trial court should have concluded that he had abandoned any such crime ever attempted. Again, we disagree. Defendant emphasizes that there was evidence that during the struggle between complainant and himself, part of complainant's key ring broke off and fell to the ground, and that he picked it up, handed it back to her, and then walked away. However, the defense of abandonment is not available where the actor fails to complete the attempted crime because of unanticipated difficulties, unexpected resistance, or circumstances which increase the probability of apprehension. In this case, the trial court could well have concluded that defendant abandoned his attempted larceny only when confronted with complainant's vigorous resistance, the appearance of the complainant's coworker, or the combination of both. We defer to the factfinder's superior ability to adjudge credibility and otherwise weigh the evidence. Thus, the trial court did not clearly err.

Affirmed.

Discussion Questions and Notes

- 1) Why might a jurisdiction want to offer an abandonment defense? Why not?
- 2) Can you think of a reason that the abandonment defense makes far more sense under the MPC approach to attempt than in a common law jurisdiction?
- 3) The *Kocur* case seems like a closer call than the facts in *Baker*. Do you agree with the court's analysis in *Kocur*?
- 4) Assuming an abandonment defense is good policy, why not offer it in circumstances when a third party intervenes or a victim runs away?

B. Impossibility

A great deal of confusion surrounds the impossibility defense. The cases distinguish between legal and factual impossibility. It is everywhere agreed that factual impossibility

is not a defense. Many courts say that legal impossibility is a valid defense. Courts, however, differ on how and where to draw the line between legal and factual impossibility.

Michigan v. Thousand, 631 N.W.2d 694 (Mich. 2001)

YOUNG, J.

....

The circuit court granted defendant's motion to quash and dismissed all charges against him on the basis that it was legally impossible for him to have committed any of the charged crimes. We conclude that the concept of impossibility, which this Court has never adopted as a defense, is not relevant to a determination whether a defendant has committed attempt under *MCL 750.92*, and that the circuit court therefore erred in dismissing the charge of attempted distribution of obscene material to a minor on the basis of the doctrine of legal impossibility....

Deputy William Liczbinski was assigned by the Wayne County Sheriff's Department to conduct an undercover investigation for the department's Internet Crimes Bureau. Liczbinski was instructed to pose as a minor and log onto "chat rooms" on the Internet for the purpose of identifying persons using the Internet as a means for engaging in criminal activity.

On December 8, 1998, while using the screen name "Bekka," Liczbinski was approached by defendant, who was using the screen name "Mr. Auto-Mag," in an Internet chat room. Defendant described himself as a twenty-three-year-old male from Warren, and Bekka described herself as a fourteen-year-old female from Detroit. Bekka indicated that her name was Becky Fellins, and defendant revealed that his name was Chris Thousand. During this initial conversation, defendant sent Bekka, via the Internet, a photograph of his face.

From December 9 through 16, 1998, Liczbinski, still using the screen name "Bekka," engaged in chat room conversation with defendant. During these exchanges, the conversation became sexually explicit. Defendant made repeated lewd invitations to Bekka to engage in various sexual acts, despite various indications of her young age.²

During one of his online conversations with Bekka, after asking her whether anyone was "around there," watching her, defendant indicated that he was sending her a picture of himself. Within seconds, Liczbinski received over the Internet a photograph of male genitalia. Defendant asked Bekka whether she liked and wanted it and whether she was getting "hot" yet, and described in a graphic manner the type of sexual acts he wished to perform with her. Defendant invited Bekka to come see him at his house for the purpose of engaging in sexual activity. Bekka replied that she wanted to do so, and defendant cautioned her that they had to be careful, because he

² Defendant at one point asked Bekka, "Ain't I a lil [sic] old??" Upon Bekka's negative reply, defendant asked, "You like us old guys?" Bekka explained that boys her age "act like little kids," and reiterated that she was fourteen years old. Bekka mentioned that her birthday was in 1984 and that she was in ninth grade, and defendant asked when she would be fifteen. Defendant asked whether Bekka was still "pure," to which Bekka responded that she was not, but that she did not have a lot of experience and that she was nervous.

could "go to jail." Defendant asked whether Bekka looked "over sixteen," so that if his roommates were home he could lie.

The two then planned to meet at an area McDonald's restaurant at 5:00 p.m. on the following Thursday. Defendant indicated that they could go to his house, and that he would tell his brother that Bekka was seventeen. Defendant instructed Bekka to wear a "nice sexy skirt," something that he could "get [his] head into." Defendant indicated that he would be dressed in black pants and shirt and a brown suede coat, and that he would be driving a green Duster. Bekka asked defendant to bring her a present, and indicated that she liked white teddy bears.

On Thursday, December 17, 1998, Liczbinski and other deputy sheriffs were present at the specified McDonald's restaurant when they saw defendant inside a vehicle matching the description given to Bekka by defendant. Defendant, who was wearing a brown suede jacket and black pants, got out of the vehicle and entered the restaurant. Liczbinski recognized defendant's face from the photograph that had been sent to Bekka. Defendant looked around for approximately thirty seconds before leaving the restaurant. Defendant was then taken into custody. Two white teddy bears were recovered from defendant's vehicle. Defendant's computer was subsequently seized from his home. A search of the hard drive revealed electronic logs of Internet conversations matching those printed out by Liczbinski from the Wayne County-owned computer he had used in his Internet conversations with defendant.

Following a preliminary examination, defendant was bound over for trial on charges of solicitation to commit third-degree criminal sexual conduct, *MCL 750.157b(3)(a)* and *750.520d(1)(a)*, attempted distribution of obscene material to a minor, *MCL 750.92* and *722.675*, and child sexually abusive activity, *MCL 750.145c(2)*.

Defendant brought a motion to quash the information, arguing that, because the existence of a child victim was an element of each of the charged offenses, the evidence was legally insufficient to support the charges. The circuit court agreed and dismissed the case, holding that it was legally impossible for defendant to have committed the charged offenses. The Court of Appeals affirmed the dismissal of the charges of solicitation and attempted distribution of obscene material to a minor, but reversed the dismissal of the charge of child sexually abusive activity....

We must determine in this case whether the circuit court and the Court of Appeals properly applied the doctrine of "legal impossibility" in concluding that the charges against defendant of attempt and solicitation must be dismissed. The applicability of a legal doctrine is a question of law that is reviewed de novo. Similarly, the issue whether "impossibility" is a cognizable defense under Michigan's attempt and solicitation statutes presents questions of statutory construction, which we review de novo....

The doctrine of "impossibility" as it has been discussed in the context of inchoate crimes represents the conceptual dilemma that arises when, because of the defendant's mistake of fact or law, his actions could not possibly have resulted in the commission of the substantive crime underlying an attempt charge. Classic illustrations of the concept of impossibility include: (1) the defendant is prosecuted for attempted larceny after he tries to "pick" the victim's empty pocket; (2) the defendant is prosecuted for attempted rape after he tries to have nonconsensual intercourse, but is unsuccessful because he is impotent; (3) the defendant is prosecuted for attempting to receive stolen property where the property he received was not, in fact, stolen; and

(4) the defendant is prosecuted for attempting to hunt deer out of season after he shoots at a stuffed decoy deer. In each of these examples, despite evidence of the defendant's criminal intent, he cannot be prosecuted for the *completed* offense of larceny, rape, receiving stolen property, or hunting deer out of season, because proof of at least one element of each offense cannot be derived from his objective actions. The question, then, becomes whether the defendant can be prosecuted for the *attempted* offense, and the answer is dependent upon whether he may raise the defense of "impossibility."

Courts and legal scholars have drawn a distinction between two categories of impossibility: "factual impossibility" and "legal impossibility." It has been said that, at common law, legal impossibility is a defense to a charge of attempt, but factual impossibility is not. *See* AMERICAN LAW INSTITUTE, MODEL PENAL CODE AND COMMENTARIES (1985), comment to § 5.01, pp 307-317; PERKINS & BOYCE, CRIMINAL LAW (3d ed), p 632; DRESSLER, UNDERSTANDING CRIMINAL LAW (1st ed), § 27.07[B], p 349. However, courts and scholars alike have struggled unsuccessfully over the years to articulate an accurate rule for distinguishing between the categories of "impossibility."

"Factual impossibility," which has apparently never been recognized in any American jurisdiction as a defense to a charge of "exists when [the defendant's] intended end constitutes a crime but she fails to consummate it because of a factual circumstance unknown to her or beyond her control." Dressler, *supra*, § 27.07[C][1], p 350. An example of a "factual impossibility" scenario is where the defendant is prosecuted for attempted murder after pointing an unloaded gun at someone and pulling the trigger, where the defendant believed the gun was loaded.

The category of "legal impossibility" is further divided into two subcategories: "pure" legal impossibility and "hybrid" legal impossibility. Although it is generally undisputed that "pure" legal impossibility will bar an attempt conviction, the concept of "hybrid legal impossibility" has proven problematic. As Professor Dressler points out, the failure of courts to distinguish between "pure" and "hybrid" legal impossibility has created confusion in this area of the law. Dressler, *supra*, § 27.07[D][1], p 351.

"Pure legal impossibility exists if the criminal law does not prohibit *D*'s conduct or the result that she has sought to achieve." *Id.*, § 27.07[D][2], p 352 (emphasis in original). In other words, the concept of pure legal impossibility applies when an actor engages in conduct that he believes is criminal, but is not actually prohibited by law: "There can be no conviction of criminal attempt based upon *D*'s erroneous notion that he was committing a crime." Perkins & Boyce, *supra*, p 634. As an example, consider the case of a man who believes that the legal age of consent is sixteen years old, and who believes that a girl with whom he had consensual sexual intercourse is fifteen years old. If the law actually fixed the age of consent at fifteen, this man would not be guilty of attempted statutory rape, despite his mistaken belief that the law prohibited his conduct. *See* Dressler, *supra*, § 27.07[D][2], pp 352-353, n 25.

When courts speak of "legal impossibility," they are generally referring to what is more accurately described as "hybrid" legal impossibility.

Most claims of legal impossibility are of the hybrid variety. *Hybrid legal impossibility* exists if *D*'s goal was illegal, but commission of the offense was impossible due to a factual mistake by her regarding the legal status of some factor relevant to her conduct. This version of impossibility is

a "hybrid" because, as the definition implies and as is clarified immediately below, D's impossibility claim includes both a legal and a factual aspect to it.

Courts have recognized a defense of legal impossibility or have stated that it would exist if D receives unstolen property believing it was stolen; tries to pick the pocket of a stone image of a human; offers a bribe to a "juror" who is not a juror; tries to hunt deer out of season by shooting a stuffed animal; shoots a corpse believing that it is alive; or shoots at a tree stump believing that it is a human....

It is notable that "the great majority of jurisdictions have now recognized that legal and factual impossibility are 'logically indistinguishable' ... and have abolished impossibility as a defense." *United States v Hsu*, 155 F.3d 189, 199 (CA 3, 1998). For example, several states have adopted statutory provisions similar to Model Penal Code, § 5.01(1), which provides:

A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:

(a) purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or

(b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or

(c) purposely does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

In other jurisdictions, courts have considered the "impossibility" defense under attempt statutes that did not include language explicitly abolishing the defense. Several of these courts have simply declined to participate in the sterile academic exercise of categorizing a particular set of facts as representing "factual" or "legal" impossibility, and have instead examined solely the words of the applicable attempt statute.

The Court of Appeals panel in this case, after examining Professor Dressler's exposition of the doctrine of impossibility, concluded that it was legally impossible for defendant to have committed the charged offense of attempted distribution of obscene material to a minor. The panel held that, because "Bekka" was, in fact, an adult, an essential requirement of the underlying substantive offense was not met (dissemination to a minor), and therefore it was legally impossible for defendant to have committed the crime.

We begin by noting that the concept of "impossibility," in either its "factual" or "legal" variant, has never been recognized by this Court as a valid defense to a charge of attempt....

Finding no recognition of impossibility in our common law, we turn now to the terms of the statute....

Under our statute, ... an "attempt" consists of (1) an attempt to commit an offense prohibited by law, and (2) any act towards the commission of the intended offense....

We are unable to discern from the words of the attempt statute any legislative intent that the concept of "impossibility" provide any impediment to charging a defendant with, or convicting him of, an attempted crime, notwithstanding any factual mistake-regarding either the attendant circumstances or the legal status of some factor relevant thereto-that he may harbor. The attempt

statute carves out no exception for those who, possessing the requisite criminal intent to commit an offense prohibited by law and taking action toward the commission of that offense, have acted under an extrinsic misconception.

Defendant in this case is not charged with the substantive crime of distributing obscene material to a minor.... It is unquestioned that defendant could not be convicted of that crime, because defendant allegedly distributed obscene material not to "a minor," but to an adult man. Instead, defendant is charged with the distinct offense of attempt, which requires only that the prosecution prove intention to commit an offense prohibited by law, coupled with conduct toward the commission of that offense. The notion that it would be "impossible" for the defendant to have committed the *completed* offense is simply irrelevant to the analysis. Rather, in deciding guilt on a charge of attempt, the trier of fact must examine the unique circumstances of the particular case and determine whether the prosecution has proven that the defendant possessed the requisite specific intent and that he engaged in some act "towards the commission" of the intended offense.

Because the nonexistence of a minor victim does not give rise to a viable defense to the attempt charge in this case, the circuit court erred in dismissing this charge on the basis of "legal impossibility."

KELLY, J. (*concurring in part and dissenting in part*).

I respectfully disagree with the majority's conclusion that the doctrine of "legal impossibility" has never been adopted in Michigan. There is ample evidence to the contrary in the case law of the state. Because "legal impossibility" is a viable defense, I would affirm the Court of Appeals decision affirming the circuit court's dismissal of attempted distribution of obscene material to a minor....

The majority errs in concluding that "legal impossibility" has never been adopted in Michigan. It focuses on language in *Tinskey* pertaining to "legal impossibility" as a defense to attempt, but ignores the reasoning of the decision. Viewing the forest as well as the trees, one observes that the reasoning and the conclusion of the *Tinskey* Court prove that it accepted the doctrine of "legal impossibility."

Tinskey held that the defendants could not be guilty of conspiracy to commit abortion because the woman who was to be aborted was not pregnant. *Tinskey, supra at 109*. The Court reasoned that the Legislature, in enacting the statute, purposely required that conspiracy to abort involve a pregnant woman. It thereby rejected prosecutions where the woman was not pregnant. It concluded that the defendants in *Tinskey* could not be prosecuted for conspiracy to commit abortion because one of the elements of the crime, a pregnant woman, could not be established.

Significantly, the *Tinskey* Court stated that "the Legislature has not, as to most other offenses, so similarly indicated that impossibility is not a defense." *Id.* By this language, *Tinskey* expressly recognized the existence of the "legal impossibility" defense in the common law of this state. Even though the reference to "legal impossibility" regarding the crime of attempt may be dictum, the later statement regarding the "impossibility" defense was part of the reasoning and conclusion in

Tinskey. This Court recognized the defense, even if it did not do so expressly concerning charges for attempt or solicitation.

Moreover, Michigan common law is not limited to decisions from this Court. The majority should not ignore decisions from the Court of Appeals. That Court has accepted "legal impossibility" as a defense....

Even if "legal impossibility" were not part of Michigan's common law, I would disagree with the majority's interpretation of the attempt statute. It does not follow from the fact that the statute does not expressly incorporate the concept of impossibility that the defense is inapplicable.

Examination of the language of the attempt statute leads to a reasonable inference that the Legislature did not intend to punish conduct that a mistake of legal fact renders unprohibited. The attempt statute makes illegal an "... attempt to *commit an offense prohibited by law*" *MCL 750.92* (emphasis added). It does not make illegal an action not prohibited by law. Hence, one may conclude, the impossibility of completing the underlying crime can provide a defense to attempt.

This reasoning is supported by the fact that the attempt statute codified the common-law rule regarding the elements of attempt....

This state's attempt statute, unlike the Model Penal Code and various state statutes that follow it, does not contain language allowing for consideration of a defendant's beliefs regarding "attendant circumstances." Rather, it takes an "objective" view of criminality, focusing on whether the defendant actually came close to completing the prohibited act. 1 Robinson, Criminal Law Defenses, § 85(a), pp 423-424; § 85(b), p 426, n 22. The impossibility of completing the offense is relevant to this objective approach because impossibility obviates the state's "concern that the actor may cause or come close to causing the harm or evil that the offense seeks to prevent." *id.* at 424.

The majority's conclusion, that it is irrelevant whether it would be impossible to have committed the completed offense, contradicts the language used in the attempt statute. If an element of the offense cannot be established, an accused cannot be found guilty of the prohibited act. The underlying offense in this case, disseminating or exhibiting sexual material to a minor, requires a minor recipient. Because the dissemination was not to a minor, it is legally impossible for defendant to have committed the prohibited act.

This Court should affirm the Court of Appeals decision, determining that it was legally impossible for defendant to have committed the charged offense of attempted distribution of obscene material to a minor, *MCL 750.92, 722.675*....

As judges, we often decide cases involving disturbing facts. However repugnant we personally find the criminal conduct charged, we must decide the issues on the basis of the law. I certainly do not wish to have child predators loose in society. However, I believe that neither the law nor society is served by allowing the end of removing them from society to excuse unjust means to accomplish it. In this case, defendant raised a legal impossibility argument that is supported by Michigan case law. The majority, in determining that legal impossibility is not a viable defense in this state, ignores that law.

In keeping with precedent and legal authority, I would affirm the Court of Appeals decision that it was legally impossible for defendant to commit the charged offense of attempted

distribution of obscene material to a minor. Of course, if this view prevailed, defendant could still be prosecuted for his alleged misconduct. He is to be tried on the most serious of the charges, child sexually abusive activity, *MCL 750.145c...*

CAVANAGH, J., concurred with KELLY, J.

[separate opinion by Taylor omitted]

Discussion Questions and Notes

- 1) The MPC does not acknowledge a defense argument that some have termed an "impossibility defense." To illustrate the MPC approach, consider this case. Defendant buys a "voodoo doll" in the image of the intended victim. Believing that sticking a metal pin will kill the intended victim, the Defendant does so. The MPC is interpreted such that the defendant is not guilty of attempted murder. Why not?
- 2) Do you agree with the majority or dissent in *Thousand*?

Review Exercise 1

Watch [this film clip](#) and answer these questions:

- Pete is charged with attempted receipt of stolen property where stolen property is:
 - "purposely receives, retains, or disposes of movable property of another knowing that it is has been stolen, or believing that it has probably been stolen."
- Did Pete engage in sufficient conduct to commit attempted receipt of stolen property under the MPC? Under the common law using "dangerously close" test?
- In an MPC jurisdiction, does Pete have an impossibility defense? Would your analysis be different in a common law jurisdiction?

Review Exercise 2

Watch [this film clip](#) and address the following question:

The defendants are charged with attempted homicide. Do they have an impossibility defense in either an MPC or common law jurisdiction?

Review Exercise 3

After watching [this film clip](#), address the following questions:

- In an MPC jurisdiction, Farhad is charged with the attempted homicide of Daniel.
- Assess whether Farhad has engaged in sufficient conduct, has the appropriate *mens rea*, whether an impossibility defense is available, and whether an abandonment defense is available.
- What is different in your analysis for a common law jurisdiction?

CHAPTER 6: ACCOMPLICE LIABILITY

Thus far, we have focused on a defendant's independent liability for their own conduct and *mens rea*. In this chapter, we focus on the very common situation where one defendant is criminally liable for the conduct of another. In contrast to independent liability, accomplice liability *derives* one person's criminal liability from another accomplice.

I. Act Requirements

The general language used to describe accomplice liability act requirements is "aiding and abetting." However, it is important to recognize the wording of specific accomplice liability statutes. Some include broader language that anticipates specific types of aiding and abetting such as "instigating" or "encouraging." In terms of act requirements, the primary differences between common law and MPC jurisdictions are formalistic – the substantive rules are very similar.

Common law jurisdictions differentiate between principals and accessories. Principals are those persons who commit all of the act requirements and *mens rea* in violation of a specific criminal statute. Accessories facilitate the actions of the principals through their own acts. It is important when analyzing a problem in a common law jurisdiction to properly identify who is a principal and who is an accessory.

In contrast, the Model Penal Code simply designates everyone as an accomplice with no differentiation between principals and accessories. There still must be at least one person involved in a crime that fulfills the act and *mens rea* requirements sufficiently to constitute independent liability. But every other accomplice is assessed on their aiding and abetting acts as well as their independent *mens rea*.

This case provides a nice illustration of the low threshold that exists for aiding and abetting acts.

United States v. Cejas, 761 F.3d 717 (7th Cir. 2014)

WILLIAMS, Circuit Judge.

Brothers Constantino and Nicholas Cejas' Valentine's Day drug dealing activities attracted the attention of law enforcement officials. As a result, they were each convicted of ... possessing and distributing 50 grams or more of methamphetamine [] and possessing a firearm to further their

drug activity that day. Constantino was also convicted on charges related to his drug activities on February 8, 2011. The brothers appeal their convictions....

The jury convicted Constantino of two drug trafficking offenses, and found that he carried a gun during each. So as harsh as a mandatory twenty-five year sentence for a second conviction may be, it does not violate double jeopardy, and the conviction stands.

We affirm the brothers' convictions and Constantino's sentence....

Brothers Constantino and Nicholas Cejas were indicted on charges related to drug activity that occurred on February 8, 2011 and February 14, 2011. Their illicit activities came to the attention of law enforcement officials in early 2011 during the Federal Bureau of Investigation's ("FBI") surveillance of the methamphetamine trafficking activities of Brian Denny and his neighbor Gregory Miller in Terre Haute, Indiana. FBI agents monitored and recorded the activities that occurred outside of Denny's and Miller's homes through the use of a pole camera mounted on a nearby utility pole, which allowed the agents to view and control the video feed from a remote location. Much like a convenience store surveillance camera, the pole camera captured a live feed, but the recording skipped every few seconds and did not produce a fluid, continuous video.

On February 8, 2011, FBI Special Agent Ed Wheele and other agents monitored the live video feed. The camera recorded Constantino, a security guard, and his son as they arrived at Denny's residence in Constantino's company car. The video showed the pair enter Denny's residence and exit the home a short time later. Denny's cooperation with the FBI later revealed that Constantino sold him methamphetamine while inside his home that day. Once the deal was done, undercover agents followed Constantino's car to a nearby restaurant and saw him carrying a handgun and a small shield on his hip. In an effort not to compromise the surveillance operation, the special agents did not arrest Constantino that day.

The pole camera showed Constantino arrive at Denny's residence once again on February 14, 2011. This time, his brother Nicholas was with him, driving Nicholas's pick-up truck with Constantino in the passenger seat and Constantino's son in the backseat. The pole camera recording showed the brothers leave the truck and Nicholas walk over to the toolbox attached to the bed of the truck and place his hand on the toolbox lid. The video records the toolbox lid open and then shut, with Nicholas standing beside it. But, as Nicholas points out, the feed does not show him take anything out of the box. The brothers then entered Denny's home. Denny later testified that, once inside, either Nicholas or Constantino placed four ounces of methamphetamine in his microwave and received \$8,000 from him. After leaving the home and coming back within the pole camera's view, the brothers walked to the truck and both went to the truck's toolbox before driving away. Agent Wheele witnessed this activity via the live feed and ordered the on-site surveillance team to follow Nicholas's truck. When the law enforcement officers stopped them, Constantino showed the officers his security badge and admitted to possessing a firearm. The officers seized a loaded firearm from his waistband and found a second handgun and \$8,000 cash in the toolbox....

In connection with their activities on February 14, 2011, they were charged with possession and distribution of 50 grams or more of methamphetamine, in violation of 21 U.S.C. § 841(a)(1), and possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A). Constantino was also hit with identical charges for his actions on February 8, 2011,

as well as possession of a firearm by an alien illegally or unlawfully present within the United States, in violation of 18 U.S.C. § 922(g)(5). Constantino pled guilty on this last count, and the brothers went to trial on the remaining charges.

At trial, Denny testified against the brothers. He admitted purchasing methamphetamine from Constantino, known to him as "Tino," on five occasions in 2011 and testified that Nicholas accompanied Constantino to Denny's residence "at least once, possibly twice." According to Denny, he did not know which brother actually provided the drugs on the occasion when they came to his house together because they placed the drugs in his microwave out of his sight....

[A]ctual or constructive possession of narcotics is sufficient to support a conviction under 21 U.S.C. § 841(a). Here, there is no definitive evidence that Nicholas was the one who physically possessed the drugs sold to Denny on February 14. But whether Nicholas touched or controlled the drugs is not dispositive since "any person who knowingly aids ... the commission of an offense may be found guilty of that offense if he knowingly participated in the criminal activity and tried to make it succeed." SEVENTH CIRCUIT PATTERN JURY INSTRUCTION 5.06 (2012 Ed.); *see* 18 U.S.C. § 2(a) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."). In other words, he who aids and abets another in committing a criminal offense is guilty of that offense just as if he had committed it himself. *See Rosemond v. United States*, 134 S. Ct. 1240, 1245, 188 L. Ed. 2d 248 (2014) ("§ 2 reflects a centuries-old view of culpability: that a person may be responsible for a crime he has not personally carried out if he helps another to complete its commission."). And an indictment need not charge the [aiding and abetting offense] separately. The government argued at trial that Nicholas was guilty of Count IV because he aided and abetted its commission and the court instructed the jury on this theory of liability after trial.

Culpability for the substantive offense of possessing and distributing narcotics attaches when the defendant affirmatively acts to further the offense with the intent of facilitating the commission of the offense. *See Rosemond*, 134 S. Ct. at 1245. Precedent sets a low bar for satisfying the "affirmative act" requirement, which is met when the defendant actively and knowingly participates in carrying out any part of the felonious conduct, irrespective of how minimal. *Id.* at 1245-46 (discussing history in detail and recognizing that "every little bit helps" if it aids crime as a whole). The defendant does not have to participate in every element of the offense. Nicholas drove to Denny's home, backed his truck into his driveway, and entered Denny's home with Constantino and, according to the jury's reasonable determination, a gun. These actions solidly satisfy the affirmative act requirement for aiding and abetting the drug offense....

The gun evidence suggests that Nicholas was aware of the plan to distribute drugs to Denny and acted to make the plan succeed. There was therefore sufficient evidence to convict him for possession with the intent to distribute and distribution of the methamphetamine that Denny received when the brothers came to his house on February 14....

The convictions and sentences of Constantino and Nicholas Cejas are AFFIRMED.

Discussion Questions and Notes

- 1) Notice that the charges against the defendant do not specifically say that he was an accomplice. This is because, ordinarily, no separate charge is required for accomplice liability. Why do you think no separate charge is required (unlike for attempt or conspiracy liability)?
- 2) The court states that any assistance to a crime, "irrespective of how minimal," is sufficient for accomplice liability. What if the accomplice is wholly ineffective? For example, what if the defendant is a lookout during a bank robbery but never sees any police? Or what if the defendant sees police but does not alert her accomplices?

Review Exercise 1

Watch [this film clip](#) and answer these questions:

- In a common law jurisdiction, all three are charged with petit theft. Who is the principal? Who are the accessories? Who are the accomplices? Are they all equally guilty?
- How do we treat the crime differently in an MPC jurisdiction?
- Would the charges be different if only Everett stole the pie and the other two ate it with him?

II. *Mens Rea* Requirements

As with any other type of crime we discuss, there is a separate rule for *mens rea* for accomplice liability.

A. Common Law Approach

Common law jurisdictions have two separate rules. Some jurisdictions apply a specific intent standard such that the prosecution has to show beyond a reasonable doubt that the accessory defendant honestly knew about their aiding and abetting of the crime which the principal committed. The following case illustrates the application of the specific intent rule.



Figure 20: Marihuana Revenue Stamp \$1 1937 Issue, U.S. Bureau of Engraving and Printing (1937)

Idaho v. Romero-Garcia, 75 P.3d 1209 (Idaho Ct. App. 2003)

PERRY, Judge

Mario Romero-Garcia appeals from the judgments of conviction entered by the district court after a jury found him guilty of one count each of aiding and abetting trafficking in cocaine and aiding and abetting the failure to affix illegal drug tax stamps. We affirm....

On December 14, 2000, law enforcement officers met with a confidential informant (CI), who had arranged for a controlled cocaine purchase through Romero-Garcia. Pursuant to previous arrangements, officers followed the CI's vehicle to Hailey where the CI picked up Romero-Garcia at his residence. The CI and Romero-Garcia then drove to the parking lot of an apartment in Ketchum. While under law enforcement surveillance, Romero-Garcia exited the vehicle, walked to an apartment, and returned to the vehicle with another individual. The individual, a high-level drug dealer, agreed to sell the CI an ounce of cocaine, and walked back to the apartment to obtain the drugs. The drug dealer returned and gave the ounce of cocaine to the CI in exchange for \$800. For his part in the transaction, Romero-Garcia was paid \$200 and was returned to his residence. Ultimately, Romero-Garcia and the drug dealer were tried together on numerous drug-related offenses. The drug dealer was found guilty by a jury of trafficking in cocaine by knowingly and unlawfully delivering 28 grams or more to another person. The drug dealer was also found guilty of failing to affix illegal drug tax stamps to the cocaine he sold. As to both of these offenses, Romero-Garcia was charged with and found guilty of aiding and abetting trafficking in cocaine, I.C. §§ 37-2732B(a)(2)(A), 37-2732B(c), 18-204, and aiding and abetting the failure to affix drug tax stamps, I.C. §§ 63-4205(1), 63-4207(2), 18-204....

Romero-Garcia ... argues that the evidence was insufficient to support the verdict for aiding and abetting the failure to affix illegal drug tax stamps and that the district court improperly instructed the jury on that charge....

Romero-Garcia argues that the jury was improperly required to find that he personally failed to affix the appropriate tax stamps. Romero-Garcia insists that he had no duty to personally affix tax stamps because he did not possess the cocaine. Romero-Garcia next contends that the jury instructions improperly failed to require the jury to find that Romero-Garcia knew the required tax stamps were not affixed to the cocaine. Additionally, Romero-Garcia argues that the district court erred by failing to instruct the jury, on the special verdict form, that it must find Romero-Garcia aided and abetted the failure to affix the tax stamps beyond a reasonable doubt....

The question whether the jury has been properly instructed is a question of law over which we exercise free review. When reviewing jury instructions, we ask whether the instructions as a whole, and not individually, fairly and accurately reflect applicable law.

The state's evidence showed that cocaine was sold by the drug dealer to the CI in accordance with the arrangements made by Romero-Garcia. For these acts, the drug dealer was found guilty of trafficking in cocaine by delivery. Similarly, Romero-Garcia was found guilty of aiding and abetting trafficking in cocaine by delivery. Under the Idaho Illegal Drug Tax Act, illegal drug tax stamps were required to be permanently affixed to the cocaine sold. Because no stamps were attached, the drug dealer was charged with and found guilty of failure to affix the required tax stamps. Romero-Garcia was charged with and found guilty of aiding and abetting the failure to affix tax stamps.

The main dispute as to aiding and abetting the failure to affix the illegal drug tax stamps centers on the mental state required. An individual who participates in or assists the commission of an offense is guilty of aiding and abetting the crime. The mental state required is generally the same as that required for the underlying offense—the aider and abettor must share the criminal intent of the principal and there must be a community of purpose in the unlawful undertaking.

Idaho Code Section 63-4203(1) provides that “every person who in violation of Idaho law possesses a controlled substance shall be liable for payment of an excise tax on all of the controlled substance.” When any person possesses a controlled substance subject to illegal drug taxes, the person must obtain illegal drug tax stamps and permanently affix them on the controlled substance to show that the required tax has been paid. I.C. § 63-4205(1). Possession, in addition to its ordinary meaning, includes holding, selling, and transferring. I.C. § 63-4202. Any person subject to the drug tax who distributes or possesses a controlled substance, without affixing the appropriate stamps, is guilty of a criminal offense. I.C. § 63-4207(2).

The Illegal Drug Tax Act, as discussed above, does not specifically indicate the mental state necessary for commission of this crime. However, I.C. § 18-114 requires that in every crime or public offense there must exist a union, or joint operation, of act and intent, or criminal negligence. Intent as used in that section means not an intent to commit a crime, but merely the intent to knowingly perform the interdicted act or, by criminal negligence, fail to perform the required act.

Pursuant to these statutes then, a person who fails to affix the illegal drug tax stamps becomes strictly liable for the omission. Accordingly, in order to find Romero-Garcia guilty of aiding and abetting the failure to affix the required drug tax stamps, the jury was required to find that: (1)

Romero-Garcia knowingly participated in or assisted the drug dealer in the possession or distribution of cocaine; and (2) the necessary drug tax stamps had not been affixed. The jury was instructed that to prove Romero-Garcia's guilt, the state must show beyond a reasonable doubt that, on or about the alleged date in Blaine County, Romero-Garcia "intentionally aided and abetted the possession or distribution of seven (7) grams or more of any controlled substance sold by weight" and that he failed to "permanently affix to it the appropriate Idaho tax stamp." Romero-Garcia insists that the instruction improperly imposed upon him the duty to affix tax stamps because he did not personally possess the cocaine and, therefore, had no duty to do so. Romero-Garcia also argues that the instructions erroneously failed to require proof that he knew that the appropriate tax stamps were not attached to the cocaine.

The Due Process Clause of the United States Constitution precludes conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which a defendant is charged. The instructions given in this case required the jury to find the two necessary elements. To aid and abet the failure to affix illegal drug tax stamps, Romero-Garcia needed only to participate or assist in the possession or distribution of cocaine for which the drug dealer failed to attach the appropriate stamps. Contrary to Romero-Garcia's argument, it was not necessary that he know that the cocaine lacked the required stamps in order to commit the offense of aiding and abetting the failure to affix drug tax stamps. Rather, the mental state necessary to that charge required only that Romero-Garcia knowingly participated in or assisted the drug dealer in the possession or distribution of cocaine. Although the jury instructions could have more clearly stated the applicable law, they adequately required the jury to find all facts necessary to constitute aiding and abetting the failure to affix illegal drug tax stamps. Thus, the jury verdict need not be vacated based on these challenges.

Romero-Garcia next argues that the jury instructions given by the district court were erroneous because the jury verdict form on aiding and abetting the failure to affix illegal drug tax stamps lacked language requiring a finding of guilt beyond a reasonable doubt. This argument is without merit. As discussed above, this Court examines whether the instructions as a whole, and not individually, fairly and accurately reflect applicable law. The jury in this case was specifically instructed, in jury instruction number 27, that a guilty verdict must be based upon a finding of each element of the crime beyond a reasonable doubt. We find no error in the instructions with regard to Romero-Garcia's challenge on this basis.

Finally, Romero-Garcia asserts that the district court erred when it refused to give his requested instruction on the ignorance or mistake of law provisions found in I.C. § 18-201(1). Romero-Garcia appears to argue that the intent element required for aiding and abetting the failure to affix illegal drug tax stamps was not met because he did not know tax stamps were not affixed. However, as discussed previously, knowledge that the necessary stamps were not attached was not required. Thus, the district court committed no error in refusing to give Romero-Garcia's requested jury instruction....

Romero-Garcia argues that the evidence at trial was insufficient to support a conviction for aiding and abetting the failure to affix illegal drug tax stamps because there was no substantial evidence that he intended that the tax stamps not be attached to the cocaine, that he knew tax stamps were not attached to the cocaine, that he participated in the drug dealer's failure to affix tax stamps to the cocaine, nor that he assisted or encouraged the drug dealer to not affix the tax

stamps to the cocaine. This argument fails because this crime did not require proof of any of those elements. Rather, the state was required to show only that Romero-Garcia participated or assisted in the possession or distribution of cocaine lacking the required tax stamps.

The jury instructions in this case properly defined possession to include the sale of a controlled substance. The evidence showed that Romero-Garcia arranged the sale of cocaine to the CI and accompanied him to the drug dealer's residence where the sale took place. In return, Romero-Garcia was paid \$200. Thus, the element of aiding and abetting possession or distribution of a controlled substance was supported by sufficient evidence. Likewise, the evidence showed that the drugs confiscated after the sale lacked the appropriate tax stamps. Thus, each element of aiding and abetting the failure to affix illegal drug tax stamps was sufficiently supported by the evidence presented at trial....

We conclude that the prosecutor did not improperly comment upon Romero-Garcia's exercise of the right not to present evidence during closing argument and, therefore, no prosecutorial misconduct has been shown in that regard. We need not decide whether the prosecutor's subtle references to Romero-Garcia's status as a non-citizen of the United States constituted prosecutorial misconduct because, even if such comments were improper, this Court is not convinced that the jury's verdict would have been different in view of the overwhelming evidence of Romero-Garcia's guilt. Therefore, we deem the error harmless.

Although the jury instructions given in this case could have more clearly set forth the applicable law, the jury was required to find, beyond a reasonable doubt, all of the required elements of aiding and abetting the failure to affix illegal drug tax stamps. The evidence presented at trial was sufficient to support the jury's verdict of guilty on that charge. We therefore affirm Romero-Garcia's judgments of conviction for aiding and abetting trafficking in cocaine and for aiding and abetting the failure to affix illegal drug tax stamps.

Discussion Questions and Notes

- 1) What do you think about the substantive crime charged in the case? Is there any sound policy rationale for attaching criminal liability to a failure to affix tax stamps to illegal drugs?
- 2) Notice that the defendant is precluded from arguing that he honestly was mistaken as to the principal's failure to affix the stamps. How is this consistent with our rules about specific intent?

Other common law jurisdictions use a different rule for accomplice liability *mens rea*: The Rule of Natural and Probable Consequences. In contrast to the subjective specific intent rule, the Rule of Natural and Probable Consequences asks the jury to assess whether the conduct of the principal was reasonably foreseeable at the time of a pre-

existing criminal relationship. The application of the Rule emerges when the principal engages in conduct that the accessory did not anticipate. In cases where the principal is engaged in planned conduct of which the accessory is aware, the normal specific intent requirement applies. The following case shows how the objective Rule of Natural and Probable Consequences expands criminal liability for accessories.

California v. Smith, 337 P.3d 1159 (Cal. 2014)

CHIN, J.

A person who aids and abets a crime is guilty of that crime, sometimes called the target crime. Additionally, that person is guilty of any other crime a principal in the target crime commits, sometimes called the nontarget crime, that is a natural and probable consequence of the target crime. In this case involving violent criminal street gangs, we must decide whether defendant was properly convicted of the murders of two of his fellow gang members even though he neither personally killed them nor desired their deaths. Because, under the peculiar circumstances of the case, a reasonable jury could find that a principal or principals in the target crimes committed the murders, and they were a reasonably foreseeable consequence when defendant aided and abetted the target crimes, we conclude that he was properly convicted of them. Accordingly, we affirm the judgment of the Court of Appeal, which reached a similar conclusion.

I. FACTUAL AND PROCEDURAL HISTORY

....

Three criminal street gangs played a role in this case: the Gateway Posse Crips (Gateway Posse), the YAH (short for Young Ass Hustlers) Squad, and the Pueblo Bishop Bloods (Pueblo Bishop). Pueblo Bishop members were known to carry guns and use them against rival gangs. Gateway Posse and Pueblo Bishop were enemies, and there had been a history of violence between them.

Defendant Vince Bryan Smith was a member of Gateway Posse. Each of the two murder victims, defendant's friend, Vincent McCarthy, and his cousin, Demetrius Hunt, was either a member or an "associate" of the gang. Defendant's friend, Julian McKee, was a member of yet another gang, but one that was affiliated with Gateway Posse.

The YAH Squad began as an unaffiliated dance crew in 2002 and eventually transitioned into a criminal street gang whose members often carried guns. At the time of the killings, the YAH Squad had about 10 members. It had developed an affiliation with Pueblo Bishop because one of its members, Deshawn Littleton, was also affiliated with that gang. Members of the YAH Squad present at the killings included Littleton, Jermarr Session, Edward Scott, Aaron Lee, Lonnie Walton, and Jesus Hernandez. Defendant's younger brother, Robert McMorris, was a member of the YAH Squad, but he wanted to leave the gang....

On February 7, 2006, the day of the killings, defendant told his brother he was taking him to get "jumped out" of the YAH Squad. The Court of Appeal summarized the evidence about what this meant. "To join a criminal street gang, potential members often have to be 'jumped in,' which typically involves three or four members of the gang beating the potential new member for a set period of time while the new member does his or her best to fight back. Likewise, in order to get out of a gang, a member must be 'jumped out,' which typically involves a beating of that member by the same members who jumped him or her into the gang."

Littleton told YAH Squad members that they were going to fight Gateway Posse "homies." Defendant picked up McMorris after school, then picked up McCarthy, Hunt, and McKee to make sure his brother did not get beaten too badly and things did not get out of hand. McCarthy had a gun. As they drove, they agreed they would shoot back only if shot at first. McMorris told defendant that YAH Squad members Scott and Lee had jumped him into the gang.

When defendant, McMorris, McCarthy, Hunt, and McKee arrived, they approached a group of men that had gathered outside some apartments, including members of the YAH Squad and Pueblo Bishop. Demontre observed Tovey give Littleton what appeared to be a gun. He said that Tovey also possessed another gun.

Defendant pointed at Scott and Lee and said, "I want you guys to put my brother off." Those present decided to do the "jump out" in a field next to the apartments. The two groups remained separate as they headed to the field. Just before the fight began, defendant said, "I don't want nobody kicking my brother in the head." Walton testified that defendant's attempts to give orders to YAH Squad members did not sit well with them.

At some point, McMorris heard Littleton tell Scott and Lee, "You guys know what you guys got to do." McMorris began to fight with Scott and Lee. They got the better of him, and Lee hit McMorris, bloodying him and knocking him to the ground. Defendant intervened, grabbed his brother, and pulled him up.

What happened next was the subject of much discussion at trial.

Walton testified that YAH Squad member Jesus Hernandez yelled at defendant, "Fuck that, JR [(meaning defendant)]. He [(meaning McMorris)] got put on by four people." Walton testified this meant that because four people had jumped in McMorris, four people had to jump him out. In response, defendant said, "Fuck you." He walked over to Hernandez and took a swing at him. According to Walton, another Pueblo Bishop member grabbed defendant and told him to calm down. Walton heard a gunshot from behind, ducked, and then took off running. As he ran he heard more gunshots. He estimated he heard a total of seven or eight shots.

McMorris testified that as Hernandez came near the fight, defendant tried to stop Hernandez and swung at him. McMorris saw Littleton, who had been leaning on a brick wall nearby, pull out a gun and start shooting. He saw the flash from the muzzle. McMorris hopped a fence and began running. Walton and Session also started running.

Demontre testified that several YAH Squad members came at McMorris after McMorris approached the group. He said that all of them struck McMorris, who attempted to fight back. With McMorris on the ground, Demontre heard defendant say, "Fuck this shit." He saw defendant pull out a gun from his pants and point it at several people. Demontre saw Littleton and Tovey

respond by each pulling out a gun. As he dropped to the grass, Demontre heard several gunshots. He ran away, observing others also fleeing the scene.

Julian McKee told investigators that he did not see who fired the shots, but that once the shooting started he saw defendant with a handgun. He said that defendant was not the shooter, and that the other group did the shooting.

Hunt died at the scene after being shot four times. McCarthy was shot twice and died later at the hospital. Police investigators recovered two guns, five expended nine-millimeter bullet casings, and two expended .40-caliber casings. The bullets recovered from Hunt's body were nine millimeter; the single bullet recovered from McCarthy's body had the "weight and appearance" of a nine-millimeter bullet.

The evidence did not make clear who fired the fatal shots. The prosecutor's theory at trial was that Littleton fired the fatal shots.

The prosecutor charged defendant and several others with various crimes arising out of these events, including the murders of McCarthy and Hunt. Although defendant had several codefendants at trial, only he is involved in this appeal. The prosecution's theory was that defendant was guilty of the murders as an aider and abettor of those who actually shot the victims.

A jury found defendant guilty of the second degree murders of McCarthy and Hunt and of one count of active participation in a criminal street gang. (PEN. CODE, §§ 187, subd. (a), 186.22, subd. (a).) It found true an allegation that the murders were committed for the benefit of, at the direction of, or in association with a criminal street gang. (PEN. CODE, § 186.22, subd. (b)(1).)

The Court of Appeal ... affirmed the murder convictions. We granted defendant's petition for review limited to the question of whether he was properly convicted of murder under the natural and probable consequence theory of aiding and abetting.

II. DISCUSSION

Defendant was charged with, and convicted of, McCarthy's and Hunt's murders not on the theory that he actually shot them, but on the theory that he aided and abetted the person or persons who did.

"Penal Code section 31, which governs aider and abettor liability, provides in relevant part, 'All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission ... are principals in any crime so committed.' An aider and abettor is one who acts 'with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' (*People v. Beeman* (1984) 35 Cal.3d 547, 560 [199 Cal. Rptr. 60, 674 P.2d 1318].)" (*People v. Chiu* (2014) 59 Cal.4th 155, 161 [172 Cal. Rptr. 3d 438, 325 P.3d 972], fn. omitted.) "[A] person who aids and abets the commission of a crime is a 'principal' in the crime, and thus shares the guilt of the actual perpetrator." (*People v. Prettyman* (1996) 14 Cal.4th 248, 259 [58 Cal. Rptr. 2d 827, 926 P.2d 1013] (*Prettyman*)).

An aider and abettor is guilty not only of the intended, or target, crime but also of any other crime a principal in the target crime actually commits (the nontarget crime) that is a natural and

probable consequence of the target crime. "Thus, for example, if a person aids and abets only an intended assault, but a murder results, that person may be guilty of that murder, even if unintended, if it is a natural and probable consequence of the intended assault." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117 [108 Cal. Rptr. 2d 188, 24 P.3d 1210].)

A consequence that is reasonably foreseeable is a natural and probable consequence under this doctrine. "A nontarget offense is a "'natural and probable consequence'" of the target offense if, judged objectively, the additional offense was reasonably foreseeable. [(*People v. Medina* (2009) 46 Cal.4th 913, 920 [95 Cal. Rptr. 3d 202, 209 P.3d 105].)] The inquiry does not depend on whether the aider and abettor actually foresaw the nontarget offense. (*Ibid.*) Rather, liability "'is measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted.'" (*Ibid.*) Reasonable foreseeability 'is a factual issue to be resolved by the jury.' (*Id.* at p. 920.)"

Even though the murder victims were defendant's cousin and a friend, and no doubt he never intended their deaths, he was convicted of their murders under this natural and probable consequence doctrine. The prosecution's theory was that, although defendant, a Gateway Posse member, and members of the rival Pueblo Bishop gang (including the actual gunmen) were normally enemies, they cooperated in staging the jump out and, in so doing, aided and abetted each other in committing the target crimes of disturbing the peace and assault or battery. The prosecutor argued that during the commission of the target crimes, a principal in those crimes (a member of Pueblo Bishop) committed the murders, and the murders were the natural and probable consequence of the target crimes....

Defendant contends the natural and probable consequence doctrine was misapplied in this case. He argues that not all principals in the target crime may be guilty of nontarget crimes, but only some. Specifically, he argues that "the English common law, as incorporated in Penal Code section 31, would not extend accessory liability to the acts of a person who was not directly aided and abetted by the accessory." We disagree. The law provides no distinction between those principals who directly, and those who indirectly, aid and abet the perpetrator who commits the nontarget crime....

The statutes and, accordingly, the natural and probable consequence doctrine, do not distinguish among principals on the basis of whether they directly or indirectly aided and abetted the target crime, or whether they directly or indirectly aided and abetted the perpetrator of the nontarget crime. An aider and abettor of the target crime is guilty of any crime that any principal in that target crime commits if it was a natural and probable, i.e., reasonably foreseeable, consequence of the target crime....

To establish aiding and abetting liability under the natural and probable consequence doctrine, the prosecution must prove the nontarget offense was reasonably foreseeable; it need not additionally prove the nontarget offense was not committed for a reason independent of the common plan to commit the target offense....

Defendant contends the evidence was insufficient because the jury could not determine for sure who committed the two murders. The prosecution theory was that Littleton was the killer. But exactly who shot and killed the two victims was not entirely clear. There was evidence that

both Littleton and Tovey possessed guns and fired shots. It was not certain which gun Littleton used and which gun Tovey used. But any such uncertainty did not matter as long as the jury unanimously agreed, as to each killing, that, whoever the actual gunman was, that gunman both committed murder, i.e., killed a human being with malice (PEN. CODE, § 187), and was a principal in the target crimes. If the jury made those findings and also found that defendant aided and abetted the commission of the target crimes, and the murders were a natural and probable consequence of the target crimes, it could convict defendant of the murders despite uncertainty as to who exactly the killer was....

[T]he evidence supported the jury's finding that the murders were the natural and probable consequences of the target offenses of disturbing the peace and assault or battery. Members of Pueblo Bishop were known to carry guns and use them against rival gangs, including Gateway Posse. A few days before the jump out, defendant flashed a gang sign and threatened to kill members of the YAH Squad "over [his] brother." He also told YAH Squad and Pueblo Bishop members that he was going to bring some of his "homies" to ensure the jump out did not escalate. Defendant brought a gun to and helped establish the rules of the jump out. Rival Crips and Blood gang members both attended and participated in the jump out and were thus in close proximity to each other. Defendant did in fact bring fellow gang members to act as backup in case things got out of hand. There was also evidence that during the jump out itself, defendant pulled out his gun and pointed it at several people. Under these circumstances, a reasonable jury could find that the murders were a very foreseeable consequence of the jump out that defendant aided and abetted.

III. CONCLUSION

We affirm the judgment of the Court of Appeal.

[Separate opinion by Liu omitted]

Discussion Questions and Notes

- 1) Since courts have the benefit of hindsight, some contend that they are more apt to find the specific facts of a case to be reasonably foreseeable? Do you agree?
- 2) Is the court saying that someone dying in any gang-related crime is always reasonably foreseeable? Or are there situations where a death would not be foreseeable enough to meet the Rule of Natural and Probable Consequences?

B. MPC Approach

The MPC uses purpose as the *mens rea* for accomplice liability. The following opinion shows how the high Alaska court transitioned from applying the common law approach to “purpose” as required by Alaska’s adoption of the MPC.

Riley v. Alaska, 60 P.3d 204 (Alaska Ct. App. 2002)

MANNHEIMER, Judge.

Richard L. Riley and another man, Edward F. Portalla, opened fire on an unsuspecting crowd of young people who were socializing around a bonfire on the Tanana River near Fairbanks. Two of the young people were seriously wounded. Riley and Portalla were indicted on two counts of first-degree assault (recklessly causing serious physical injury by means of a dangerous instrument) and six counts of third-degree assault (recklessly placing another person in fear of imminent serious physical injury by means of a dangerous instrument). Riley was ultimately convicted of all eight charges. In this appeal, Riley challenges his two convictions for first-degree assault.

The State faced a problem in prosecuting Riley and Portalla for first-degree assault: the physical evidence (in particular, the ballistics analysis) did not reveal which of the defendants’ weapons had fired the wounding shots. The bullet recovered from the body of one victim was so deformed that it could not be matched to either Riley’s or Portalla’s weapon, and the bullet that wounded the other victim passed through the victim’s body and was never recovered. Thus, with respect to each victim, the State could prove that the wound was inflicted by one of the two defendants, but the State could not easily prove which one.

At the close of Riley’s trial, the jurors were instructed that, with regard to each count of first-degree assault, they should decide whether Riley acted as a “principal” (i.e., by firing the wounding shot) or, if they could not decide beyond a reasonable doubt which man fired the shots, they should decide whether Riley acted as an “accomplice” (i.e., by aiding or abetting Portalla to fire the wounding shot). The jurors found Riley guilty as an accomplice in the wounding of both victims.

In *Echols v. State*, 818 P.2d 691 (Alaska App. 1991), this Court addressed a situation where a wife was charged as an accomplice to first-degree assault committed by her husband. The State’s evidence showed that the defendant summoned her husband to discipline their child, then stood by and watched while the husband inflicted serious physical injury on the child by whipping her with an electric cord. The question was whether the wife’s conduct was sufficient to establish her accountability as an accomplice to the assault.

The underlying crime of first-degree assault required proof that the principal (i.e., the husband) acted recklessly with respect to the result (i.e., the infliction of serious physical injury). The State argued that the wife could be convicted as an accomplice to the first-degree assault because (1)

she solicited her husband to discipline the child and (2) she acted with the culpable mental state required for the crime – i.e., she acted recklessly with respect to the possibility that the beating would result in serious physical injury to the child.

But this Court held that the wife's complicity could not be premised on recklessness. Rather, we held that the wife could be held accountable as an accomplice to the first-degree assault only if the State proved that she acted intentionally with respect to the prohibited result – i.e., that her conscious objective was to have the child suffer serious physical injury.

In the present appeal, Riley relies on *Echols*. He contends that his jury instruction on accomplice liability was flawed because it failed to clearly inform the jurors that the State was obliged to prove that Riley intended to have Portalla inflict serious physical injury on the victims (and not simply that Riley acted recklessly with respect to the possibility that Portalla's conduct would cause this result).

[T]he State asks us to re-examine our holding in *Echols*. We have done so and, for the reasons explained here, we conclude that we misstated the law of complicity in *Echols*.

We were wrong when we said in *Echols* that liability for assault or criminal homicide under a complicity theory always requires proof that the defendant intended to cause the injury or the death, even though the underlying crime requires proof of only a lesser culpable mental state (extreme indifference to the value of human life, recklessness, or criminal negligence). When a defendant solicits, encourages, or assists another to engage in conduct, and does so with the intent to promote or facilitate that conduct, the defendant becomes accountable under AS 11.16.110(2) for that conduct. If that conduct leads to unintended injury or death, the defendant can be convicted of assault or criminal homicide if the government additionally proves that the defendant acted with the culpable mental state required for the charged crime.

Thus, to establish Riley's guilt of first-degree assault in the present case, the State did not have to prove that Riley acted with the intention of causing serious physical injury. Rather, the State had to prove that Riley acted recklessly with respect to the possibility that serious physical injury would be inflicted on another person through (1) Riley's own conduct or (2) the conduct of another for which Riley was accountable under AS 11.16.110. And, to prove that Riley was accountable for Portalla's conduct under AS 11.16.110(2), the State had to prove (1) that Riley solicited, encouraged, or assisted Portalla's act of shooting at the victims, and (2) that Riley did so with the intent to promote or facilitate this conduct.

To summarize: when two or more people are jointly accountable for conduct under Alaska's complicity statute, and if, on the basis of that conduct, they are charged with a crime that is defined in terms of an unintended injury or death (i.e., an injury or death for which the accompanying culpable mental state is something other than "intentionally"), that same culpable mental state – whether it be "extreme indifference to the value of human life", "recklessness", or "criminal negligence" – applies to the State's prosecution of all participants, whether they acted as principals or accomplices, and regardless of whether the resulting injury or death can be linked beyond a reasonable doubt to a particular defendant's conduct...

For example, let us assume that Riley and Portalla engaged in the same conduct (jointly firing weapons into a crowd) but, through misfortune, one of their victims was killed. Let us further assume that the State believed that it was impossible to prove, beyond a reasonable doubt, that

this death was intended, so the State charged both defendants with manslaughter. And finally, let us assume that the evidence linking the homicide to either Riley's or Portalla's personal conduct was so inconclusive that it was impossible to say, beyond a reasonable doubt, which of them was the principal and which the accomplice.

Under the rule of *Echols*, neither Riley nor Portalla can be convicted of manslaughter in this hypothetical situation. The State can prove that both defendants acted recklessly with respect to the possibility that their conduct would cause human death, and this culpable mental state would be sufficient to establish the principal's guilt of manslaughter. But the State can not prove (beyond a reasonable doubt) which of the defendants was the principal. This means that the State will have to prove both defendants' guilt under a complicity theory. And *Echols* holds that, to prove guilt under a complicity theory, the State has to prove that the defendants acted with the intent to kill. In effect, *Echols* says that, under these circumstances, the State has to prove the defendants guilty of first-degree murder (intentional taking of human life) or the defendants will escape criminal liability for the homicide....

Echols has not found favor among legal scholars. And, indeed, *Echols* represents a distinctly minority view on this issue.

This is not to say that other states impose accomplice liability without proof of *mens rea*. Quite the opposite. It is universally acknowledged that accomplice liability can not be based solely on the fact that a person's words or actions had the effect of encouraging or assisting another to commit a crime. The government must also prove, at a minimum, that the accomplice provided the encouragement or assistance with knowledge of the other person's criminal design. Many common-law decisions and many complicity statutes (such as Alaska's) require the government to prove, not only that the defendant knew of the other person's criminal design, but also that the defendant intended to further that criminal design....

But here we reach the critical question: If a defendant provides aid or encouragement to another, acting not only with knowledge of the other person's intention to engage in unlawful or dangerous conduct, but also with the intent to promote or facilitate that unlawful or dangerous conduct, can the defendant be held accountable as an accomplice for a crime arising from the unintended consequences of that conduct? At common law, the answer is "yes".

The rule at common law is that when a person purposely assists or encourages another person to engage in conduct that is dangerous to human life or safety, and unintended injury or death results, it does not matter which person actually caused the injury or death by their personal conduct. Any participant can be convicted of assault or manslaughter (or any similar crime involving proof of an unintended result) so long as the government can prove that the participant acted with the culpable mental state required for the underlying crime – "recklessness", "criminal negligence", "extreme indifference to the value of human life", etc..

For example, "those present at an unlawful fist fight [who] encourage continued blows by shouts or gestures ... will be guilty of manslaughter if death should ensue."

....

Similarly, if two drivers engage in an unlawful race on a public highway, thus encouraging each other to drive recklessly, both will be guilty of manslaughter if one of them strikes and kills a third person.

And courts applying the common law frequently hold that a person who knowingly allows and encourages an intoxicated person to drive a car can be held liable as an accomplice to manslaughter if the intoxicated person kills someone....

Another example of the common-law rule of complicity is *Black v. State*, 103 Ohio St. 434, 133 N.E. 795, 19 Ohio L. Rep. 423 (Ohio 1921), a case in which several police officers decided to test their marksmanship by shooting at a target at the back of a saloon. One of the shots (it was impossible to tell which one) passed through the saloon wall and killed a passerby. The Ohio Supreme Court ruled that all of the participating officers were criminally responsible for the unintended death....

Alaska's complicity statute is based on Model Penal Code § 2.06(3). This section reads:

- A person is an accomplice of another person in the commission of an offense if:
- (a) with the purpose of promoting or facilitating the commission of the offense, he
 - (i) solicits [the] other person to commit it, or
 - (ii) aids or agrees or attempts to aid [the] other person in planning or committing it,
 - or
 - (iii) having a legal duty to prevent the commission of the offense, fails to make proper effort to do so[.]

In the Model Penal Code, this provision is immediately followed by § 2.06(4), a section which addresses the legal issue at the heart of this appeal: the culpable mental state required to establish a person's complicity in an offense involving a particular prohibited result. Section 2.06(4) reads:

When causing a particular result is an element of an offense, an accomplice in the conduct causing [that] result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense....

One of the primary aims of the Model Penal Code's approach to accomplice liability was to leave behind the common-law concepts of principals and accessories, and to have a person's criminal liability rest on conduct – either conduct that they performed personally or conduct of another person for which they can be held accountable under the various complicity provisions of § 2.06....

When we examine court decisions from states that have complicity statutes modeled after § 2.06(3) of the Model Penal Code (statutes requiring that an accomplice act with the "intent" or the "purpose" of promoting or facilitating the offense), we find that the great majority have rejected [the] suggestion that this phrase precludes accomplice liability unless the government proves that the defendant intended to cause the prohibited result. Instead, these states have interpreted their statutes in conformity with the Model Penal Code commentary....

In particular, with respect to offenses that involve a resulting injury or death, these courts hold that accomplice liability requires proof (1) that the accomplice intended to promote or facilitate another's unlawful or dangerous conduct, and (2) that the accomplice acted with the culpable mental state specified in the underlying statute with respect to the resulting injury or death. Thus, these courts uphold accomplices' convictions for unintended criminal homicides – e.g., "extreme indifference" murder or reckless manslaughter – based on proof that the accomplice, acting with the culpable mental state required for the underlying crime, purposely encouraged or aided

another person to engage in conduct that posed a substantial and unjustifiable danger to human life.

For example, the Alabama case of *Ex Parte Simmons*, 649 So. 2d 1282 (Ala. 1994), involved a fact situation quite similar to the facts of Riley's case. The defendant, Simmons, was one of a group of men who recklessly fired weapons toward a crowd of people. A three-year-old child was struck by a bullet and killed. The State's expert witness testified that the fatal bullet "could have been fired from any of the revolvers and semi-automatic pistols that were used in the shoot-out". That is, "it could not be determined ... which of the men fired the fatal shot."

Because the government could not prove which of the men fired the fatal shot, the government prosecuted Simmons for "reckless murder" under a theory of accomplice liability. (The Alabama crime of "reckless murder" is the equivalent of second-degree murder under AS 11.41.110(a)(3): that is, Simmons was convicted of killing another person while engaged in conduct "manifesting extreme indifference to human life".) The government's theory was that Simmons purposely encouraged or aided the reckless conduct that resulted in the death of the child.

The Alabama Court of Criminal Appeals reversed Simmons's conviction. Essentially, the appeals court adopted the same reasoning that this Court adopted in *Echols*: a person can not "intend[] to promote or assist the commission of reckless conduct". But the Alabama Supreme Court disagreed and reinstated Simmons's the murder conviction....

....

In the instant case, even if it is assumed that defendant did not inflict the fatal blows on James, she admitted that she did hit James in the head, beat him with a belt, and inflicted other forms of abuse on him. Furthermore, she was aware of the severity of the beatings inflicted on James by Keith Novy. She told the police on December 2, 1989 that just two weeks before James' death, Keith struck the two children's heads together so hard that defendant heard it in the kitchen. It was after this that James began to show signs of severe head injury. Defendant was also aware that Keith had at least threatened James with a baseball bat, and it is not an unreasonable inference from all the evidence that Keith hit James in the head with the bat and defendant knew this. Defendant was well aware of the severity of James' injuries. Despite this, defendant continued to associate with Keith Novy, she did not inform the authorities of the batteries upon James, despite numerous opportunities to do so, and she even concealed the evidence of the offense by making excuses for James' injuries and absences. We think that the evidence is sufficient to support a finding of a common design to batter the victim and that a [reckless murder] conviction based upon a theory of accountability is supported by the evidence....

Alaska's complicity statute, AS 11.16.110(2), is based on Model Penal Code § 2.06(3). It specifies that a person can be held accountable for the conduct of another if the person (1) solicits that conduct, encourages the conduct, or assists in planning or performing the conduct, and (2) when doing so, the person acts "with intent to promote or facilitate the commission of the offense". The task facing this Court in *Echols* was to interpret what the drafters of Alaska's Criminal Code meant by "the offense". Do these words refer to the accomplice's intent to promote or facilitate the other person's conduct? Or do these words refer to the accomplice's intent to promote or facilitate the other person's conduct and ensuing result? We ultimately adopted the latter interpretation in *Echols* – concluding that whenever the elements of an offense include a particular result, a person

can not be convicted as an accomplice to that offense unless they consciously intended to achieve that result. Our decision in *Echols* rests on two foundations....

In conclusion: The Model Penal Code was written to impose accomplice liability for crimes involving unintended injury or death if the accomplice intentionally promotes or facilitates the conduct that produces the injury or death, even though the accomplice did not intend this result. Among the states that have complicity statutes based on the Model Penal Code, most courts have interpreted their statutes this way. The reasons that we gave in *Echols* for interpreting AS 11.16.110(2) differently do not withstand analysis. Accordingly, we now overrule our decision in *Echols*. When AS 11.16.110(2) speaks of a person's "intent to promote or facilitate the commission of the offense", this phrase means that the accomplice must act with the intent to promote or facilitate the conduct that constitutes the *actus reus* of the offense. With respect to offenses that require proof of a particular result, the government must prove that the accomplice acted with the culpable mental state that applies to that result, as specified in the underlying statute.

Thus, Riley could properly be convicted of first-degree assault under AS 11.41.200(a)(1) either upon proof that he personally shot a firearm into the crowd or (alternatively) upon proof that, acting with intent to promote or facilitate Portalla's act of shooting into the crowd, Riley solicited, encouraged, or assisted Portalla to do so. These are alternative ways of proving that Riley was accountable for the conduct that inflicted the injuries. The government was also obliged to prove that Riley acted with the culpable mental state specified by the first-degree assault statute. But regardless of whether Riley acted as a principal or an accomplice, the applicable culpable mental state remained the same: recklessness as to the possibility that this conduct would cause serious physical injury.

Because Riley's jury was instructed in accordance with *Echols*, they were asked to decide whether the State met a higher burden: proof that Riley intended to inflict serious physical injury. The jury's verdict that Riley acted intentionally with respect to this result is sufficient to establish Riley's guilt under the true standard, "recklessly". See AS 11.81.610(c): "If recklessly suffices to establish an element, that element also is established if a person acts intentionally or knowingly."

For these reasons, we affirm Riley's two convictions for first-degree assault.

Discussion Questions and Notes

- 1) The case illustrates how the MPC precludes finding a defendant guilty through accomplice liability with the *mens rea* of recklessness. What are the benefits and drawbacks to such an approach?

The following case demonstrates how the MPC purpose rule does not explicitly address situations when an accomplice has purpose toward the facilitating act, but there are special *mens rea* rules for the substantive crime.

Pennsylvania v. Roebuck, 32 A.3d 613 (Pa. 2011)

MR. JUSTICE SAYLOR

In this appeal, we consider whether it is possible, as a matter of law, to be convicted as an accomplice to third-degree murder.

The complete factual background is somewhat cumbersome. For present purposes, it is enough to say the Commonwealth presented evidence that the victim was lured to an apartment complex, where he was ambushed, shot, and mortally wounded. Appellant participated, with others, in orchestrating the events, but he did not shoot the victim....

For his role, Appellant was charged with, among other offenses, murder of the third degree. As he did not physically perpetrate the homicide... The matter proceeded to a bench trial, and a verdict of guilt ensued.

On appeal, Appellant argued that there is no rational legal theory to support accomplice liability for third-degree murder. He rested his position on the following syllogism: accomplice liability attaches only where the defendant intends to facilitate or promote an underlying offense; third-degree murder is an unintentional killing committed with malice; therefore, to adjudge a criminal defendant guilty of third-degree murder as an accomplice would be to accept that the accused intended to aid an unintentional act, which is a logical impossibility....

The legal accountability of accomplices for the conduct of others is treated in 2.06 of the Code.... Two material passages follow, developing the meaning of the term “accomplice” and the requisite *mens rea*, as relevant to the present case:

(3) A person is an accomplice of another person in the commission of an offense if ... with the purpose of promoting or facilitating the commission of the offense, he ... aids or agrees or attempts to aid such other person in planning or committing it[.]

(4) When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.

Section 2.06(4) thus prescribes that an accomplice may be held legally accountable where he is an “accomplice in the conduct” – or, in other words, aids another in planning or committing the conduct with the purpose of promoting or facilitating it – and acts with recklessness (i.e., the “kind of culpability ... sufficient for the commission of” a reckless-result offense).

To the extent any aspect of this accountability scheme is unclear, ample clarification is provided in the explanatory note and commentary. As a threshold matter, the commentary explains that the term “commission of the offense,” as used in Section 2.06(3), focuses on the conduct, not the result. This diffuses any impression that an accomplice must always intend results essential to the completed crime. The commentary then points to the fourth subsection as supplying the essential culpability requirement, as follows:

One who solicits an end, or aids or agrees to aid in its achievement, is an accomplice in whatever means may be employed, insofar as they constitute or commit an offense fairly envisaged in the purposes of the association. But when a wholly different crime has been committed, thus involving conduct not within the conscious objectives of the accomplice, he is not liable for it unless the case falls within the specific terms of Subsection (4).

According to the commentary, the purport of the fourth subsection is to hold the accomplice accountable for contributing to the conduct to the degree his culpability equals what is required to support liability of a principal actor....

For the above reasons, at least under the regime of the Model Penal Code, holding an accomplice criminally liable for a result requiring a mental state of recklessness is not theoretically impossible, as Appellant asserts. To the contrary, it is precisely the norm....

As Appellant indicates (albeit lacking the above elaboration), Section 306 of the Pennsylvania Crimes Code derives from the Model Penal Code. Furthermore, the provisions of the Crimes Code establishing legal accountability for accomplice conduct are materially identical to the corresponding terms of Section 2.06 of the MPC in all relevant respects.

We recognize that the Crimes Code does not contain the wealth of collateral explanatory material which accompanies the Model Penal Code, including the latter's extensive notes and commentaries. Nevertheless, we believe the text of the Pennsylvania statute is clear enough. In terms identical to those of Section 2.06 of the MPC, Section 306(d) of the Crimes Code directs the focus, for result-based elements, to the level of culpability required of a principal. In the present factual scenario, the purport is to avoid elevating a recklessness-oriented culpability requirement to a purposeful one relative to an accomplice. The policy basis for such treatment is readily discernable, and a homicide committed with the degree of recklessness predicate to murder provides a paradigmatic example.

Appellant's position garners its only ostensible strength from his attempt to read Section 306(c) in isolation. We are obliged, however, to read statutes in a manner giving effect to all of their provisions which, in the present case, includes Section 306(d). Moreover, to the extent there is any tension between Sections 306(c) and (d), the latter is the more specific term relative to offenses containing result-based elements; therefore, it controls....

In light of the above, it is apparent that the first premise of Appellant's impossibility syllogism embodies the erroneous proposition that the culpability requirement for accomplice liability is necessarily tied to a result (here, the killing). Again, Section 306(d) provides differently. The statute's reach simply is not confined to substantive crimes requiring a specific intention to bring about a particular result. For offenses where a principal actor need not intend the result, it is also not necessary for the accomplice to do so....

In summary, a conviction for murder of the third degree is supportable under complicity theory where the Commonwealth proves the accomplice acted with the culpable mental state required of a principal actor, namely, malice. In other words, the Pennsylvania Crimes Code legally, logically, and rationally imposes accomplice liability for depraved heart murder.

Discussion Questions and Notes

- 1) Pennsylvania embodies a very real problem with distinguishing between the MPC and common law approach: no jurisdiction wholly adopted the MPC. As a result, the portions of the MPC that were adopted run into problems when integrated with common law traditions. Do you think this court handled the particular problem of depraved heart murder (which we will explore further in a later chapter) well?

Review Exercise 1

Watch [this film clip](#) and answer these questions:

After the scene shown, Jack Foley and Buddy Bragg commit attempted grand larceny. Karen Sisco is charged as an accomplice.

How do we evaluate the charges under common law (*mens rea* and *actus reus*)? Under the MPC?

If Foley and Bragg are never caught, can Sisco be charged under common law? Under the MPC?

Review Exercise 2

Watch [this film clip](#) and apply the following statute to Dante (the one who does not sell the cigarettes) under an MPC and common law approach to complicity:

18 Pa.C.S. § 6305: "a person is guilty of a summary offense if the person ... sells a tobacco product to any minor..."

Review Exercise 3

Watch [this film clip](#) and answer these questions:

Are the two unarmed defendants liable for the homicide committed by their friend in a common law jurisdiction using the rule of natural and probable consequences? A common law jurisdiction using a specific intent standard? An MPC jurisdiction?

CHAPTER 7: CONSPIRACY LIABILITY

Conspiracy law serves two functions: 1) it is an inchoate crime, like attempt; and 2) it is a means of holding one person liable for the conduct of another, like accomplice liability. It is because conspiracy liability is used in both roles that some legal oddities emerge. It is fair to say that understanding conspiracy, in most United States jurisdictions, is essential to navigating the modern criminal justice system. Conspiracy law is a prosecutor's best friend when an alleged crime includes at least two actors. Unlike accomplice liability, conspiracy always requires a separate charge.

The purposes of conspiracy and criminal law have changed over time. This essay highlights the historical motivations of punishing conspiracy under criminal law and how its expansive modern formulation is, in part, a product of its odd historical origins.

Francis B. Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393 (1922)

The origin of the crime of conspiracy goes back to the very early pages of the history of our common law.... [T]he famous Third Ordinance of Conspirators, passed in 1304, [] in certain respects summed up the pre-existing law and gave a precise definition of conspiracy.... During the seventeenth century the courts took a [] step in extending and broadening the limits of the crime of conspiracy... Prior to this century, the crime had been confined very strictly to combinations to defeat the just administration of the law, such as the procuring of false indictments, embracery, and maintenance. During the seventeenth century the courts began to extend the offense so as to cover combinations to commit all crimes of whatsoever nature, misdemeanors as well as felonies.

In Christian's edition of *Blackstone's Commentaries*, it is said: "Every confederacy to injure individuals, or to do acts which are unlawful, or prejudicial to the community, is a conspiracy." A reincarnation of the doctrine took form in Lord Denman's famous epigram that a conspiracy indictment must "charge a conspiracy either to do an unlawful act or a lawfulact by unlawful means."

Like the magic jingle in some fairy tale, through whose potency the bewitched adventurer is delivered from all his troubles, this famous formula was seized upon by judges laboring bewildered through the mazes of the conspiracy cases as a ready solution for all their difficulties. It would fit any conspiracy case whatever; it was, so to speak, ready to wear, and obviated the necessity of carefully thinking through or correctly analyzing the doctrine of conspiracy. As a consequence, judges gave to it the widest use....

Perhaps enough has been said to make it evident that it is high time to abandon the prevalent and often repeated idea that mere combination in itself can add criminality or illegality to acts otherwise free from them. Such a doctrine grew out of an historical mistake, and has no real basis in our law. It is logically unsound and indefensible. Moreover, it is dangerous. It tends to rob the law of predicability, and to make justice depend too often upon the chance prejudices and

convictions of individual judges. It has tended to make the law chaotic and formless in precisely those situations where the salvation of our troubled times most demands a precise and understandable law.... It is a doctrine which has proved itself the evil genius of our law wherever it has touched it.

I. Act Requirements

There are two possible act requirements for conspiracy: an agreement and an overt act. The MPC requires an overt act in furtherance of the conspiracy and some common law jurisdictions do as well. However, the overt act requirement, when it is applicable, is generally far less limiting than the overt act requirement for attempted crimes.

The following case shows the outer boundary of inferring an agreement in a jurisdiction without an overt act requirement.

Mondello v. Wyoming, 843 P.2d 1152 (Wyo. 1992)

CARDINE, Justice.

This is a conspiracy to sell drugs case in which there was no evidence that Giuseppe Mondello, a/k/a Joe Mondello (Mondello) and Mark Charles Jones (Jones) ever sold any drugs to anybody. There was no drug distribution ring. There was no one in the business of selling narcotics except the State's informant. Over a period of one and a half years, Mondello did no more than give money or pay money to buy drugs for himself. The case was made by a drug dealer who, in exchange for testifying to an agreement with Mondello and Jones to sell drugs, avoided prosecution for his acknowledged crime.

In this consolidated appeal, Jones and Mondello appeal their convictions for conspiracy to deliver controlled substances, marijuana and cocaine. Proof of intent was established by evidence of a reverse sting operation mounted by police officers in which they sold one, but delivered two, ounces of cocaine to Mondello. The jury, being unable to agree, refused to convict Mondello of possession of cocaine with intent to distribute but convicted appellants of agreeing to sell cocaine and marijuana.

We reverse both convictions....

The relevant facts of this case begin with a deal made around Thanksgiving 1988. Mondello gave a man named Ronnie Lee (Lee) \$1,300.00 to obtain an ounce of cocaine for him. Lee, in turn, gave the money to a source named Dara Kenney. Lee never saw Dara Kenney, any cocaine, or the money again.

Mondello was angered at Lee, who he held responsible for the loss. He subsequently paid several visits to Lee's house to demand repayment of the \$1,300.00. On one of these visits, Mondello brought along a "friend" who Lee estimated was six feet tall or more and weighed 300 pounds. On another visit, Mondello told Lee that he could place a call "East" and arrange to "get guns" or have arms broken. Lee became frightened because he had no way to repay the money, so he went to the police.

Lee was introduced to Officer Glick, a deputy sheriff on special assignment to work narcotics. It was agreed that Glick would pose as the person who was given Mondello's money. Glick and Lee met Mondello at Lee's residence, where Glick used the alias "Mike Melvin." Glick promised to repay Mondello the \$1,300.00 Lee owed him in exchange for Mondello letting Lee "off the hook." Glick paid Mondello \$300.00 from state confiscated funds at that time. Over the next few weeks, Glick paid Mondello another \$700.00, leaving \$300.00 due.

Eight months later, during June 1989, Glick was reassigned by the sheriff's department, and his special assignment duties with narcotics came to an end. Essentially all that transpired during the eight-month period was repayment to Mondello of \$1,000.00 by the State. The Mondello case sat dormant for the next year, or until June of 1990, when appellants Jones and Mondello met with a drug dealer named Chris Bascus (Bascus) at Bascus' home. Jones told Bascus that Mondello was looking for someone to get Mondello cocaine. Mondello wanted a supplier who could furnish him with an "eight ball" every other day. (An "eight ball" is 3 ½ grams of cocaine. An ounce contains forty-eight grams.)

Bascus, unknown to Mondello and Jones, had been arrested for selling cocaine and had turned informant for the government, i.e., cut a deal in which he would make a case against Mondello and avoid prosecution for his own crime. He testified at trial that the deal Mondello offered was to give Bascus \$1,350.00 to buy an ounce of cocaine. Bascus was then to sell the cocaine and use the profits to buy more cocaine. Mondello would take back his stake in the form of either "an eight ball a week" for his personal use, or in cash. Bascus further testified that Mondello suggested that Bascus invest in and sell marijuana to build up his money supply faster. Bascus testified that Mondello was not interested in marijuana for his personal use, only cocaine. The plan also called for Jones to help sell whatever Mondello did not use. It was Bascus' testimony about this plan which formed the alleged conspiracy of which Mondello and Jones were convicted.

Bascus informed the police of details of the plan. He then made a recorded telephone call to Mondello for the police department on June 12, 1990. Bascus told Mondello that "Mike" (Officer Glick) was back in Cheyenne and had "four big ones" (four ounces of cocaine) for Mondello. Mondello could pay for two ounces and would be "fronted" the other two to sell. Mike would set off the \$300.00 still owed to Mondello against the price of the cocaine. Bascus told Mondello that Mike would only agree to front to Mondello, not Bascus, because Mike and Mondello knew each other. Bascus tried to arrange a rendezvous at the Flying J truck stop, but Mondello said he had to work and agreed only to have Jones call Bascus if he arrived that day.

Bascus managed to reach Jones at home that same afternoon. Bascus was still calling from the tapped phone. The transcript of this conversation shows that Jones thought Mondello would be reluctant to go along with Bascus' plan. Bascus described Mike's offer of the four ounces of cocaine. Jones told Bascus that Mondello would not want to buy even two ounces. Bascus offered to chip in another \$700.00 so that Mondello could buy two ounces. Jones told Bascus that

Mondello only wanted "what he wants * * *. He don't even want to have nothing extra or nothing." Jones said Mondello was "just going to wait till somebody keeps getting 8ths, or more so he could, 'cause that is what he wants * * *." Jones finally said he was willing to "go [along] for the ride," but he had to check it out with Mondello.

Bascus again reached Jones later that day. Jones indicated that Mondello wanted Jones to go to meet Mike at the Flying J truck stop. However, Jones did not have access to a car. Bascus agreed to give Jones a ride. While they were travelling in Bascus' car, Bascus and Jones discussed Mike's offer again. Jones told Bascus that, although he wanted all four ounces, it was up to Mondello whether the transaction would be made because Mondello had the money. (This conversation was apparently not recorded.)

Bascus and Jones ended up at Parkway Pizza, the business owned by Mondello and his wife. They were unable to discuss the drug transaction in detail because Mondello's wife was present. However, Jones later told Bascus that, during the visit to Parkway Pizza, Mondello gave Jones a total of \$1,000.00 to buy cocaine: \$300.00 from the [] cash register and \$700.00 he had concealed in his sock.

Jones and Bascus proceeded to the Time Out, a video arcade. On the way, they had a conversation concerning cocaine. Bascus was wearing a body mike, but the sound quality was so poor, the tape was not played for the jury except to demonstrate the poor sound quality. Neither Mondello nor Jones met with Mike (Officer Glick) that day.

Later in the afternoon, Bascus placed a recorded call to Jones and informed him that Mike (Officer Glick) was not able to meet with them that day because it was raining and hailing in Denver, and Mike could not ride his motorcycle in the rain up to meet them. Bascus told Jones that he had instructed Mike to call Mondello. Jones remarked that "I don't think he [Mondello] will want it." Jones asked Bascus about "another place" where Bascus could obtain an ounce of cocaine. Bascus said he would try.

Officer Glick, again posing as Mike Melvin, called Mondello at 4:30 p.m. that afternoon to apologize for not being able to make the delivery. Mike (Officer Glick) told Mondello that it had rained and that he was stuck in Denver because he could not ride his motorcycle safely in the rain. Mondello and Glick talked in coded language because of Mondello's (justified!) fear that his phone might be tapped. Glick suggested Mondello take "four cases" (ounces), and Mondello indicated he was interested in two. Mondello inquired as to the purity of the cocaine ("skim" v. "100% whole milk") and, when told that it was "100% whole milk," stated cryptically "yeah, people like better like that." The two agreed to a price of \$900.00 per ounce for the cocaine.

On the next day, Glick placed several calls attempting to get back with Mondello and to reach Jones. He finally was able to speak to Mondello. Mondello asked Glick if he had been able to contact Chris Bascus; Glick responded that he had. Mondello told Glick that the deal "looked like it [was] up in the air" because there were "too many things around * * * too many bad guys." Glick then offered to sell Mondello just two ounces. Mondello was very reluctant; he expressed a fear that the sale would "put [Mondello] in jeopardy." Mondello told Glick to come back next week because he already had plenty of cocaine; Glick could perhaps bring five cases (ounces) the next week and leave them with Mondello for five days. Glick's impression of the conversation was Mondello seemed "a little * * * 'cool' * * *. He didn't seem like he wanted to deal."

Glick waited a week and then contacted Mondello again on June 20, 1990. Glick told Mondello that he had just received a call from Chris Bascus and that he was ready to meet Mondello out at the Flying J truck stop. Mondello offered to send either a member of his family or Chris Bascus out to meet Glick, but Glick stated he would much rather meet with Mondello. The two arranged for a meeting a half hour later at the Flying J.

The day before, on the 19th, Chris Bascus had called Jones to let him know that Glick would be in town the next day. Bascus let Jones know that Glick would sell two ounces for \$1,800.00. Jones said he would let Mondello know. Bascus exhorted Jones that he could "get rid of [i.e. sell] [the cocaine] fast." Bascus then told Jones he would like to get ahold of an "eighth." Jones said he would "check it out."

Bascus called Jones back to ask if he had talked to Mondello and to advise him that Glick would be in town about 2:00 that day. Jones said he had not talked to Mondello but would attempt to do so and would call Bascus back. Bascus called twice more. On the second phone call, Jones told him he "didn't know" whether the transaction would work. Bascus said he would take one of the ounces, and Jones asked him if the price was two ounces for \$1,500.00. Bascus responded in the affirmative.

Jones called Bascus later that afternoon to advise him that he had \$750.00, enough money to buy one ounce. Bascus responded that he did not know if Glick would deal with them for only one ounce. Bascus asked Jones to come up with another \$750.00 for a second ounce. Jones said Mondello did not have it. Bascus said he would call Jones back, but he doubted the deal could go through for only one ounce. This was Bascus' last call to Jones.

Officer Glick wore a body mike to the rendezvous with Mondello at the Flying J. Mondello was waiting at the information center, just north of the Flying J, and so Glick went to meet him there. Mondello stated he had six hundred dollars with him. Glick told Mondello that he had the cocaine packaged in two ounce lots and did not have a scale to divide them. Glick instructed Mondello to sell the other ounce and keep the money for him until his return; if Mondello did this, Glick promised to "furnish [Mondello] forever." Mondello showed some hesitancy, but accepted the two ounces. Glick kept up a steady stream of encouragements as Mondello left him: "make sure you get a good price"; "don't get less than two and a half a eighth for it"; "just remember to get a good price for that stuff." Then the police closed in on Mondello and arrested him.

On July 2, 1990, the State filed a[n] Information charging Jones with one count of conspiracy to deliver marijuana and cocaine under W.S. 35-7-1042 (June 1988 Repl.) and an Information charging Mondello with one count of conspiracy to deliver marijuana and cocaine under W.S. 35-7-1042 and with one count of possession of cocaine with intent to deliver under W.S. 35-7-1031(a)(i) (June 1988 Repl.). The trial court approved the State's motion for joinder of the defendants' trials and denied Mondello's motion for severance....

The consolidated trial was held September 4-5, 1990. After six hours of deliberation on September 5 and a full day's deliberation on September 6, the jury had reached a guilty verdict on the conspiracy charges against both Jones and Mondello but was deadlocked on the possession with intent to distribute charge against Mondello. The court allowed the jury to announce its verdicts of guilty as to the charges of conspiracy to distribute marijuana and cocaine and then declared a mistrial as to the possession charge against Mondello. The court denied the

defendants' motion for a new trial on October 15, 1990. It sentenced Mondello to 16 to 32 months imprisonment and Jones to 20 to 40 months imprisonment. Appellants took timely appeal from the court's sentencing orders.

We reverse appellants' convictions because the State failed to prove beyond a reasonable doubt the alleged conspiracy to distribute marijuana and cocaine...

Both Mondello and Jones next raise the issue of whether sufficient evidence exists to establish the conspiracy charged. Because we hold there is not sufficient evidence, we must reverse both convictions....

When examining if the verdict is supported by sufficient evidence, we review the record to examine all the evidence in the light most favorable to the State... We examine the evidence from this perspective because we defer to the jury as the fact-finder and assume they believed only the evidence adverse to the defendant since they found the defendant guilty beyond a reasonable doubt....

[A]fter drawing into the open only the evidence adverse to the defendant, we examine whether that evidence permits the jury's inference that the defendant violated the elements of the statute as charged. Our focus is singular and only examines the reasonableness of the inference from premises admittedly adverse to the defendant.

To prove a conspiracy under Wyoming's controlled substances conspiracy statute, it is not necessary to show that the parties to the conspiracy performed an overt act to effect the objective of the agreement. We have used the following language to describe the agreement which the prosecution must prove under the general conspiracy statute, which applies equally to conspiracy to deliver a controlled substance:

One might suppose that the agreement necessary for conspiracy is essentially like the agreement or "meeting of the minds" which is critical to a contract, but this is not the case. Although there continues to exist some uncertainty as to the precise meaning of the word in the context of conspiracy, it is clear that the definition in this setting is somewhat more lax than elsewhere. A mere tacit understanding will suffice, and there need not be any written statement or even a speaking of words which expressly communicates the agreement. * * *

Because most conspiracies are clandestine in nature, the prosecution is seldom able to present direct evidence of the agreement. Courts have been sympathetic to this problem, and it is thus well established that the prosecution may "rely on inferences drawn from the course of conduct of the alleged conspirators."

W. LAFAVE AND A. SCOTT, CRIMINAL LAW 460-61 (1972), quoted in *Burke v. State*, 746 P.2d 852, 855 (Wyo. 1987) and also in *Bigelow*, 768 P.2d at 562.

The charge against Mondello and Jones was conspiracy to deliver marijuana and cocaine. The only direct evidence of the claimed conspiracy was provided by Bascus' testimony concerning what he, Jones and Mondello agreed to. The State had Bascus on a drug-pushing rap, and he testified to get lenient treatment for himself. Significantly, Bascus admitted at trial that after the crucial conversation with Jones and Mondello in which they allegedly developed the conspiracy, he told Officer Farmer that Mondello had told him to "think about it for a couple of days," and that Mondello would get back to him. This suggests the parties were still in the negotiation stage, and had not yet reached agreement to actually buy or sell marijuana and cocaine.

Mondello did not reinitiate contact with Bascus. It was Bascus who called Mondello and Jones repeatedly in the days afterward. In the course of these conversations, Jones repeatedly told Bascus that he would defer to Mondello's decision on whether a purchase would be made and made statements implying that Mondello only wanted enough cocaine for his personal use. Jones did say "I would go for the ride right now," referring to Bascus' offer of two ounces, but his statement in context indicated that his participation was conditional on Mondello's approval.

At times, Mondello indicated a willingness to buy more than one ounce of cocaine and to sell the excess. However, there is no evidence linking Mondello's statements, which came in response to subsequent offers by Detective Glick, to the originally-charged conspiracy to sell marijuana and cocaine. Furthermore, the telephone conversations never show Mondello agreeing unequivocally to buy cocaine for reselling purposes. Nor does Jones agree, without conditions, in the telephone transcriptions. In fact, as late as the day before Mondello's arrest, Jones was still saying he would "talk to" Mondello about a deal for two ounces. The day of the arrest, in his last conversation with Bascus, Jones stated that Mondello only wanted one ounce, much to Bascus' disappointment.

Officer Farmer testified that he heard Jones and Bascus discussing selling "eight balls" inside Parkway Pizza over a body mike Bascus was wearing. However, he admitted on cross-examination that the sole purpose of setting up Bascus in business was to insure a supply of eight balls for Mondello personally, and that it was "not impossible" that Bascus and Jones were discussing that when they spoke of eight balls.

The evidence, then, shows that according to Bascus the parties discussed selling small quantities of cocaine and marijuana to support Mondello's habit at their initial meeting, but they never concluded an agreement to do so. If we believe Bascus, the initial meeting failed to produce anything but a tentative plan and a promise to discuss the plan further at a later date. The State then intervened, in tapped phone conversations with the defendants, with suggestions, proposals and counterproposals for purchases or sales of larger amounts of cocaine. The transcripts of these phone conversions are colored by Mondello's reluctance to buy the large amounts the State was pushing, his desire expressed through Jones to buy only for his own use, and Jones' reluctance to act without Mondello's consent. Noticeably absent from the calls is any further reference to the original, alleged conspiracy to distribute marijuana and cocaine.

More importantly, the prosecution failed to tie the final "buy" by Mondello to the agreement Bascus reported. To do so based on the evidence presented would have been difficult. Perhaps recognizing this, at one point the prosecutor took a shortcut by arguing to the jury that Officer Glick's "delivery" of the cocaine to Mondello was the "delivery" intended in the originally-charged conspiracy. This argument was improper and was erroneous as a matter of law. It had the potential to mislead the jury and to thereby create reversible error.

If the prosecutor's argument were believed, the jury could have found Mondello guilty of a conspiracy to deliver cocaine to himself! This is clearly wrong; we have stated that "the [mere] purchaser of controlled substances [i.e. Mondello] commits the crime of 'possession' and not 'delivery.'" *Wheeler v. State*, 691 P.2d 599, 602 (Wyo. 1984). The purchaser is not an accomplice in a sale to himself. *Id.* Nor is he a conspirator to deliver to himself. For a conviction of conspiracy to deliver cocaine, there must be a showing that the conspirators agreed to make some further distribution of the cocaine. That is what is missing from this case....

In conspiracy, the agreement itself is the criminal act... Since the agreement forms the *actus reus*, the State must prove beyond a reasonable doubt that it exists in order to convict the defendant of conspiracy. The rule of evidence that an agreement may be inferred from surrounding circumstances must not be applied at the expense of the rule of law that an agreement must be established. Here, an agreement was not established based on the evidence proved at trial.

Finally, we wish to discuss the State's conduct in this case. They had an admitted drug dealer, Chris Bascus. They knew Mondello wanted drugs for his own use. They could have charged Mondello with possession and use of illegal drugs. But the State apparently wanted a "big drug case." They used Bascus to make a case of possession with intent to sell and a conspiracy against Mondello, the user, and his friend Jones. Meanwhile, Bascus essentially got a free pass. The scenario may be analogous to a manufacturer who knowingly and fraudulently sells a defective product, is not prosecuted, and yet all of his customers are charged with conspiracy to buy and resell his product.

We hold that there was insufficient evidence for either Jones' or Mondello's conviction of conspiracy. This decision is based on the prosecution's specific failure in this case to prove a conspiracy to deliver marijuana and cocaine. For this reason, appellants' convictions are reversed.

[Separate opinion by Golden omitted]

THOMAS, Justice, dissenting.

I must dissent from the disposition of this case according to the majority opinion. It is seldom a failure of logic like that manifested here is found in a court opinion. The majority carefully sets forth the material facts, and it states the applicable rules of law. It then misapplies those rules in such a way that it substitutes itself for the jury, not only reweighing the evidence, relying substantially on the version of the facts submitted by Mondello and Jones, but then deciding the case in this court, in effect, concluding it is not persuaded of guilt beyond a reasonable doubt, which it describes as insufficiency of the evidence. It seems to me that, having discerned no unlawful conduct on the part of the officers, this court decided to rectify a situation that offended the court by nullifying the jury verdict. It then substituted its perception of the evidence for that of the jury and acquitted the defendants....

In light of what the majority espouses as correct rules relative to proof of conspiracy and sufficiency of the evidence, the statement that, "more importantly, the prosecution failed to tie the final 'buy' by Mondello to the agreement Bascus reported" ... is a classic non sequitur. Since the rule is that there is no necessity for proof of an overt act to establish the conspiracy, why should the prosecution "tie the final 'buy' by Mondello" to the charged conspiracy. That offense was complete upon proof of an agreement to violate the Controlled Substances Act. The testimony from Bascus that is quoted above certainly establishes such an agreement.

Apparently recognizing, at least at a subliminal level, the difficulty with the logic, the majority, in direct violation of the rules pertaining to the standard for sufficiency of the evidence, quotes and describes other testimony the majority perceives as contradictory. In essence, the majority

weighs the evidence and concludes the court is not persuaded of guilt beyond a reasonable doubt. This is a clear substitution of the court for the jury; an invasion of the jury's prerogative; and a violation of a fundamental rule of appellate jurisprudence. The further argument about the apparent inconsistency in the verdicts is nothing more than a judicial hare. It is entirely possible, if speculation is permitted, that the jury was not persuaded beyond a reasonable doubt that Mondello received the cocaine from Glick for resale rather than personal use and, yet, was persuaded beyond a reasonable doubt that a conspiracy was formed in June of 1990 for Mondello, Jones, and Bascus to market cocaine in order to finance Mondello's personal habit.

I would affirm the judgments and sentences in this case.

Discussion Questions and Notes

- 1) Do you think Mondello was part of the conspiracy agreement for which he was convicted at trial?
- 2) Since conspiracy agreements are rarely written down as contracts, what types of evidence should be used to prove the existence and scope of criminal conspiracy agreements?

II. *Mens Rea* Requirements

Conspiracies often present very difficult *mens rea* issues that are intertwined with confusing act issues. If the jury finds that there was a very narrow agreement, then a lot of substantive crimes by co-conspirators are unplanned as far as other co-conspirators are concerned. Conversely, if the jury finds a broad, long-lasting agreement, the *mens rea* analysis is often more straightforward as most (if not all) of the co-conspirators presumably have the necessary *mens rea* for the agreed to crimes. The common law and MPC approaches resolve these situations, and others, with very different rules.

A. Common Law Approach

The *mens rea* for the underlying agreement of a conspiracy is specific intent. However, once that agreement is formed, the defendant can be held responsible for substantive crimes outside of the agreement via the *Pinkerton* rule. Based upon the Supreme Court decision in *Pinkerton v. United States*, 328 U.S. 640 (1946), defendants are liable for any reasonably foreseeable offense of a co-conspirator. The moment of the agreement is when jurors should focus to determine what was reasonably foreseeable.



Figure 21: Strearns Moonshine Still (Brian Stansberry, 2009)

In the following case, focus on the individual *actus reus* and *mens rea* for each defendant. Then, look at how Grasso is held liable for acts that he did not independently commit.

United States v. Grasso, 724 F.3d 1077 (9th Cir. 2013)

IKUTA, Circuit Judge:

Kyle Grasso appeals his convictions for money laundering, bank fraud, loan fraud, and conspiracy to commit loan and bank fraud, stemming from a Los Angeles-based scheme to defraud mortgage lenders. We conclude that the evidence adduced at trial, taken in the light most favorable to the government, was adequate to enable a rational trier of fact to find the essential elements of each conviction....

The scheme, as crafted by Mark Abrams, a mortgage broker, and Charles Elliott Fitzgerald, a real estate developer, took advantage of the real estate frenzy of the early 2000s. The conspirators would enter into a purchase agreement for a home in an exclusive Westside Los Angeles community, and then obtain a loan for significantly more than the sale price, pocketing the extra money. For this scheme to work, the conspirators had to exert control over multiple aspects of each real estate transaction. Among other things, the sellers and agents had to keep the true purchase price of the home confidential; the appraisal reports had to show the falsely inflated values of the homes; the title and escrow companies had to prepare two sets of documents, one showing the actual purchase price (for the seller) and one showing the inflated purchase price (for the lender); and finally the Multiple Listing Service (MLS) had to show the falsely inflated sales price of the homes. Abrams and Fitzgerald coordinated the efforts of a range of colleagues to make this conspiracy work. Abrams relied on Jamieson Matykowski, one of his employees, and Richard Maize, who controlled Americorp Funding, among others. Americorp, a mortgage broker, would send loan packages to lending agents for review and approval. The conspirators generally targeted banks that did not require their lending agents to use rigorous documentation and approval standards. Over the course of the scheme, the conspirators conducted roughly 80 fraudulent transactions. The banks that ultimately financed the loans that their lending agents

approved, including Lehman Brothers (through its lending agent, Aurora Loan Services), GreenPoint Bank (through its lending agent, GreenPoint Mortgage), and RBC Mortgage Company, together lost at least \$46 million in the Abrams-Fitzgerald conspiracy.

Grasso was one of Abrams and Fitzgerald's recruits for this scheme. Grasso and his partner Joseph Babajian were successful real estate agents in the same affluent area that Abrams and Fitzgerald targeted, Westside Los Angeles. From 2000 to January 2001, Grasso and Babajian were the top-producing real estate agents at Fred Sands Realtors in Beverly Hills. Grasso and Babajian subsequently left Fred Sands and became affiliated with Prudential....

At trial, the government presented evidence to prove that Grasso became involved in the Abrams-Fitzgerald scheme some time in 2000 and worked with them through at least late 2002. According to the government, Grasso participated primarily by identifying houses to be included in the scheme, ensuring that the seller would keep the sales price confidential, managing the information reported in the MLS listings, and obtaining the title insurance and escrow documents needed for the conspiracy through his access to Cal Title....

In August 2007, a grand jury indicted Grasso for one count of conspiracy to commit bank fraud and loan fraud, in violation of 18 U.S.C. § 371. This charge named Grasso and three co-defendants, including Rizk and Babajian, along with six other co-conspirators, including Abrams and Fitzgerald. Listing nine transactions as overt acts, the government alleged that the co-conspirators devised and executed a scheme to commit bank fraud against Lehman Brothers, GreenPoint Bank, and other federally-insured institutions between 2000 and 2003, and to commit loan fraud by submitting false statements, reports, and valuations in connection with the listed transactions.

The indictment also charged Grasso with one count of bank fraud and aiding and abetting, in violation of 18 U.S.C. §§ 2, 1344(1); seventeen counts of loan fraud and aiding and abetting, in violation of 18 U.S.C. §§ 2, 1014; and three counts of money laundering and aiding and abetting, in violation of 18 U.S.C. §§ 2, 1956(a)(1). The bank fraud charge named all four defendants and rested on the same allegations as the conspiracy charge. The money laundering and loan fraud charges related to specific real estate transactions. The three money laundering charges related to individual "referral" payments that Abrams made to Prudential after the Yoakum Drive and Benedict Canyon Drive transactions.

After a jury trial, Grasso was convicted on all conspiracy, bank fraud, and money laundering charges, and on the loan fraud charges relating to the Claridge Drive, Alta Drive, Mandeville Canyon Road, and Claircrest Drive transactions. Grasso moved for acquittal on all charges or in the alternative for a new trial. The district court denied these motions, rejecting his sufficiency of the evidence claims. The court sentenced Grasso to twelve months and one day in prison and \$13 million in restitution....

On appeal, Grasso argues that the district court erred in denying his motion for acquittal, see FED. R. CRIM. P. 29, because the evidence was insufficient to support a guilty verdict on the conspiracy, bank fraud, loan fraud, and money laundering counts for which he was convicted....

We begin with Grasso's appeal of his conviction for conspiracy to commit loan fraud and bank fraud. To convict Grasso of conspiracy, the government must first prove that a conspiracy existed. To prove a conspiracy under 18 U.S.C. § 371, the government must first establish: (1) an agreement to engage in criminal activity, (2) one or more overt acts taken to implement the agreement, and

(3) the requisite intent to commit the substantive crime. "Once the existence of the conspiracy is shown, evidence establishing beyond a reasonable doubt a knowing connection of the defendant with the conspiracy, even though the connection is slight, is sufficient to convict him of knowing participation in the conspiracy." *United States v. Meyers*, 847 F.2d 1408, 1413 (9th Cir. 1988). We have explained that a defendant may have a "slight connection" to a conspiracy even if the defendant did not know all the conspirators, did not participate in the conspiracy from its beginning or participate in all its enterprises, or otherwise know all its details. See *United States v. Reed*, 575 F.3d 900, 924 (9th Cir. 2009). However, "[i]t is not a crime to be acquainted with criminals or to be physically present when they are committing crimes." *United States v. Herrera-Gonzalez*, 263 F.3d 1092, 1095 (9th Cir. 2001).

Where the defendant has a connection (even if slight) to the conspiracy, the government must also show that the defendant's connection to the conspiracy is knowledgeable; "that is, the government must prove beyond a reasonable doubt that the defendant knew of his connection to the charged conspiracy." *Meyers*, 847 F.2d at 1413. To establish a knowing connection, "[t]here need not, of course, be proof that the conspirators were aware of the criminality of their objective," *Ingram v. United States*, 360 U.S. 672, 678, 79 S. Ct. 1314, 3 L. Ed. 2d 1503, 1959-2 C.B. 334 (1959). Instead, the government must show that the defendant was aware of "the unlawful object toward which the agreement [was] directed," *United States v. Krasovich*, 819 F.2d 253, 255 (9th Cir. 1987); see also *id.* ("[k]nowledge of the objective of the conspiracy is an essential element of any conspiracy conviction.") (citing *Ingram*, 360 U.S. at 678). The government may rely on circumstantial evidence and inferences drawn from that evidence in order to prove the defendant's knowing connection to the conspiracy.

Here, it is undisputed that the government sufficiently proved the existence of a conspiracy to commit bank fraud and loan fraud... Abrams, Fitzgerald, and others associated with them initiated and carried out a scheme to defraud mortgage lenders. Nor does Grasso contest that he participated in the conspiracy; rather, the disputed issue is whether he did so knowingly.

To that end, Grasso argues that the government failed to adduce sufficient evidence to prove he had knowledge of the objective of the conspiracy... According to Grasso, Abrams and Fitzgerald targeted and manipulated him because of his "highly respected and extremely successful" real estate practice in Los Angeles. Grasso claims that the evidence showed that his involvement in the conspiracy was limited to the legitimate aspects of the real estate transactions, and he was unaware of the fraudulent steps in Abrams and Fitzgerald's scheme.

Viewing the facts in the light most favorable to the prosecution ... we conclude that the government presented more than sufficient evidence that Grasso knew the objectives of the fraudulent scheme. A rational jury could determine beyond a reasonable doubt that as early as July 2000, Grasso knew that the real estate transactions were structured to deceive Lehman Brothers, GreenPoint Bank, and other federally insured banks, and that he assisted in this deception. The evidence showed that Grasso assisted his co-conspirators in convincing lenders that various properties were sold for more than their actual sales prices. Grasso personally benefitted from falsely inflating the purchase price for his Claridge Drive property, and he personally inflated the MLS listing in the Alta Drive transaction. He was aware of the role Cal Title played in creating two different title insurance policies, one showing the inflated purchase price and one showing the true purchase price. Matykowski's testimony that he joked with Grasso about

forging the signature of a straw purchaser, along with other evidence, indicated that Grasso knew that the conspirators furthered the scheme by using the names of straw purchasers who might not even be aware of the transaction. Finally, the evidence showed that Grasso was an expert in his field, so the jury could reasonably conclude that he was not duped by Abrams and Matykowski into innocently carrying out the acts described above....

Next, we consider Grasso's appeal of his convictions for loan fraud...

Grasso ... argues that there was insufficient evidence to convict him of loan fraud because he was involved only in the legitimate first step of the real estate transactions, had no knowledge of the scheme to defraud banks, and did not make any false statements to a federally insured financial institution in the Alta Drive, Claircrest Drive, and Mandeville Drive transactions.

This argument also fails. Under *Pinkerton v. United States*, a defendant charged with participating in a conspiracy may be subject to liability for offenses committed as part of that conspiracy, even if the defendant did not directly participate in each offense. *Pinkerton* renders all co-conspirators criminally liable for reasonably foreseeable overt acts committed by others in furtherance of the conspiracy they have joined, whether they were aware of them or not....

Taking the evidence adduced at trial in the light most favorable to the government, a reasonable juror could find all the necessary elements to impose *Pinkerton* liability, contrary to Grasso's contention that he had nothing to do with the fraud. Abrams and Matykowski testified that Grasso was well aware of the conspiracy's fraudulent purpose and had a substantial role in it by the time the Alta Drive, Mandeville Canyon Road, and Claircrest Drive transactions occurred. Moreover, Abrams admitted that he committed loan fraud in each of these transactions, which took place according to the scheme's basic blueprint. Because Grasso was aware of this blueprint, he could reasonably have foreseen Abrams's loan fraud in those transactions. Thus, there is no due process problem in holding him liable for Abrams's acts under *Pinkerton*. Because there is sufficient evidence to uphold Grasso's convictions for loan fraud under *Pinkerton*, it does not matter whether Grasso was aware of when or whether Abrams committed the acts constituting loan fraud in each transaction....

We now turn to Grasso's appeal of his conviction for bank fraud...

In making its case that Grasso was guilty of bank fraud, the government relied on the same evidence of Grasso's knowledge that supported his conviction for conspiracy to commit bank fraud. Accordingly, Grasso's argument that the evidence was insufficient fails for the same reason that his challenge to his conspiracy conviction fails: viewing the facts in the light most favorable to the prosecution, there was ample evidence that Grasso was well aware of the scheme's fraudulent objective and that he intentionally furthered the fraud....

We conclude that there was sufficient evidence to support Grasso's convictions for conspiracy, loan fraud, bank fraud, and money laundering, and that the district court therefore did not err in denying Grasso's motion for acquittal.

[Separate opinion by Berzon omitted]

Discussion Questions and Notes

- 1) Notice that it only takes one conspiracy charge to link the defendant to a wide number of substantive crimes. This is very different than either attempt or accomplice liability where each substantive offense must be proven separately. Why do you think we have such a different arrangement for conspiracy and vicariously-linked substantive offenses?
- 2) Are there any portions of the court's reasoning in *Grasso* that trouble you?

The differences between the expansive, objective rule of *Pinkerton* and a specific intent standard applicable for accomplice liability are well illustrated in the unusual facts of this case.

United States v. Cottrell, 333 Fed. Appx. 213 (9th Cir. 2009)

William Jensen Cottrell appeals his convictions for conspiracy to commit arson in violation of 18 U.S.C. § 844(n) and for seven counts of arson in violation of 18 U.S.C. § 844(i).... We affirm the conspiracy conviction, vacate the arson convictions and the sentence, and remand for further proceedings....

In considering Cottrell's challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecution. There was sufficient evidence for the jury to find Cottrell guilty beyond a reasonable doubt on all counts for which he was convicted. Evidence established that Cottrell obtained maps to the car dealerships and used his car to transport the group throughout the night. Cottrell was at the gas station with the others when bottles were filled with gasoline. He acknowledged actively participating in the spray-painting vandalism. He was present when the first SUV was set on fire with a Molotov cocktail and remained with the group thereafter. He was continuously present throughout the vandalism of the car dealerships, including the last dealership where eight SUVs were set on fire with Molotov cocktails. Witnesses testified that Cottrell described his involvement to them afterwards in ways that appeared to take credit for the attacks. Cottrell sent several emails to a newspaper claiming responsibility for the attacks. In the face of this substantial evidence of his involvement, the jury's guilty verdict was clearly based on sufficient evidence....

The proposed expert testimony on Asperger's Syndrome was not relevant to the charge of conspiracy. A conspirator may be held liable for a crime committed by another co-conspirator, provided that the acts making up the crime were reasonably foreseeable and were carried out in furtherance of the conspiracy, even though the conspirator did not participate in the actual commission. *Pinkerton v. United States*, 328 U.S. 640, 645-48, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946). On the issue of foreseeability, the law requires the application of an objective standard. An objective standard is presumably used because in criminal law there is generally an "unwillingness

to vary legal norms with the individual's capacity to meet the standards they prescribe, absent a disability that is both gross and verifiable." *United States v. Johnson*, 956 F.2d 894, 898 (9th Cir. 1992). Blindness may be taken into account in determining criminal responsibility, for example, because it limits the facts available to the defendant, but a condition like Asperger's, which affects only the defendant's ability to draw inferences from facts that he perceives, does not qualify. The proposed Asperger's evidence did not speak to that objective standard. Whether Cottrell personally believed that his companions would not set any more fires after the first one – and thus failed to foresee that his companions might set fire to the SUVs at the dealership – was not the relevant question. A defendant's gullibility does not generally excuse his criminal liability if it does not rise to a mental defense or capacity issue. The Asperger's evidence would not have established such a defense, so it was not an abuse of discretion to exclude it with regard to that conviction.

The arson counts presented different issues, however. The government sought to convict Cottrell under alternative theories, as a principal or as an aider and abetter. The jury's verdict did not specify which theory it adopted, so we must recognize the possibility that it found Cottrell guilty of aiding and abetting.

"Aiding and abetting is a specific intent crime." *United States v. Bancalari*, 110 F.3d 1425, 1430 (9th Cir. 1997). The evidence must establish that the defendant "'associate[d] himself with the venture, that he participate[d] in it as something he wish[ed] to bring about, and that he [sought] by his action to make it succeed.'" *United States v. Smith*, 832 F.2d 1167, 1170 (9th Cir. 1987) (alterations in original) (quoting *Nye & Nissen v. United States*, 336 U.S. 613, 619, 69 S. Ct. 766, 93 L. Ed. 919 (1949)). Because aiding and abetting requires specific intent, the government's inclusion of the aiding and abetting charges placed Cottrell's subjective intent at issue in a way that the conspiracy charge did not. To the extent that the Asperger's evidence was aimed at defeating an inference of Cottrell's intent from the circumstances, it was relevant and could have assisted the jury's determination of whether Cottrell had the specific intent required for aiding and abetting. The exclusion of that evidence was thus an abuse of discretion. The arson convictions, which might have been affected by that evidence, must be vacated....

We affirm defendant's conviction for conspiracy. We vacate the convictions for arson, based on the improper exclusion of evidence that was relevant to support Cottrell's defense to the aiding and abetting theory of liability. Because sufficient evidence was presented by the government to support convictions on those counts, the government may elect to retry them. We vacate the sentence imposed on all counts, including the conspiracy conviction, and remand for further proceedings.

PREGERSON, Circuit Judge, affirming in part and dissenting in part:

I concur in the majority's conclusion that we vacate the 100-month sentence imposed on all counts. I agree that we reverse the convictions for arson based on the improper exclusion of evidence that the defendant was afflicted with Asperger's Syndrome. Evidence of Asperger's Syndrome could have assisted the jury to determine whether Cottrell had the specific intent required for aiding and abetting the commission of arson.

I disagree, however, that evidence that Cottrell was suffering from Asperger's Syndrome was irrelevant to assisting the jury to determine whether Cottrell participated in a conspiracy to commit arson. I agree with the majority that we use an objective standard to determine whether the criminal acts that fell within the ambit of the conspiracy were reasonably foreseeable and were carried out in furtherance of the conspiracy, absent a showing that the defendant suffers from a disability that is "both gross and verifiable." *United States v. Johnson*, 956 F.2d 894, 898 (9th Cir. 1992). But I submit that Asperger's Syndrome meets these two requirements. Cottrell's perception of what is reasonably foreseeable could be impaired by his disability. Accordingly, evidence of the complexity, severity, and extent of Asperger's Syndrome suffered by Cottrell could have assisted the jury to determine whether arson was a reasonably foreseeable act of the conspiracy.

Therefore, I dissent in part.

Discussion Questions and Notes

- 1) Although the facts of Cottrell are unusual, they illustrate the difficulty with inferring the existence of conspiracy agreements and the *mens rea* of all parties to those agreements. Do you think the majority was right to affirm the conviction?
- 2) The majority distinguishes between physical ailments like blindness and Asperger's Syndrome. Is that distinction persuasive? How would you articulate the line between the categories drawn by the court?

Determining what was reasonably foreseeable at the time of an agreement is always a fact-specific analysis. As a result, jurists will often disagree about what substantive offenses should be linked by the *Pinkerton* rule, as exhibited in this New Jersey case.

State v. Stein, 360 A.2d 347 (N.J. 1976)

Justice Conford

This appeal emanates from a petition for certification by defendant and a cross-petition by the State, both granted by the court, 68 N.J. 496 (1975), to review a judgment of the Appellate Division partly affirming and partly reversing a series of convictions of defendant arising from a number of connected occurrences. The trial was before a Law Division judge, sitting without a jury, largely based upon a stipulated record consisting of testimony taken on a preliminary motion to suppress certain statements, given to the Mercer County Prosecutor by defendant, and certain documents. The court filed a written opinion finding defendant guilty of all counts of the indictment.

The evidence adduced on the State's case indicates that defendant, a Trenton lawyer, suggested to a certain underworld figure that the house of one Dr. Gordon in Trenton was a likely target for a successful breaking and entering or burglary, as large amounts of cash were kept there. Defendant expected to share in the gains. As a result, there was an armed robbery at that home about a year later. While attempting to evade the police, who had been alerted to the affair, the perpetrators abducted members of the family and injured two policemen. They were caught and arrested. Subsequently defendant was lured by the police into providing money for a purported but fictitious effort to release one of the arrestees on bail so that he might supposedly flee the country.

As a result of all of the foregoing defendant was indicted on counts of (a) conspiracy to steal currency; (b) armed robbery, assaults with an offensive weapon, kidnapping, kidnapping while armed and assaults upon a police officer; and (c) obstruction of justice and conspiracy to obstruct justice. Defendant was convicted on all counts and sentenced concurrently to terms of imprisonment aggregating 30 years to 30 years and one day.

The Appellate Division affirmed all the convictions except those for assault with an offensive weapon, kidnapping, kidnapping while armed, assault upon a police officer and obstruction of justice, those being set aside. In addition to affirming the other convictions, the appellate court also determined that while defendant could not be guilty of obstruction of justice on the evidence, he was guilty of an attempt to obstruct justice, and it entered a conviction thereof. One judge dissented in part, being of the view that the counts for obstruction of justice and conspiracy to obstruct justice should be vacated on grounds of entrapment.

Subject to amplified comment hereinafter, the factual background of this matter is adequately set out in the Appellate Division opinion as follows:

On March 17, 1972 Testa and Stasio, impersonating police officers, gained entrance to the Trenton home of Dr. Arnold Gordon. The pair produced pistols and demanded money and jewelry from Gordon. While Testa and Stasio obtained \$470 from Gordon and bound him and his wife Edith, a maid telephoned the police. When the police arrived, the robbers took Edith and her 14 year old daughter Shelly from the house at gunpoint as hostages and attempted an escape at high speed in a getaway car. A chase ensued. Ultimately, the getaway car crashed into a police car barrier, seriously injuring two police officers. The police arrested Testa and Stasio and freed Edith and Shelly. Bail was set at \$250,000 for Testa and \$100,000 for Stasio.

Subsequent investigation aroused the suspicions of the county prosecutor as to the possible involvement of others in the crime. Testa testified before the grand jury as follows: In September 1971 Joe Bradley introduced him to Pontani. Pontani gave Testa particulars about the layout of the Gordon home. Pontani wanted to be sure the children were not in the house at the time of the robbery. Pontani, Testa and Bradley met three times between September and October 18, 1971, the date of Bradley's death. Tassone was present on a few occasions. Testa stated that from the outset it was intended that the crime would be an armed robbery. Although burglary had been initially discussed, it was discarded as an impossibility. After Bradley's death, Pontani spoke to a lawyer who guaranteed the amount of money that would be in the house, the movements of the family and the layout of the telephone system. Pontani had indicated that the lawyer was "Jewish" and a close friend of the Gordons. Testa was present when Pontani telephoned the lawyer. The latter advised Pontani that \$200,000 would be found in the house.

On May 9, 1973, after Testa testified, a plan of action was formulated by Assistant Prosecutor Farkas and various law enforcement personnel, including Detectives Moaba and Logan and Investigator Diszler, to determine the extent of the involvement of Stein and Pontani. Moaba called Pontani and, posing as Testa's friend, demanded that Pontani and his lawyer friend come up with \$6,000 so that Testa could make bail and flee the country. Moaba stressed that Testa had not implicated Pontani or the lawyer. Pontani emphasized that he had not had any dealings with Testa and that he had given the information months earlier to Bradley.

On May 11, Moaba, still posing as a friend of Testa, again telephoned Pontani. Pontani stated that he had spoken with his lawyer friend, who said he was going to see what he could do. On May 15, Moaba, equipped with a body transmitter and recorder, met with Pontani at Pontani's home. Pontani indicated that his friend would come up with \$5,000 within a week. Pontani told Moaba that he had nothing to do with Testa, that he had done business with Bradley and that Testa had used the information without informing Pontani. Moaba advised Pontani to "press" defendant for the money but Pontani said he had to be careful because this "guy's a legitimate stiff." Pontani told Moaba that a friend of his would visit Testa in jail on Saturday. The police relayed this information to Testa.

On May 18, Moaba called Pontani. Pontani arranged to meet Moaba with the money at a shopping center in Monmouth on May 21.

On Saturday May 19, the prosecutor's office conducted a photographic surveillance of the Mercer County Jail. A man identified as Vincent Fiore, sent by Pontani, visited Testa and checked Moaba's story with him.

Surveillance of defendant was conducted on Monday, May 21. Stein carried a manila envelope to his office. He left his office and met Pontani at Stein's car. Pontani then entered Stein's office and exited with the envelope.

At noon, Moaba saw Pontani at the agreed upon location. Moaba identified himself as De Angelis from New York. Pontani advised Moaba that they would have to go to Trenton to get the money.

At 1:15 p.m. Moaba, posing as De Angelis, called Stein. He informed Stein that he had not received the money, that Pontani wanted him to follow him back to Trenton and that he thought "they're going to do the job on me." Stein said they would not and that he had given Pontani the money.

At 2:20 p.m. on May 21, Pontani was arrested and \$5,000 was found on his person. He was jailed in lieu of \$250,000 bail.

At 10 p.m. that day, Logan and Diszler spoke with Stein at his home. Logan told defendant that they were investigating Pontani and that the police had found \$5,000 on his person. Defendant volunteered that he had given Pontani \$5,000 in an envelope that very morning. He stated that he had helped out Pontani, a former client, in the past and that Pontani approached him for the money in order to help a friend. Logan stated that Pontani was in deep trouble and involved in a kidnapping and robbery. Stein expressed surprise. Logan asked Stein to come to the prosecutor's office the next day. Stein said that he had an appointment out of town the next day and would call Logan in the afternoon when he returned.

Prosecutor Bruce Schragger, who was personally acquainted with Stein, unsuccessfully attempted to meet him on the next day, May 22. Schragger wanted to give Stein the opportunity to explain his role in the matter....

Stein gave his age, 46, and stated that he was an attorney who was also engaged in real estate development. He became involved with Pontani as an attorney. Stein was introduced to Pontani by a woman, Wilson Marcello. Stein knew that Pontani was a professional second-story man who was in financial difficulty. Stein was also in financial straits. It was suggested that if they could locate a home where there was cash, Pontani would burglarize the home. In the course of a casual "almost flippant" conversation on the subject, Stein ventured some names from the area in which he resided, including that of Dr. Gordon. Stein knew that Gordon, a dentist, took cash home. He estimated the amount at less than \$10,000 but he did not know where the money was kept. During the course of subsequent conversations over a long period of time, Stein, in response to Pontani's questions, offered such information as the number of people in the Gordon household and where and when the children went to school. Although there was no specific discussion as to Stein's share of the money to be stolen, Stein anticipated that he would participate therein. The attempted robbery occurred anywhere from 9 months to a year after the last conversation on the matter. After two months Stein assumed that no crime would occur. However, he did nothing in the interim to prevent it from happening. After the robbery and other crimes took place, Pontani advised Stein by telephone that the people who had tried to pull off the job had no right to do it, since "they had really in effect stolen information that he had given to another party [Joe Bradley] and that he had abandoned the idea long since." Pontani insisted he had nothing to do with it. Stein had assumed that any attempted larceny would be in the form of breaking and entering while the Gordons were away, not a "personal confrontation."

....

The Appellate Division reversed the convictions of the defendant on the substantive charges of assault with an offensive weapon (against Edith and Shelly Gordon), kidnapping, kidnapping while armed and assaults on a police officer. It sustained that of armed robbery. The former were deemed not within the scope of the original conspiracy... We review this ruling pursuant to our grant of the State's cross-petition for certification.

The question as to the criminal responsibility of a conspirator for the commission by others of substantive offenses having some causal connection with the conspiracy but not in the contemplation of the conspirator has been a matter of considerable debate and controversy. Here there is no question but that Stein did not actually contemplate any criminal consequence of his "tip" to Pontani beyond a burglary and theft of money from the Gordon home. The trial court applied the conventionally stated rule that each conspirator is responsible for "anything done by his confederates which follows incidentally in the execution of the common design as one of its probable and natural consequences, even though it was not intended as part of the original design", citing 15A C.J.S. CONSPIRACY § 74 at 825; and *see Pinkerton v. United States*, 328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489 (1956); *cf. State v. Carbone*, 10 N.J. 329 (1952); *State v. Cooper*, 10 N.J. 532 (1952)....

It remains to apply the rule to the instant fact situation. Ordinarily the matter of factual application of the rule would be submitted to the jury under appropriate instructions. Here the matter was for the trial judge in the first instance as fact-finder. The Appellate Division found

correct the trial ruling that the armed robbery was within the scope of the conspiracy to steal currency from the Gordon home. We are in agreement.... But the Appellate Division concluded that the assaults with an offensive weapon on the wife and daughter of Dr. Gordon were "not connected with the robbery as such" but "with the preliminary acts of taking the Gordons as hostages and the eventual kidnappings" and therefore "not fairly * * * part of the conspiratorial agreement". The assault convictions were therefore set aside.

We are not in complete agreement with this last determination. The brandishing of handguns by the robbers when they first encountered Dr. and Mrs. Gordon in the house was clearly a foreseeable event in the course of an unlawful invasion of the house for criminal purposes by armed men. That assault on Mrs. Gordon did not merge with the armed robbery, as the Appellate Division suggested might be the case, since the robbery charged was of Dr. Gordon alone, not the members of his family assaulted. Thus the assault conviction as to Mrs. Gordon should not have been set aside as too remote from the conspiracy.

As to the charge of assault with an offensive weapon on Shelly Gordon (daughter of the Gordons), since the evidence indicates that offense occurred only at the time of the attempted escape from the police, its disposition depends on the determination as to the other associated charges, discussed next below.

Liability of the defendant for the kidnapping, kidnapping while armed and assaults on a police officer presents a much closer question. The Appellate Division held that these substantive acts were "offenses committed by the criminals effecting the conspiratorial specific crime after that crime had been committed, as part of a plan to flee when it became evident that they were about to be apprehended" and that defendant could not be charged therefor. On balance, we are satisfied that this is a correct result, particularly in relation to the kidnapping phases of the episode. This holding will also apply to the reversal by the Appellate Division of the conviction for assault with an offensive weapon on Shelly Gordon....

The judgment of the Appellate Division is reversed in part, and affirmed in part, conformably with this opinion. Remanded for a new trial on the charges of conspiracy to steal currency, armed robbery, and assault with an offensive weapon on Edith Gordon; the charges on the other counts are to be dismissed. The impoundment order heretofore entered is vacated.

Discussion Questions and Notes

- 1) Consider each of the crimes that Stein was charged with. You might even draw a grid with each crime and each court or fact-finder reviewing the case. Which ones do you think were reasonably foreseeable at the time of the original agreement between Stein and Pontani?
- 2) Should we care that Stein never knew about the people who ultimately committed the substantive offenses that Stein was found guilty of?

- 3) What about the passage of time between Stein and Pontani's discussion about the Gordon residence and the actual home invasion? Should that matter in the court's analysis?

B. MPC Approach

The MPC was written after the Supreme Court issued its opinion in *Pinkerton*. And the MPC drafters took a far narrower view than the Court in *Pinkerton* of the crimes for which a defendant should be criminally liable.

New Hampshire v. Donohue, 834 A.2d 253 (N.H. 2003)

NADEAU, J.

The defendant, Robert Donohue, was convicted after a jury trial in Superior Court (Smukler, J.) of reckless second-degree assault and conspiracy to commit second-degree assault. Donohue appeals only the conspiracy conviction, arguing that the trial court erred in denying his motion to dismiss the indictment on the ground that one cannot conspire to commit reckless second-degree assault. We reverse the conspiracy conviction.

The jury could have found the following facts. At approximately 1:00 a.m. on March 24, 2001, Jason Lonergan and Christopher Burke left a bar in Laconia. As they were leaving, they noticed a woman crying and asked if she was all right. Meanwhile, the woman's boyfriend, Donohue, left the bar and approached the two men, stating that "she [is] with me, and she's all set." The conversation between Donohue and Lonergan escalated into an argument.

Shortly thereafter, the argument ended and Donohue told Lonergan and Burke that he was going inside to get his brother. Donohue entered the bar and retrieved his half-brother, Joe Gardner. At first, Donohue simply told Gardner, "We've [sic] leavin'." On their way out of the bar, Donohue mentioned to Gardner that there were a couple of guys with whom he had argued and who he thought wanted to fight.

When Donohue and Gardner left the bar, Lonergan and Burke were no longer there. Donohue testified that he and Gardner walked to Donohue's van, which was located in the Citizens Bank parking lot. Meanwhile, Lonergan and Burke, who were also walking through the parking lot, heard an angry "hey." When they turned around, Lonergan was punched by Donohue while Burke was punched by Gardner.

As a result of this incident, Donohue was charged with one count of second-degree assault, and one count of conspiracy to commit second-degree assault. The first count alleged that Donohue did in concert with and aided by Gardner, recklessly cause bodily injury to Lonergan. The second count alleged that Donohue, with the purpose that an assault be committed, agreed with Gardner to commit a reckless assault, and committed one or more overt acts in furtherance of the conspiracy. Following a jury trial, he was convicted on both counts.

On appeal, Donohue argues that it is legally impossible to be convicted of conspiracy to commit reckless assault because one cannot conspire to recklessly cause a particular harm. He contends that under New Hampshire law, conspiracy requires that the defendant possess a purposeful mental state with respect to every element of the underlying crime. In doing so, Donohue urges us to adopt the position of the Model Penal Code.

A person is guilty of conspiracy if, with a purpose that a crime defined by statute be committed, he agrees with one or more persons to commit or cause the commission of such crime, and an overt act is committed by one of the conspirators in furtherance of the conspiracy.

RSA 629:3, I. Conspiracy punishes the agreement to commit or cause the commission of a crime. To establish liability for conspiracy, the State must demonstrate that the defendant had a true purpose to effect the criminal result.

Here, Donohue was charged and convicted of conspiracy to commit a reckless second-degree assault. A person is guilty of second-degree assault if he "recklessly causes serious bodily injury to another." RSA 631:2, I(a). "A person acts recklessly with respect to a material element of an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct." RSA 626:2, II(c) (1996).

We have recognized that our Criminal Code is largely derived from the Model Penal Code. For this reason, we have looked to the Model Penal Code commentaries for guidance when interpreting analogous New Hampshire statutes. Once again, the commentary to the Model Penal Code is instructive. The section concerning conspiracy explains:

In relation to those elements of substantive crimes that consist of proscribed conduct or undesirable results of conduct, the Code requires purposeful behavior for guilt of conspiracy, regardless of the state of mind required by the definition of the substantive crime. If the crime is defined in terms of prohibited conduct, such as the sale of narcotics, the actor's purpose must be to promote or facilitate the engaging in of such conduct by himself or another. If it is defined in terms of a result of conduct, such as homicide, his purpose must be to promote or facilitate the production of that result. Thus, it would not be sufficient ... if the actor only believed that the result would be produced but did not consciously plan or desire to produce it.

MODEL PENAL CODE § 5.03 comment 2(c)(i) at 407 (Official Draft and Revised Comments 1985). This commentary makes clear that in order to be guilty of conspiracy, a person must engage in purposeful behavior, even if the underlying crime requires a lower *mens rea*. Here, the State charged Donohue with a reckless assault, which plainly requires a lower standard of culpability than the conspiracy statute. *See* RSA 629:3; RSA 626:2, II(a) (1996) ("A person acts purposely with respect to a material element of an offense when his conscious object is to cause the result or engage in the conduct that comprises the element.").

The Model Penal Code commentary also addresses substantive crimes that involve a reckless state of mind:

When recklessness or negligence suffices for the actor's culpability with respect to a result element of a substantive crime, as for example when homicide through negligence is made criminal, there could not be a conspiracy to commit that crime. This should be distinguished, however, from a crime defined in terms of conduct that creates a risk of harm, such as reckless driving or driving above a certain speed limit. In this situation the

conduct rather than any result it may produce is the element of the crime, and it would suffice for guilt of conspiracy that the actor's purpose was to promote or facilitate such conduct—for example, if he urged the driver of the car to go faster and faster.

MODEL PENAL CODE § 5.03 comment 2(c)(i) at 408. This section of the commentary explicitly recognizes that one cannot conspire to commit a crime where mere recklessness or negligence with respect to a result element suffices for the actor's culpability.

Numerous state courts have followed the reasoning set forth in the Model Penal Code to conclude that one cannot conspire to accomplish an unintended result. *See People v. Swain*, 12 Cal. 4th 593, 49 Cal. Rptr. 2d 390, 909 P.2d 994, 997-1001 (Cal. 1996) (conspiracy to commit reckless murder not a crime); *Palmer v. People*, 964 P.2d 524, 528-30 (Colo. 1998) (conspiracy to commit reckless manslaughter not a crime); *State v. Beccia*, 199 Conn. 1, 505 A.2d 683, 684-85 (Conn. 1986) (conspiracy to commit reckless arson not a crime); *Conley v. State*, 146 Ga. App. 739, 247 S.E.2d 562, 565 (Ga. Ct. App. 1978) ("One cannot conspire to kill another in the heat of passion."); *Mitchell v. State*, 363 Md. 130, 767 A.2d 844, 847, 854-55 (Md. 2001) (conspiracy to commit a "non-premeditated" murder not a crime); *People v. Hammond*, 187 Mich. App. 105, 466 N.W.2d 335, 336-37 (Mich. Ct. App. 1991) (conspiracy to commit second-degree murder not a crime); *State v. Baca*, 1997 NMSC 59, 950 P.2d 776, 787-88, 124 N.M. 333 (N.M. 1997) (conspiracy to commit reckless murder not a crime).

The State relies heavily on the holdings in *State v. Horne*, 125 N.H. 254, 256, 480 A.2d 121 (1984), and *State v. Locke*, 144 N.H. 348, 352-53, 761 A.2d 376 (1999), for the proposition that one can conspire to commit a reckless assault. In *Horne*, we wrestled with the interpretation of RSA 626:8, III and IV (Supp. 1983) as they related to the conviction of an accomplice for reckless second-degree assault. Section III states:

A person is an accomplice of another person in the commission of an offense if:

(a) With the purpose of promoting or facilitating the commission of the offense, he solicits such other person in committing it, or aids or agrees or attempts to aid such other person in planning or committing it....

Section IV states:

When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense, if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.

Horne, 125 N.H. at 256 (quotation omitted). We quoted *State v. Etzweiler*, 125 N.H. 57, 63, 480 A.2d 870 (1984), which concluded that:

Section III sets forth the elements which must be present above, beyond, and regardless of the substantive offense. Section IV sets forth the elements of the substantive offense that must be present in order to charge the accomplice Under section III, the State has the burden of establishing that the accomplice acted with the purpose of promoting or facilitating the commission of the substantive offense.

Horne, 125 N.H. at 256 (quotation omitted). In reading sections III and IV together with *Etzweiler*, we concluded that RSA 626:8, III and IV are interconnected, and that the elements in section III must be alleged and proven by the State in order to establish accomplice liability. In

reaching this conclusion, we endorsed the idea that one can be an accomplice to crimes requiring proof of recklessness as to a result element.

In *Locke*, we reinforced the principle that one can be an accomplice to reckless crimes by concluding that "a person can act with the purpose of promoting or facilitating the commission of a reckless homicide and thus be charged as an accomplice to such crime." *Locke*, 144 N.H. at 353....

The Model Penal Code commentary distinguishes conspiracy from accomplice liability with respect to recklessly causing a particular result by explaining:

As to the liability of one who renders aid for the completed crime

... when causing a particular result is an element of a crime, a person is an accomplice in the crime if he was an accomplice in the behavior that caused the result and shared the same purpose or knowledge with respect to the result that is required by the definition of the crime.

MODEL PENAL CODE § 5.03 comment 2(c)(i) at 408.

A person cannot be guilty of conspiracy to commit a reckless assault because an assault, like a reckless manslaughter, is controlled by the resulting harm. In other words, a person cannot agree, in advance, to commit a reckless assault, because, by definition, a reckless assault only arises once a future harm results from reckless behavior. In this case, since there was no agreement to cause the particular harm that resulted, the defendant cannot be guilty of conspiracy to commit reckless assault.

Accordingly, we adopt the view of the Model Penal Code that one cannot conspire to commit a crime where the culpability is based upon the result of reckless conduct. In doing so, we conclude that the State cannot charge a person under RSA 629:3 for conspiracy to commit a reckless second-degree assault. Here, the State alleged that Donohue, with the purpose that an assault be committed, agreed with Gardner to commit a reckless assault, and committed one or more overt acts in furtherance of this conspiracy. Based on the above reasoning, this indictment fails to allege facts that, if proven, would constitute a cognizable crime. Because the trial court erred in denying Donohue's motion to dismiss the indictment, we reverse the conspiracy conviction.

Reversed.

Discussion Questions and Notes

- 1) Why do you think the MPC drafters chose such a high *mens rea* requirement (purpose) for conspiracy charges?
- 2) Which case outcomes would be different in the cases from Section II.A of this chapter?

III. Affirmative Defenses to Conspiracy

Impossibility, which is already a confused defense under attempt, is not generally thought to be a defense to conspiracy. Although there is some disagreement on this issue among a small number of judges, the statement that impossibility is not an affirmative defense to conspiracy charges is essentially correct.

Abandonment (also known as renunciation or withdrawal), however, is a viable affirmative defense in some jurisdictions. The traditional common law approach states that abandonment is not a defense to conspiracy charges. In contrast, the Model Penal Code affords the defendant a narrow affirmative defense referred to as renunciation: "It is an affirmative defense that the actor, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose." MODEL PENAL CODE § 5.03(6).

The following case illustrates how difficult it is for a defendant to receive a renunciation or abandonment jury instruction.

Casement v. Arkansas, 1995 Ark. App. LEXIS 211 (Ark. Ct. App. 1995)

JOHN B. ROBBINS, Judge

Appellant Jacque Casement was convicted of conspiracy to deliver a controlled substance, cocaine, and sentenced to eighteen years in the Arkansas Department of Correction. Appellant contends on appeal that the trial court erred in denying his motion for a directed verdict, arguing there was no agreement between him and Damon Kramer, and in the alternative that he renounced his involvement. We find no error and affirm.

Appellant first contends that the trial court erred in not directing a verdict in his favor because there was no substantial evidence of an agreement between the appellant and Mr. Kramer. A motion for a directed verdict is a challenge to the sufficiency of the evidence, and we review the evidence in the light most favorable to the appellee and affirm the conviction if there is substantial evidence to support it. Substantial evidence is evidence that is of sufficient force and character that it will, with reasonable and material certainty, compel a conclusion one way or the other passing beyond suspicion and conjecture.

The evidence viewed in the light most favorable to the State shows that appellant and Damon Kramer arranged a drug transaction that was to occur on May 8, 1992. Damon Kramer testified on behalf of the State that he and the appellant had discussed purchasing one kilo of cocaine from Greg Mahan, a confidential informant. Mr. Kramer testified that he and the appellant drove from Hot Springs to North Little Rock that morning, and that the appellant brought twenty-five thousand dollars (\$25,000.00) cash in his pants to purchase the cocaine. Testimony showed that the appellant and Mr. Kramer went to Mr. Mahan's house upon their arrival in North Little Rock,

and that the appellant showed Mr. Mahan the money. Mr. Kramer, as well as undercover officers observing the parties, testified that later that day the appellant used a pay telephone at a convenience store to speak with Mr. Mahan and arrange a meeting place for the transaction.

Several witnesses testified that the appellant and Mr. Kramer met with Mr. Mahan and Bryan Scott, an undercover officer with the North Little Rock Police Department, at the Wal-Mart store on Camp Robinson Road. Several witnesses testified that Officer Scott entered Mr. Kramer's vehicle and asked if the appellant and Mr. Kramer had the money, and the appellant asked if Scott had the cocaine. Officer Scott handed a sack over the seat and both the appellant and Mr. Kramer reached for it. Appellant retrieved the sack, placed it between his legs, and looked into the sack. Testimony showed that the appellant then stated, "This shit's whacked," indicating that the cocaine was powder and not a solid brick. The evidence indicated that the appellant became angry and threw the sack back across the seat at Officer Scott and told him to get out of the vehicle. At that point undercover officers were given a cue via the body microphone worn by Officer Scott to approach and make the arrests. Appellant and Mr. Kramer were arrested at that point and appellant's money was seized.

Arkansas Code Annotated § 5-3-401 (Repl. 1993), defines the conduct which constitutes conspiracy as follows:

A person conspires to commit an offense if with the purpose of promoting or facilitating the commission of any criminal offense:

(1) He agrees with another person or other persons:

(A) That (1) or more of them will engage in conduct that constitutes that offense; or

(B) That he will aid in the planning or commission of that criminal offense; and

(2) He or another person with whom he conspires does any overt act in pursuance of the conspiracy.

The State is required to prove both that there has been an agreement of the parties to commit the crime and that one of the conspirators did at least a minimal act in furtherance of that agreement. Due to the very nature of a criminal conspiracy, direct evidence of the criminal agreement is seldom able to be shown, but the conspiracy may be proved by circumstantial evidence.

Mr. Kramer testified that the appellant was aware that the purpose of the trip to North Little Rock was to purchase cocaine, and that they had discussed the purchase many times prior to the day in question. Appellant brought twenty-five thousand dollars cash with him to make the purchase, which was the precise sum of money they had discussed paying for a kilo of cocaine. Testimony showed that appellant displayed the money to Mr. Mahan earlier in the day, and to Officer Scott just prior to Officer Scott showing the appellant the cocaine. Appellant initially accepted the sack containing the cocaine and only refused it when he was disappointed with the quality or form of the cocaine. We hold that there was sufficient evidence to find that the appellant engaged in a conspiracy to deliver cocaine.

Appellant secondly contends that the trial court erred in denying his motion for a directed verdict based on his affirmative defense of renunciation. Ark. Code Ann. § 5-3-405 (Repl. 1993), provides that:

It is an affirmative defense to a prosecution for conspiracy to commit an offense that the defendant:

- (1) Thwarted the success of the conspiracy under circumstances manifesting a complete and voluntary renunciation of his criminal purpose; or
- (2) Terminated his participation in the conspiracy and;
 - (A) Gave timely warning to appropriate law enforcement authorities; or
 - (B) Otherwise made a substantial effort to prevent the commission of the offense, under circumstances manifesting a voluntary and complete renunciation of his criminal purpose.

Appellant argues that his refusal to purchase the cocaine and ordering Officer Scott out of the vehicle showed that he withdrew his participation in the offense.

It is clear from the above facts that the appellant did not renounce his participation in the crime. The conspiracy was completed when the appellant and Mr. Kramer agreed to make the purchase and the overt act occurred of showing Mr. Mahan and Officer Scott the money in an effort to purchase the cocaine. Appellant did not terminate his participation in the conspiracy by voluntarily renouncing his criminal purpose, giving a timely warning to law enforcement authorities, or preventing the commission of the offense voluntarily. Appellant's refusal to purchase the cocaine based on its quality was not a renunciation. Our review of the record reveals no affirmative evidence of appellant's withdrawal. The trial court did not err in failing to grant appellant's motion for a directed verdict on this point....

Affirmed.

Discussion Questions and Notes

- 1) What portions of the abandonment test did Casement fail?
- 2) Would Casement have met the MPC abandonment standard used for attempt?
How are the two standards different?

Review Exercise 1

Watch [this film clip](#) and answer these questions:

Right after Caldwell enters the house, police raid the house and arrest everyone. Caldwell is charged with conspiracy to commit robbery and attempt to commit robbery for a plan to rob a shared casino vault

Assume this robbery statute is used: N.D. Cent. Code, § 12.1-22-01: "A person is guilty of robbery if, in the course of committing a theft, he inflicts or attempts to inflict bodily injury upon another or threatens or menaces another with imminent bodily injury."

Under common law approach, assess the charges against Caldwell. Are there any different considerations under the MPC?

Review Exercise 2

Watch [this film clip](#) and answer this question:

Colin is charged with conspiracy to commit arson, conspiracy to distribute narcotics, arson, and, attempted distribution of narcotics. What should be the result of the charges under the common law and MPC approaches?

Review Exercise 3

Watch [this film clip](#) and answer these questions:

Assuming the people in the car were going to commit homicide in retaliation for the murder of their friend or relative, did the defendant getting out of the car “abandon” the conspiracy to commit homicide in an MPC jurisdiction? Did he abandon attempted homicide in an MPC jurisdiction?

CHAPTER 8: HOMICIDE

At its core, homicide is a very simple crime: one person kills another. However, substantive criminal law has added levels of complexity to prosecuting homicide cases by differentiating the types of homicide by analyzing a defendant's *mens rea*. The *actus reus* analysis is usually less knotty, but there are some notable boundary cases that warrant exploring.

I. Act Requirements

The textual definitions of homicide under the common law and MPC do not vary substantially in regard to the act requirements. Pennsylvania has enacted a homicide statute identical to the MPC except for substituting "intentionally" for "purposely."

18 Pa.C.S. § 2501

A person is guilty of criminal homicide if he intentionally, knowingly, recklessly or negligently causes the death of another human being.

Under both the common law and MPC approaches, the key words which we examine further for the act requirements of homicide are "causes" and "human being."

A. Causation

When a solo shooter aims, fires, and kills his intended target, there is little confusion about who caused the death of the victim. However, sometimes intervening causes emerge which call into question who should be held criminally responsible. The following potential homicide by omission illustrates the difficulty in determining whether a homicide has taken place in certain scenarios.

Montana v. Schipman, 2 P.3d 223 (Mont. 2000)

Justice William E. Hunt, Sr. delivered the Opinion of the Court.

Following a trial by jury, Defendant Stacy J. Schipman (Schipman) was convicted of negligent homicide, a felony, pursuant to § 45-5-104, MCA (1995), and negligent endangerment, a

misdemeanor, pursuant to § 45-5-208, MCA (1995). Schipman appeals from the Findings, Reasons, Judgment & Order Deferring Imposition of Sentence issued by the Fifth Judicial District Court, Beaverhead County. We reverse and vacate Schipman's conviction of negligent homicide.

The dispositive issue on appeal is whether the result of Schipman's conduct in leaving the scene after striking the horse was negligent homicide....

At about 9:45 p.m. on July 21, 1995, Schipman left his two daughters with a babysitter at his trailer home near Dillon, Montana, and headed to a birthday party at the Glen Bar. Schipman first went to the Metlen Bar, arriving at approximately 10 p.m., where he consumed one beer. He then proceeded to the Glen Bar, arriving at about 10:45 p.m., only to find that the birthday party was over. Schipman nevertheless remained at the bar and played pool until about 12:30 p.m. While at the Glen Bar, Schipman stated that he thought he consumed about three more beers.

In the early morning hours of July 22, 1995, Andy Weakley (Weakley) was driving on Montana Highway 91 north of Dillon when he noticed that a horse was loose on the highway. Although it was a dark and rainy evening and the horse was a dark color, Weakley was able to spot the horse running on the highway and stopped his vehicle. Weakley then attempted to catch the horse, but was unable to restrain the animal. Unable to capture the horse, Weakley immediately returned to Dillon and called 911 at 1:41 a.m. to report the horse running on the highway.

It was a very dark night, according to Schipman, when he left the Glen Bar. Schipman was nearly home from the bar when a dark horse lunged out of the ditch alongside the highway and struck his vehicle, causing extensive damage to the passenger side of Schipman's truck. The horse lunged so suddenly that Schipman had no time to react and, thus, did not attempt to swerve or brake to avoid hitting the horse. Schipman recounted that only the front torso of the horse was on the highway upon impact. After hitting the horse, however, Schipman did not stop his vehicle; looking back Schipman did not see the horse on the highway and, assuming that it was dead, proceeded home. Upon arriving home, Schipman's neighbor asked him what had happened to his truck. Schipman described the collision to his neighbor, stating that he had hit the horse so hard that the impact had knocked the horse into the borrow pit alongside the highway, and that he was sure the horse was not still on the highway.

Meanwhile, Weakley returned to the location where he had first seen the dark horse. He discovered the horse in approximately the same location as before, but the horse was lying motionless across the southbound lane of the highway. Upon inspecting, Weakley determined that the horse appeared to have a broken neck. Weakley thought the horse was dead. Thus, he parked his vehicle in the northbound lane of Montana Highway 91 some distance ahead of the horse, and turned on his flashers in an attempt to warn oncoming traffic of the road hazard. Shortly thereafter, a second vehicle driven by Larry Mallon (Mallon) pulled in behind Weakley's vehicle.

At about this same time, two recent high school graduates, Jamie Keller (Keller) and Tresa Dorvall (Dorvall), were returning home to Dillon after spending an evening with friends in Virginia City. Keller was driving Dorvall's older model Toyota pickup at a speed of about 55 miles per hour. Upon noticing two vehicles parked in the northbound lane of travel, Keller slowed down. However, Keller could not see any reason why the two vehicles were stopped. Dorvall, upon seeing two men standing by the side of the road, told Keller not to stop. Thus, Keller continued past the two men until Dorvall

exclaimed, "There's something in the road." Keller then saw the horse but it was too late. She pulled the vehicle to the right because she thought that it would be better to go into the borrow pit than to hit the horse. Keller could not avoid hitting the horse.

Upon impact, Keller initially lost consciousness. When she came to, she was still inside the vehicle and the vehicle was in the borrow pit. However, Dorvall was not in the vehicle. Dorvall had been thrown from the pickup and was lying off the road not far from the horse. Dorvall was having great difficulty breathing, and subsequently died from the injuries she sustained. Beaverhead County authorities responded to the accident, and the first officer on the scene reported that even with knowledge of the horse's location, it was very difficult to spot the dead horse on the highway.

Upon arriving home after the accident, Schipman called his girlfriend and told her that he had hit a horse but that he thought it went into the ditch alongside the highway. According to Schipman, he did not immediately report hitting the horse to the authorities because he had been drinking. It was not enough in my opinion to—I did not consider myself intoxicated, but I considered myself a likely candidate for a Breathalyzer that would maybe flunk. Drink two beers and you are legally intoxicated on the Breathalyzer. I did not want to risk my—I did not want to risk that.

The day following the accident, Schipman called authorities to report hitting the horse. When interviewed about the accident, Schipman told authorities that he did not call in the accident immediately after hitting the horse because he had been drinking and did not want to risk being charged with a DUI. When asked why he did not stay at the accident scene, Schipman responded, "No reason I guess."

The dispositive issue on appeal is whether the result of Schipman's conduct in leaving the scene after striking the horse was negligent homicide.

The parties agree on appeal that Schipman's conduct in leaving the scene of the accident without first stopping to determine whether the horse was blocking the roadway and whether there was a need to warn oncoming motorists of that road hazard is the alleged criminally negligent act underlying Schipman's convictions. Thus, the dispositive question becomes whether Schipman's decision to leave the scene of the accident was the cause in fact of Dorvall's death.

Schipman was convicted of negligent homicide, a felony, pursuant to § 45-5-104, MCA (1995), which provides that "[a] person commits the offense of negligent homicide if he [or she] negligently causes the death of another human being." Section 45-5-104(1), MCA (1995). Schipman was also convicted of negligent endangerment, a misdemeanor, pursuant to § 45-5-208, MCA (1995), under which "[a] person who negligently engages in conduct that creates a substantial risk of death or serious bodily injury to another commits the offense of negligent endangerment." Section 45-5-208(1), MCA (1995). Therefore, as a material element of either offense, the State was required to prove beyond a reasonable doubt that Schipman's conduct was criminally negligent pursuant to the definition of § 45-2-101(42), MCA (1995).

The conduct alleged to be negligent was Schipman's decision to leave the scene of the collision without taking action to warn other motorists of the potential risk the horse posed. Schipman's collision with the horse occurred in an "open range" area on a stormy night. Numerous witnesses testified that the horse was dark in color, and that it was virtually impossible to perceive the horse on the road given that it was a dark and rainy night. Following the impact with the horse, as Schipman

points out, he looked back to see if the horse was on the highway but he could not see it lying in the roadway. On several occasions following the collision, Schipman stated that he firmly believed that the horse was in the borrow pit alongside the highway. The serious body damage to the passenger-side of Schipman's truck supports Schipman's story. Following the accident, since Schipman's truck was leaking radiator fluid and Schipman had glass shards in his head, Schipman chose to drive one fourth of a mile to the driveway of his trailer court to attend to his personal problems. In sum, Schipman left the scene of the collision with the horse under a mistaken belief that the horse was dead and in the ditch alongside the highway.

Schipman contends that had he remained at the scene of the accident, the actual result would not have been any different. In so arguing, Schipman contends that there were "independent intervening events," namely, the young girls' decision to disregard the warnings of Weakley and Mallon, which should absolve him of criminal liability for the result of Dorvall's death. After Schipman departed from the scene of the accident, Weakley and then Mallon stopped near the dead horse and Weakley engaged the hazard lights of his vehicle. As Keller and Dorvall subsequently approached the scene of the accident, Weakley got out of his vehicle, and began waving his arms and yelling, "Stop." When Keller did not appear to be slowing down, Weakley then flashed his headlights on and off. Keller recounted seeing the hazard lights and the two men on the roadside in the middle of the night. Upon seeing the two men, Keller and Dorvall made a conscious decision not to stop. Based on these facts, Schipman argues that the jury should not be allowed to speculate as to whether Keller would have slowed down or stopped had there been three vehicles with their flashers on and three men along the roadside attempting to warn oncoming traffic of the horse in the road. Therefore, Schipman asserts that this Court should not permit the result, i.e., the death of Dorvall, to influence his criminal culpability. We agree.

In this case, cause in fact was not established. Even though Schipman did not stop at the scene of the accident, others did. Those who did made every reasonable effort to warn oncoming motorists that a hazard existed on the road. They parked their vehicles on the highway, left their headlights on, activated their emergency blinkers, and tried to warn oncoming motorists. Had Schipman stopped, he could not have done more. In spite of the efforts to warn motorists of the road hazard, the vehicle in which Dorvall was a passenger did not stop. The girls did not do so because they noticed two men alongside the road. There is no basis to speculate that they would have stopped or avoided the road hazard had they seen three men alongside the road.

Schipman claims in his reply brief on appeal that "if this Court finds that his actions do not amount to criminal negligence, both the misdemeanor [negligent endangerment] and felony [negligent homicide] convictions must fall." We disagree. First, we note that Schipman's contentions in his principal brief on appeal appear to focus exclusively on the infirmity of his negligent homicide conviction; only in his reply brief does Schipman claim that the issues raised on appeal relate to both convictions. Second, in this decision, we have assumed, without deciding, that Schipman's actions were criminally negligent under the definition of § 45-2-101(42), MCA(1995).

We conclude that there is no evidence that Schipman's negligent act did, in fact, cause Dorvall's death. Therefore, the elements of negligent homicide have not been proven and Schipman's conviction for that offense must be reversed.

The conviction for negligent homicide is reversed and vacated.

Justice Karla M. Gray, dissenting.

I dissent from the Court's opinion which appears to be based on a determination that Schipman's negligent conduct in failing to take any action to warn motorists of the dead horse in the road did not cause Dorvall's death as a matter of law. It is my view that the causation question in this case was a question of fact for the jury which was properly submitted to the jury and, applying the correct standard of review, we are obligated to affirm Schipman's conviction for negligent homicide.

Our standard in reviewing a jury verdict is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In conducting such a review, we must keep in mind that witness credibility and the weight to be given testimony are to be determined by the trier of fact. Without explanation, the Court does not cite or apply these standards. Moreover, it does not view the evidence in the light most favorable to the prosecution. Indeed, the Court relies almost totally on Schipman's version of the events and accepts his testimony at face value without any regard to the State's evidence and particularly without regard to inconsistencies and weaknesses in Schipman's version, such as the fact that he did not tell law enforcement officials until much later that he had looked back and seen nothing after hitting the horse. Nor does the Court discuss the conflicting evidence that Schipman hit the horse head-on, resulting in the horse immediately falling to the ground in the southbound lane and staying there to ultimately be hit by the vehicle Keller was driving.

Finally, the Court does not present clearly either the State's theory of the case or Schipman's somewhat conflicting defense theories. The State's theory was that the horse was in the road, not lunging toward it, when Schipman hit it broadside and left it lying in the southbound lane. Moreover, while the State agreed that Weakley and Mallon's actions in parking in the northbound lane and attempting to warn oncoming motorists about the horse in the southbound lane were not unreasonable, the State's evidence pointed to other actions Schipman could have taken which would have prevented the accident. For example, had Schipman actually checked on the horse's whereabouts and seen that it was in the southbound lane, he could have remained at the scene and parked his vehicle with his headlights shining on the dead horse as a clear warning to other motorists on that dark night that the road was obstructed. Similarly, he could have placed his vehicle—much more visible than a dark, dead horse—in the southbound lane marking the spot so that oncoming southbound vehicles would have had to go around it. In addition, the record reflects that about 10 minutes elapsed between Schipman hitting the horse and the fatal accident. According to the timing-related evidence, Schipman could have driven to his home after hitting the horse in approximately 30 seconds, as he did, and called 911 instead of engaging friends in conversation for an extended period of time; had he done so, the evidence reflects that law enforcement officers could have responded to the dead horse in the roadway in 3 minutes and properly "secured" the area to warn oncoming motorists by placing flares and turning on the patrol car's revolving top lights.

The Court's failure to discuss Schipman's alternative defense theories, which likely undermined his credibility in the jury's eyes, also reflects the extent to which the Court has merely accepted Schipman's evidence and argument that cause in fact was not established as a matter of law.

Schipman's primary theory—as related by the Court—was that he hit the horse as it was lunging near to, but not on, the roadway, looked back, saw nothing, assumed the horse was in the borrow pit and proceeded home. Under this theory, the horse subsequently returned to the roadway and died prior to the time Weakley arrived to find it in the southbound lane, and nothing Schipman could have done would have changed the result. This theory incorporated two of Schipman's defenses: that Weakley and Mallon's actions mitigated any culpability he might have had and that the Keller vehicle should have seen the dead horse in the road and stopped in time. Schipman's version of the accident itself, however, was challenged on cross-examination and through substantial evidence presented by the State. Furthermore, as pointed out above, the record reflects other ways in which Schipman could have given warning to prevent the fatal accident. Schipman also presented an "alibi" defense of sorts. Under this somewhat undeveloped theory, he apparently either hit a different horse or hit the horse at issue earlier, leaving it alive, and was already home by the time Weakley first saw the horse running loose on the highway.

The State charged Schipman with negligent homicide in that he negligently caused Dorvall's death. See § 45-5-104, MCA (1995). The allegedly negligent conduct at issue was Schipman's decision to leave the scene and do nothing to warn other motorists of the risk the horse posed after he hit it. Although it is somewhat difficult to tell from its opinion, the Court appears to assume *arguendo* that Schipman's conduct was, in fact, criminally negligent in that Schipman consciously disregarded the risk that a death would result from his leaving a dead horse on the road without taking any steps to warn other motorists. See § 45-2-101(42), MCA (1995). Thus, under the Court's reasoning, only the causation element remained to be established.

In a negligent homicide case, the State must prove that the accused's conduct is the "cause-in-fact" of the victim's death. See *State ex rel. Kuntz v. Thirteenth Judicial Dist. Court*, 2000 MT 22, PP36-37, 995 P.2d 951, PP36-37, 57 Mont. St. Rep. 111, PP36-37. "A party's conduct is a cause-in-fact of an event if 'the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event, if the event would have occurred without it.'" *Kuntz* P37 (citations omitted). Combining that definition with our standard of review of a jury verdict, the question before us, properly stated, is this: Whether, viewed in the light most favorable to the prosecution, there was sufficient evidence for a rational jury to conclude beyond a reasonable doubt that, but for Schipman leaving the scene of the horse accident and failing to take any action to warn of the risk he had created, Dorvall would not have died. Viewing the evidence of record in the light most favorable to the prosecution, I would conclude there was sufficient evidence for a jury to find causation in this case. I simply cannot agree with the Court's implicit determination that the fatal accident was unavoidable as a matter of law once Schipman hit the horse.

In closing, it is appropriate to observe that this was not a particularly strong case for the prosecution. Had the case against Schipman been either stronger or weaker, a plea agreement might have been reached. That did not occur, however, and the case proceeded to a jury. In my view, this is the kind of close case in which a decision by the jury was entirely appropriate. While the jury might well have acquitted Schipman of negligent homicide on the evidence before it, and while some might think that was a more appropriate outcome, I submit the jury was well within its province in convicting Schipman. In my view, it is unwise for this Court to start down the road of deciding close factual

questions in criminal cases as a matter of law, especially when it accomplishes such a resolution by merely accepting the defendant's version of the facts and arguments. I dissent.

Justice W. William Leaphart, dissenting.

I join in Justice Gray's dissenting opinion and note with curiosity that the Court twice mentions that, after hitting a dark horse on a very dark night, Schipman looked back in his rear view mirror and when he did not see the dark horse on the dark road, assumed it was in the ditch. The Court concludes that Schipman left the scene "under a mistaken belief that the horse was dead and in the ditch alongside the highway." Given that no one (even without the benefit of four beers) would be able to see a dark horse on a dark night in a rear view mirror any more than they could look in a rear view mirror and see a white horse lying on a snow-packed highway in a blizzard, I fail to see how this meaningless glance in the mirror justified Schipman's "mistaken belief" that the horse was not on the highway.

Discussion Questions and Notes

- 1) Try to separate the questions of whether the defendant was negligent (a *mens rea* issue) from whether he caused the death of another. Do you think the majority or dissent had the better argument on the act requirement causation issue?
- 2) If the driver of the victims' car was driving with no headlights and at excessive speed, would your answer on causation change? What if the driver was drunk?

Notably, as illustrated in the following case, causation never need be exclusively attributed to a single person. The case also demonstrates the outer limits of the modern doctrine.

Roy and Settles v. United States, 871 A.2d 498 (D.C. 2005)

NEBEKER, Senior Judge:

At the conclusion of a jury trial, appellants were convicted on several counts, stemming from the events of June 12, 2000, in which appellants Roy and Settles opened fire on one another on a public street, resulting in the death of an innocent bystander, Grace Edwards. Appellant Settles was convicted of second-degree murder, two counts of assault with a dangerous weapon (ADW), one count of possession of a firearm during the commission of a crime of violence (PFDCV), and carrying

a pistol without a license (CPWL). Appellant Roy was also convicted of second-degree murder, four counts of ADW, five counts of PFDCV, one count of CPWL, and one count of simple assault. Both appellants timely noted appeals of these convictions, asserting error as to ... the jury instructions on causation.... We affirm...

The appellants had a common acquaintance in Nacheta Harris. Harris had been Roy's girlfriend and is the mother of his child. Upon her break up with Roy, Harris began dating Settles. On the fateful morning, Harris and Settles arrived at her cousin's house on Valley Avenue. Settles had his motorcycle. Roy was waiting in the alley behind Valley Avenue for Harris and Settles and began running toward them. Settles, seeing Roy, dropped his motorcycle and began running away. Roy stopped where Harris was standing, punched her in the face, then ran after Settles, firing three or four shots from his gun. Settles did not return gunfire, but rather was able to escape. Roy gave up the chase at that point, returned to Harris, who he again punched in the face, and then went to a field leading to Tenth Place.

Settles, after running from Roy, arrived on Valley Avenue and met Ralph Faulkner who was sitting on his porch. Settles told Faulkner what had happened and asked him if he would retrieve his motorcycle and saw a man, matching Roy's description, standing in the field across the street from the alley, watching him. He dropped the motorcycle and returned to his apartment. From his apartment building he could still see Roy. He was then standing near the footbridge to Tenth Place.

Settles proceeded to the apartment of a friend, Andre Brown, who was keeping Settles' gun under a mattress in the apartment. Brown retrieved the gun and gave it to Settles who left the apartment, calling for Brown to come with him. Outside, another friend, Bernard James, was encountered. Settles asked Brown to drive him to Tenth Place, which he did, accompanied also by James. Settles was in the front passenger seat with the window down and his gun in his lap when the car entered Tenth Place.

As the car entered Tenth Place, another witness, Charles Reeves, was sitting on the porch of his apartment building and Grace Edwards was taking her morning walk. Some evidence reflected that Roy then came up out of a nearby stairwell, pointing a gun at the car. Settles fired three shots at Roy, who returned fire with several shots of his own. Witness Reeves had already run inside his building as the car continued up Tenth Place. Grace Edwards screamed and fell to the ground having been fatally hit by a stray bullet.

Having missed Roy, Settles told Brown to circle around, but while doing so, Brown noticed two police officers, in an unmarked car, driving behind him. Accordingly, instead of driving back to Tenth Place, Brown parked the car on Valley Avenue and the three men entered Brown's apartment building. Approximately five minutes elapsed from the time the men left for Tenth Place and the time they returned to the apartment.

Meanwhile, the officer had noticed Brown and the other men in the vehicle as well, and was about to check the car's tags in the computer, when he received a call for the shooting on Tenth Place. Upon his arrival on Tenth Place, he heard someone say that shots had been fired from a four-door Dodge Intrepid with three occupants. He broadcast a lookout for the vehicle he had previously seen. The car was later located parked on Valley Avenue. Ballistics evidence recovered from the scene showed that two guns were fired on Tenth Place, a 9 mm semiautomatic and a .380 caliber firearm....

Prior to trial, a joint pre-trial hearing was held, at which the government submitted a memorandum of law setting forth their theories of liability for both Settles and Roy. That memorandum set forth the government's theory that Settles was guilty under a gun-battle theory of liability, while it presented alternative theories with regard to Roy. The government's primary theory of liability for Roy was that he was guilty of the first-degree murder of Ms. Edwards under a transferred intent theory. As an alternative theory, however, the government argued that Roy too was liable under a "depraved heart murder theory," for his participation in the gun battle on a public street. At the close of the hearing, the judge ruled that it did not matter which appellant started the gun battle or which bullet actually killed Ms. Edwards but rather that the appellants' actions:

Demonstrated conscious disregard of the safety of citizens in the District of Columbia when they sought to kill each other, and that there would have been ... no murder of an innocent person but for the willingness of both Mr. Roy and Mr. Settles to turn city streets into an urban battle ground.

At the close of trial, the parties discussed the language of the causation instructions which would be given to the jury. The government contended that the instructions should require the jury to find that Settles and Roy were "armed and prepared" to engage in a gun battle and that they, in fact, did engage in a gun battle. Settles argued that the jury should be required to find that Settles "agreed, either explicitly or tacitly, to engage in mutual combat involving firearms" or "'to engage in a gun battle,'" contending that the language offered by the government required a "one-sided" action, instead of a mutual agreement. The court opted for the "armed and prepared" language stating "in my view, there's not much difference, if any at all, in terms of ... if one is armed and prepared to engage in a gun battle versus a tacit agreement to engage in a gun battle."

Roy then contended that the causation instructions applied only to Settles, and that the court, so as to avoid confusion, should so instruct the jury. The court initially agreed that it would not give the causation instructions with regard to Roy. However, after further discussions, the court stated that the legal principles involved in the causation instructions applied to Roy as well as Settles and that since evidence had been presented which may lead the jury to conclude that Roy was involved in the battle but not responsible for the fatal shot, the instructions should be given for both Settles and Roy.⁸

⁸ The instruction on causation, under the lesser included offense of second-degree murder, finally given to the jury stated:

A person causes the death of another person if his actions are a substantial factor in bringing about the death and if death is a reasonably foreseeable consequence of his actions. Death is reasonably foreseeable if it is something which should have been foreseen as reasonably related to the defendant's actions.

It is not necessary for the government to prove that a defendant personally fired the fatal round in this case. Rather, if you are convinced beyond a reasonable doubt that:

One, the defendant was armed and prepared to engage in a gun battle;

Two, that the defendant did, in fact, engage in a gun battle on the 3400 block of Tenth Place, Southeast on June 12, 2000;

....

Both Settles and Roy challenge the trial court's instructions on causation, contending that it mischaracterizes the law of homicide liability in the District of Columbia. We review the instruction given for its compatibility with the law.

We think it important to note that while proximate causation as a theory of second-degree murder liability has been recognized in our case law for some time, the factual scenario of a "gun battle" on city streets, as in this case, is relatively new. While urban gun battles years ago involved revolvers or clipped pistols of limited fire power, they have now escalated to the use of automatic and semiautomatic weapons. The results are pocket wars with no rules of engagement resulting in a highly increased risk to noncombatants. It is this increased risk to innocent bystanders which justifies the application of proximate cause liability to those participants who willfully choose to engage in these battles.¹⁰

In this jurisdiction we have held findings of homicide liability permissible where: (1) a defendant's actions contribute substantially to or are a substantial factor in a fatal injury; and (2) the death is a reasonable foreseeable consequence of the defendant's actions. We have defined substantial cause as that conduct which a reasonable person would regard as having produced the fatal effect. Thus,

Three, that the defendant did not act in self-defense, as I will describe that concept to you, at the time he participated in a gun battle;

Four, that the defendant's conduct on Tenth Place on June 12th, 2000 was a substantial factor in the death of Grace Edwards; and

Five, that it was reasonably foreseeable that death or serious bodily injury to innocent bystanders could occur as a result of the defendant's conduct on Tenth Place on June 12th, then, as a matter of law, the defendant is deemed to have caused the death of Grace Edwards.

The government must prove causation beyond a reasonable doubt.

Now, the second element, ladies and gentlemen, is:

Two, that at the time the defendant did so, he had the specific intent to kill or seriously injure the decedent, or acted in a conscious disregard of an extreme risk of death or serious bodily injury to the decedent;

Three, there were no mitigating circumstances....

Four, that he did not act in self-defense [...] ...

¹⁰ Other jurisdictions have extended proximate cause liability to participants in gun battles, finding that an individual's participation in such a battle represents a depraved indifference to human life such that he or she meets the *mens rea* for second-degree depraved heart murder. Further, courts have determined that the combined hail of bullets that result from such a battle are jointly responsible for the fatal injury, such that a determination of which defendant's bullet "actually" caused the death is unnecessary. Finally, courts have found that a death which results from the shower of bullets created during this type of battle is more than reasonably foreseeable, i.e., conscious awareness of danger. *Alston v. State*, 101 Md. App. 47, 643 A.2d 468, 469 (Md. Ct. Spec. App. 1994), *aff'd*, 339 Md. 306, 662 A.2d 247 (Md. 1995); *Commonwealth v. Santiago*, 425 Mass. 491, 681 N.E.2d 1205, 1215 (Mass. 1997); *People v. Sanchez*, 26 Cal. 4th 834, 111 Cal. Rptr. 2d 129, 29 P.3d 209 (2001); *State v. Brown*, 589 N.W.2d 69 (Iowa App. 1998), overruled on other grounds by *State v. Reeves*, 636 N.W.2d 22, 25 (Iowa 2001); *Phillips v. Commonwealth*, 17 S.W.3d 870, 873-75 (Ky. 2000).

we hold defendants criminally accountable for all harms that are reasonably foreseeable consequences of his or her actions....

While the evidence was unclear as to whether Roy's or Settles' bullet was responsible for the fatal shot, such a determination is unnecessary if both men prepared for and undertook to participate in the gun battle where it was clearly foreseeable that others would be endangered. Our dissenting colleague as to this point would have the court view what happened on Valley Avenue separately from the events on Tenth Place. He concludes that the first shots fired by Roy on Valley Avenue are of no relevance because "there was a hiatus between the two encounters." (Dissent at note 1.) But the first of the two encounters is highly revealing of Roy's earlier and continuing intent to shoot Settles. When Roy emerged from the stairwell pointing his gun at Settles who had arrived after quickly arming himself, it was no separate event from the first. It was a continuum of Roy's desire to shoot Settles and scarcely constituted a break in the altercation.

In addition, we do not read the jury instruction as treating the Valley Avenue shooting as separate from the altercation as a whole. The instruction, of necessity, had to relate to the Tenth Street site since that was where the death occurred. The change of the location in the brief period did not interrupt the continuity of the events.

GLICKMAN, Associate Judge, concurring in part and dissenting in part:

I agree that a defendant who unlawfully participated in a gun battle may be found guilty of murder if a stray bullet killed an innocent bystander, regardless of which combatant actually fired the fatal shot. So long as the defendant entered the fray before that shot was fired, the question of proximate causation - whether the harm was a reasonably foreseeable consequence of the defendant's acts, *see McKinnon v. United States*, 550 A.2d 915, 918 (D.C. 1988) - poses no great conceptual difficulty. "By choosing to engage in a shootout, a defendant may be the cause of a shooting by either side because the death of a bystander is a natural result of a shootout, and the shootout could not occur without participation from both sides." *Commonwealth v. Santiago*, 425 Mass. 491, 681 N.E.2d 1205, 1215 (Mass. 1997). Where two or more persons "voluntarily and jointly created a zone of danger," it is fair to hold each one "responsible for his own acts and the acts of the others" that ensued. *People v. Russell*, 91 N.Y.2d 280, 693 N.E.2d 193, 195, 670 N.Y.S.2d 166 (N.Y. 1998). As "the deadly homicidal force ... was a collective hail of bullets, a collective fusillade," *Alston v. State*, 101 Md. App. 47, 643 A.2d 468, 469 (Md. Ct. Spec. App. 1994), *aff'd*, 339 Md. 306, 662 A.2d 247 (Md. 1995), the responsibility may be collective as well.

It is a different matter if the defendant did not join the combat until after the bystander was killed. In that case, the victim's death could not have been a consequence of the defendant's subsequent actions even if the defendant wholeheartedly and unjustifiably perpetuated the gun battle. The defendant's actions after the bystander was shot have no causal relationship to the previous stray bullets, and therefore such a defendant cannot be held criminally liable under the gun battle theory for the bystander's injuries. This principle is analogous to the rules that an accessory after the fact is not guilty of the substantive crime previously committed by the principal, *see, e.g., Williams v. United States*, 478 A.2d 1101, 1106 (D.C. 1984), and that a member of a criminal conspiracy is not liable for

crimes committed in furtherance of the conspiracy before he joined it, *see, e.g., United States v. Goldberg*, 105 F.3d 770, 775-76 (1st Cir. 1997).

In light of these considerations, the application of the gun battle theory of causation in the present case to appellant Roy was problematic. At trial, there was no dispute that it was appellant Settles, not Roy, who started the shooting on Tenth Place. Settles fired a volley of shots at Roy before Roy fired back. There also was no dispute that the errant bullet that struck and killed Grace Edwards may have come from Settles' opening volley. Thus, Ms. Edwards may have been killed before Roy joined in the gun battle that resulted in her death. The critical causation question, therefore, was whether Roy intentionally provoked or was otherwise responsible for Settles' opening volley - whether, in other words, the shootout was a jointly created affair from the outset.

The answer to this question was in doubt. On the one hand, as my colleagues correctly observe, the evidence was "susceptible of an inference that before the first shot was fired, Roy and Settles both had expected to engage in the street gun battle" and met on Tenth Place with that shared purpose in mind. There even was testimony that Roy emerged from an apparent hiding place in a stairwell on Tenth Place and began the battle by pointing his gun at Settles. On the other hand, however, this evidence was contested, and the jury may have doubted it. The jury permissibly could have entertained the possibility that Roy did not voluntarily meet Settles on Tenth Place for a battle and did nothing there to encourage Settles's opening salvo....

Because I conclude that the causation instruction allowed the jury to find Roy guilty of murder even if it was Settles who shot Ms. Edwards without finding that Roy had already joined in the combat or had provoked Settles to shoot - i.e., without finding that Roy did anything that proximately caused the fatal shot - I respectfully dissent from my colleagues' decision to affirm Roy's second degree murder conviction.

Discussion Questions and Notes

- 1) What is the test for causation that is being used?
- 2) Do you agree with the dissent or majority?

Review Exercise 1

Watch [this film clip](#) and address this question:

Did the defendant "cause" the death of another with a charge of murder?

Review Exercise 2

Watch [this film clip](#) and answer this question:

Did the defendant “cause” the death of another with a charge of negligent homicide?

B. Human Being

The debate about when a human comes into being is, because of voluntary, physician-assisted abortion, a highly politicized topic. Try to read the following two cases by putting your thoughts about abortion aside. Particularly in *Keeler*, the state judges clearly have a hard time separating the politics of abortion and law of the cases before them. Yet, in *Taylor*, you will see how the actual prosecutions, as currently structured, do not ordinarily have direct bearing on whether voluntary abortion is legal or not.

Keeler v. The Superior Court of Amador County, 470 P.2d 617 (Cal. 1970)

MOSK, J.

In this proceeding for writ of prohibition we are called upon to decide whether an unborn but viable fetus is a “human being” within the meaning of the California statute defining murder (PEN. CODE, § 187). We conclude that the Legislature did not intend such a meaning, and that for us to construe the statute to the contrary and apply it to this petitioner would exceed our judicial power and deny petitioner due process of law.

The evidence received at the preliminary examination may be summarized as follows: Petitioner and Teresa Keeler obtained an interlocutory decree of divorce on September 27, 1968. They had been married for 16 years. Unknown to petitioner, Mrs. Keeler was then pregnant by one Ernest Vogt, whom she had met earlier that summer. She subsequently began living with Vogt in Stockton, but concealed the fact from petitioner. Petitioner was given custody of their two daughters, aged 12 and 13 years, and under the decree Mrs. Keeler had the right to take the girls on alternate weekends.

On February 23, 1969, Mrs. Keeler was driving on a narrow mountain road in Amador County after delivering the girls to their home. She met petitioner driving in the opposite direction; he blocked the road with his car, and she pulled over to the side. He walked to her vehicle and began speaking to her. He seemed calm, and she rolled down her window to hear him. He said, “I hear you’re pregnant. If you are you had better stay away from the girls and from here.” She did not reply, and he opened the car door; as she later testified, “He assisted me out of the car.... [It] wasn’t roughly at this time.” Petitioner then looked at her abdomen and became “extremely upset.” He said, “You sure are. I’m going to stomp it out of you.” He pushed her against the car, shoved his knee into her

abdomen, and struck her in the face with several blows. She fainted, and when she regained consciousness petitioner had departed.

Mrs. Keeler drove back to Stockton, and the police and medical assistance were summoned. She had suffered substantial facial injuries, as well as extensive bruising of the abdominal wall. A Caesarian section was performed and the fetus was examined in utero. Its head was found to be severely fractured, and it was delivered stillborn. The pathologist gave as his opinion that the cause of death was skull fracture with consequent cerebral hemorrhaging, that death would have been immediate, and that the injury could have been the result of force applied to the mother's abdomen. There was no air in the fetus' lungs, and the umbilical cord was intact.

Upon delivery the fetus weighed five pounds and was 18 inches in length. Both Mrs. Keeler and her obstetrician testified that fetal movements had been observed prior to February 23, 1969. The evidence was in conflict as to the estimated age of the fetus;¹ the expert testimony on the point, however, concluded "with reasonable medical certainty" that the fetus had developed to the stage of viability, i.e., that in the event of premature birth on the date in question it would have had a 75 percent to 96 percent chance of survival.

An information was filed charging petitioner, in count I, with committing the crime of murder (PEN. CODE, § 187) in that he did "unlawfully kill a human being, to wit Baby Girl Vogt, with malice aforethought." In count II petitioner was charged with wilful infliction of traumatic injury upon his wife (PEN. CODE, § 273d), and in count III, with assault on Mrs. Keeler by means of force likely to produce great bodily injury (PEN. CODE, § 245). His motion to set aside the information for lack of probable cause (PEN. CODE, § 995) was denied, and he now seeks a writ of prohibition; as will appear, only the murder count is actually in issue. Pending our disposition of the matter, petitioner is free on bail....

Penal Code section 187 provides: "Murder is the unlawful killing of a human being, with malice aforethought." The dispositive question is whether the fetus which petitioner is accused of killing was, on February 23, 1969, a "human being" within the meaning of the statute. If it was not, petitioner cannot be charged with its "murder" and prohibition will lie.

Section 187 was enacted as part of the Penal Code of 1872. Inasmuch as the provision has not been amended since that date, we must determine the intent of the Legislature at the time of its enactment. But section 187 was, in turn, taken verbatim from the first California statute defining murder, part of the Crimes and Punishments Act of 1850. (STATS. 1850, CH. 99, § 19, P. 231.) Penal Code section 5 (also enacted in 1872) declares: "The provisions of this code, so far as they are substantially the same as existing statutes, must be construed as continuations thereof, and not as

¹ Mrs. Keeler testified, in effect, that she had no sexual intercourse with Vogt prior to August 1968, which would have made the fetus some 28 weeks old. She stated that the pregnancy had reached the end of the seventh month and the projected delivery date was April 25, 1969. The obstetrician, however, first estimated she was at least 31 1/2 weeks pregnant, then raised the figure to 35 weeks in the light of the autopsy report of the size and weight of the fetus. Finally, on similar evidence an attending pediatrician estimated the gestation period to have been between 34 1/2 and 36 weeks. The average full-term pregnancy is 40 weeks.

new enactments." We begin, accordingly, by inquiring into the intent of the Legislature in 1850 when it first defined murder as the unlawful and malicious killing of a "human being."

It will be presumed, of course, that in enacting a statute the Legislature was familiar with the relevant rules of the common law, and, when it couches its enactment in common law language, that its intent was to continue those rules in statutory form. This is particularly appropriate in considering the work of the first session of our Legislature: its precedents were necessarily drawn from the common law, as modified in certain respects by the Constitution and by legislation of our sister states.

We therefore undertake a brief review of the origins and development of the common law of abortifacient homicide. From that inquiry it appears that by the year 1850 – the date with which we are concerned – an infant could not be the subject of homicide at common law unless it had been born alive. Perhaps the most influential statement of the "born alive" rule is that of Coke, in mid-17th century: "If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe, or if a man beat her, whereby the childe dyeth in her body, and she is delivered of a dead childe, this is a great misprision [i.e., misdemeanor], and no murder; but if the childe be born alive and dyeth of the potion, battery, or other cause, this is murder; for in law it is accounted a reasonable creature, in rerum natura, when it is born alive." (3 COKE, INSTITUTES * 50 (1648)).... Whatever intrinsic defects there may have been in Coke's work, the common law accepted his views as authoritative. In the 18th century, for example, Coke's requirement that an infant be born alive in order to be the subject of homicide was reiterated and expanded by both Blackstone and Hale....

By the year 1850 this rule of the common law had long been accepted in the United States. As early as 1797 it was held that proof the child was born alive is necessary to support an indictment for murder (*State v. McKee* (Pa.) Addison 1), and the same rule was reiterated on the eve of the first session of our Legislature (*State v. Cooper* (1849) 22 N.J.L. 52)....

The People urge, however, that the sciences of obstetrics and pediatrics have greatly progressed since 1872, to the point where with proper medical care a normally developed fetus prematurely born at 28 weeks or more has an excellent chance of survival, i.e., is "viable"; that the common law requirement of live birth to prove the fetus had become a "human being" who may be the victim of murder is no longer in accord with scientific fact, since an unborn but viable fetus is now fully capable of independent life; and that one who unlawfully and maliciously terminates such a life should therefore be liable to prosecution for murder under section 187. We may grant the premises of this argument; indeed, we neither deny nor denigrate the vast progress of medicine in the century since the enactment of the Penal Code. But we cannot join in the conclusion sought to be deduced: we cannot hold this petitioner to answer for murder by reason of his alleged act of killing an unborn – even though viable – fetus. To such a charge there are two insuperable obstacles, one "jurisdictional" and the other constitutional....

Whether to thus extend liability for murder in California is a determination solely within the province of the Legislature. For a court to simply declare, by judicial fiat, that the time has now come to prosecute under section 187 one who kills an unborn but viable fetus would indeed be to rewrite the statute under the guise of construing it. Nor does a need to fill an asserted "gap" in the law between abortion and homicide – as will appear, no such gap in fact exists – justify judicial legislation of this nature: to make it "a judicial function 'to explore such new fields of crime as they may appear

from time to time' is wholly foreign to the American concept of criminal justice" and "raises very serious questions concerning the principle of separation of powers." (*In re Davis* (1966) 242 Cal.App.2d 645, 655-656 & fn. 12 [51 Cal.Rptr. 702].)

....

We conclude that the judicial enlargement of section 187 now urged upon us by the People would not have been foreseeable to this petitioner, and hence that its adoption at this time would deny him due process of law.

Let a peremptory writ of prohibition issue restraining respondent court from taking any further proceedings on Count I of the information, charging petitioner with the crime of murder.

BURKE, Acting C. J., dissenting.

The majority hold that "Baby Girl" Vogt, who, according to medical testimony, had reached the 35th week of development, had a 96 percent chance of survival, and was "definitely" alive and viable at the time of her death, nevertheless was not a "human being" under California's homicide statutes. In my view, in so holding, the majority ignore significant common law precedents, frustrate the express intent of the Legislature, and defy reason, logic and common sense.

Penal Code section 187 defines murder as "the unlawful killing of a human being, with malice aforethought." Penal Code section 192 defines manslaughter as "the unlawful killing of a human being, without malice." The majority pursue the meaning of the term "human being" down the ancient hallways of the common law, citing Coke, Blackstone and Hale to the effect that the slaying of a "quickened" (i.e. stirring in the womb) child constituted "a great misprision," but not murder. Although, as discussed below, I strongly disagree with the premise that the words of our penal statutes must be construed as of 1648 or 1765, nevertheless, there is much common law precedent which would support the view that a viable fetus such as Baby Girl Vogt is a human being under those statutes...

[A]t common law, the killing of a quickened child was severely punished, since that child was considered to be a human being. The majority would have us assume that the Legislature in 1850 and 1872 simply overlooked this "great misprision" in codifying and classifying criminal offenses in California, or reduced that offense to the lesser offense of illegal abortion with its relatively lenient penalties (PEN. CODE, § 274).

In my view, we cannot assume that the Legislature intended a person such as defendant, charged with the malicious slaying of a fully viable child, to suffer only the mild penalties imposed upon common abortionists who, ordinarily, procure only the miscarriage of a nonviable fetus or embryo. (See COMMENT, MODEL PENAL CODE, § 207.11, p. 149 (TENT. DRAFT NO. 9, 1959).) To do so would completely ignore the important common law distinction between the quickened and unquickened child....

The majority opinion suggests that we are confined to common law concepts, and to the common law definition of murder or manslaughter. However, the Legislature, in Penal Code sections 187 and 192, has defined those offenses for us: homicide is the unlawful killing of a "human being." Those

words need not be frozen in place as of any particular time, but must be fairly and reasonably interpreted by this court to promote justice and to carry out the evident purposes of the Legislature in adopting a homicide statute....

We commonly conceive of human existence as a spectrum stretching from birth to death. However, if this court properly might expand the definition of "human being" at one end of that spectrum, we may do so at the other end. Consider the following example: All would agree that "Shooting or otherwise damaging a corpse is not homicide" (PERKINS, CRIMINAL LAW (2d ed. 1969) ch. 2, § 1, p. 31.) In other words, a corpse is not considered to be a "human being" and thus cannot be the subject of a "killing" as those terms are used in homicide statutes. However, it is readily apparent that our concepts of what constitutes a "corpse" have been and are being continually modified by advances in the field of medicine, including new techniques for life revival, restoration and resuscitation such as artificial respiration, open heart massage, transfusions, transplants and a variety of life-restoring stimulants, drugs and new surgical methods. Would this court ignore these developments and exonerate the killer of an apparently "drowned" child merely because that child would have been pronounced dead in 1648 or 1850? Obviously not. Whether a homicide occurred in that case would be determined by medical testimony regarding the capability of the child to have survived prior to the defendant's act. And that is precisely the test which this court should adopt in the instant case....

The trial court's denial of defendant's motion to set aside the information was proper, and the peremptory writ of prohibition should be denied.

Now read a more recent California case to see how many legislatures addressed the fetal homicide issue after decisions like *Keeler* and the Supreme Court's holding in *Roe v. Wade*, 410 U.S. 113 (1973). This case also concerns a unique aspect of homicide law: transferred intent, which is sometimes colloquially referred to as "intent follows the bullet."

California v. Taylor, 86 P.3d 881 (Cal. 2004)

BROWN, J.

A defendant shoots a woman, killing her. As a result, her fetus also dies. In the absence of evidence the defendant knew the woman was pregnant, may the defendant be held liable for the second degree implied malice murder of the fetus? We conclude he may, and therefore reverse the judgment of the Court of Appeal....

Defendant Harold Wayne Taylor and the victim, Ms. Patty Fansler, met in the spring of 1997. They dated and then lived together along with Fansler's three children. In July 1998 Fansler moved out. Defendant was heard threatening to kill Fansler and anyone close to her if she left him. Defendant

wanted to "get back" with Fansler, and told one of her friends he could not handle the breakup, and if he could not have her, "nobody else could."

Defendant and Fansler spent New Year's Eve 1998 together. On January 1, 1999, a police officer responded to a call regarding a woman screaming in a motel room. In the room he found defendant and Fansler. Fansler was "upset and crying," and said defendant had raped her. Defendant was arrested, and shortly thereafter Fansler obtained a restraining order against him.

After the first of the year, Fansler asked her employer to alter her shifts so defendant would not know when she was working. In January 1999, defendant followed Fansler and her ex-husband in a car at high speeds for a mile or so, and on two other occasions tailgated her.

On March 9, 1999, defendant entered Fansler's apartment through a ruse, and after an apparent struggle, shot and killed Fansler. Fansler's son Robert, who heard his mother's muffled screams, but was unable to enter the apartment, pounded on Fansler's window outside the bedroom in which she was being attacked, and yelled "Goddamn it, you better not hurt her." Defendant was seen leaving the apartment, and Robert and a friend, John Benback, Jr., chased but did not catch him.

Back in the apartment Fansler was found by her boyfriend John Benback, his son, John, Jr., and Robert. John Benback, Sr., testified, "She was lying on her back on the bed. The room had been pretty well trashed. There was blood everywhere."

Fansler died of a single gunshot wound to the head. (A subsequent search of the room revealed a second bullet had penetrated and exited the nightstand, and a fragment of this bullet was found near the nightstand.) Fansler also suffered a laceration on the back of her head that penetrated to her skull and chipped the bone, and bruising on her neck, legs, and elbows.

The autopsy revealed that Fansler was pregnant. The fetus was a male between 11 and 13 weeks old who died as a result of his mother's death. The examining pathologist could not discern that Fansler, who weighed approximately 200 pounds, was pregnant just by observing her on the examination table.

The prosecution proceeded on a theory of second degree implied malice murder as to the fetus. The jury convicted defendant of two counts of second degree murder, and found true attendant firearm enhancements. (PEN. CODE, § 187, subd. (a).) He was sentenced to 65-years-to-life in prison.

The Court of Appeal reversed defendant's second degree murder conviction based on the fetus's death. The court concluded there was evidence to support the physical, but not the mental, component of implied malice murder. "There is not an iota of evidence that [defendant] knew his conduct endangered fetal life and acted with disregard of that fetal life. It is undisputed that the fetus was [11] to 13 weeks old; the pregnancy was not yet visible and [defendant] did not know Ms. Fansler was pregnant." In contrast to "the classic example of indiscriminate shooting/IMPLIED MALICE" of a person firing a bullet through a window not knowing or caring if anyone is behind it, "[t]he undetectable early pregnancy [here] was too latent and remote a risk factor to bear on [defendant's] liability or the gravity of his offense." "[T]he risk to unknown fetal life is latent and indeterminate, something the average person would not be aware of or consciously disregard." "[W]ere we to adopt the People's position, we would dispense with the subjective mental component of implied malice. Where is the evidence that [defendant] acted with knowledge of the danger to, and conscious disregard for, fetal life? There is none. This is dispositive."

....

"Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." (*People v. Hansen* (1994) 9 Cal.4th 300, 307 [36 Cal. Rptr. 2d 609, 885 P.2d 1022] (*Hansen*); § 187, SUBD. (a).) "[V]iability is not an element of fetal homicide under section 187, subdivision (a)," but the state must demonstrate "that the fetus has progressed beyond the embryonic stage of seven to eight weeks."

....

Here, as the Attorney General notes, defendant "knowingly put human life at grave risk when he fired his gun twice in an occupied apartment building." As the Attorney General observed during oral argument, if a gunman simply walked down the hall of an apartment building and fired through the closed doors, he would be liable for the murder of all the victims struck by his bullets –including a fetus of one of his anonymous victims who happened to be pregnant. Likewise, defense counsel conceded at oral argument that defendant would be guilty of implied malice murder if one of his bullets had struck an infant concealed by the bedcovers. On this point, both counsel are right. Had one of Fansler's other children died during defendant's assault, there would be no inquiry into whether defendant knew the child was present for implied malice murder liability to attach. Similarly, there is no principled basis on which to require defendant to know Fansler was pregnant to justify an implied malice murder conviction as to her fetus.

In battering and shooting Fansler, defendant acted with knowledge of the danger to and conscious disregard for life in general. That is all that is required for implied malice murder. He did not need to be specifically aware how many potential victims his conscious disregard for life endangered....

Defendant ... asserts that the legislative history of section 187 demonstrates that the Legislature did not intend to hold a defendant liable for the murder of a fetus unless he had knowledge the woman was pregnant. Prior to 1970, the killing of a fetus was not murder. In *Keeler v. Superior Court* (1970) 2 Cal.3d 619, 623 [87 Cal. Rptr. 481, 470 P.2d 617], a fetus was deliberately "'stomp[ed] out of 'the mother, but this court held a fetus was not a "human being" within the meaning of former section 187, subdivision (a). Following *Keeler*, the Legislature amended section 187, subdivision (a) to provide that murder was the unlawful killing of either a human being or a fetus. (STATS. 1970, CH. 1311, § 1, p. 2440.) Relying on a law review article interpreting the legislative history of this amendment, defendant contends, "the stated purpose of the bill's author was 'to make Robert Keeler's actions susceptible to a charge of murder.' "

The language of section 187, subdivision (a), that "[m]urder is the unlawful killing of a human being, or a fetus, with malice aforethought," is clear, making resort to its legislative history unnecessary. Moreover, we find no such stated purpose in the legislative history. In any event, given *Keeler* was the motivating force behind the 1970 amendment to section 187, subdivision (a), any references in the legislative history as to how the amendment would punish "Keeler's actions," which involved an intentional attack on a fetus, are to be expected and do not preclude our interpretation here.

Nor is the fact that the Legislature chose to simply include fetuses in the statute, and not separately define them as human beings, indicative of any intent to modify the existing law of murder which, as a result of the amendment, would now also apply to a fetus. As defendant himself notes,

"[t]here is no suggestion in the legislative history of any intent to alter the established common-law definition of implied malice for purposes of the new crime of fetal murder."

....

The judgment of the Court of Appeal is reversed, and the case remanded for proceedings consistent with this opinion.

KENNARD, J., Dissenting.

A man who shoots a woman, unlawfully and intentionally causing her death, is guilty of the woman's murder, of course. If the woman is some 12 weeks pregnant, and the fetus also dies, is the man also guilty of murdering the fetus even though he did not intend to kill the fetus and did not even know of its existence?

....

The Legislature has carefully defined murder in terms of two distinct classes of victims –human beings and fetuses. The majority's reasoning effectively abrogates this important distinction by the manner in which it defines the mental state requirements for implied malice fetal murder. Instead of requiring proof of implied malice toward a particular fetus or fetuses in general, the majority requires only proof of implied malice toward "life in general."

In my view, however, a defendant is guilty of murdering a fetus on an implied malice theory only if the fetus's death resulted from the defendant's intentional act, the natural consequences of which were dangerous to fetal life, with knowledge of that particular danger....

The majority asserts that when a defendant, aware of the risk, commits an act whose natural consequences are dangerous to human life, with a mental state of "a conscious disregard for life in general," he has committed implied malice murder. In sum, the majority concludes that conscious disregard "for life in general" –by which it apparently means human life as well as fetal life –is a sufficient mental state for implied malice murder of both human beings and fetuses, the two categories of murder victims specified in section 187, which defines murder. In essence, the majority holds that one whose mental state is a generalized conscious disregard for life bears that same mental state toward all "potential victims", even those of whom the actor is not aware.

The rule articulated by the majority may or may not be what the Legislature intended. But the majority neither acknowledges the breadth of the rule it has fashioned, nor does the majority explain why that rule is compelled by the Legislature's 1970 amendment to section 187, which added fetuses as victims of murder....

The lack of parallel punishment for killing a human being and killing a fetus suggests that the Legislature did not intend the crime of fetal murder to parallel that of murder of a human being. To the extent California's homicide law "attempts to sort killings according to the culpability they reflect" (Mounts, *Malice Aforethought in California* (1999) 33 U.S.F. L.REV. 313, 314), the fact that the same murderous conduct is punished differently depending upon the type of victim, either a human being or a fetus, implies that the Legislature intended to treat fetal murders differently. If murder of a fetus is not the same crime as murder of a human being, is the mental state for murder of a fetus different

from the mental state required for murder of a human being? After much thought and considerable research, I cannot answer the question. The Legislature has given no clue what it intended in this regard.

In attempting to answer the question just posed, one must recognize the biological fact that for a considerable time a fetus's presence in its mother's womb may not be readily apparent to others. What, then, is the required mental state when one kills the fetus of a woman who shows no outward signs of pregnancy, and the killer's conduct or expressions of intent do not permit the inference that he acted with express malice toward the fetus? Those are the cases that are difficult to grapple with. Far easier are the cases in which the defendant's actions show express malice toward the fetus. In the latter category is the defendant in *Keeler v. Superior Court*, supra, 2 Cal.3d at page 623, who exhibited express malice toward the fetus, both by stating his intent to "stomp" the fetus out of his pregnant former wife's belly and by proceeding to do just that....

The prosecution's theory at trial was that when defendant shot and killed his former girlfriend, Patty Fansler, in an occupied apartment building, he acted with conscious disregard not only for her safety but for the safety of any human beings who might be in the building. This trial theory derives from the "zone of harm" rationale that this court described in *People v. Bland* (2002) 28 Cal.4th 313, 329 [121 Cal. Rptr. 2d 546, 48 P.3d 1107]: "Where the means employed to commit the crime against a primary victim create a zone of harm around that victim, the factfinder can reasonably infer that the defendant [had the actual intent to kill] all who are in the anticipated zone."

....

But the rule fashioned today by the majority is far broader than the prosecution's zone-of-harm theory used at trial. The only mental state the majority requires for implied malice murder of a fetus is that the defendant commit an act whose natural consequences endanger "life in general" or "all life, fetal or otherwise." Thus, the majority implicitly concludes that the crime of fetal murder may be committed by one who acts only with conscious disregard for human victims, even when the actor's conduct kills no living human being, but causes the death of a fetus. Under the majority's rule, when one commits an act directed at a female victim and does so with an awareness that it carries a substantial risk to her life, that mental state suffices to establish implied malice murder of a fetus in her womb whose existence is neither apparent nor known to the actor. Suppose that defendant, while alone with Patty Fansler in the apartment, had beaten her severely, putting her life in peril. Suppose defendant did not know that Fansler was carrying three 12-week-old fetuses. And suppose that although Fansler recovered from her injuries, the beating caused the death of her three fetuses. Under the majority's holding, defendant in this scenario would be liable for the implied-malice second degree murder of each of the three fetuses, of whose existence defendant was ignorant, based entirely on his mental state of implied malice toward life in general when he attacked Fansler....

I would affirm the Court of Appeal's judgment reversing defendant's conviction for the second degree murder of Fansler's fetus.

Discussion Questions and Notes

- 1) In *Keeler*, what is the primary tool of statutory interpretation relied upon by the majority? The dissent?
- 2) Do you think the newer California law described in *Taylor* is consistent with the legal and constitutional status of abortion in the United States?

II. *Mens Rea* Requirements

Modern criminal law differentiates between different levels of homicide based on the defendant's *mens rea*. The common law tries to draw finer distinctions between different levels of homicide than the MPC. Both sets of jurisdictions agree with one basic distinction: murder is homicide with malice aforethought; manslaughter is homicide without malice aforethought.

A. Murder



Figure 22: *The Murder* (Paul Cézanne, 1867 - 1870)

The common law approach that is most commonly used today differentiates between first- and second-degree murder. Generally speaking, first degree murder is homicide with an intent to kill or cause grievous bodily injury and premeditation (and deliberation). Second degree murder is either homicide with an intent to kill or cause grievous bodily injury without premeditation (or deliberation) or homicide exhibiting a reckless indifference to human life.

In contrast, MPC murder is inclusive of both first- and second-degree murder as exhibited in this excerpt from the criminal statute in Guam, which enacted the original MPC language.

9 GCA § 16.40

Criminal homicide constitutes murder when:

- (1) it is committed intentionally or knowingly; or
- (2) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life...

Consider the following federal case which focused on whether there was sufficient evidence that the defendant had premeditated his crime (and was therefore guilty of what is commonly referred to as first-degree murder).

United States v. Begay, 673 F.3d 1038 (9th Cir. 2011)

CLIFTON, Circuit Judge:

Kenderick Begay appeals his convictions on two counts of first-degree murder in violation of 18 U.S.C. §§ 1111(a) and 1153(a), and two counts of using a firearm during a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A). Begay's principal argument on appeal is that the evidence introduced at trial, even when taken in the light most favorable to the prosecution, fails to establish that he acted with premeditation and thus fails to support his convictions for first-degree murder. We conclude that there was sufficient evidence to establish premeditation and affirm the convictions.

In the early morning hours of March 28, 2002, Kenderick Begay² drove his truck through the Navajo Indian Reservation in Greasewood, Arizona, after leaving a gathering at the "windmill," an area in town where the youth partied. His passengers included his sister Mecheryl Begay, Loren Clark, Emmanley Begay, and Jessica Lee. When a car passed them traveling in the opposite direction sometime around 2:00 a.m. or 3:00 a.m., Begay turned his truck around. The other car turned around as well. When the two vehicles passed each other again, Begay flashed the lights of his truck, a signal that resulted in stopping the other car. The two vehicles pulled off the highway and onto a dirt road. Begay got out of his truck and walked to the driver's side of the other car. Two high school students, J.T. and O.C., were in the car; O.C. was in the driver's seat and J.T. was in the front passenger's seat.

² The record reflects that "Begay" is a common surname in the Navajo Nation and does not always reflect a familial relation between two individuals bearing that name. In this case, four relevant parties bear the surname Begay: the defendant, his sister Mecheryl, a man named Emmanley, and a man named Larry. The latter two bear no familial relation to the first two or to each other. We refer to the defendant by his surname and to the other Begays by either their first or full names.

After about a minute of standing by the driver's side of the car, Begay walked back to his truck. He reached under the driver's seat, pulled out a .30 caliber rifle, and walked back to the passenger's side of the car. Begay shot eight or nine times through the passenger-side front window, shattering the glass. Six of the bullets hit J.T., while some of the shots missed, hitting the driver's side door. One of the bullets that struck J.T. passed through him and hit O.C.

After firing the shots, Begay walked back to his truck and put the gun under the back seat. Clark, who had gotten out of the truck prior to the shooting to relieve himself, "just stood there" before asking, "What the hell are you doing?" Begay did not answer. His sister Mecheryl ran up to him making "horrible cries" and yelling at him, screaming, "What did you do?" or "Why did you do that?" Begay told her to be quiet. Clark walked over to the car and saw J.T. gasping for air and O.C. sitting in her seat. Clark again asked Begay why he shot the victims, but Begay did not respond.

Begay, Mecheryl, and Clark got back into the truck and drove away. Lee remained behind. Up until the shooting, she had been in a comatose state in the rear of the truck as a result of having consumed too much alcohol. The gunshots roused her from her stupor, at which point she felt an immediate need to vomit and exited the truck to do so. Lee did not reenter the vehicle following the shooting, but instead walked home from the crime scene. As she passed O.C.'s car, she saw O.C. trying to hold J.T. upright and saw that J.T.'s shirt was bloody.

O.C. managed to drive her car to a nearby housing area, where she sought help from Rosita Clark, Loren Clark's mother. By the time O.C. and J.T. arrived, J.T. was already dead. O.C. was transported to a nearby hospital before being transferred to a hospital in Albuquerque, New Mexico, where she died from her wounds three days later....

A jury convicted Begay on two counts of first-degree murder and two counts of using a firearm during a crime of violence. The district court imposed mandatory concurrent life sentences for each murder conviction as well as consecutive 120-month and 300-month sentences, or a total of thirty-five years, for the firearm convictions.

A three-judge panel of our court reversed Begay's first-degree murder convictions, concluding that the evidence was insufficient for the jury to find that the killings had been premeditated. The panel decision affirmed the convictions for using a firearm during a crime of violence.

We granted the government's petition for rehearing en banc.

Begay contends that the evidence of premeditation was insufficient to convict him of first-degree murder. Murder is defined in the relevant statute as follows:

Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

Any other murder is murder in the second degree.

18 U.S.C. § 1111(a)....

[I]n this case, premeditation is the essential element that distinguishes first-degree and second-degree murder. Without proof of premeditation, Begay could not be convicted of first-degree murder.

The jury in this case was instructed, following our circuit's model jury instructions, that

Premeditation means with planning or deliberation. The amount of time needed for premeditation of a killing depends on the person and the circumstances. It must be long enough, after forming the intent to kill, for the killer to have been fully conscious of the intent and to have considered the killing.

9TH CIR. MODEL CRIM. JURY INSTR. 8.89 (2003). Begay did not object to that instruction at trial and has not done so in this appeal.

Premeditation can be proved by circumstantial evidence. Relevant circumstantial evidence includes but is not limited to "the defendant's prior relationship to the victim, the defendant's carrying of the murder weapon to the scene, and the manner of the killing." *Id.*...

We turn to the evidence presented at trial in this case.... At least four pieces of evidence were relevant to whether Begay acted with planning or deliberation in killing his victims and whether there was sufficient time for him to plan or deliberate.

First, the jury could reasonably infer, from Loren Clark's testimony, that Begay walked back to his truck after talking to O.C. and J.T., got a gun from under the back seat and then returned to shoot the victims. Carrying the murder weapon to the scene is strong evidence of premeditation. Leaving the scene to retrieve a weapon is even stronger evidence of premeditation because it suggests that Begay had formed a plan for committing the murders and then set about carrying it out.

Second, Clark testified that Begay walked both ways between his truck and O.C.'s car. There was no evidence that he was agitated or rushed. The jury could reasonably infer that he had enough time to become fully conscious of his intent to kill and to consider the killing.

Third, Clark testified that when Begay returned to O.C.'s car, he went to the passenger's side, where J.T. was sitting, even though he had initially spoken to O.C. and J.T. from the driver's side. The jury could reasonably infer that he did so to get a clearer shot at J.T....

Finally, Clark testified that Begay did not answer when, after the shooting, Clark asked what he had done. He also testified that Begay's sister, Mecheryl, yelled something like "What did you do?" to Begay at that point, and Begay told her to shut up and be quiet. The jury could reasonably infer that Begay was acting with a cool mind....

The evidence ... viewed in the light most favorable to the prosecution [] was sufficient for a rational juror to conclude that Begay acted with planning or deliberation in shooting J.T. and that he had enough time to do so....

Begay argues that because there was no evidence presented at trial to establish a motive on the part of Begay to kill J.T. or O.C. or to prove that Begay had a prior relationship with them, it would have been irrational for a juror to conclude that Begay premeditated the killings. But although evidence of motive or of a past relationship often helps to establish a given defendant's guilt, neither motive nor a past relationship is an element of first-degree murder.

A rational juror could have concluded beyond a reasonable doubt from the evidence concerning Begay's activity and the manner of killing that Begay acted with premeditation. Begay does not

contest the sufficiency of evidence as to any other element of first-degree murder. The evidence was therefore sufficient to support the jury's verdict and the convictions for first-degree murder....

REINHARDT, Circuit Judge, with whom Judges THOMAS and BERZON join, dissenting:

.... Because I disagree with the majority that the minimal facts that it sets forth in its opinion are sufficient to establish premeditation beyond a reasonable doubt, whatever reasonable inferences may be drawn, I dissent....

The government charged Kenderick Begay with first-degree murder for two simultaneous killings that he carried out in the early morning of March 28, 2002. In order to convict Begay of first-degree murder the government was required to prove beyond a reasonable doubt not only that he intended to kill one of the victims, J.T., and killed him deliberately, or with malice aforethought, but that Begay had premeditated or planned that murder by reflecting on it for some period of time with a cool mind. It is undisputed that the prosecution presented none of the evidence traditionally offered to prove premeditation. It presented no evidence that Begay had planned J.T.'s killing, no evidence that Begay had a motive to kill J.T., no evidence that Begay had any prior relationship with the victim, no evidence regarding Begay's demeanor during the time of the killing, and no evidence that the manner in which the killing was committed was particularly calculated or methodical....

The evidence presented by the prosecution allows only for speculation as to that crucial question.... While the prosecution may present circumstantial evidence that would allow a rational finder of fact to draw an inference that a defendant actually premeditated a murder, no such evidence has been presented by the prosecution in this case, as a close examination of the four items of evidence relied on by the majority clearly reveals.

The first item is that Begay retrieved his rifle from his truck, which was parked besides or behind the car in which J.T. was sitting, immediately after an interaction of some sort between the two young men at the site of the killing. That evidence does not warrant the inference that Begay planned or otherwise reflected with a cool mind upon the commission of the murder. The majority does not contend that premeditation is shown by the fact that Begay was driving with his rifle in the truck when he arrived at the location where the two vehicles parked near each other—only by the fact that he retrieved it from his truck after his initial encounter with J.T. The majority asserts that Begay's retrieving of the rifle evidenced premeditation because premeditation can be proven by a defendant's "carrying the murder weapon to the scene." But the notion that Begay's truck constituted a separate "scene" from which Begay obtained the weapon after the interaction at the window of the car is wholly contrary to the record. What little testimony there was on the location of the two vehicles suggests that they were parked immediately adjacent to one another: one prosecution witness testified that the vehicles were parked "side by side" and answered affirmatively when asked whether the "cars were parked relatively close together"; another testified that Begay had parked his truck "behind the [victims'] car." Carrying a weapon to a murder scene may in some circumstances support an inference of premeditation because it suggests that the defendant "arrived on the scene already possessed of a calmly planned and calculated intent to kill." *See Belton v. United States*, 382 F.2d 150, 152, 127 U.S. App. D.C. 201 (D.C. Cir. 1967). But the logic supporting that inference does not

hold where, as here, the murder occurs at a place directly adjacent to the location from which the defendant retrieved the weapon. Obtaining the gun from a vehicle already at the scene does not bear the hallmarks of calculation and planning.

It is, of course, possible that, as the majority asserts, Begay "formed a plan for committing the murders and then set about carrying it out," and that he did so after deliberating with a cool mind, while walking from one vehicle to the other and back. Admittedly, he had the time to do so, but without knowing what occurred between Begay and J.T. in their encounter before Begay retrieved his rifle, and without any evidence as to his demeanor, or how he appeared to be acting when he obtained the weapon and returned to the victims' car, there is simply no basis other than speculation for any rational trier of fact to so conclude beyond a reasonable doubt....

The majority next argues that premeditation can be inferred from Loren Clark's testimony that Begay walked between his truck and O.C.'s car.... The majority absolves the government of its burden of presenting such evidence, instead inferring premeditation from the absence of evidence regarding Begay's demeanor. That there is "no evidence that Begay was agitated or rushed," Maj. Op. at 680, is exactly what it sounds like—no evidence—no evidence that he was agitated or that he exhibited a cool manner. The majority's contrary conclusion contradicts centuries-old principles of American criminal justice, imposing upon murder defendants the burden of proving they were not calm while committing a murder.

The majority also asserts that Begay's walking helps prove premeditation because it shows "he had enough time to become fully conscious of his intent to kill and to consider the killing." But while "enough time" is a necessary condition for establishing premeditation, it is not a sufficient one. If "enough time" to premeditate were all that need be shown to sustain a first-degree murder conviction, the government could meet the burden of establishing first-degree murder in almost every murder case, and there would be little reason to establish two categories of offenses, first- and second-degree murder, other than to allow the prosecution to decide as a matter of its own whim or bias which defendants should be punished for "first-degree" murder and which for "second-degree," and in some instances which should be executed and which should be imprisoned....

The third item of evidence that the majority contends supports a finding of premeditation is Clark's testimony that Begay "went to the passenger's side, where [his intended victim] J.T. was sitting" prior to shooting him. This, according to the majority, supports an inference "that [Begay] did so to get a clearer shot at J.T." Indeed it may, but the fact that Begay wanted a clear shot at J.T. simply establishes that Begay intended to kill J.T. and that he did so deliberately; not that he had reflected or premeditated upon the killing with a cool mind. Intent and premeditation are, as the majority acknowledges, separate and distinct elements of first-degree murder. Both are required. Intent alone will not suffice.... That Begay sought a clear line of sight of J.T. demonstrates that he intended to kill J.T. But if there is any "chain of logic," that connects this evidence of intent to an inference of premeditation, it is neither discernible from the facts of this case nor from the majority's opinion. Nor, of course, is any such "chain of logic" discernible with respect to any of the other three items that the majority contends a reasonable fact-finder could conclude would support a finding of premeditation beyond a reasonable doubt. Here, the "chain of logic" is simply a legal phrase that the majority employs to justify a conclusion that it has reached, without any explanation of what it means or why it is applicable to the present case.

Fourth, the majority argues that the jury could have permissibly inferred that Begay acted with a cool mind from two related facts: first, that "Begay did not answer when, after the shooting, Clark asked what he had done," and second, that Begay told his sister to shut up after she asked him "What did you do?" This argument starkly illustrates the insidiousness of the majority's cavalier willingness to find an "inference" of premeditation lurking behind every fact pertaining to this crime. Begay can be convicted of premeditated murder if, when asked what he has done, he responds forcefully; so, too, can he be convicted if he remains silent. Under this logic, any action Begay took subsequent to the murders could support a finding of premeditation: if he showed fear, an inference could be drawn; so too, if he demonstrated a lack of emotion....

The four items of evidence, whether viewed individually or collectively, are manifestly insufficient to support a conviction of murder in the first degree and would be insufficient even were there no countervailing evidence in the record. But there is indeed countervailing evidence that is far more relevant to the question of premeditation than whether, for example, Begay walked the short distance between the car and the truck or told his sister to shut up after the shooting or failed to answer Clark's question. The majority does not even consider the fact that the government's principal witness, who provided the bulk of the eyewitness testimony upon which the prosecution relied, and whom the jury obviously deemed credible, also testified that Begay was "pretty drunk" at the time of the shooting, a fact that strongly suggests the absence of premeditation. By the same token, the government's witnesses, who spent the night in question with Begay, reported that they reacted with shock after he fired into the victims' vehicle, suggesting that neither Begay's demeanor nor his words or conduct on that night were those of an individual who had been planning or otherwise premeditating a murder....

In sum, there is simply no evidence that Begay reflected upon, planned, or otherwise premeditated J.T.'s killing, and certainly no evidence from which a rational fact-finder could infer the necessary element of first-degree murder beyond a reasonable doubt. Surely a conviction for second-degree murder—murder with malice aforethought—should have been enough.

Discussion Questions and Notes

- 1) The court's reasoning in *Begay* is at the outer bounds (and possibly beyond) the typical application of the modern rule regarding premeditation. Ordinarily, courts require specific evidence of actual premeditation by a defendant and do not allow mere inferences to be sufficient. Do you think the evidence cited by the majority was sufficient for a guilty verdict on first degree murder?
- 2) Why should we care if a defendant premeditated their crime? Does it make the crime worse in some way?

In contrast to the court in *Begay*, this decision seems very forgiving of the defendant on the issue of premeditation.

Thornton v. Arkansas, 433 S.W.3d 216 (Ark. 2014)

DONALD L. CORBIN, Associate Justice

Appellant Justin Jamaille Thornton appeals from an order of the Lincoln County Circuit Court convicting him of capital murder, and sentencing him to life imprisonment without the possibility of parole. Thornton's sole argument on appeal is that the circuit court erred in denying his motions for a directed verdict because there was insufficient evidence to establish that he acted with the requisite intent of premeditation and deliberation.... We reverse and dismiss.

Officers with the Lincoln County Sheriff's Office received a call that the body of a black male had been discovered in a ditch on Brooklyn Road. According to Lt. Kenneth Davis, an officer assigned to investigate the case, the victim, later identified as Kwame Turner, had suffered a gunshot wound to the side of his face. Lieutenant Davis also stated that there were scuff marks on the victim's back indicating that the body had been dragged down to the ditch. Authorities later discovered Turner's car at an apartment complex in Pine Bluff.

After police developed Thornton as a suspect, they obtained a warrant to search his residence, which sits behind a house on Boston Road. Lieutenant Davis stated that upon arriving at the residence, he noticed grass in the backyard that looked identical to grass found inside the front door of Turner's vehicle. There was also a blood stain on a back step, as well as what appeared to be blood inside the door. Officers also discovered a bag in the kitchen that contained a towel with red stains, believed to be blood, and a bucket with pinkish water and a mop in the kitchen near the backdoor. There were also several areas of what appeared to be blood on an orange chair in the living room. Also in the living room, investigators discovered a pair of house shoes and a pair of sweat pants, both of which appeared to have blood stains on them. Police found two .45-caliber bullets on a dresser in the bedroom, as well as five bullet casings on the ground about 100 yards away from Thornton's residence....

Thornton was charged by felony information with one count each of capital murder, felony theft of property, possession of a firearm, and abuse of a corpse. The State also alleged that Thornton was subject to a sentence enhancement for using a firearm to commit a felony and as a habitual offender....

As his sole point on appeal, Thornton argues that the circuit court erred in denying his motions for a directed verdict because the evidence submitted by the State was insufficient to prove the charge of capital murder. More specifically, Thornton asserts that the State failed to establish that he acted with premeditation and deliberation, which is the requisite intent to establish the crime of capital murder. In support of his assertion, Thornton argues that all of the evidence presented was circumstantial and left the fact-finder to engage in speculation and conjecture in determining guilt. The State counters that the circuit court correctly denied the directed-verdict motions as there was

ample proof to establish Thornton's guilt. The State further asserts that circumstantial proof may constitute sufficient evidence and does so in this case....

A defendant commits capital murder, if, with the premeditated and deliberated purpose of causing the death of another person, he causes the death of any person. ARK. CODE ANN. § 5-10-101(A)(4) (REPL. 2013). Premeditated and deliberated murder occurs when the killer's conscious object is to cause death, and he forms that intention before he acts and as a result of a weighing of the consequences of his course of conduct.... [P]remeditation is not required to exist for a particular length of time. It may be formed in an instant and is rarely capable of proof by direct evidence but must usually be inferred from the circumstances of the crime.

In reviewing Thornton's sufficiency challenge, we turn to the evidence adduced at trial. Bobby Humphries, chief latent-print examiner with the Arkansas State Crime Laboratory, testified that he had examined the evidence submitted in this case. This included a plastic-mold impression of a partial shoe print that Lieutenant Davis had discovered near the victim's body. The mold was sent to the state crime lab, along with a pair of tennis shoes that Davis recovered from Thornton after his arrest. Humphries stated that the pattern in the cast of the print was consistent with the pattern of the Nike shoes Davis recovered when he arrested Thornton. He further stated that the physical size of the heel area of Thornton's Nike shoe corresponded with the physical size of the cast. However, on cross-examination, Humphries explained that he could not state with certainty that it was the Nike shoe that had made the print by the victim's body. He explained that other shoes, including other brands, could have similar patterns....

Vickie Jackson testified that she lived in a house on Boston Road near the house where Thornton resided and knew both Thornton and Turner. On the night of the murder, Jackson stated that she did not see Turner but that his car was parked next to Thornton's, outside Thornton's house. Later that evening, between 8:00 and 8:30 p.m., Jackson was walking back from her mother-in-law's house to her house when she heard a gunshot come from Thornton's house. She stated that she continued walking and Thornton came to the door and said, "Ms. Vickie, I'm okay. I just dropped my gun. It went off on the floor." According to Jackson, Turner's car was still parked outside Thornton's residence when this happened, but the next morning when she left for work, she noticed that Turner's car was gone. Jackson stated that as far as she knew, Thornton and Turner got along well.

Marcus Kennedy, a neighbor of Thornton's, testified that Thornton was his wife's cousin and that he knew who Turner was and recognized him when he saw him. According to Kennedy, he saw Turner's vehicle parked at the back door of Thornton's house, with the rear of the vehicle pulled up next to the doorstep. Kennedy opined that it looked like Thornton was about to load something. Kennedy denied ever hearing a gunshot on the night of the murder. Kennedy also testified that Thornton had previously been at his house target shooting with a .45 High Point semiautomatic weapon. Kennedy further stated that he was not aware of any kind of argument between Thornton and Turner.

Thornton's cousin, Tyrone Hellums, who also lived on Boston Road, testified that he knew both Thornton and Turner and knew them to be friends. Hellums stated that on September 29, 2011, he saw Turner's vehicle pulling into a driveway and assumed Turner was going to Thornton's house.... According to Hellums, when he learned the next day that Turner had been killed, he called Thornton and Thornton stated that he was going to call and make sure people "knew that he didn't do it."

Hallums further stated that the next time he talked to Thornton, Thornton stated that people were saying he had killed Turner and that they were looking for him and that he had guns loaded and ready for them. Thornton called Hellums again that day and said that "when stuff happened in his house something got on the couch."

Alex Reed testified that on the evening of the murder, between 9:00 and 10:00 p.m., he received a phone call that Thornton was at Reed's grandmother's house. Reed went over to pick up Thornton and stated that Thornton was not acting out of the ordinary at that time. According to Reed, Thornton stayed with him the next two nights, and on the third night, Reed rented Thornton a hotel room at the Executive Inn. Reed stated that he rented the room because Thornton did not have any identification.

Dr. Stephen Erickson, deputy chief medical examiner at the Arkansas State Crime Laboratory, testified that he had performed the autopsy on Turner. He stated that there was a single gunshot wound to the head, with an entrance wound above the left ear and exit wound on the right jaw area. Dr. Erickson opined that it was likely that once the bullet exited the jaw, it entered the right arm and remained there.... Dr. Erickson also stated that he ruled the manner of death to be a homicide, or at the hands of another person. On cross-examination, Dr. Erickson stated that there were many possible scenarios to explain the track of this wound....

Morgan Nixon, a forensic DNA analyst at the Arkansas State Crime Laboratory, testified that a blood sample from the orange chair at Thornton's residence matched Turner's DNA, as did the swab of blood from the trunk and bumper of Turner's car. She further stated that the blood on a sock that had been found on Thornton's back step also matched Turner's DNA. She admitted, however, that no forensic evidence had been retrieved from Turner's car to link Thornton to that car.

Greg Harmon, warden at the Wrightsville Unit of the Arkansas Department of Correction (ADC), testified that Thornton was incarcerated there while awaiting trial. During that time, Harmon was notified that a suspicious letter had been discovered during a routine mail-room check. There were question marks in place of a return name and address, and it was addressed to a "Mrs. Hallums," mother of State's witness, Tyrone Hallums. The letter stated that Tyrone had helped move Turner's body and could get into trouble and advised that if anyone talked to police or testified at trial they would be harmed. Because the letter referenced the September homicide and contained threats, Harmon turned it over to ADC officials, who, in turn, submitted it to Lieutenant Davis. Davis showed the letter to Kristi Hunter, who had been Thornton's juvenile probation officer. When she saw the letter, she immediately stated that she recognized the handwriting as that of Thornton's. As a result of the investigation into the letter, ADC authorities ordered that Thornton was to be transferred to the Varner Supermax Unit.

Thereafter, Thornton took the stand in his own defense. He stated that he and Turner had been friends since kindergarten and had not had any fights or arguments. According to Thornton, on the day of the murder, he was in Pine Bluff the entire day with a friend, Brianna Christian. Thornton denied that he had ever lived at the residence on Boston Road or that he had seen or talked to Vickie Jackson that day. Thornton stated that she was lying and thus must have had something to do with the murder. He further denied owning a gun or killing Turner.

Clearly, the foregoing evidence establishes that Turner was shot and killed inside Thornton's house; however, this evidence is insufficient to support a conclusion that Thornton killed Turner with a premeditated and deliberate intent. To establish the requisite *mens rea* for capital murder, the State was required to prove that Thornton had the conscious object to cause Turner's death, that such an intention was formed before he acted, and that he weighed in his mind the consequences of his course of conduct.

This court has recognized that intent may be inferred from the circumstances of the crime. More specifically, this court has held that premeditation and deliberation may be inferred from the type and character of the weapon; the manner in which the weapon was used; the nature, extent, and location of the wounds; and the accused's conduct. In this vein, this court has held that evidence of multiple close-range gunshots is consistent with a conclusion of premeditation and deliberation. Here, however, Dr. Erickson testified that there was no evidence of close-range fire, and, in fact, he stated that a close range would be anywhere from one to no more than three feet. When asked from how far away the shot could have been fired, Dr. Erickson stated that it "[c]ould be a mile away," and explained that it would depend on the length of the room.

As to the location of a wound, this court has upheld findings of premeditation in cases where the evidence showed that a victim was shot multiple times from behind. Here, the State asked Dr. Erickson if it was possible that Turner was seated in a chair when the bullet entered the back of his head, and Erickson agreed it was possible. But, he went on to state that even though there was nothing in his review that was inconsistent with such a theory, "the scene investigation has to be decided by a lot more investigation than me." Moreover, he admitted on cross-examination that there could be multiple scenarios explaining the trajectory of the bullet.

In trying to demonstrate that the circumstantial evidence presented in this case was of a sufficient force to compel the conclusion that Thornton acted with premeditation and deliberation, the State relies specifically on the medical examiner's description of the fatal wound and the location of the blood evidence on the chair in Thornton's house. The State asserts that there is no likelihood that the gunshot was the result of the gun being dropped or mishandled. Whether the evidence could establish another likely scenario for what transpired inside Thornton's home is not the proper inquiry, however, where the record in this case demonstrates that the circuit court reached its conclusion by engaging in speculation and conjecture in concluding that Thornton acted with premeditation and deliberation. Specifically, in considering the charge of capital murder, the circuit court stated as follows:

When we talk about capital murder and first-degree murder, they get rather close. And the differentiating difference is premeditation and deliberation. And we've defined those two. When we go back again and we consider that the defendant is a reasonably intelligent human being who has been exposed to weapons, who have shot a .45-caliber pistol, it has been testified to, more than three times, because we have witnesses who have been with him when he has shot them, as such, and he shot them multiple rounds in that. He understands what a .45-caliber pistol will do to a human being and a human head. To take such a weapon and point it toward someone's head and squeeze the trigger, it is, in this Court's mind, impossible for one who does not appear to be under the influence of any substances, one who does not have any particular anger or vengness [sic] toward a person, one who is not in a self-defense mode, but to pick up that pistol and walk up behind someone and squeeze a

round off into their head, the Court believes you've got to give some thought to what this could do. And since there is nothing in the record that shows anything else than an intentional act, that is deliberate. Therefore, the Court finds that in what was done here, the Court concludes that from the record presented in this matter, the defendant acted with premeditation and deliberation in causing the death of Kwame Turner, and thus he is guilty of capital murder.

There are two problems with the circuit court's reasoning. First, while the forensic evidence was consistent with a conclusion that Turner was shot from behind, there was absolutely no evidence that Thornton deliberately picked up a gun, walked behind Turner, pointed the gun at his head, and "squeez[ed] a round off into" Turner's head. As Dr. Erickson noted, there were multiple scenarios that could account for the bullet's trajectory. As previously stated, where a case rests on circumstantial evidence, such evidence must be consistent with the defendant's guilt and inconsistent with any other reasonable conclusion.

It is true that whether the evidence excludes every other hypothesis is a question for the fact-finder, here the circuit court. The problem that arises in this instance is that the circuit court, in weighing the evidence, improperly shifted the burden of proof to Thornton. The circuit court concluded that this was a deliberate, intentional act because "there is nothing in the record that shows anything else." In reaching this conclusion, the circuit court posited that there was no evidence that Thornton was intoxicated, angry, or acting in self-defense and, thus, he must have acted deliberately. But, Thornton was not required to allege or offer proof of any such defenses, particularly where his defense was one of wholesale denial. It is, of course, a fundamental principle of criminal law that the State has the burden of proving the defendant guilty beyond a reasonable doubt. Accordingly, because the circuit court engaged in speculation in determining that Thornton acted with premeditation and deliberation and improperly shifted the burden of proof when weighing the evidence, we must reverse Thornton's conviction for capital murder. While the evidence cannot sustain the charge of capital murder, we offer no opinion about whether it would sustain a lesser offense.

Reversed and dismissed.

COURTNEY HUDSON GOODSON, Justice, dissenting.

The majority fails to view the evidence in the light most favorable to the State and, therefore, errs in holding that there was no substantial evidence to support the finding of premeditation and deliberation to support Thornton's conviction of capital murder. In addition, the majority errs in finding that the trial court shifted the burden of proof to Thornton based on a comment made by the trial judge, an argument that was not made by Thornton on appeal. Because of these errors by the majority, I respectfully dissent...

This case involves a single gunshot wound to the back of the victim's head during a shooting that took place in the defendant's home. In its decision, the majority pays mere lip service to this court's long-standing rule that we view the evidence in the light most favorable to the State, considering only that evidence which supports the verdict. Rather than viewing the evidence in the light most favorable to the State, the majority impinges on the fact-finder's province and independently

determines that the State did not exclude every reasonable hypothesis but that of guilt. For instance, the majority acknowledges that the medical examiner testified that the bullet entered the victim's head from behind the left ear and traveled in a downward trajectory, but immediately discounts this testimony by pointing out that the medical examiner testified on cross examination that "there were many possible scenarios to explain the track of this wound." Curiously, the majority then implies that this court has always required evidence of multiple gunshots wounds to show premeditation and deliberation, as though it is impossible to show that the intent to kill exists in a single shot when there are no witnesses to the crime. However, this court has previously recognized that pointing a loaded gun at the victim is sufficient to support a capital-murder conviction. As this court stated in its early case law, "if a man willfully and deliberately points a gun, or a pistol, which he knows to be loaded with powder and ball, at another's head or heart, fires it and kills him, not having received any provocation from him, surely there is as much malignity in his heart, there is as little excuse for him, and there is evidence of as willful, deliberate and premeditated a purpose to kill, as if he had waylaid him." *McAdams v. State*, 25 Ark. 405, 415 (1869). These cases are consistent with this court's precedent that premeditation and deliberation may be inferred from the type and character of the weapon, the manner in which the weapon was used, the nature, extent, and location of the wounds, and the accused's conduct...

The majority seems to emphasize that there was no testimony of any disagreement between Thornton and the victim, but that factor alone cannot be sufficient to overcome the substantial evidence presented by the State because this court has previously recognized that premeditation does not require any prior knowledge or interaction with the victim by the perpetrator. However, what is truly concerning, is that the majority never identifies what reasonable hypothesis the State failed to exclude, but yet it concludes that the fact-finder erroneously determined that there was evidence of premeditation and deliberation from a single gunshot wound to the back of the victim's head....

Based on the majority's failure to view the evidence in the light most favorable to the State and its decision to address a burden of proof argument that was not presented on appeal, I respectfully dissent.

Discussion Questions and Notes

- 1) Which approach to premeditation do you prefer? The one in *Begay* or *Thornton*?
- 2) At times, the majority and dissent focus on evidence that has little to do with premeditation and more to do with whether Thornton is guilty of any homicide crime. Do you think there was a reasonable doubt that Thornton was not guilty of any homicide charge?

The next case helps to distinguish first- and second-degree murder in common law jurisdictions.

Commonwealth v. Malone, 47 A.2d 445 (Pa. 1946)

OPINION BY MR. CHIEF JUSTICE MAXEY

This is an appeal from the judgment and sentence under a conviction of murder in the second degree. William H. Long, age 13 years, was killed by a shot from a 32-caliber revolver held against his right side by the defendant, then aged 17 years. These youths were on friendly terms at the time of the homicide. The defendant and his mother, while his father and brother were in the U.S. Armed Forces, were residing in Lancaster, Pa., with the family of William H. Long, whose son was the victim of the shooting.

On the evening of February 26, 1945, when the defendant went to a moving picture theater, he carried in the pocket of his raincoat a revolver which he had obtained at the home of his uncle on the preceding day. In the afternoon preceding the shooting, the decedent procured a cartridge from his father's room and he and the defendant placed it in the revolver.

After leaving the theater, the defendant went to a dairy store and there met the decedent. Both youths sat in the rear of the store ten minutes, during which period the defendant took the gun out of his pocket and loaded the chamber to the right of the firing pin and then closed the gun. A few minutes later, both youths sat on stools in front of the lunch counter and ate some food. The defendant suggested to the decedent that they play "Russian Poker".¹ Long replied: "I don't care; go ahead". The defendant then placed the revolver against the right side of Long and pulled the trigger three times. The third pull resulted in a fatal wound to Long. The latter jumped off the stool and cried: "Oh! Oh! Oh!" and Malone said: "Did I hit you, Billy? Gee, Kid, I'm sorry." Long died from the wounds two days later.

The defendant testified that the gun chamber he loaded was the first one to the right of the firing chamber and that when he pulled the trigger he did not "expect to have the gun go off". He declared he had no intention of harming Long, who was his friend and companion. The defendant was indicted for murder, tried and found guilty of murder in the second degree and sentenced to a term in the penitentiary for a period not less than five years and not exceeding ten years. A new trial was refused and after sentence was imposed, an appeal was taken.

Appellant alleges certain errors in the charge of the court and also contends that the facts did not justify a conviction for any form of homicide except involuntary manslaughter. This contention

¹ It has been explained that "Russian poker" is a game in which the participants, in turn, place a single cartridge in one of the five chambers of a revolver cylinder, give the latter a quick twirl, place the muzzle of the gun against the temple and pull the trigger, leaving it to chance whether or not death results to the trigger puller.

we over-rule. A specific intent to take life is, under our law, an essential ingredient of murder in the *first* degree. At common law, the "grand criterion" which "distinguished murder from other killing" was malice on the part of the killer and this malice was not necessarily "malevolent to the deceased particularly" but "any evil design in general; the dictate of a wicked, depraved and malignant heart": 4 BLACKSTONE 199. Among the examples that Blackstone cites of murder is "coolly discharging a gun among a multitude of people", causing the death of someone of the multitude.

In Pennsylvania, the common law crime of murder is divided into two degrees, and murder of the *second* degree includes every element which enters into first degree murder except the intention to kill: *Commonwealth v. Divomte*, 262 Pa. 504, 507; 105 A. 821.... This court has declared that if a driver "wantonly, recklessly and in disregard of consequences" hurls "his car against another or into a crowd" and death results from that act "he ought to face the same consequences that would be meted out to him if he had accomplished death by wantonly and wickedly firing a gun": *Com. v. Mayberry*. 290 Pa. 195, 199; 138 A. 686, citing cases from four jurisdictions.

In *Com. v. Hillman*, 189 Pa. 548; 42 A. 196, the charge of the court below was approved by this court. In that charge appears this statement: "Malice in law means a depraved and wicked heart that is reckless and disregards the rights of others. Reckless conduct that results in the death of another is malice. To illustrate that: If a man fires a gun into a crowd and kills another it is murder, because the fact of the reckless shooting of a gun into a crowd is malice in law. That wicked and depraved disposition and that recklessness and disregard of human life is malice."

In *Com. v. Knox*, 262 Pa. 428; 105 A. 634, the following instructions by the trial judge in a murder case was held by this court not to be error: "When a man uses a gun loaded with powder and shot and aimed at a vital part of the body of another and discharges it, he must be presumed to know that death is likely to follow." In *Com. v. Arnold*, 292 Pa. 210 at 213; 140 A. 898, this court said: "Malice will be implied from conduct, recklessness of consequences, or the cruelty of the crime".

....

The killing of William H. Long by this defendant resulted from an act intentionally done by the latter, in reckless and wanton disregard of the consequences which were at least sixty per cent certain from his thrice attempted discharge of a gun known to contain one bullet and aimed at a vital part of Long's body. This killing was, therefore, murder, for malice in the sense of a wicked disposition is evidenced by the intentional doing of an uncalled-for act in callous disregard of its likely harmful effects on others. The fact that there was no motive for this homicide does not exculpate the accused. In a trial for murder proof of motive is always relevant but never necessary.

All the assignments of error are over-ruled and the judgment is affirmed. The record is remitted to the court below so that the sentence imposed may be carried out.

Discussion Questions and Notes

- 1) If Long had held the gun and pulled the trigger himself, as is normally how "Russian Roulette" is played, Malone would not be independently culpable for homicide. Does

the game structure of the homicide change your *mens rea* analysis? If Long had clearly and enthusiastically consented to play the game, do you think Malone should be not guilty of murder? What if Long were an adult?

- 2) Second-degree murder statutes often include very colorful language like “depraved heart” murder. It is often difficult to determine exactly what such phrases actually mean except through examples (e.g., shooting into a crowd). The MPC drafters felt that there was not a meaningful distinction at the trial phase between first- and second-degree murder and thus classified both as simply “murder.” In a case like *Malone*, do you think the MPC or common law approach is better?

B. Manslaughter

As with murder, common law jurisdictions draw finer distinctions than those that have adopted the MPC provisions regarding homicide. Under the common law tradition, voluntary manslaughter is an intentional killing where a defendant is in a “heat of passion.” Involuntary manslaughter is an unintentional killing caused by a defendant’s recklessness (often while driving a motor vehicle). Across the United States, voluntary manslaughter is considered to be the more serious offense.

One crucial difference between the MPC and common law approaches is in what constitutes a legally recognized “heat of passion” or “extreme mental or emotional disturbance.” The modern common law hybrid approach to voluntary manslaughter uses the following to test whether a defendant was legally provoked sufficient to prove she was in a heat of passion:

- 1) Defendant was subjectively in a heat of passion;
- 2) A reasonable person would have been in a heat of passion in the same circumstances; and,
- 3) The cause of the provocation was legally recognized.

On the last point regarding the legally adequate baseline for the defendant’s heat of passion, many jurisdictions use what are known as the Ashworth categories. Using that categorization system the following are situations where provocation is legally recognized:

- 1) Angry words followed by assault
- 2) The sight of a friend or relative being beaten
- 3) The sight of a citizen being unlawfully deprived of liberty
- 4) Adultery

In contrast, these five categories are alone insufficient to establish legally adequate provocation:

- 1) Words alone
- 2) Affronting gestures
- 3) Trespass to property
- 4) Misconduct by a child or servant
- 5) Breach of contract

The Model Penal Code only utilizes a subjective and objective test, with no regard to the Ashworth categories or other legally adequate baseline.

The following case illustrates how rigid the application of the Ashworth categories (or similar lists) can be in specific cases.

Michigan v. Young, 2003 Mich. App. LEXIS 2139 (Mich. Ct. App. 2003)

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. She was sentenced to a prison term of fifteen to twenty-five years for the second-degree murder conviction and to a two-year mandatory consecutive prison term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant argues that the trial court erred in failing to instruct the jury on voluntary manslaughter. Claims of instructional error are reviewed de novo on appeal. *People v Hall*, 249 Mich. App. 262, 269; 643 N.W.2d 253 (2002).

Defendant was charged with first-degree premeditated murder for shooting her boyfriend, Sean Reynolds. The jury convicted her of the lesser offense of second-degree murder. Reynolds died of a single gunshot wound to the left lower back. There was no evidence of close-range firing....

Christine Henderson testified that she worked with Reynolds for about a month at AAA on the same shift. She paged Reynolds once each day for three days during the month of November. She paged Reynolds on November 22, 2000, and someone else returned the page. The next day, Reynolds told her that his girlfriend had returned the page. On November 25, 2000, Henderson received numerous phone calls starting at about 4:00 a.m. The voice on the phone was the same voice as the person who called her on November 22, 23, and 24, 2000, and who Reynolds had identified as his girlfriend. Henderson told the caller that she was sleeping with Reynolds and was pregnant with his child. Henderson testified that this statement was not true but that she said it because the caller was harassing her. Henderson stated that there came a time when she told the caller that she did not know Reynolds and was not pregnant by him but the calls did not stop.

Defendant took the stand and testified that Reynolds was her boyfriend and they had been going together for four years. When she got home from work on November 25, 2000, between 3:30 and 4:00 a.m., she checked her caller ID and saw the same number that was on Reynolds' pager and she called it back. The person who answered the call told defendant that her name was "Kim" and that

she had had a relationship with Reynolds for the last six months and was pregnant with Reynolds' child. Defendant found out later that the woman's name was Christine Henderson. Defendant was very hurt and was crying. Reynolds came home and defendant asked Reynolds about "Kim." Reynolds replied, "Bitch, I'm not about to go through this with you. I'm tired of this shit." Defendant stated she stood in front of Reynolds with the gun in her hand but she did not point it. Reynolds said something like, "Bitch, you're going to pull a gun on me. You ain't going to shoot me." Reynolds then pushed defendant down onto the bed and the gun went off. Defendant stated she did not know how it was that Reynolds was shot in the back. She said she fired the gun but she does not know how she did it, she did not intend to shoot Reynolds, and she did not intend to kill him.

On cross-examination, defendant stated she talked to "Kim" twice on the morning of November 25, 2000. There was a time lapse of an hour between her first conversation with "Kim" and the time that Reynolds arrived at her house. She knew the gun was loaded, and was familiar with the gun and how to handle it.

The trial court denied the request for a voluntary manslaughter instruction... The court concluded that words alone could not provide the necessary provocation for manslaughter, and that pushing another person as well does not provide the necessary provocation. The court also concluded that adultery only provides adequate provocation in the context of a marital relationship...

A rational view of the evidence here does not support an instruction on voluntary manslaughter based on an adequate provocation. Voluntary manslaughter under such a theory consists of an intentional killing committed under the influence of passion produced by adequate provocation before a reasonable time has passed for blood to cool.

Here, the evidence showed that defendant was upset with Reynolds because he was having an affair with Henderson. After telephoning Henderson and being told that Henderson was sleeping with Reynolds and was pregnant, defendant confronted Reynolds when he arrived at defendant's house. Reynolds responded, "Bitch, I'm not going to go through this shit," and stated that he was "about to go over there." As Reynolds turned to walk away, defendant grabbed the gun from her nightstand and pointed it at him. Reynolds made statements such as, "Bitch, your ass ain't going to shoot me." Reynolds then turned and tried to walk away. Defendant then fired a shot at Reynolds, striking him in the back.

Although adequate provocation can arise from informational words ... the evidence in this case reveals that defendant at least suspected that defendant was having an affair two or three days before the present offense. Defendant telephoned Henderson on numerous occasions during the three days before the shooting. Defendant telephoned Henderson the day of the shooting and was informed that Henderson was pregnant with Reynold's child. An hour passed before defendant again telephoned Henderson, and it was during this second conversation that Reynolds arrived at defendant's house. Reynolds did not make any informational statements to provoke defendant. Rather, when defendant confronted Reynolds, the victim indicated that he was not going to "take this shit" and that he was "going to go there." It was at this point that Reynolds turned to leave and defendant shot him. Because no reasonable jury could find that the provocation was adequate, the trial court properly refused to instruct the jury on voluntary manslaughter.

WHITE, J. (dissenting).

The Supreme Court has recently made clear that "manslaughter, in both its forms, is an inferior offense of murder within the meaning of MCL 768.32. Therefore, an instruction is warranted when a rational view of the evidence would support it." *People v Mendoza*, 468 Mich. 527, 548; 664 N.W.2d 685 (2003). In the instant case, the trial court determined, and the majority agrees, that a rational view of the evidence would not support a conviction of voluntary manslaughter. I respectfully dissent.

I disagree with the trial court's application of *People v Pouncey*, 437 Mich. 382; 471 N.W.2d 346 (1991), and *People v Eagen*, 136 Mich. App. 524; 357 N.W.2d 710 (1984). First, *Eagen, supra*, did not adopt the rule that adultery on the part of an unmarried lover cannot provide adequate provocation. *Eagen* recognized that the rule might be appropriate in the case of a longstanding relationship comparable to husband and wife. Second, while insulting words may not constitute adequate provocation, words of an informative nature have been considered adequate provocation.... Here, the words creating the provocation were Henderson's words informing defendant that she was having a relationship with Reynolds and that she was pregnant, and Reynolds' confirmation of the relationship and statement that he was leaving to go see Henderson other woman. Additionally, the jury was free to believe defendant's testimony that Reynolds pushed her on the bed, which while insufficient provocation in and of itself, could be considered as part of the total circumstances.

I conclude that defendant's statement and testimony provided adequate support for a voluntary manslaughter instruction. Defendant had learned that her boyfriend of four years was being unfaithful and had made another woman pregnant. During defendant's second conversation with the other woman, Reynolds came into the house. When defendant confronted him with the situation, he mocked her, taunted her and said he was leaving to go to the other woman. While there was evidence to support a different construction of the facts, or that defendant was in full possession of her faculties and that her thought process was not distorted, it was a jury question whether the killing was committed in the heat of passion, caused by an adequate provocation, without a lapse of time during which a reasonable person could control his passions.

The remedy in such a situation is to remand for a new trial on the charge of second degree murder, the defendant having been acquitted of first-degree murder, or the entry of a conviction of voluntary manslaughter, at the prosecution's option.

Discussion Questions and Notes

- 1) Does it make sense that discovering adultery by a spouse can reduce a defendant's culpability from murder to manslaughter?
- 2) Assuming adultery should provide sufficient legal basis for provocation, does it make sense to differentiate long-term loving relationships on the basis of marriage?

- 3) Are there any situations where you think words, of a non-informative nature, should be sufficient enough for a defendant to be found guilty of manslaughter instead of murder?

Review the following case and assess whether the government had met its burden under the facts described.

New York v. Lewie, 953 N.E.2d 760 (N.Y. 2011)

Smith, J.

A jury convicted defendant of second degree manslaughter and first degree reckless endangerment for her role in the events leading to the death of her son. In so doing, the jury found that defendant acted both recklessly and with depraved indifference to human life. We hold that the record supports the jury's finding as to the first of these mental states, but not the second. We therefore uphold the conviction for manslaughter and vacate the conviction for reckless endangerment.

On November 13, 2007, defendant and the man she lived with, Michael Flint, brought her eight-month-old son, Colbi Bullock, to a hospital emergency room. The child was not breathing and had no pulse. Attempts to resuscitate him did not succeed, and he was pronounced dead the following day.

At the time of his death, Colbi had injuries consistent with very severe abuse. There were many bruises on his face—around his cheek, his chin, both eyes and one ear—and there were also bruises elsewhere on his head, and on his neck, chest and abdomen. There were patterns of bruises and abrasions on his arms consistent with three human bite marks, two on the right arm and one on the left. The injuries on his neck were consistent with choking. His ribs had been broken at least a month previously; this injury was consistent with squeezing, or grabbing and shaking. It also appeared that the ribs had been reinjured more recently. A bone in the forearm had been recently broken, close to a bite mark. A doctor who conducted an autopsy found that injury to be "consistent with someone biting and snapping the arm at the same time." He also found evidence of a brain injury, in the form of hemorrhages less than four days old. In the doctor's opinion, the brain injury was the cause of death.

It is not disputed that Colbi's injuries were inflicted by Michael Flint. Flint pleaded guilty to two counts of depraved indifference murder, and related lesser charges. Defendant was prosecuted [for] second degree manslaughter based on [the theory] that, in the last 45 days of his life, she left him in Flint's care, knowing that to do so was to put the child's life in danger. She was also charged with first degree reckless endangerment and with endangering the welfare of a child.

Defendant was convicted on all four counts.... We now affirm as to the manslaughter and endangering the welfare of a child counts, but reverse as to reckless endangerment....

[D]efendant does not dispute the sufficiency of the evidence that she was guilty of endangering the welfare of a child. She does challenge the sufficiency of the evidence supporting her [] manslaughter conviction and her conviction for reckless endangerment. As to both counts, the critical question is what the evidence shows as to defendant's state of mind when, over a period of six weeks, she repeatedly left her baby with the man who abused and eventually killed him. We will summarize the evidence on that issue, resolving any conflicts, as the jury presumably did, in the People's favor.

Defendant and Colbi began living with Flint when Colbi was about three months old. Defendant worked full time; she hired a babysitter, but Flint was often alone with Colbi. A few days before Colbi's death, defendant dismissed the babysitter and agreed with Flint that Flint would care for the child while defendant worked.

Seven friends and acquaintances of defendant testified to contacts with defendant, Flint and Colbi during the time the three of them lived together. Five of them said that they saw bruises on Colbi, and six of them said that defendant expressed, in one way or another, knowledge, belief or fear that Flint was abusing the child. One said that defendant told her "how she felt uncomfortable leaving the baby home with Michael, that she was scared, she never knew what she was going to go home to." The same witness said defendant "told me that Michael had shaken the baby ... shaken and bit him." Another witness recounted a conversation between defendant and Flint, as defendant described it to the witness: "she had told him he had to be more careful with Colbi ... and if he happened to get angry or upset, to shake the teddy bear instead of Colbi." (In a statement to police after Colbi's death, defendant admitted telling Flint something quite similar.) A third witness said that Flint had shown the witness some bruises on Colbi's head and that, when defendant learned of the conversation, she "walked over to Michael and started yelling at him.... She asked him why he pointed out the bruises to me."

Three witnesses said they had told defendant to call the police, leave the apartment or both. A fourth told her that the idea of Flint as babysitter "scared me and made me quite nervous for Colbi," and a fifth, when defendant told him that Flint would be babysitting, observed: "You're nuts."

There was other evidence that defendant knew Flint could be violent and cruel. Three witnesses testified that defendant told them Flint had abused her physically: one said that, according to defendant, Flint had shoved, hit and bitten her; another that defendant had "bruises ... that she said [were] from Michael"; and a third that she had "bruises and a burn" that she said "were from Mike." Two witnesses testified that defendant knew Flint had been charged with cruelty to a dog, and one said that she had "started to believe" he was guilty of that crime. The same witness testified that, according to defendant, Flint had once kicked a kitten against a wall; defendant later found the kitten dead; and "she believed Michael had killed the cat."

The events of the last days of Colbi's life, while directly relevant to the dismissed manslaughter count (based on failure to seek medical care), also have some bearing on the counts before us, because they show defendant's persistence in leaving Colbi with a dangerous man. Flint called defendant at work on November 12 to tell her that "the baby had fallen in the shower." Defendant reported this to a coworker who was a certified nursing assistant, and received advice about what symptoms to look for. Arriving home, defendant found, according to her statement to the police, that Colbi "had bruising on the side of his face, his eyes were black and blue, he had a fat lip, and he

had redness on his torso and his neck area.” Flint told her the baby had vomited—one of the symptoms the coworker had identified as calling for medical attention.

Defendant not only sought no care for the baby; there was evidence that she tried to conceal the injuries. A witness who encountered Colbi, Flint and defendant the following morning, before defendant went to work, testified that her attention was drawn by Colbi’s “persistent, weak ... very strange cry.” Colbi was dressed in a snowsuit, with a hood covering his head (though defendant herself wore a T-shirt). When the witness slid the hood back, she saw that Colbi had two black eyes, and asked defendant: “Did you take him to the hospital?” Defendant replied, falsely, that she had been at the hospital all night, and that the doctor had told her that the baby was fine. Later that day, defendant went to work as usual, leaving Colbi with Flint for the last time.

We must decide whether this evidence shows the degree of culpability necessary to support defendant’s manslaughter and reckless endangerment convictions. We consider the two separately.

Manslaughter

Defendant was convicted of manslaughter in the second degree, a class C felony, under PENAL LAW § 125.15 (1), applicable to someone who “recklessly causes the death of another person.” “Recklessly” is defined in PENAL LAW § 15.05 (3), which says, in relevant part:

“A person acts recklessly with respect to a result ... when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur ... The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.”

The question here is whether the jury could find, beyond a reasonable doubt, that defendant was aware of, and consciously disregarded, a substantial and unjustifiable risk that leaving Colbi in Flint’s care would lead to Colbi’s death. It is not enough that defendant should have known the child’s life was in danger, or that she did know the child could be seriously hurt. She must have actually known of, and consciously disregarded, a risk to the child’s life. On the other hand, it is not necessary to a manslaughter conviction that defendant knew the child would die, or believed it likely. Even a small risk that a baby will die of child abuse is “substantial and unjustifiable.”

We conclude that the evidence is sufficient to support the jury’s finding that defendant knew such a risk existed. The evidence shows that defendant knew, or at least believed it possible, that Flint was hitting, shaking and biting her child. She knew that he was capable of inflicting significant injury on an adult, herself. She believed him capable of killing a small animal in a rage. She was worried enough to tell Flint that, if he was angry, he should “shake the teddy bear instead of Colbi.” Yet, she left Colbi with Flint again and again—even after she saw, on November 12 and 13, that Colbi had been seriously hurt.

It is, perhaps, conceivable that defendant did not actually know that Flint’s maltreatment of Colbi created a risk to the child’s life, but the jury could rationally find that she did know it....

Having found that defendant knew of that risk, the jury was also justified in finding that she consciously disregarded it. And it is obvious that the risk was “of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable

person would observe in the situation.” The evidence was therefore sufficient to support defendant’s conviction for manslaughter in the second degree.

Reckless Endangerment

Reckless endangerment in the first degree is defined by PENAL LAW § 120.25: “A person is guilty of reckless endangerment in the first degree when, under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person.”

This crime, a class D felony, is less serious than manslaughter in the second degree. Yet the mental culpability necessary to support defendant’s reckless endangerment conviction is greater than that required to support her manslaughter conviction: to be guilty on the reckless endangerment count, she must have acted not only recklessly, but also with depraved indifference to human life.

The reason for this apparent anomaly is an exercise of prosecutorial discretion. The People chose not to charge defendant with depraved indifference murder, though such a charge has just as much basis in the record as the charge of first degree reckless endangerment. The definition of depraved indifference murder contained in PENAL LAW § 125.25 (2) is identical to the definition of reckless endangerment that we have quoted, except that the murder statute adds the words “and thereby causes the death of another person.” Here, of course, the person who was put at risk did die, and indeed the jury, in convicting defendant of manslaughter, so found. Thus the jury that convicted defendant on the reckless endangerment count would, if it was logically consistent, also have convicted her of depraved indifference murder had that charge been presented to it. And we cannot uphold her reckless endangerment conviction unless we would uphold a murder conviction on the same facts.

The distinction between conscious disregard of a known risk to human life (required for a reckless manslaughter conviction) and depraved indifference to human life (required for a depraved indifference murder or first degree reckless endangerment conviction) can be hard to grasp, especially in a disturbing case like this one. Consciously to disregard a substantial risk to the life of one’s own child—as the jury found, on legally sufficient evidence, this defendant did—is shocking behavior, and in ordinary speech people might call it “depraved.” But “depraved indifference to human life,” as used in the murder and reckless endangerment statutes, is something even worse.

Our cases make clear that the word “indifference” is to be taken literally: “depraved indifference is best understood as an utter disregard for the value of human life—a willingness to act ... because one simply doesn’t care whether grievous harm results or not” (*People v Feingold*, 7 NY3d 288, 296, 852 NE2d 1163, 819 NYS2d 691 [2006], quoting 7 NY3d at 298 [Ciparick, J., dissenting], quoting *People v Suarez*, 6 NY3d 202, 214, 844 NE2d 721, 811 NYS2d 267 [2005]). In other words, a person who is depravedly indifferent is not just willing to take a grossly unreasonable risk to human life—that person does not care how the risk turns out. This state of mind is found only in “rare cases” (*Suarez*, 6 NY3d at 218-219 [G.B. Smith, Rosenblatt and R.S. Smith, JJ., concurring]). Such cases do exist; in the situation before us, Flint pleaded guilty to depraved indifference murder, and we do not suggest that

his plea was ill-founded. But depraved indifference to the life of another is still rare, and it is surely even rarer when the other person is one's own child.

Here, while the evidence certainly shows that defendant cared much too little about her child's safety, it cannot support a finding that she did not care at all. On the contrary, the evidence shows that defendant feared the worst and—recklessly, as the jury found—hoped for the best. A witness who unsuccessfully advised defendant to call the police about Flint's behavior testified that defendant seemed "worried," and no witness's testimony points to a contrary finding. Some of the evidence most damaging to defendant on the manslaughter count is actually favorable to her on the depraved indifference issue. Thus her statement that she "was scared" and "never knew what she was going to go home to" shows that she was fearful of harm to her baby, not that she was indifferent to the possibility. And in telling Flint to "shake the teddy bear instead of Colbi," she was trying, however weakly and ineffectively, to protect the child....

In short, while the evidence is sufficient to support the jury's finding that defendant was guilty of manslaughter, it would not support a conviction for the even more serious crime of depraved indifference murder. Perhaps the People implicitly recognized this when they decided not to bring a murder prosecution—even though they asked the jury to find all the elements of depraved indifference murder. Since a murder conviction could not stand on this record, as a matter of logic the conviction of depraved indifference reckless endangerment cannot stand either....

JONES, J. (dissenting in part):

I agree with the majority's dismissal of the reckless endangerment count. However, I dissent from that portion of the majority's opinion upholding defendant's conviction for manslaughter in the second degree (count seven of the indictment) because I do not believe this conviction was supported by legally sufficient evidence....

The prosecution here built its reckless manslaughter case around the allegation that sometime during the stated 45-day period, defendant actually became aware that Flint was physically abusing her son and chose to ignore the grave risk this conduct posed for the child by repeatedly leaving him in Flint's unsupervised care. To make out its case, the prosecution had witnesses testify that defendant told them that Flint, on numerous occasions, had physically abused her and was physically abusing her child in her absence. Further, the prosecution proffered medical evidence which confirmed that defendant's son had been repeatedly abused during the period of time that defendant left him in unsupervised Flint's care.

While this evidence may have shown that defendant was criminally negligent in leaving her child with Flint, it did not establish the elements necessary to support a reckless manslaughter conviction. The evidence, when viewed in the light most favorable to the prosecution, established that the acts of abuse took place while defendant was at work—i.e., defendant could not know the severity of the abuse to the child; it was not possible for defendant to know that the injuries sustained by her child were life-threatening or could contribute to his death because to the naked eye they only appeared to be marks or bruises; hospital personnel were only able to determine the extent of the child's internal injuries after multiple x-rays and blood tests were performed; and the internal injuries that

caused the child's death were only detected upon the medical examiner's internal inspection of the child's remains during the postmortem examination. Further, while the evidence established that the child's death resulted from trauma to the head, the medical examiner was unable to pinpoint precisely when the trauma was inflicted upon the child. He could only opine that the fatal injuries were sustained within four days prior to his death (which occurred on November 14, 2007).

While the evidence adduced at trial established that defendant was aware of a risk of abuse to her son, the prosecution did not meet its burden of establishing defendant's awareness and conscious disregard of a substantial and unjustifiable risk of her son's death. There was no evidence to establish at what point during the stated 45-day period defendant actually perceived that her child was exposed to a substantial and unjustifiable risk of death....

In upholding defendant's reckless manslaughter conviction, the majority concludes that the jury could logically find, based on the evidence adduced at trial, that defendant knew a substantial and unjustifiable risk of death existed and consciously disregarded it. But, in support of the inference it claims the jury could make, the majority points to evidence of defendant's awareness of a risk of physical abuse, not death. Stated differently, the majority, without support, equates knowledge of a risk of physical abuse with knowledge of a risk of death. In effect, the majority has held that once a parent is aware his/her child has been physically abused by someone with whom they regularly leave the child, even where the abuse occurs outside the presence of the parent, and even where any injuries sustained appear to be superficial, that parent may be held criminally liable for reckless manslaughter if the child dies at the hands of the abusive caregiver. Such a ruling marks an unwarranted departure from our jurisprudence and a drastic diminution of the proof required to make out reckless manslaughter in a case involving a passive defendant parent....

For the foregoing reasons, I would modify by dismissing count seven of the indictment charging reckless manslaughter and by dismissing count eight of the indictment charging reckless endangerment.

Discussion Questions and Notes

- 1) Do you think the defendant's *mens rea* was sufficient to meet the definition of manslaughter?
- 2) Should we assess the loss a parent feels in a child's death in determining guilt or length of the sentence?

C. Negligent Homicide

Negligent homicide is, straightforwardly, homicide with a *mens rea* of negligence as Montana's adoption of the MPC language indicates.

45-5-104, MCA(1)

A person commits the offense of negligent homicide if the person negligently causes the death of another human being.

This next case helps to show the differences between manslaughter and negligent homicide.

Rollins v. Arkansas, 347 S.W.3d 20 (Ark. 2009)

ELANA CUNNINGHAM WILLS, Associate Justice

Appellant Vance Rollins was charged with two counts of manslaughter after he caused a head-on car collision that killed Lawrence and Nina Humphrey. He was tried by a Perry County jury on October 24, 2007, and was sentenced to two consecutive four-year terms of imprisonment. Rollins appealed to the court of appeals, contending that there was insufficient evidence to support his manslaughter convictions. The court of appeals agreed, affirming his convictions but modifying the judgment to reflect the lesser-included offense of negligent homicide. The State petitioned for review from the court of appeals' opinion, arguing that it was decided contrary to this court's prior decisions and involved an issue of substantial public interest that requires clarification....

In his first argument for reversal, Rollins argues that the trial court erred in denying his motion for directed verdict because the evidence was insufficient to sustain the manslaughter conviction. On appeal, we treat a motion for directed verdict as a challenge to the sufficiency of the evidence. We will affirm the circuit court's denial of a motion for directed verdict if there is substantial evidence, either direct or circumstantial, to support the jury's verdict. This court has repeatedly defined substantial evidence as evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. In reviewing the sufficiency of the evidence, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the State, without weighing it against conflicting evidence that may be favorable to the appellant, and affirm the verdict if it is supported by substantial evidence.

As noted above, Rollins contends that the evidence introduced at trial was insufficient to support his manslaughter conviction. More specifically, he contends that the evidence was insufficient to demonstrate that he acted recklessly. Rollins was charged under Arkansas Code Annotated section 5-10-104(a)(3) (Repl. 2006), which states that a person commits manslaughter if the "person recklessly causes the death of another person." "Recklessly" is defined in Arkansas Code Annotated section 5-2-202(3) (Repl. 2006) as follows:

(A) A person acts recklessly with respect to attendant circumstances or a result of his or her conduct when the person consciously disregards a substantial and unjustifiable risk that the attendant circumstances exist or the result will occur.

(B) The risk must be of a nature and degree that disregard of the risk constitutes a gross deviation from the standard of care that a reasonable person would observe in the actor's situation[.]

At trial, the State introduced the testimony of O.J. and Barbara Williams. Mr. Williams testified that, on the day of the accident, he was driving southbound on Highway 7 towards Hot Springs when a vehicle came up behind him. Mr. Williams decided to let the vehicle pass him, so he slowed down and pulled over to the edge of his lane. The vehicle did not pass, and Mr. Williams resumed his speed. The vehicle, however, "just kept coming up behind" Mr. Williams, which made him nervous. Mr. Williams attempted several times over the course of about fifteen miles to slow down to let the other vehicle pass, but it never did. Mr. Williams said he never observed the vehicle cross the center line, but the tailgating nonetheless made him nervous.

Finally, Mr. Williams pulled into a CCC camp and stopped for a while. After a few minutes, during which several other vehicles went down the road, he returned to the highway and resumed his journey. About five miles down the road, he saw that the vehicle that had been following him had been in a wreck. That vehicle was completely on the opposite side of the center lane, he said.

Barbara Williams described the vehicle behind them as "driving erratically." She said that the vehicle would repeatedly "come way up on our bumper, and then would back off." Mrs. Williams said that the other vehicle was "not fast," but would pull up close behind them and then back away without passing. She also described how they eventually pulled off the road at a CCC camp for five minutes or so and then, when they got back on the highway, they came upon the wreck. Mrs. Williams testified that the vehicle that had been following them was "obviously in the wrong lane."

The State's next witness was Linda Brewer, a nurse who witnessed the accident. Brewer said that she and her daughter had spent the day in Hot Springs and were driving north on Highway 7 at around 3:00 p.m. behind a tan car. As they started down a little grade, she saw a red sport-utility vehicle driving in their lane. At first, she thought it would swerve back, but then she saw the taillights of the tan car just before the SUV hit it. She saw a flash of flame, pulled up alongside the tan car and then, concerned about the fire, quickly accelerated past the wreck. She then pulled over and told her daughter to call 911.

Brewer ran first to the red SUV and tried to open the door but could not. She saw the driver moving around and told him to stay still. She then went to the tan car and tried to help its passengers, the Humphreys; however, they were badly injured, and both expired at the scene of the wreck. As she attempted to assist the Humphreys, she saw the driver of the red SUV, Rollins, trying to get out of his vehicle, so she ran back to help him. She told him that he had been in an accident and needed to sit still, but he got out and kept trying to open the back door of the SUV. Brewer heard him say "Molly," and she realized that there was someone else in the vehicle. After they managed to get the door open, Brewer saw a woman on the floorboards of the back seat. Brewer and her daughter helped the woman out of the vehicle. Rollins then began feeling around on the floorboard, and Brewer thought that perhaps he needed oxygen.

By that time, emergency vehicles had arrived, and Brewer went to speak with the emergency personnel. As she was doing so, she saw Rollins at the side of the road and thought he looked like he was going to pass out. She went to him and told him he needed to sit down; she also asked if he was hurt. He said that he was not, and as she looked at his hands, she saw him drop some green pills.

Brewer said that, as a nurse, she thought they might be heart pills, so she asked whether he had any conditions that required medication. He shook his head, and she eventually got him to sit down. A moment or two later, however, he began struggling to get up, and Brewer again tried to get him to sit still. At that point, the woman who had been in the backseat of the SUV began hollering, and Rollins rolled over to try to get up. When he did, Brewer saw green pills underneath him, and she picked up three or four of them and later gave them to police.

Faith Miller, Brewer's daughter, also witnessed the collision. As they came around a curve on the highway, she saw Rollins's red SUV "all the way" in their lane and also observed Rollins looking over his right shoulder. She said that Rollins was going fast around a curve and "never appeared to slow down, he didn't dodge, he didn't swerve." After the accident, Miller said that her mother went to help Rollins, who "was shaky and wobbly" and appeared to be "in shock and stuff."

Trooper Greg McNeese of the Arkansas State Police, who responded to the scene of the accident at 5:45 p.m., testified that an officer from the Perry County Sheriff's Office handed him the pills that Brewer had picked up; he placed them in an envelope and secured them in his vehicle. McNeese also testified that he found a duffel bag in the front passenger floorboard of the SUV that contained clothes, toiletries, and a black cigarette case with three pipes in it. Christa Hall, a forensic chemist at the Arkansas State Crime Laboratory, testified that the pipes tested positive for cocaine residue. Hall also testified that the green pills were hydrocodone and acetaminophen.

Shawn Wright, a nurse at St. Joseph's Hospital in Hot Springs, testified that he took a blood sample from Rollins on the day of the wreck; the blood alcohol report form indicates that the sample was collected at 7:15 p.m. Becky Carlisle, a forensic toxicologist at the Crime Lab, testified that she tested the blood samples that were taken from Rollins after the accident. The samples tested positive for cocaine and sertraline, or Zoloft, but the level of both drugs was less than .05 micrograms per milliliter, which indicated that the person had ingested the drugs, but it was a fairly low amount. She said that she did not know how or when the drugs were ingested, and she could not ascertain how long either drug had been in the blood prior to the samples' being taken. When asked whether there was a period of time at which blood tests would no longer detect the ingestion of cocaine, Carlisle said it would be "over eight hours." Her testing revealed no other controlled substances in Rollins's blood sample, including hydrocodone. On cross-examination, Carlisle said that she could not give an opinion as to whether the person was impaired by the level of "whatever substances were to the degree that would interfere with normal functioning."

At the conclusion of the State's case, Rollins moved for a directed verdict on the manslaughter charges, arguing that the State had failed to prove the element of recklessness. The circuit court denied his motion, but it did agree to instruct the jury on the lesser-included charge of negligent homicide. As noted above, the jury convicted Rollins on two counts of manslaughter and sentenced him to two consecutive four-year sentences.

Viewing all this evidence in the light most favorable to the State, and considering only the evidence that supports the verdict, we conclude that the circuit court did not err in denying Rollins's motion for directed verdict. At issue in this appeal is whether the State proved that Rollins acted recklessly. As set out above, our statute declares that one acts recklessly "with respect to attendant circumstances or a result of his conduct when he consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur." ARK. CODE ANN. § 5-2-202(3).

The original commentary to the manslaughter statute, section 5-10-105, notes that the test for differentiating between reckless or negligent conduct is "whether the actor perceived the substantial risk of death or serious physical injury and disregarded it (reckless conduct) or failed to perceive the risk in the first place (negligent conduct)." ORIGINAL COMMENTARY TO ARK. CODE ANN. § 5-10-105 (Repl. 1995)....

In the present case ... we conclude that the evidence supported the trial court's denial of Rollins's motion for directed verdict. Rollins argues that there was no testimony that the drugs in his blood would affect his ability to drive a vehicle, and thus there was no evidence that he had any knowledge of any risk. While no evidence was presented of Rollins's level of impairment or intoxication from ingesting cocaine, we note that such evidence is not necessary to sustain a conviction for reckless manslaughter. Rather, the State needed only to prove that Rollins recklessly caused the death of another person. That is, the State was required to prove that Rollins consciously disregarded a substantial and unjustifiable risk of causing death, and that such risk was of a nature and degree that disregard of it constituted a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

Although Rollins argues that there was no proof that he consciously disregarded a risk, this court has repeatedly noted that intent is rarely provable by direct evidence. Since intent ordinarily cannot be proven by direct evidence, jurors are allowed to draw upon their common knowledge and experience to infer it from the circumstances. Here, there was evidence that Rollins had been driving erratically prior to the crash that occurred around 3:00 p.m., tailgating the Williamses for fifteen miles, driving fast on a curving highway, and crossing over the center line while looking over his shoulder. There was further testimony that he did not attempt to stop or swerve as he drove headfirst into the Humphreys' vehicle. Moreover, proof was presented from which the jury could infer that, at some point within the eight hours preceding the drawing of his blood at 7:15 p.m., Rollins had ingested cocaine. Taking all of these facts and circumstances together and viewing them in the light most favorable to the State, as we are required to do under our standard of review, we cannot agree that the circuit court erred in denying Rollins's motion for directed verdict....

Affirmed; court of appeals reversed.

HANNAH, C.J., dissenting.

I respectfully dissent. The State prosecuted Rollins for manslaughter, argued his conduct was reckless, and then offered evidence to prove that Rollins was negligent. The jury verdict of two convictions for manslaughter is unsupported by substantial evidence, and the circuit court erred in submitting the issue of manslaughter to the jury. The jury was left to speculation and conjecture. The evidence does support the lesser included offense of negligent homicide. Accordingly, I would affirm the judgment of the court of appeals, modify the judgment to two convictions for negligent homicide, and sentence Rollins to the maximum allowed on both convictions.

The evidence the State offered was that Rollins was driving too fast and looked over his right shoulder about the time he approached a curve. The State also showed that through his inattention in looking back, Rollins crossed the double yellow line, veered into the lane of oncoming traffic, and

struck the victims' car. This all constitutes evidence of negligence. However, the State's strategy at trial was to argue that the evidence of negligent conduct could satisfy the requirements of reckless conduct. This is apparent from the State's argument despite the State peppering its argument with the word "consciously." The State argued that Rollins "consciously disregarded the rules of the road" when he failed to make himself conscious of the conditions of the road in that he looked over his shoulder instead of keeping his eye on the road. According to the State, this caused him to cross a double yellow line in the curve and drive "entirely" on the wrong side of the road. Although the State couched its argument in terms of "conscious disregard," nothing offered showed that Rollins consciously decided to look away from the road, consciously decided to drive in the wrong lane on a curve, and consciously decided to remain in that wrong lane. The State in summary argued that Rollins consciously disregarded a perceived risk when he failed to abide by "basic driver safety" and when he failed to "be aware of the conditions" under which he was driving. According to the State, "all he had to do was stay on his side of the road," and in failing to do so, he was reckless. Thus, while characterizing the conduct as reckless, the State actually argues that Rollins was criminally negligent, that he should have been aware of the attendant circumstances, that he should have been aware of a substantial and unjustifiable risk, and that his failure to perceive the risk involves a gross deviation from the standard of care that a reasonable person would observe. The State even argued that Rollins violated his "standard of care," which again reveals the State was arguing negligence. The evidence the State offered showed that Rollins exercised very poor judgment in taking his eyes from the road. That is negligence, either civil, or criminal, if the burden of proof can be met. There is no support in the evidence to show that Rollins consciously disregarded a substantial and unjustifiable risk with the knowledge of probable harmful consequences of a wrongful act, or that his conduct was a willful and deliberate failure to act to avoid the consequences. These are the requirements to prove reckless conduct.

The State further argued Rollins might have been impaired by the drugs, but admitted it "did not know how that might affect you." Rollins's blood test showed that Rollins was not intoxicated, and the State chose not to put on an expert to testify about whether the level of cocaine in Rollins's blood could have impaired his driving. As the court of appeals concluded, on this record, the issue of driving under the influence was a closed question. The State chose not to pursue the question.

The accident and death of the elderly victims was horribly tragic. However, despite the tragedy, at best, the evidence the State offered shows that Rollins unintentionally veered into oncoming traffic when he failed to watch the road. There is no evidence that he consciously drove on the wrong side of the road. There is no evidence of a conscious disregard of a perceived risk. I do note the testimony by Mr. and Mrs. Williams. Both testified that Rollins was driving erratically, in that he tailgated them for about fifteen miles prior to Williams pulling over to force Rollins to go by. While tailgating is hardly safe or appropriate behavior, it casts little if any light on whether Rollins consciously crossed the double yellow line, consciously drove in the oncoming lane on a curve, and consciously decided to remain in the wrong lane.

The majority errs in relying on *Hoyle v. State*, 371 Ark. 495, 268 S.W.3d 313 (2008), because Hoyle was intoxicated. He was driving an eighteen-wheeler. Prior to the accident causing a death, Hoyle almost ran a truck off the road. Expert testimony at trial showed that Hoyle had .221 micrograms

methamphetamine per milliliter that without doubt affected his driving. *Hoyle*, 371 Ark. at 501, 268 S.W.3d at 319....

This court should rely on *Hunter v. State*, 341 Ark. 665, 19 S.W.3d 607 (2000). Hunter was not intoxicated and caused the death of three people in a head-on collision while in the wrong lane. In *Hunter*, this court affirmed a conviction for negligent homicide where Hunter knew the road, knew the double yellow line meant he was not allowed to pass, knew his vision was obscured by mist and spray from rain, and yet decided to pass on a hill where he knew it was unsafe. He collided with a car that came over the crest of the hill and killed three people. The court affirmed the denial of the directed-verdict motion, holding that the proof supported the allegation of a gross deviation from the standard of care that a reasonable person would observe in the situation. *Hunter*, 341 Ark. at 669, 19 S.W.3d at 610 (quoting ARK. CODE ANN. § 5-2-202(4) (Repl. 1997)). The court stated as follows on the issue of negligent and reckless conduct:

In the commentary to the above section, it is noted that negligent conduct is distinguished from reckless conduct primarily in that it does not involve the conscious disregard of a perceived risk. In order to be held to have acted negligently under § 5-10-105, it is not necessary that the actor be fully aware of a perceived risk and recklessly disregard it. It requires only a finding that under the circumstances he should have been aware of it and his failure to perceive it was a gross deviation from the care a reasonable, prudent person would exercise under those circumstances.

Hunter, 341 Ark. at 668, 19 S.W.3d at 609 (citing *Phillips v. State*, 6 Ark. App. 380, 382, 644 S.W.2d 288, 289 (1982)). The conduct in *Hunter* is far more intentional than what the proof shows in the present case, and that conduct was held to be criminally negligent. The majority rewrites the statute and judicially creates criminal liability for manslaughter contrary to the elements of the crime set out in the statutes enacted by the General Assembly.

While it is clear to me that the State failed to provide substantial evidence to support the jury's decision on manslaughter, it is also clear that the State provided substantial evidence to prove the lesser included offense of negligent homicide. I agree with the court of appeals that pursuant to *Dixon v. State*, 260 Ark. 857, 545 S.W.2d 606 (1977), we should modify the judgments of conviction to the lesser included offenses of negligent homicide under Arkansas Code Annotated section 5-10-105(b)(1) (Repl. 2006) and set the sentence at the maximum allowed by law for negligent homicide.

Discussion Questions and Notes

- 1) The line between recklessness and negligence hinges on the defendant's knowledge that he is taking a substantial and unjustified risk. Do you think there was sufficient evidence in the above case to warrant the majority's holding?
- 2) Note the importance of the drug use to the majority. In general, driving under the influence is associated with reckless conduct and mere bad driving is associated with

negligence. How should we deal with cases like Rollins where evidence of drug use does not necessarily indicate substantial impairment?

- 3) What types of evidence should we use to infer whether a defendant is aware of a substantial and unjustified risk when we lack direct statements by the defendant?

Review Exercise 1

Watch [this film clip](#) and answer these questions:

- The Dread Pirate Roberts ("DPR") is charged with the homicide of Vizzini. Homicide is defined as "causing the death of another."
- In a common law jurisdiction, has DPR committed First Degree Murder, Second Degree Murder, Voluntary Manslaughter, or Involuntary Manslaughter?
- Under the MPC, has DPR committed Murder, Manslaughter, or Negligent Homicide?

Review Exercise 2

Watch [this film clip](#) and answer these questions:

Has the mother committed homicide? If so, what is the appropriate level of culpability under the MPC and common law approaches?

Review Exercise 3

Watch [this film clip](#) and answer these questions:

Is the defendant guilty of second degree murder under the common law (or simply murder under the MPC)? Voluntary manslaughter?

D. Felony Murder Rule

The traditional felony murder rule is that a defendant is guilty of murder for all deaths that occur during the commission of a felony. This rule applies to principals and accessories under the common law. It has the effect of making the *mens rea* for murder strict liability as the prosecution need only show an underlying felony and a death. Indeed, the rule also abrogates an essential component of the act requirements of homicide as well: causation. Mere death is sufficient, even if not caused by the defendant or an accomplice, for a defendant to be guilty of murder via the felony murder rule. For our class purposes, a felony

is defined as any crime for which the maximum statutory penalty is at least one year of imprisonment.

Under the traditional rule or modern limitations of it, a basic question concerns what it means to for a death to occur during the commission of a felony. The following opinion attempts to temporally address the issue.

California v. Russell, 187 Cal. App. 4th 981 (Cal. Ct. App. 2010)

HUFFMAN, Acting P. J.

Following a court trial, Karl Joseph Russell, Jr., was convicted of first degree murder (PEN. CODE, 1 §§ 187, subd. (a), 189), evading an officer and causing serious bodily injury or death (Veh. Code, § 2800.3), residential burglary (§§ 459, 460), and vehicle theft (VEH. CODE, § 10851, subd. (a)). The court also found true an allegation that Russell inflicted great bodily injury in the commission of the vehicle theft (§ 12022.7, subd. (a)).

Russell was sentenced to an indeterminate term of 26 years to life, composed of 25 years to life for first degree murder, plus one year for the use of a deadly weapon enhancement pursuant to section 12022, subdivision (b). The court stayed the terms for the remaining counts and enhancements pursuant to section 654.

Russell appeals challenging only his conviction for first degree murder. Russell contends that the felony-murder escape rule should not apply to flight during the commission of a burglary and that even if it does apply the evidence is insufficient to show that the death in this case occurred during an escape from the commission of a burglary.... We ... affirm the conviction....

About 4:30 or 4:35 a.m. on September 5, 2006, Ryan Creighton was outside of his house on North Tremont Street in Oceanside. Creighton was loading his truck in order to go to a 5:30 a.m. fire academy class at Palomar College. Creighton observed movement taking place on the porch of his neighbors across the street, Klaas and Golda Meurs. Creighton saw a shadowy figure moving quickly on the porch of the Meurses' residence. In the process of loading his truck Creighton made a loud sound when he dropped the tailgate of the truck. Creighton noted then that the quickly moving figure stopped, looked in his direction for three to five seconds, then bent over, turned around and went back inside the Meurses' residence. Thereafter, Creighton observed a flashlight sweep in the interior of the Meurses' house. Creighton then noticed what he thought were lights in the upper story bedroom of the Meurses' residence and therefore decided he did not need to call the police.

Creighton continued to load his truck and then drove away for his training class. He estimated based upon his normal schedule that he would have left about 4:40 a.m. When Creighton left his house, the neighbors' garage door was still down in the normal position.

Investigation later determined that the Meurs family was away at the time of these events. They had left their white Oldsmobile in their closed garage.

Since Russell does not challenge the sufficiency of the evidence to prove the residential burglary, the vehicle theft or his flight from police causing death, we will truncate the discussion of all the facts surrounding those events and deal only with those necessary to provide a foundation for the discussion of the issue of sufficiency of the evidence to prove felony murder.

The investigation revealed that the Meurses' home had been burglarized, that items were taken, including the Meurses' white Oldsmobile from the garage. The garage door remained open when the burglar left with the Oldsmobile.

Russell left a duffel bag close to the sliding glass door of the Meurses' residence. Items of Russell's personal property and property taken from the residence were located in that duffel bag.

About 4:52 a.m., approximately 12 minutes after Creighton had left the Meurses' home, where the garage door remained closed, Carlsbad Police Sergeant Mickey Williams observed the Meurses' white Oldsmobile stopped at a red light at the intersection of Plaza Drive and El Camino Real in the City of Carlsbad. Russell was driving the Oldsmobile. The location in Carlsbad is around four miles from the area in Oceanside where Russell had been last seen.

At the time Officer Williams was likely observed by Russell, Williams was driving a marked patrol car, was in uniform and was about to exit the parking lot near the intersection where Russell was stopped at a red light.

Before the light changed, Williams observed Russell rapidly accelerate, driving through the red light and across the intersection. The officer could hear the Oldsmobile accelerating at a rapid rate proceeding southbound on El Camino Real. The police officer activated the patrol car's emergency overhead lights and pursued the white Oldsmobile. The officer estimated that at times the Oldsmobile was traveling 70 to 80 miles per hour in a 35-mile-per-hour zone.

The chase continued at high speeds with the white Oldsmobile running red lights, driving erratically, and weaving in and out of traffic. At one point, Russell drove 60 to 80 miles per hour down the center median of a shopping area designated for left turns. At one point the Oldsmobile reached speeds of 100-plus miles per hour.

Ultimately, with the police officer remaining in pursuit of Russell, the stolen Oldsmobile crashed into the front passenger side of a pickup truck driven by the victim, Rodrigo Vega. Vega was killed as a result of that collision. When Officer Williams approached Russell at the crash scene, Russell threatened the officer, stating that he had a gun, and then ran away. Carlsbad police pursued Russell and found him crouching in the corner next to an office building.

Police officers recovered items of property stolen in the burglary in Russell's pants pockets and from the Oldsmobile. They also found a silver flashlight under the passenger seat of the car. A blood sample taken from Russell about 6:07 a.m. showed he had a blood-alcohol level of 0.12 percent. A later blood sample showed a blood-alcohol level of 0.11 percent. A forensic criminalist testified that at the time of the fatal crash, Russell likely had a blood-alcohol level of 0.14 percent.

Russell testified in his own defense and testified to drinking prior to the burglary. He said he met his friend Kurt McFarlane at the Rusty Spur bar in Oceanside about 9:30 p.m. He testified about entering the Meurses' residence with McFarlane and acknowledged leaving a bag outside the door of the residence. He said they were in the house for about an hour and that McFarlane was the one seen on the porch.

Russell testified that after they left the residence he dropped McFarlane off at an area near the beach where McFarlane often slept on a boat several blocks away. Russell said he then drove around to see if he could "kick it with some friends," but did not find anyone and got lost in the Oceanside area. He did not remember driving in the manner in which Officer Williams described his driving and only remembered he was trying to find a place to sleep....

Russell contends there is not sufficient evidence to support a conviction for felony murder. He contends that there is insufficient evidence to establish that at the time of the accident he was still in the commission of the burglary or that there was evidence that he was fleeing from the scene of the burglary. As a subset of that contention Russell also argues that the escape doctrine of felony murder cannot apply to an escape from a burglary and that even if it does, the escape doctrine cannot apply unless the perpetrator is actively pursued from the crime scene or in the alternative that the police have been called and the crime reported.

Applying the appropriate standard of review, we are satisfied that Russell is wrong on his legal arguments that the escape doctrine of felony murder does not apply to burglary because case law establishes that it clearly does. We think he is also wrong in his contention that for the escape doctrine to apply the perpetrator must be actively chased from the scene or at a minimum someone must have called the police promptly upon the perpetrator's departure from the scene. No case requires such pursuit. For the escape doctrine to apply, it is only necessary to establish that the perpetrator of the felony has not yet reached a place of temporary safety after the actual commission of the crime before the killing takes place. There is substantial evidence in this record to establish the homicide in this case occurred as part of a continuous transaction from the commission of the burglary before Russell was able to obtain a position of temporary safety....

Thus, the question presented by this appeal is whether at the time Russell crashed into the victim's car causing his death that killing was part of a continuous transaction that had not reached culmination because Russell had not found a place of "temporary safety." Here the trial court after completion of the evidence found defendant guilty of first degree murder. The only theory of first degree murder presented or available from these facts would be based upon felony murder pursuant to section 189. The trial court did not make other factual findings. Thus, our review of the record requires us to determine whether there are sufficient facts from which a reasonable inference can be drawn that Russell was continuously in flight from the burglary at the time of the death. In making that assessment we are not obliged to consider Russell's version of the facts that was obviously rejected by the trial court. Russell's version of the events following the burglary is wholly inconsistent with a finding by the trial court that Russell was in flight from the burglary at the time of the death. Accordingly, as we will discuss below, we have to determine whether reasonable inferences can be drawn from the facts to support the trial court's implied finding....

In our view proper application of the substantial evidence standard of review compels the conclusion the trial court's decision should be affirmed. If we draw all reasonable inferences in favor of the decision of the trial court, and accept the proposition that the trial court could have rejected Russell's self-serving testimony, we can easily determine Russell was still in flight from the burglary at the time of the victim's death.

Here the trial court could reasonably determine that at around 4:30 to 4:35 a.m. on the morning of the offense, Russell was on the porch of the Meurses' residence. He was the "shadowy figure"

observed by the neighbor. The court could infer that the loud noise made by the tailgate of Mr. Creighton's truck dropping caught Russell's attention because we know the shadowy figure looked at Creighton for three to five seconds. There is no substantial evidence that a second burglar was present at that scene. It is also reasonable to infer that Creighton left the area at around 4:40 a.m. and that when he left, the door to the neighbor's garage was closed.

Moving forward to the next sighting of Russell, we know that Russell left some of his belongings and loot from the burglary at the crime scene. Russell was seen driving the victim's car, which had been stolen from the garage, and the garage door had been left open on Russell's departure. The experienced trial judge could easily and reasonably infer that Russell being observed by Creighton beat a hasty retreat from the scene. Russell had left his belongings, fled the scene, and was observed by police four-plus miles away, only 10 to 15 minutes after Creighton left for his class.

Thus, we think it entirely reasonable to infer that when Russell spotted Officer Williams's marked patrol car leaving an adjacent parking lot, Russell ... feared he was about to be caught and therefore fled. Russell's maniacal driving at speeds up to 100-plus miles per hour, placing innocent lives at risk, speaks loudly about Russell's fear of apprehension.

From these facts the trial court could find Russell had not achieved a place of temporary safety when he began his deadly flight from Officer Williams.

Before a trial court's judgment may be set aside for insufficiency of evidence to support the verdict, it must clearly appear that on no hypothesis whatever is there sufficient evidence to support it.

Applying the direction of our Supreme Court regarding the application of the substantial evidence standard of review, we find Russell's conviction for first degree murder is well supported in this record....

McINTYRE, J., Dissenting.

I agree with the majority that the felony-murder escape rule applies to burglary. However, neither the law nor the facts justify the majority's extension of the escape rule to the circumstances of this case. The escape rule has never been applied where, as here, no one pursued Russell immediately following the burglary, no one alerted police that a burglary had taken place or that the Meurses' Oldsmobile had been stolen, and about 15 minutes had elapsed between the time Creighton left the neighborhood and observed that the Meurses' garage door was closed and the time Officer Williams spotted the Oldsmobile nearly five miles away stopped at a red light. Russell had completed his escape from the burglary and reached a place of temporary safety. Not mentioned by the majority is the fact that police did not connect the Oldsmobile with the Meurses' burglary until well after the fatal crash. Subjectively, neither Russell nor Officer Williams had reason to believe Russell was fleeing from the scene of a burglary....

Here, Russell and his claimed accomplice stayed in the house as much as 12 minutes after Creighton saw a shadowy form on the porch. And because Creighton continued to load his truck in preparation to leave, there would have been little reason for a burglar like Russell to believe he had called police. Given Russell's state of intoxication, it is of little significance that Russell left a drum

and duffle bag containing some of the Meurses' property at the point of entry into the house. Based on the lapse of time and distance, Russell had actually reached a place of temporary safety as a matter of law... Accordingly, the burglary and homicide were not part of one continuous transaction for purposes of the felony-murder rule.

There is certainly sufficient evidence to form the basis of a second degree murder conviction given Russell's conduct after he saw Officer Williams, but I conclude the extension of the felony-murder escape rule to the situation we have here is unwarranted. As tragic and unnecessary as Rodrigo Vega's death was, the degree of culpability present here does not comport with first degree murder. I would reverse Russell's conviction of first degree felony-murder in count 1.

Discussion Questions and Notes

- 1) From a policy perspective, does the felony murder rule make sense to you?
- 2) Do you agree with the majority's finding that the death resulted during the commission of a felony in *Russell*?

The following opinion offers a brief history of the Rule and attempts to limit its scope due to various criticisms of it. Make sure to note and consider the three modern limitations discussed in the majority opinion.

Montana v. Burkhart, 103 P.3d 1037 (Mont. 2005)

Justice Jim Regnier delivered the Opinion of the Court.

Defendant Richard Earl Burkhart (Burkhart) was convicted by a jury in the Eighth Judicial District Court, Cascade County, on one count of deliberate homicide, felony-murder. Burkhart appeals his conviction. We affirm....

On November 13, 2001, the body of William Ledeau (Ledeau) was found at 12th Street and 1 Alley North in Great Falls, Cascade County. He had been struck in the head four times with a blunt object....

The trial began on September 9, 2002. The State's evidence at trial showed the following: In search of the individuals behind an attempted break-in of his car, Burkhart and his friend, Michael Staley (Staley), encountered Ledeau in the alley between 1 Alley North and 12th Street. Ledeau had been walking home from his aunt's house. Burkhart and Staley confronted Ledeau, accusing him of breaking into Burkhart's car earlier that evening. When Ledeau denied his involvement in the break-in and took offense at being accused, Burkhart hit Ledeau in the head once with a ball-peen hammer.

After the initial blow, Ledeau attempted to flee but was eventually caught and hit three more times in the back and top of the head by Burkhart. Burkhart and Staley then returned to Staley's house and called police to report the break-in.

Officer Jamie Pinski of the Great Falls Police Department initially arrived at the crime scene and stated she was approached by Burkhart and Staley. According to Pinski, Burkhart and Staley told her Burkhart's vehicle had been broken into and they had seen a male run northbound across Central Avenue down 12th Street North. They also saw a second male run after the first male and, intending to confront the suspected thieves, gave chase after the two men. In pursuit, Burkhart and Staley said they ran through the parking lot to the east-side of "All Seasons Spas" and cut off one of the males in 1 Alley North. Burkhart and Staley told Pinski they caught and confronted one of the males.

Staley indicated the male flipped his hat off and stated, "Come on mother-fuckers, let's go" and began challenging them to a fight. Pinski reported she pointed out a baseball cap lying near Ledeau and asked them if it appeared to be the same cap the male suspect was wearing. Pinski indicated both Burkhart and Staley agreed that it was the suspect's hat. Ledeau's aunt, Joanne Dubois, testified at trial Ledeau was wearing the baseball hat when he left her home that evening.

Burkhart and Staley were further interviewed that evening by police. Detectives learned from Burkhart he had broken parole that day, traveling from Bigfork to Great Falls to visit Staley, another parolee, and buy some methamphetamine. Burkhart stated he was getting ready to drive back to Bigfork when they both walked out to his car and discovered someone had stolen some change, cigarettes, and a jacket from inside the automobile. Additionally, someone had attempted to pry open the trunk of his car in order to gain access to the speakers in the back.

Both men told officers they had confronted an Indian man in the alley but had walked away when the individual became angry and confrontational. They described the male as Native American, in his twenties, about 5' 10" with a stocky build, skinny mustache, some hair on his chin and a "skater hair cut." Burkhart indicated the male was wearing a dark shirt, dark pants and a blue baseball cap. This description matched Ledeau when officers found him that evening. Burkhart and Staley also claimed to have seen other suspicious individuals in the area that evening. Although Burkhart maintained he and Staley had left the confrontation when the male became angry, he later told detectives he chased the male to within 50 feet of where Ledeau's body was found.

As part of their investigation, detectives also interviewed Staley's roommate, Rochelle Smith-Sterner. Smith-Sterner recalled on November 12, 2001, observing Burkhart and Staley leave her residence to execute a methamphetamine purchase. A short time later, she remembered hearing Burkhart yelling that someone had broken into his car, specifically "I am going to kill the fucker that broke into [my] car." Shortly thereafter, Smith-Sterner observed Burkhart and Staley running after two individuals in the area of Central Ave and 12th Street. Smith-Sterner's residence is across the street from the alley where Ledeau was found. Smith-Sterner indicated that as Burkhart and Staley caught and confronted the second male on Central Avenue, she "knew right then and there that someone was going to get their ass kicked." Smith-Sterner described the person encountered as a male about twenty-years old, about 5' 8" in height with a somewhat heavy build and a dark-complexion of Spanish or Native American heritage. Smith-Sterner also indicated the male was wearing a baseball cap. Smith-Sterner went on to state her attention was diverted by her two small children running in the street. It took approximately five to ten minutes to return her kids to the

house by which time she was unable to see what had transpired between Burkhart, Staley and the individual.

Although police interviewed a number of other suspects, Burkhart and Staley remained the primary focus of their investigation. Although both men proclaimed their innocence and claimed the man in the alley they confronted was not Ledeau, officers suspected collusion when Staley and Burkhart separately assisted police sketch-artists in producing a composite sketch of the man they confronted in the alley. The sketches resembled Ledeau. When Staley was confronted with this fact, he became emotional and terminated the interview.

Fearing incarceration for accountability to deliberate homicide, Staley eventually admitted he had witnessed Burkhart assault Ledeau. At trial, Staley testified Burkhart, upon confronting Ledeau, had struck Ledeau in the right cheek with a ball-peen hammer which had been lying on the car's passenger-side fender. After Ledeau stumbled backwards, he regained composure and ran down the alley. Burkhart gave chase, eventually seizing Ledeau and leveling several blows to the top and side of Ledeau's head. Staley then testified he and Burkhart agreed to tell friends and police they had seen someone in the alley that night but had left the encounter. Staley then told Burkhart to get rid of the ball-peen hammer because it might have fingerprints. Great Falls Police later recovered the ball-peen hammer from a local resident who found it near where Ledeau had died. The ball-peen hammer in evidence carried neither fingerprints nor bloodstains.

Dr. Gary Dale, the State Medical Examiner, performed Ledeau's autopsy on November 14, 2001, and determined the cause of death to be blunt-force trauma to the head. Dr. Dale found Ledeau had been struck at least four times in the head by an unknown object. One of the wounds had penetrated Ledeau's skull, leaving an approximate one and one quarter inch circular hole in his head. The blow tore the brain directly beneath another laceration and also bruised the brain-stem, a wound itself sufficient to kill Ledeau. There were two other tears on the back of his head consistent with a blunt instrument which penetrated the muscle at the back of the neck.

Dr. Dale also retained the two fractured portions of Ledeau's skull and used them at trial to show how the ball-peen hammer fit into the depressions. Although police had gathered other hammers through their investigation, only the ball-peen hammer found at the crime scene fit both of Ledeau's depressions precisely. The rounded bottom of one of the fractures was smooth, matching the ball-peen end, and other characteristics of the wound showed that a rounded surface the size of the ball-peen end caused the injuries. Dr. Dale concluded Ledeau was struck at least four times with an instrument, two blows on the side of his skull and two in the back, including one in the neck. Ledeau would not have been able to stumble consciously after receiving the most severe injury.

Burkhart was found guilty by the jury on September 19, 2002, for felony-murder pursuant to § 45-5-102(1)(b), MCA. On October 24, 2002, the District Court sentenced Burkhart to life in prison. Burkhart appeals. We affirm....

... Burkhart argues the State abridged his due process rights because the predicate offense underlying his felony-murder charge was not independent of the homicide. Burkhart's contention is the principle of merger prevents charging him with felony-murder when the predicate offense, felonious assault with a weapon, is an integral part of the homicide. In other words, Burkhart asserts where the only felony committed was the assault upon the victim which resulted in the victim's death,

the assault should merge with the killing and cannot be relied upon by the State as an ingredient of a felony-murder. Burkhart also argues the charge of felony-murder under the facts of this case precludes him from raising certain defenses and lesser included offenses available under the deliberate homicide statute and thereby denies him due process of law. Thus, Burkhart maintains the felony-murder rule punishes all homicides, committed in the course of proscribed felonies whether intentional, unintentional or accidental, without the necessity of proving the relation between the homicide and the perpetrator's state of mind.

The State counters the felony-murder statute found in § 45-5-102(1)(b), MCA, as written and intended by the Montana Legislature, does not require merger. The State also maintains Burkhart was properly convicted under the felony-murder statute because he knowingly and purposely caused bodily injury to Ledeau with a hammer which resulted in Ledeau's death.

... Burkhart asserts his due process rights were abridged because the State was relieved from having to prove a specific mental state for homicide. Burkhart maintains the felony-murder charge eliminates the State's burden of proving he purposely or knowingly caused the death of Ledeau. Thus, Burkhart argues the felony-murder charge allows the State to "bootstrap" a homicide charge on the basis of a felonious assault, circumventing the mental state requirements of the deliberate homicide statute.

The State counters Burkhart's conduct created a dangerous circumstance and thus, the mental state to commit the felony was properly supplied for all consequences, including the homicide. The State asserts there is little difference between proving Burkhart purposely and knowingly struck Ledeau with a ball-peen hammer, thus causing his injury and consequently death, and proving he purposely or knowingly caused Ledeau's death....

The felony-murder doctrine comes to us through the common law making one who causes another's death during a felony responsible for murder....

After its early enunciation, the felony-murder doctrine went unchallenged because at that time practically all felonies were punishable by death. It was, therefore, of no particular consequence whether the condemned was hanged for the initial felony or for the death accidentally resulting from the felony. Case law of the nineteenth century, however, reflects the efforts of the English courts to limit the doctrine by requiring the underlying felony involve violence or be the "natural and probable consequence of the defendant's conduct" 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW, § 14.5 at 446-47 (2d ed. 2003). In the twentieth century, the felony-murder doctrine was rarely invoked in England and in 1957, abolished. Opponents of the doctrine pointed out that in later years, numerous offenses which were once regarded as gross misdemeanors or misdemeanors had been made felonies by statutory enactment, many of which were *malum prohibitum* rather than *malum in se*. These changes, it was argued, made the felony-murder rule too harsh.

While some states have recently abolished the felony-murder doctrine as passed down through the common law, others have expressly limited its provisions. In particular, some jurisdictions limit the underlying felony and its manner of commission to a high risk of causing death while others require the defendant's conduct be the proximate or legal cause of the victim's death. Still others have circumscribed its application by requiring the underlying felony be independent of the homicide. Burkhart urges this Court to adopt the latter. We decline....

The facts of this case disclose Burkhart struck Ledeau once, chased after him, and stuck him several more times, causing his death. Montana's felony-murder statute specifically contemplates the facts at hand when, "in the course of the forcible felony, any person legally accountable for the crime causes the death of another human being." SECTION § 45-5-102, MCA. Montana's statute does not require the death to be "in furtherance" of the threshold crime, only that the homicide occur in the course of the enumerated forcible felony. Further, we have held the only causal connection required is that the death actually occurred during the underlying felony or the flight thereafter. Evidence at trial indicates Burkhart encountered Ledeau in the alley and physically confronted him. Burkhart then chased after Ledeau where he was eventually found dead. We conclude that Burkhart's underlying offense was assault with a weapon, a forcible felony, and an offense encompassed under Montana's felony-murder statute. Under the circumstances Burkhart's due process rights were not abridged....

Under the felony-murder rule, Burkhart's purpose and knowledge to commit felony-murder was presumed when he assaulted Ledeau with a hammer, causing Ledeau's death. This Court has held "when a defendant commits a felony such as burglary, kidnapping or aggravated assault, he initiates conduct which creates a dangerous circumstance. Therefore the intent to commit the felony supplies the intent for all the consequences, including homicide, arising therefrom." *State v. Nichols* (1987), 225 Mont. 438, 449, 734 P.2d 170, 176....

Therefore, we affirm the District Court's dismissal.

[Separate opinion by Cotter omitted]

Justice W. William Leaphart dissenting.

Because I believe that the felony-murder statute under which the Appellant was charged is fundamentally defective under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, I dissent.

Although the Court recites the history of the felony-murder rule, with special reference to the various limitations which courts have imposed upon it in an effort to mitigate some of the more illogical and legally troubling results of its application, the opinion does not, to my mind, properly confront the rationale behind the limitation which the Appellant cites. The merger doctrine precludes assaultive offenses from providing the basis for a charge of felony murder, when the victim of the assault is also the victim of the homicide—that is, when the assault is an ingredient of the homicide, or is included within it in fact, even (in the doctrine's most robust form) if not in law. In doing so, the doctrine seeks to prevent the worst results of the felony-murder rule's having dispensed with a *mens rea* element for the murder charge. As the Illinois Court of Appeals has explained, "Unless application of the felony-murder rule is limited to cases in which a killing occurs during the commission of a felony consisting of conduct other than that inherent in the killing itself, all deliberate killings and all fatal shootings may be charged as felony murder." *People v. Morgan* (Ill. App. 1999), 307 Ill. App. 3d 707, 718 N.E.2d 206, 211, 240 Ill. Dec. 725. All homicides could be charged as felony murders, because all homicides, by definition, include an initial assault upon the victim. Thus, "the felony that eliminates the quality of the intent must be one that is independent of the homicide and of the assault merged

therein...." *People v. Moran* (N.Y. 1927), 246 N.Y. 100, 158 N.E. 35, 36 (Cardozo, C.J.). *See also Ragland v. Hundley* (8th Cir. 1996), 79 F.3d 702, 705 n.4 (merger doctrine intended "to avoid the prosecution's bootstrapping a simple homicide to a higher degree of murder without showing the requisite intent")....

The felony-murder rule is based on the ancient idea that the defendant is an evil person who has committed a bad act, and therefore should be held maximally responsible for all the consequences that flow therefrom, whether he intended them in any sense, or not. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 560 (1972). The law once deemed this an adequate arrangement, that a defendant could be punished criminally for results which he may have in no wise intended, and this indifference to the actual culpability of the individual is amply evidenced in the felony-murder rule's failure to prescribe a *mens rea* element for a finding of murder-guilt. The law, however, has long since progressed beyond this point, a development reflected in the Due Process jurisprudence of the Supreme Court of the United States.

Make no mistake: I have no sympathy whatsoever for the Appellant. His actions, besides being horrific in themselves, clearly caused the death of another human being, and he should be held accountable to the full extent of the law. But a charge of deliberate homicide under § 45-5-102(1)(a), MCA, would have been more appropriate and far less constitutionally troubling. No intensity of personal sentiment, however valid and well-intentioned, can strip this defendant, or any other, of the guarantee of Due Process of law. The remarkable procedure ... subscribed to today by the Court, is nothing more than a parlor trick, unworthy of this honorable Court and of our system of justice. The principles enshrined in the Due Process Clause call for the repudiation of the felony-murder rule, and an affirmation of the idea of punishment for individual culpability.

Discussion Questions and Notes

- 1) Do you agree with the majority or dissent in regard to whether the merger limitation should be applied to the felony murder rule?
- 2) What felonies do you think would merge with murder in jurisdictions applying that limitation?
- 3) What felonies do you think are not inherently dangerous such that they could not be used as a predicate felony in jurisdictions applying that limitation?

Review Exercise 1

Watch [this film clip](#) and answer these questions:

- Since Durden was the person responsible for ordering Operation Latte Thunder, he is charged in a common law jurisdiction with: Terroristic Threats, Robbery, and

Murder of Robert Paulson, all of which carry maximum penalties of at least one year in prison. Evaluate the charges against Durden.

- Terroristic Threats is defined as (O.C.G.A. § 16-11-37)
 - "1) A person commits the offense of a terroristic threat when he or she threatens to:
 - (A) Commit any crime of violence;
 - (B) Release any hazardous substance; or
 - (C) Burn or damage property.
 - (2) Such terroristic threat shall be made:
 - (A) With the purpose of terrorizing another;
 - (B) With the purpose of causing the evacuation of a building, place of assembly, or facility of public transportation..."
- Robbery is defined as: N.D. Cent. Code, § 12.1-22-01: "A person is guilty of robbery if, in the course of committing a theft, he inflicts or attempts to inflict bodily injury upon another or threatens or menaces another with imminent bodily injury."

CHAPTER 9: RAPE AND SEXUAL ASSAULT

Rape and sexual assault are crimes where the legal and cultural understanding of the concepts involved are very different. It is likely that you and many others in the room know someone who was sexually assaulted and/or were yourself a victim. Despite the frequency with which people are raped or sexually assaulted, very few people are actually convicted of such crimes. Analyzing the statutes and cases related to rape helps to illustrate why there is such a significant disjunction between the law and reality in regards to sexual violence.

Terminology for rape and sexual assault can be confusing. Many jurisdictions refer to rape separately from sexual assault (with sexual assault being reserved for non-penetrative acts by the defendant). Other jurisdictions do not use the word "rape" at all and merely differentiate levels of sexual assault. For simplicity, this Chapter uses the word "rape" to describe the cases included except when such usage directly conflicts with the specific case being discussed.

Initially, it is important to recognize that the substantive definition of rape underwent a significant transformation in the 1970's and 1980's throughout the United States in response to the rape law reform movement. The following case illustrates the approach used by courts for much of the Twentieth Century.

Minnesota v. Cowing, 108 N.W. 851 (Minn. 1906)

JAGGARD, J.

This is an appeal from an order denying a new trial. The defendant was convicted of the crime of rape and sentenced to nine and a half years' confinement at hard labor at the State Prison.

He was a farmer, forty nine years of age, and had a family of seven children, including his oldest son, twenty two years of age. He was never before accused of any crime, and had lived continuously for many years on a farm adjoining the farm of the complaining witness. The houses were about three-quarters of a mile apart. Apart from some trouble with rheumatism, the defendant was a man of at least ordinary strength and weighed about one hundred sixty five pounds. The complaining witness was unmarried, twenty three years of age, had done the usual work of a girl on the farm, was about five feet tall, and weighed about one hundred pounds. The testimony, read in the light of the trial court's memorandum, tended to show, but not satisfactorily, that she had not the average mental endowment, nor ordinary physical strength, and that she had suffered from continued ill health. The complainant's version is that when she was in the kitchen defendant came in softly "and grabbed me with my arms tight back of me and said, 'Lizzie, we are going to have some fun.' I said, 'No, I don't want no fun,' dragging me. After I said I didn't want any fun, he grabbed me with both arms again. When he grabbed me the first time I was standing

by the stove with my back toward the door. When he grabbed me the second time I was standing the same way. Then he jerked me around, my face to the east and my arms back of me, and grabbed me tight, dragging me out of the kitchen in through the door into the front room south of the kitchen. While he was dragging me I tried to fight and get away as hard as I could, and screamed and hollered as loud as I could. I said for him to leave me alone, let go of me, but he dragged me in farther and throwed me on the couch with my arms under me and throwed me on my hands. I don't know how large the couch is. Then he kicked his left knee below my chest and pressed me down, and grabbed with his left hand into my throat and choked me as hard as he could, and with his right hand he rushed up my clothes so quick, and then he had sexual intercourse with me. It caused me to flow blood all over my skirt. I see him when he got off me. There was blood on his right hand, across his fingers, and across the whole length of his hand. This intercourse caused me pain. My throat was sore, and I was lame all over. It caused me pain when he was doing this. My head ached. It hurt me at the time he was doing this hard, just as though some one was running a knife through me and tearing me all to pieces. I did not in any manner consent to that intercourse. I was not willing that he should have it with me. I tried just as hard as I could to get away. After he did this he went right off. When he got off my person he rushed his clothes right up quick with both hands and then went right out."

The defendant's version is that he drove to the house where the complaining witness lived, asked where her father was, and inquired if her father had left any money to pay for the threshing for which he owed the defendant. The witness came to the door, opened it, passed outside, and said she thought he was hard on them in more ways than one. When he asked her what she meant, she replied he knew well enough; that he and his wife had broken up the love match between her and the defendant's son Harry; and that if he and his wife had not interfered they would have been married some time ago. Defendant says he tried to reason with her, but that she grew angry and abused him, and threatened that she would get even if she had to injure herself. Defendant drove away while she continued gesticulating wildly and shouting in a violent manner. When he ascertained that a warrant had been issued for his arrest, he telephoned the sheriff that he would appear the next day. Accordingly he went to the county seat and surrendered himself to the sheriff, as he had agreed to. The testimony as to what happened at the time (Friday) is confined to the complaining witness and the defendant. The house was isolated, so that it might well have been that her outcries, if she made them, could not have been heard. There was no one else besides them in the house. Her father and sister returned in the afternoon, had dinner, remained a short time, left for some errands, and did not return until evening, and in the evening for the first time her sister learned what had happened....

The principal question presented by the record concerns the sufficiency of the testimony of the prosecutrix to show the degree of resistance to the assault charged which the law requires....

It is of course true that, if a female of the age of consent voluntarily permits intercourse, rape is not made out. Mere verbal unwillingness does not amount to want of consent, and may amount to invitation. The utmost reluctance accompanied by the utmost resistance is undoubtedly sufficient....

In the case at bar there is no lack of testimony to the conclusion that the prosecutrix did not consent, but there is little other evidence in this regard. She says she tried to fight and get away just as hard as she could while he was dragging her, but there is no specific act of resistance

testified to after she was carried to the couch. She does not say that she employed the instinctive devices of self-defense; for example, she does not say that she crossed her legs or tried to keep them together. There is no evidence that she used the natural means of offense. While the defendant's left knee was below her chest and he was pressing her down and held her throat with his right hand, as she testifies, it might well be that she could not have taken her arms out from under her body; but it is unexplained why she did not free one arm at least when he was in the position he must afterwards have assumed to have accomplished his purpose. Not only is she not shown to have used or tried to use her hands, but there is no testimony that she used or tried to use her body, legs, or any other ordinary means of reprisal. Neither the victim nor the perpetrator appear to have borne any bruise or mark resulting from the struggle. There is confused testimony that one of her skirts was slightly torn; but no evidence that her clothing had been touched or torn. Nor does the record show any threats or intimidation on the part of the defendant, or any intent on his part to use any means necessary to accomplish his purpose, nor any reasonable ground for apprehension of bodily harm, nor such a place or position of the prosecutrix as would have rendered resistance useless....

The judgment and order appealed from are reversed, and in accordance with section 7391, G.S. 1894, a new trial is directed....

LEWIS, J. (dissenting).

When the whole record is read consecutively, several side lights are thrown upon the case which do not appear from the above statement of facts. Considering the physical condition of the prosecutrix, her graphic account of what occurred and how she was handled, defendant's subsequent conduct prior to arrest, the complete breaking down of all lines of defense, and his impeachment for truth and veracity, I am decidedly of the opinion that the trial court and jury were entitled to pass upon the question whether the offense was proven, although the prosecutrix did not testify that she tried to prevent it by crossing her legs....

Notice how the real question for the appellate judges is whether the victim, and not the defendant, acted with sufficient conduct to support the prosecution. The following article excerpt describes the basic substantive criminal law reform that started in the 1970s concerning the definition of rape.

Corey Rayburn Yung, *Rape Law Fundamentals*, 26 YALE J. OF L. & FEMINISM 1 (2015)

Consider the modern history of rape law beginning with the reform movement gaining influence in the 1970s. Rape became a crime solely because of male interests in their current or prospective spouses. As a result, early common law definitions focused on protecting that concern

with little regard to the rights of victims. The traditional elements of the crime of rape entering the reform era were: (1) sexual intercourse; (2) between a man and a woman who is not his wife; (3) achieved by force or threat of severe bodily harm; and (4) without her consent. Although not always legislatively codified, jurisdictions regularly enforced the utmost resistance requirement such that rape victims had to resist a sexual assault to their dying breath for there to be a "rape." In 1973, a New York appellate court issued one of the last reported decisions upholding the utmost resistance requirement to overturn a jury verdict.²⁰ Courts held that, even in the face of specific violent threats, consent could be given through "voluntary" submission to the rapist. As a result, if a victim eventually gave up resisting, courts would interpret the event as consensual sex.

Susan Brownmiller, Catharine MacKinnon, and other feminists attacked such outcomes and led an effort to reform rape law throughout America.... Rape law reformers achieved several victories in changing the application of substantive rape law: rape became gender-neutral; all types of sexual penetration were criminalized (and not only vaginal intercourse); and marital rape was finally made illegal. More recently, many jurisdictions eliminated the force requirement, making non-consent and the sex act the only two elements of rape.

However, despite those victories, the application of rape law in many cases did not change. Courts continue to define rape narrowly even without statutory language supporting such interpretations. Juries continue to be skeptical of rape victims and hold them to a much higher standard than victims of other crimes. Reforms have had no measurable effect in some jurisdictions, while others have shown only modest progress. What little success has occurred is largely attributable to increased cultural awareness of non-stranger rape rather than legal change. In many states, a strict requirement that the accuser show the defendant used or threatened actual force effectively blocks convictions even in extreme cases. Most states do not recognize a verbal "no" by a complainant as determinative of non-consent. Other states maintain a variation of the resistance requirement that is often applied in the same way as its more stringent predecessor.²¹ Consequently, while a formal "utmost resistance requirement" has been removed, it is de facto enforced by jurors and judges in rape trials across the country. Rubinfeld's discussion of the right to self-possession is unfortunately silent on how to confront the multitude of obstacles and much greater inconsistencies in sexual violence law. Instead, his theory at best resolves a minor wrinkle while aggravating far greater problems.

I. Act Requirements

Every state now limits rape to two or three elements: 1) a sex act; 2) nonconsent; and, sometimes, 3) force. The requirement that a victim show resistance has been formally

²⁰ *People v. Hughes*, 343 N.Y.S.2d 240, 242 (N.Y. App. Div. 1973).

²¹ *Id.* at 127.

abolished in the large majority of states. In this section, we do not consider the MPC approach because it is simply outdated by virtue of being published before the reform movement influenced modern rape law.

A. Sex Act

States vary substantially as to which sex acts can serve as the basis for rape. Every jurisdiction includes vaginal penetration by a penis. To varying degrees, jurisdictions omit penetrating parts such as fingers, inanimate objects, tongues, or other parts of the human body. Similarly, some states fail to include anal or oral penetration in certain sexual assault crimes. Very few jurisdictions recognize non-penetrative acts as rape. Although only a small number of cases that go to trial hinge on whether a defendant has committed the requisite sex act, an unknown number might never be pursued due to limited statutory language. We will return to the general issue of defining the sex act in the *mens rea* section of this Chapter.

B. Nonconsent or Incapacitation

The prosecution can establish the element of nonconsent either by showing that the victim did not in fact consent, was forced or threatened in manner that abrogated consent, or was unable to consent due to some legally recognized status or condition. Regarding explicit nonconsent, the modern approach typically uses a negative consent model meaning that victims have the responsibility to object to a sex act for there to be rape. Although so-called affirmative consent models (requiring affirmative communication by a person for there to be consent to a sex act) have been used at colleges and universities, they are not yet generally part of criminal codes.

Read the following case and consider whether you think the victim consented to the sex acts performed by the defendant.

In re: Z. B., 2010-Ohio-1345 (Ohio Ct. App. 2010)

Per Curiam....

On August 13, 2008, Z.B. and J.J., the victim in this case, were in the Brunswick High School weightlifting room and decided to take a walk together. The walk culminated in Z.B. receiving oral sex from J.J. in the men's bathroom of the school's Performing Art Center. According to Z.B., he and J.J. discussed sexual activity before entering the men's bathroom and J.J. agreed to perform

oral sex on him. According to J.J., Z.B. dragged her into the men's bathroom by the wrist and forced her to perform oral sex. After the incident, J.J. told her friend what had happened, but did not report the incident to anyone else. Near the end of September, J.J. told her boyfriend what had happened and, at his insistence, also told her mother. J.J.'s mother notified the school, and J.J. was interviewed by police officers from the City of Brunswick.

On November 18, 2008, the Medina County Prosecutor filed a complaint against Z.B. alleging one count of rape, in violation of *R.C. 2907.02(A)(2)*. Z.B.'s adjudicatory hearing took place on April 9, 2009. The same day, the court adjudicated Z.B. delinquent and set the matter for disposition. Subsequently, the court held a disposition hearing, issued Z.B.'s disposition, and committed him to the Department of Youth Services.

... Z.B. argues that his adjudication of delinquency for rape is based on insufficient evidence and is against the manifest weight of the evidence. Specifically, he argues that the evidence does not show he purposely compelled J.J. to submit by force or threat of force.

When reviewing sufficiency and manifest weight challenges in a juvenile's appeal from an adjudication of delinquency, "this Court applies the same standard of review as that applied in an adult criminal context." *In re J.F., 9th Dist. No. 24490, 2009 Ohio 1867, at P12*. In order to determine whether the evidence before the trial court was sufficient to sustain a conviction, this Court must review the evidence in a light most favorable to the prosecution. *State v. Jenks (1991), 61 Ohio St.3d 259, 274, 574 N.E.2d 492...*

R.C. 2907.02(A)(2) provides that "[n]o person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force." Fellatio is a type of sexual conduct. *R.C. 2907.01(A)*. "A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature." *R.C. 2901.22(A)*.

At trial, J.J. testified that she went for a walk with Z.B. on August 13, 2008. J.J.'s friend, T.H., had gotten angry about something. Z.B. approached J.J. in Brunswick High School's weightlifting room and asked her if she wanted to go for a walk. J.J. and Z.B. walked outside for a short time and then came back inside to walk through the school's Performing Arts Center. J.J. testified that Z.B. asked her to wait in the hallway while he stepped into the men's bathroom. Once Z.B. went inside the men's bathroom, however, he came back out, grabbed J.J. by the wrist, and pulled her inside. Z.B. took J.J. into the handicapped bathroom stall and kissed her "very forcibly." Z.B. then asked "[s]ex, anal or oral?" J.J. indicated that she did not want to engage in any type of sexual activity. Z.B. nonetheless pulled down his pants, sat down on the toilet, kissed her on the forehead, and pushed her down. J.J. testified that she began performing fellatio on Z.B. At some point, Z.B. also held J.J.'s hair. When she tried to pull away, Z.B. forced her head forward again and made her continue until he ejaculated....

In determining whether a conviction is against the manifest weight of the evidence an appellate court:

"[M]ust review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of

justice that the conviction must be reversed and a new trial ordered." *State v. Otten* (1986), 33 Ohio App.3d 339, 340, 515 N.E.2d 1009.

A weight of the evidence challenge indicates that a greater amount of credible evidence supports one side of the issue than supports the other. *Thompkins*, 78 Ohio St.3d at 387. Further, when reversing a conviction on the basis that the conviction was against the manifest weight of the evidence, the appellate court sits as the "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony. *Id.* Therefore, this Court's "discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 20 Ohio B. 215, 485 N.E.2d 717; see, also, *Otten*, 33 Ohio App.3d at 340.

J.J. testified that she was fourteen when the events of August 13, 2008 occurred. On that day, J.J. was at the Brunswick High School working as a "water girl" for the freshman football team with her friend, T.H. J.J. testified that she and T.H. went to the school's weightlifting room where they saw Z.B. J.J. stated that she had seen Z.B. around, but did not know him. Z.B. approached J.J., began talking to her, and asked her if she would like to go for a walk. J.J. complied and the two left together. As set forth above, J.J. testified that Z.B. forcibly compelled her to perform fellatio on him in the handicap stall of the men's bathroom. J.J. stated that she screamed "no" while she was in the hallway at the point where she was being pulled into the bathroom. J.J. testified that she repeatedly yelled "no" several times, so loudly that her voice echoed in the bathroom. After Z.B. ejaculated, he told J.J. he was "proud of [her]" and not to tell anyone what had happened.

According to J.J., when she and Z.B. went to leave the men's bathroom he told her that somebody was outside and she should wait in the bathroom until the hallway was clear. J.J. gave Z.B. her cell phone number so that he could leave on his own and then call her when it was safe for her to come out. J.J.'s phone battery died, however, so she never answered Z.B.'s call. Instead, she waited for a few minutes and then ran from the bathroom. J.J. returned to the weightlifting room, got T.H., and left for home. J.J. testified that she told T.H. what had happened after the two got to J.J.'s house because she was so upset and T.H. wanted to know what was wrong. J.J. further testified that she initially did not tell anyone else about the incident because she "didn't want to be looked at differently." J.J. later told her boyfriend what had happened because he noticed how upset J.J. became when Z.B.'s name arose in conversation. J.J. then told her mother about the incident because her boyfriend indicated he would tell J.J.'s mother if she did not. J.J. affirmatively stated that after the incident she did not call Z.B. She also stated that before the day of the incident, she had not told Z.B. her phone number.

T.H. also testified that she and J.J. saw Z.B. in the weightlifting room after football practice on August 13, 2008. T.H. did not know Z.B., but J.J. and Z.B. began talking. T.H. stated that earlier that day J.J. told T.H. that she "kind of like[d]" Z.B. T.H. testified that Z.B. and J.J. told her they were going for a walk, so T.H. stayed in the weightlifting room and waited for J.J. to return. About half an hour later, Z.B. returned alone and told T.H. to call J.J. on her cell phone. T.H. called J.J., but she did not answer. Approximately ten minutes later, J.J. came back into the weightlifting room. T.H. observed that J.J.'s mood "wasn't that great." She and T.H. left together and while walking home J.J. started to cry. T.H. asked J.J. if anything was wrong and J.J. told her it was nothing and that she did not feel well. According to T.H., she finally "got [J.J.] to crack and tell [her] what was wrong" when the two were in J.J.'s bedroom. After hearing what occurred, T.H. said she didn't know what

to do, "it was like, 'Oh, okay.' I just kind of sat there." After that T.H. did not say anything to anyone until police interviewed her in September. She stated that she told J.J. that everything would be fine and she stated that she "just told her she should tell her mom; if something was happening let her mom know. She was freaking out."

Z.B. testified that he was in the weightlifting room on August 13, 2008. According to Z.B., he saw J.J. on the football field before he went to the weightlifting room, and she briefly ran over to give him a hug. Subsequently, J.J. entered the weightlifting room with her friend, T.H. Z.B. testified that he and J.J. decided to go for a walk around the school's Performing Arts Center. As they entered the Performing Arts Center they passed classrooms. Z.B. stated that he observed a teacher in one of the classrooms which is next to the door of the Performing Arts Center. Z.B. stated that he and J.J. never walked outside, but they did stop at a black leather bench in the Performing Arts Center to sit down and talk for a few minutes. Z.B. testified that they spoke for about 5 to 10 minutes. They initially engaged in casual conversation, but then began talking about sexual activity. Z.B. indicated that neither person actually initiated discussion about sexual activity but it was mutual. Initially, the sexual nature of the conversation was joking but then it started getting "serious" to actually discussing the prospect of engaging in sexual activity.

According to Z.B., J.J. agreed to go into the men's bathroom with him and perform fellatio on him. Z.B. testified that he never forced J.J. to do anything and she never indicated that she did not want to engage in oral sex. While Z.B. was receiving oral sex from J.J., he heard voices in the hallway outside the men's bathroom and soon recognized them as the voices of the school's assistant principals. Z.B. asked J.J. what she wanted him to do. J.J. indicated that she did not know. Z.B. then told J.J. that he would leave the men's bathroom alone and call her on her cell phone when the assistant principals left. J.J. assented. Z.B. and J.J. did not exchange numbers, and Z.B. left and went out to the main entrance of the Performing Arts Center where he could see the principals. Z.B. tried to call J.J. multiple times, but her cell phone went to voicemail. When J.J. attempted to call Z.B. from her cell phone, Z.B. picked up but there was nothing on the other end. Z.B. knew that J.J. had called because his phone displayed J.J.'s name. After waiting approximately 10 to 15 minutes and after multiple attempts to reach J.J., Z.B. concluded that J.J. was not going to answer her phone. Z.B. then went back to the weightlifting room alone and later saw J.J. enter. Z.B. testified that J.J. appeared angry, but that he believed it was because she had to wait in the men's bathroom by herself for so long. Nevertheless, Z.B. stated that J.J. came over and gave him a hug before leaving the weightlifting room with T.H.

Z.B. argues that his adjudication of delinquency for rape is against the manifest weight of the evidence for several reasons. First, Z.B. argues that there was conflicting evidence as to how well J.J. knew Z.B. before the alleged rape occurred. J.J. testified that before August 13, 2008 she "had seen [Z.B.] around [the weight room], but really hadn't known him at all." She admitted that when initially interviewed by the police, she referred to him as a "buddy," but explained that she calls people she does not know well "buddies" and people she does know well "friends." J.J. also denied that she told police she and Z.B. were "longtime friends." Officer William Schuster, the officer who interviewed J.J., reviewed his investigative report and testified that J.J. referred to Z.B. as a "longtime friend[]" when he interviewed her. Further, T.H. had told Officer Schuster that J.J. had told her that J.J. "kind of like[d]" Z.B. According to Z.B., J.J. tried to say that she did not know him very well "to bolster her allegation of rape."

Second, Z.B. argues that there was conflicting evidence as to whether J.J. spoke to him again after the incident. J.J. testified that she did not seek out Z.B. to speak to him after the incident, but that he talked to her on a few occasions. Z.B. testified that J.J. called him later in the evening on August 13, 2008 and in the morning on August 14, 2008. As proof that J.J. called, Z.B. produced cell phone records that showed incoming calls from J.J.'s phone number. Z.B. never answered the incoming calls from J.J.'s number, but argues that J.J. would not have initiated contact on the night of the incident and the following morning if the incident had not been consensual. During her direct examination, J.J. testified that she did not call Z.B.'s cell phone after the incident.

Finally, Z.B. argues that the court erred in believing J.J.'s testimony because she: (1) incorrectly told both the police and the court that the incident on August 13, 2008 took place at approximately 5:00 p.m. when it, in fact, took place at approximately 12:30 p.m.; and (2) did not tell school officials and the police about the incident until six weeks after it occurred. According to Z.B., if his encounter with J.J. had been nonconsensual, she would have felt uncomfortable seeing him at school everyday once it began and would have reported him earlier. Z.B. argues that J.J. only told her boyfriend and mother that a rape occurred because she was afraid she would lose her boyfriend if he thought the incident was consensual. He further argues that J.J.'s inability to recall the correct details of the event, such as the time it occurred, demonstrate J.J.'s lack of veracity.

We are not convinced that any discrepancy regarding the time that the incident between J.J. and Z.B. occurred was of any real consequence in the analysis of the issues before us. Both parties agreed that the incident took place; the only issue was whether it was consensual. Further, we disagree that J.J.'s failure to report Z.B. at an earlier time, standing alone, would warrant a reversal. It is not uncommon for a victim of sexual abuse to postpone reporting the abuse for any number of reasons, not the least of which are fear and shame. Even so, we are compelled to agree with Z.B. that his adjudication of delinquency is against the manifest weight of the evidence. As set forth below, the record contains other significant discrepancies that this Court cannot ignore.

There are several troubling pieces of evidence in the record that cut against a finding of force or threat of force in this case. J.J.'s friend, T.H., testified that J.J. knew Z.B. prior to the incident. Prior to the incident J.J. told T.H. that she "kind of like[d]" Z.B. Also, T.H. stated that on one occasion, J.J. took Z.B.'s cell phone, went through it, and programmed her number into it. Conversely, J.J. testified that she hardly knew Z.B. on the date of the incident. She, however, referred to him as a long time friend to one officer, and a "buddy" to another. When cross examined at trial about the apparent inconsistency in her characterization of Z.B., J.J. attempted to explain that she described Z.B. as an "ex-buddy" because she refers to people she does not know well as "buddies" and people she does know well as "friends." This explanation defies logic. It also directly contradicts her statement to Officer Schuster that Z.B. was a "longtime friend[.]" Rather than attempt to explain this characterization, J.J. denied that she made that statement to Officer Schuster. It stands to reason, however, that Officer Schuster had no reason to fabricate this portion of his report. J.J.'s credibility was impeached.

At trial, J.J. described being lured into a restroom and sexually assaulted. She alleges that she yelled "no" as Z.B. forced her into a performing a sex act. She then described hearing voices outside in the hall that she believed to be administration officials from the school. Had J.J. been yelling "no" so loudly that her voice echoed in the bathroom, it is reasonable to assume that one

of the people that Z.B. heard talking in the hallway outside the men's bathroom would have heard her yell. After hearing the voices, J.J. did not yell or otherwise attempt to gain their attention, although she did not testify that Z.B. prevented her from doing so. Instead, she admittedly joined in a plan with him to wait until the administrators were gone when Z.B. would leave the restroom and then call her when the coast was clear. When she later arrived in the weightlifting room, she did not disclose what had happened to any authority figure.

Further, J.J. testified that she did not initiate contact with Z.B. and did not call him before, during, or after the incident. She denied calling him while she was waiting in the bathroom, and further denied that she called him later or the next day. In order to challenge her credibility, Z.B. produced phone records showing nine calls from Z.B. to J.J. after Z.B. left the bathroom between 12:48 p.m. and 1:02 p.m. Despite J.J.'s denial of having called Z.B., the phone records reflect her having called his cell phone twice during the same time. Later in the evening, Z.B.'s records show calls to his phone from J.J. at 10:09 p.m. He testified that he did not answer, but called her back at 10:10 p.m. The cell phone records support his testimony. On the next morning, the records show a call from J.J. at 9:57 a.m. to Z.B.'s phone. He did not pick up the call. It is difficult to understand why J.J. would call Z.B., on the night of the incident and again the following morning, if the incident between them was nonconsensual. It is also difficult to believe that J.J. would not remember calling Z.B. on two occasions shortly after the incident took place. J.J. admitted that, had the incident occurred as she described, it would not make sense for her to have called Z.B. It is also troubling that despite her insistence that she had not called Z.B., the telephone records directly contradicted J.J.'s testimony, once again impeaching her credibility.

Although the length of time J.J. waited to report this incident to the police would not be enough to warrant reversal in and of itself, it is yet another troublesome point that casts doubt upon J.J.'s credibility in light of all of the evidence in this case. Similarly, when J.J. was asked whether, after the incident, she had voluntarily been around Z.B., she said, "voluntarily, no." However, when pressed about a time when she and T.H. were together and T.H. offered to go home with her, and Z.B. was there, she chose to stay with Z.B. rather than leave with T.H.

This Court acknowledges that a manifest weight challenge presents an appellate court with a narrow window of review, given the fact that the trier of fact is in the best position to determine the credibility of the witnesses. Yet, when faced with a case such as this, where the only witnesses to an alleged sexual attack were the victim and the accused, and the victim's credibility stands alone as the linchpin of the State's case, this Court cannot ignore its duty to sit as the "thirteenth juror" and review the evidence with a critical eye. *Thompkins*, 78 Ohio St.3d at 387. When viewed in its entirety, we cannot agree that the State presented the greater amount of credible evidence in this case. In weighing the evidence and all reasonable inferences, we conclude that, "in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the [adjudication of delinquency] must be reversed and a new trial ordered." *Otten*, 33 Ohio App.3d at 340. J.J.'s testimony contained numerous discrepancies and was simply, at times, not believable. In addition, her testimony was consistently impeached with evidence other than Z.B.'s own testimony. Because the only issue in this case was consent, it was critical to the State's case that J.J. provide credible testimony. Because she did not do so, Z.B.'s argument that his adjudication of delinquency is against the manifest weight of the evidence has

merit. To the extent that Z.B.'s assignment of error presents a manifest weight challenge, it is sustained....

Judgment reversed, and cause remanded....

WHITMORE, J. DISSENTS, SAYING:

I respectfully dissent as I would affirm the juvenile court's adjudication of delinquency and conclude that it is not against the manifest weight of the evidence. Although J.J.'s testimony contained discrepancies, the judge, as the trier of fact, could reasonably have attributed these discrepancies to her level of maturity and the stress of the situation. Both J.J. and Z.B. agreed that J.J. performed oral sex on Z.B.; the only issue was whether it was consensual. This Court has repeatedly recognized that it is an error to reverse a decision "on a manifest weight of the evidence challenge only because the trier of fact chose to believe certain witness' testimony over the testimony of others." *State v. Littlejohn*, 9th Dist. No. 24155, 2008 Ohio 6132, at P28. Here, the court chose to believe J.J.'s testimony, which was consistent with her friend, T.H.'s, testimony. Because I do not believe this is the "exceptional case in which the evidence weighs heavily against the [adjudication of delinquency]," I would affirm Z.B.'s adjudication of delinquency. *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 20 Ohio B. 215, 485 N.E.2d 717. As such, I respectfully dissent.

Discussion Questions and Notes

- 1) Do you think there was sufficient evidence to prove nonconsent in the case?
- 2) The case involves minors, but applies ordinary criminal law. Do you think the case would have come out differently if the people involved were adults?

The next case includes evidence that is rarely available in criminal case of interpersonal violence: documentation. Because the alleged victim in the case was hearing impaired, the defendant communicated with her by writing notes after the alleged sexual assault had occurred. Despite the unusualness of the evidence and the admissions contained within it, the court overturned the defendant's conviction.

Illinois v. Denbo, 868 N.E.2d 347 (Ill. Ct. App. 2007)

JUSTICE APPLETON delivered the opinion of the court:

A jury found defendant, Kelly J. Denbo, guilty of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(2) (West 2004)) in that she persisted in an act of vaginal penetration after the victim withdrew her consent. The trial court sentenced defendant to imprisonment for seven years. She appeals on the ground of insufficiency of the evidence, arguing that the State failed to prove the victim's withdrawal of consent or her own use of force.

Defendant put her hand into R.H.'s vagina during otherwise consensual sexual relations. R.H. pushed defendant twice—harder the second time—intending to signify that she no longer consented to the sexual penetration. Defendant removed her hand from R.H.'s vagina on the second push. Looking at the evidence in a light most favorable to the prosecution, we conclude that no rational trier of fact could find, beyond a reasonable doubt, that the first push objectively communicated to defendant a withdrawal of consent.... Therefore we reverse the trial court's judgment....

At trial on April 20, 2005, the State called R.H., the adult complainant, as its first witness. Because she was extremely hard of hearing, practically deaf, she testified through an interpreter. R.H. first met defendant in June 2004 at a nursing home, where they both worked. They developed a romantic relationship. On September 27, 2004, they both had the day off and spent it together, taking defendant's one-year-old nephew and three-year-old niece to McDonald's, Rockome Gardens, and a video store. Afterward, R.H. stayed for a cookout at defendant's house in Tuscola. Defendant drank beer while grilling the steaks, but R.H. abstained from alcohol that evening. After supper, R.H. went to defendant's bedroom "and just kept waiting and waiting and waiting" while defendant talked on the telephone. "[O]kay," R.H. thought. "[She] waited a little longer[] and *** thought [that defendant] was going to give the kids a bath." Eventually, she told defendant she was "go[ing] to the store [to] get a diet [C]oke and would be right back." Defendant appeared to be "out of it": "she was very slow to respond and *** slurred her words." Upon returning from the store, R.H. noticed the lights were off in the bedroom—they were on when she left—and three candles were burning. She did not see defendant. R.H. lay down, clothed, on defendant's bed. Defendant entered the bedroom. "She had a robe on," R.H. testified, "and like a ballet outfit or something. I really don't know. I was kind of hum."

Here is what happened next, according to R.H.:

"Well, I was [lying] on the bed[,] and she was on me—kind of straddled me[—]and kissing my face[,] and then she pulled me forward. She grabbed both my arms[,] and then she took off my top and my bra[,] and all of that was within—say[,] a short period of time. Then she shoved me, and she was rough. I thought, [H]um. I had no clue as to what was going on, and then she took my shorts off and my underwear off.

Q. What happened next?

A. Well, then she went right through my vagina. I didn't scream. I didn't do anything. I knew the kids were asleep. Knew the kids were asleep[,] and she kept pushing me.

Q. What did you do to her?

A. And it continued[,] and then the second time I tried to push her away[,] and it was hard enough. I was able to get up. I went to the bathroom[,] and I was bleeding.

Q. Let's back up a little bit. You indicated you were [lying] on the bed. How was Kelly on you?

A. Kelly was kneeling on top of me and had my legs spread apart so she was in between my legs.

Q. You said she 'went through' you. Explain what was used to go through you?

A. Right there, her hand. (Indicating)

Q. Where did she place her hand?

A. Went through the pelvic area. I tried to push her back, but she continued[,] and she just kept continuing, and then I pushed her again, and then I went to the bathroom, and I was bleeding. I came back out and was looking for her[,] and she was outside at that point and crying.

Q. You went to the bathroom and noticed you were bleeding?

A. Yes.

Q. Where was the bleeding from?

A. Well, the reason I was bleeding is because she hurt me. She used her hand to go direct[ly] through my vagina, yes, my vagina.

Q. When was the next time you saw the [d]efendant

A. Well, I went to the bathroom—I went into the bathroom[,] and I came back out and was talking to her[,] and I asked her at that point why she did it. She said she didn't know why she hurt me. I continued to ask her. I stayed at Kelly's because I needed an answer from her as to why she hurt me."

Because R.H. was deaf, she and defendant often communicated with one another in writing. R.H. offered—and the trial court admitted into evidence, over defendant's foundational objection—eight handwritten letters R.H. had received from defendant. According to R.H., defendant wrote People's exhibit No. 1 on September 27, 2004, shortly after the incident. It says: "I will let you know tomorrow night. Is [illegible] us. Okay[?] I love you. I'm taking a shower."

R.H. testified she received People's exhibit No. 2 on September 28, 2004. That letter reads as follows:

"I know that no amount of apologies [is] going to be okay. I am sorry that that happened. Okay[?] I can't believe that I could do what someone did to me. It makes me fucking sick to my stomach[,] and I am sorry. I am worried. I do want you to be okay. I should have said something sooner. I've done wrong[,] and it will never be forgiven or forgotten. I am truly sorry[,] though. Be careful. I don't want to lose you. That's not what I want. I scared you, yes. I can apologize forever for that. There [is] no amount of apologies I can give you. Yes, you are to[o] good for me. I love you[,] and I hurt you. This is something that can't be forgiven. I'm so sorry. I never meant for this to happen. We probably need some time apart for awhile. I need to straighten out my scary side. Med[ication]s or something. I don't want to break up. Maybe I need to get rid of [the] scary side of me. I know I have one. We need time apart—okay[?] I'm sorry it had to end this way. I will not quit [because] I love my residents. I am sorry I hurt you last night. I don't want to hurt anyone else that way again[,] [including] you. I'm sorry. I swear to you that I did not hear you say no. I am not the kind of person that does this. I care that I hurt you. I'm sorry you're shocked. I'm sorry I did this. I'm just sorry. Okay[?] I knew you can't take me back. That's understandable. There [is] no amount of sorrys I can give you. I'm sorry. Please let me know if you're going to send me to jail or tell work. Okay[?] So I can quit and go elsewhere. I am sorry about what happened." (Emphasis in original.)

....

The final letter, People's exhibit No. 6, says: "First of all[,] I know in my heart I did not rape you. I did[,] however[,] make you bleed[,] and for that I'm sorry."

....

R.H. admitted spending the rest of the night with defendant in her bed. She admitted having sex with defendant on three occasions before the incident. These sexual encounters were all in defendant's bedroom. After September 27, 2004, R.H. visited defendant's house one time. It was defendant's idea that she come over, but when she saw that defendant had been drinking, she went home.

On redirect examination, the prosecutor asked R.H. why she did not immediately leave the premises after defendant pushed her hand through her vagina. R.H. answered: "Because I wanted to know why she had hurt me[,] and I had no clue. I never *** could understand why."

....

The State ... called Marlene Kremer, a family practice physician from Sarah Bush Lincoln Health Center in Mattoon. She testified that on September 30, 2004, she received a message at her office requesting that she telephone R.H.'s roommate, Donna Goad. "The message said that [R.H.] had been raped and was very upset and she needed an appointment." Kremer returned the telephone call and scheduled an appointment for that same day. R.H. arrived at the office with Goad, looking "very anxious and upset." The prosecutor asked Kremer:

"Q. How did she describe that she had been injured?

A. She said that three days before, her long[]time girlfriend had—was intoxicated[] and had forced her to have—using some type of an object, which I do not know what the object was, had repeatedly thrust this object into her vagina. Then she was able to fight her off and left."

The wall of R.H.'s vagina "was very abraded. It was kind of like a rug burn. There were no obvious lacerations. There was no bleeding at the time of this exam, but it was just very abraded, irritated"—as if the vagina had suffered from "[e]xcessive friction." Kremer would have expected R.H.'s vagina to look like this if R.H.'s girlfriend had done what R.H. said. It was possible that the vagina bled at the time of the injury....

Kremer continued treating R.H. after September 30, 2004—who, in fact, was her patient before then. Kremer saw her again on October 22, 2004. At that time, she diagnosed posttraumatic stress disorder. R.H. was "having crying spells. She was still able to go to work[] but was otherwise not doing much of anything else." She saw R.H. again on November 12, 2004, and found her to be still suffering from the disorder. She saw no symptoms of the disorder before September 30, 2004.

The State rested, and defendant moved for a directed verdict on the ground that the State had failed to prove "the use of force or threat of force." See 720 ILCS 5/12-14(a), 12-13(a)(1) (West 2004). Defense counsel argued: "All of the evidence points to the fact that this was a voluntary interaction. It occurred in Ms. Denbo's home, in her bedroom, on her bed, where the alleged victim came in and la[y] down and voluntarily *** allowed Ms. Denbo to undress her *** and then engaged in a sexual act that she didn't object to." The prosecutor responded that because R.H. objectively showed her lack of consent by pushing defendant and defendant nevertheless

continued to ram her hand into R.H.'s vagina, the State had proved the element of force. The trial court denied the motion for a directed verdict...

On May 25, 2005, the trial court sentenced defendant to 7 years' imprisonment, with credit for 66 days, followed by 3 years of mandatory supervised release.

This appeal followed....

The State charged defendant with aggravated criminal sexual assault ... as follows:

"(a) The accused commits aggravated criminal sexual assault if he or she commits criminal sexual assault and any of the following aggravating circumstances existed during *** the commission of the offense:

(2) the accused caused bodily harm *** to the victim ***." 720 ILCS 5/12-14(a)(2) (West 2004).

Thus, to commit aggravated criminal sexual assault, one must commit criminal sexual assault. According to the information, defendant committed criminal sexual assault within the meaning of section 12-13(a)(1) of the Code (720 ILCS 5/12-13(a)(1) (West 2004)). That section provides as follows:

"(a) The accused commits criminal sexual assault if he or she:

(1) commits an act of sexual penetration by the use of force or threat of force[.]" 720 ILCS 5/12-13(a)(1) (West 2004).

"Sexual penetration" includes "any intrusion, however slight, of any part of the body of one person *** into the sex organ *** of another person." 720 ILCS 5/12-12(f) (West 2004). Section 12-12(d) defines "force or threat of force" as follows:

"(d) 'Force or threat of force' means the use of force or violence, or the threat of force or violence, including but not limited to the following situations:

(1) when the accused threatens to use force or violence on the victim or on any other person, and the victim under the circumstances reasonably believed that the accused had the ability to execute that threat; or

(2) when the accused has overcome the victim by use of superior strength or size, physical restraint[, or physical confinement." 720 ILCS 5/12-12(d) (West 2004).

"Force," within the meaning of sections 12-12(d) and 12-13(a)(1) of the Code, does not mean the force inherent to all sexual penetration—for example, the exertion of the hand in the act of pushing into the vagina—but physical compulsion, or a threat of physical compulsion, that causes the victim to submit to the sexual penetration against his or her will.

In its case in chief, the State has the burden of proving the element of force beyond a reasonable doubt. By proving force, the State necessarily proves nonconsent, for "if *** one was forced to perform an act, it follows that [one's] act was nonconsensual; and if one freely consents to the performance of an act upon oneself, clearly [one] has not been forced." The defendant may raise the defense of consent to rebut the State's evidence of force....

In its brief, the State concedes that R.H. "implicitly consented to some sort of penetration by allowing defendant to undress her, to spread her legs apart, and to position herself between [R.H.'s] legs." We agree with that concession. When defendant sexually penetrated R.H. by inserting her fingers or hand into R.H.'s vagina, she did so with R.H.'s consent—and, therefore, not

by "force," as that term is defined in section 12-12(d) of the Code (720 ILCS 5/12-12(d) (West 2004)). One may infer that in performing the act of penetration, defendant was—as she admitted in one of her letters—"to[o] rough when [she] should have been gentle." Nevertheless, R.H. consented to the penetration itself; therefore, defendant did not accomplish the penetration by overcoming R.H.'s will with force or the threat of force.

The State contends this is a case of postpenetration aggravated criminal sexual assault.... 720 ILCS 5/12-17(a) (West 2004) ... [makes] consent effective only up to the withdrawal of consent: "A person who initially consents to sexual penetration or sexual conduct is not deemed to have consented to any sexual penetration or sexual conduct that occurs after he or she withdraws consent during the course of that sexual penetration or sexual conduct." 720 ILCS 5/12-17(c) (West 2004).

In the minds of some commentators, the concept of withdrawal of consent makes the element of force problematic. If, initially, A sexually penetrates B with B's consent (and, therefore, without force) but merely remains inside of B after B says, "Stop, I don't want to do this any longer," where is the force? "To prove the element of force is implicitly to show nonconsent" (*Haywood*, 118 Ill. 2d at 274, 515 N.E.2d at 50); but, in a case of postpenetration criminal sexual assault, it is unclear that proving the withdrawal of consent implicitly proves force....

One may reasonably infer that R.H. pushed defendant because disengagement was, for her, physically impossible until defendant withdrew. Defendant withdrew when R.H. pushed her a second time. If an aggravated criminal sexual assault happened at all, it happened during the very short duration between the first and second push, when defendant, by not moving, prevented R.H. from immediately disengaging. Even though, subjectively, R.H. no longer consented, her withdrawal of consent was ineffective until she communicated it to defendant in some objective manner so that a reasonable person in defendant's circumstances would have understood that R.H. no longer consented. Defendant used force on R.H. only if the first push operated as an objective withdrawal of consent.

Looking at the evidence in a light most favorable to the State, we conclude that no rational trier of fact could find, beyond a reasonable doubt, that a reasonable person, in defendant's circumstances, would have understood that initial push as a withdrawal of consent. According to a letter from defendant that the State presented at trial, R.H. was capable of talking ("I swear to you that I did not hear you say no"). R.H.'s excuse was that she did not want to wake the children by screaming. Even if one credited that excuse, it would not solve the problem of an uncommunicated withdrawal of consent. R.H. could have said no—and, evidently, defendant expected her to say no, or at least say something, if she wanted defendant to stop the sexual penetration. This expectation seems reasonable. R.H. did not say no or stop. Instead, she pushed defendant. The problem is, people push one another during sexual congress. We do not mean to suggest that a push can never signify nonconsent or a withdrawal of consent. In fact, the second push here was clearly made with enough force to both be distinguished from a caress and to effectively communicate the withdrawal of consent. "'Force' and 'consent' simply do not have static meanings. The significance of various factors—a cry for help, level of resistance, attempt to escape—depend[s] on the circumstances of each case." *Kinney*, 294 Ill. App. 3d at 909-10, 691 N.E.2d at 871 (Knecht, J., specially concurring). Under the circumstances of this case, a single push

to the shoulders, without more, cannot serve as an objective communication of R.H.'s withdrawal of consent....

For the foregoing reasons, we reverse the trial court's judgment.

Reversed.

JUSTICE TURNER, dissenting:

I respectfully dissent.

When a defendant challenges the sufficiency of the evidence, the reviewing court does not retry the defendant. The jury possessed the responsibility to choose between competing versions of fact, assess the witnesses' credibility, draw inferences from the evidence, and decide whether the evidence as a whole ultimately proved defendant to be guilty of the charged offense beyond a reasonable doubt. To avoid intruding upon the jury's prerogative as the finder of fact, we are to use a deferential standard of review. Thus, looking at all the evidence in a light most favorable to the prosecution, we address whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

A rational trier of fact could have found (1) the first push sufficiently informed defendant of R.H.'s withdrawal of consent and (2) defendant did not immediately disengage. It is a reasonable conclusion defendant wrote all of the letters following the September 27, 2004, incident. In these letters, she confesses wrongdoing, deplores the "scary side" of herself, admits that she "get[s] mean sometimes," and asks R.H. if she is going to "send [her] to jail." The jury could have reasonably inferred defendant knew, from the start, at the very moment of penetration, she was being "way to[o] rough" and that when R.H. first pushed her (signifying her withdrawal of consent), defendant already knew she did not consent to this violent manner of penetration. Because someone had once done the same thing to defendant (as she revealed in People's exhibit No. 2), defendant knew she was inflicting excruciating pain upon R.H. and that the first push meant "Stop!" Nevertheless, she continued ramming her hand into R.H.'s vagina until R.H. succeeded in pushing her away. Looking at the evidence in a light most favorable to the prosecution, I conclude a rational trier of fact could have found the elements of aggravated criminal sexual assault beyond a reasonable doubt.

Discussion Questions and Notes

- 1) Notice how the majority often conflates its act requirement and *mens rea* analysis regarding consent. This is a very common misstep that judges make in rape cases. Try to focus on them as separate issues. Concerning whether there was sufficient evidence to prove that the victim did not consent to the sex acts in the case (and

not the defendant's beliefs about such consent), do you think the jury's verdict was reasonable?

- 2) Is evidence of a prior relationship between the victim and defendant relevant? If so, how is it relevant?
- 3) An unusual wrinkle in the case is that the court frames the facts as a withdrawal of consent (instead of initial nonconsent). Do you think this was really a withdrawal of consent case? Do you think such cases should be handled in a different manner than other nonconsent cases?

Some jurisdictions allow for defendants to be prosecuted and convicted of rape if the victim is incapacitated such that consent is impossible. Incapacitation is most often associated with excessive intoxication of the victim, but includes other forms of incapacity as well. For example, if a person is unconscious or in a coma, they are unable to consent. The majority of states do not presently recognize nonconsent by intoxication for rape either by virtue of having a force requirement or because they require the victims to be unconscious before the law considers them incapacitated. In states that recognize incapacitation by intoxication as a form of nonconsent, one leading test asks whether victims understand the "nature and consequences" of their actions at the time of the sex act. If they do not, they cannot legally consent in such jurisdictions. Read the following case applying a different standard for incapacity: the "wholly insensible" test.

Massachusetts v. Blache, 880 N.E.2d 736 (Mass. 2008)

BOTSFORD, J.

A jury in the Superior Court convicted the defendant on an indictment charging rape in violation of G. L. c. 265, § 22 (b). The Appeals Court affirmed the defendant's conviction... Thereafter, we granted the defendant's application for further appellate review. The defendant concedes the fact of intercourse but claims it was consensual, and he argues that errors in his trial require the reversal of his conviction.

In particular, the defendant challenges the judge's instructions to the jury concerning the elements the Commonwealth must prove to obtain a conviction of the crime of rape; he focuses in significant part on the instructions concerning the complainant's possible incapacity to consent. Since at least 1870, we have recognized that in cases of rape, while the Commonwealth must prove the complainant's lack of consent as an element of the crime, there are circumstances in which this element may be satisfied by proof that the complainant lacked the capacity to consent. *Commonwealth v. Burke*, 105 Mass. 376 (1870) (*Burke*). In this case, we return to *Burke* and examine once again circumstances that may affect a complainant's capacity to consent... We conclude that the judge's instructions failed to explain adequately what must be established about

a complainant's condition before the complainant may be deemed incapable of giving or withholding consent. For the reasons explained below, we reverse the defendant's conviction....

There was evidence at trial from which the jury could have found the following. On August 17, 2000, the complainant, who was twenty-six years old, went out with a female friend to a bar in Haverhill. The complainant was five feet, two inches tall and weighed 110 pounds. Before leaving home at around 7 P.M., the complainant smoked marijuana and took an antianxiety medication called Klonopin. She had not eaten any food all day. The complainant had "[a] couple" of alcoholic drinks at the first bar she visited, and drank "[a] lot" at a second bar, where she spent the latter part of the evening. Between 11:30 P.M. and midnight, the complainant and her friend were joined by David MacRae, whom the complainant had been dating for about one week, and his friend Allan Castro. By that time, the complainant was "very drunk," and she had only intermittent memories of the remainder of the evening. When the group left the bar shortly before it closed, the complainant was "causing a scene," was argumentative, had difficulty walking, and fell twice. The complainant's friend took her keys to drive her home. Ultimately, however, Castro drove the complainant's friend home in the complainant's truck, and then he, MacRae, and the complainant drove to MacRae's house in Methuen.

At MacRae's house, the complainant continued to behave belligerently. She attempted to leave MacRae's house but drove her truck into his fence and then backed up into the house itself, at which point MacRae took her keys. Castro telephoned the police, and MacRae told them he needed assistance with an unwanted and very intoxicated female guest. Before the police arrived, the complainant returned to the house and "passed out" for some time.

The Methuen police dispatched the defendant, Officer David Blache, to respond to the call; he arrived at MacRae's house just before 2 A.M. When the defendant arrived, the complainant woke up; she was "still drunk," and Castro saw her fall "straight back and hit her head ... [o]n the wall." The defendant spent about forty-five minutes at the house gathering information for an accident report and arranging for the complainant's truck to be towed. During this time, according to MacRae, Castro, the defendant, and the tow truck driver, the complainant exhibited sexually aggressive behavior toward the defendant. She touched him, tried to kiss him and "grab[] his crotch," asked him if he wanted to have sex with her, licked the windows of his police cruiser, and pulled down her pants to show the defendant her genitals. Witnesses also testified that at this time she was still drunk; she slurred her speech; and she pulled down her pants and began to urinate in the street in front of MacRae's house when he refused to allow her back inside to use his bathroom. While the defendant was speaking with MacRae, he allowed the complainant to sit in the front seat of his cruiser because she was cold; after she twice turned on the cruiser's lights and siren, he transferred her to the back seat.

After arranging to have the complainant's truck towed, the defendant obtained permission from police headquarters to transport her home to Haverhill because she did not have enough money to pay for a taxi. The complainant testified that she did not remember leaving MacRae's house in the cruiser, and that the next thing she remembered was the car pulling up next to a dumpster. Once the car stopped, the defendant opened the driver's side rear door, pulled down the complainant's pants, and vaginally raped her in the back seat of the cruiser. She testified that she told him she "didn't want to do that," and tried to kick the defendant and the partition between the front and rear seats, but she was unable to open the opposite door because there

was no interior handle. She further testified that the defendant then drove her home, and when he dropped her off he warned her that the police have a "code of silence" and they would not believe her.

The defendant also testified at trial. He admitted having intercourse with the complainant, but he claimed that it was consensual and occurred at her house. According to the defendant, he dropped the complainant at home and cleared the call with headquarters, then he knocked on her door and asked to use her bathroom. He testified that when he emerged from the bathroom, the complainant was completely naked; they embraced, she performed oral sex on him, and they had consensual intercourse on her couch.

Although the complainant did not remember making any telephone calls after she returned home, the prosecutor played recordings of two 911 calls she placed to the Haverhill police. Additionally, Castro testified that he answered two calls from the complainant at MacRae's house about one-half hour after the complainant had left with the defendant. In the first call, she said in a "bragging" or "sarcastic" tone, "Tell Dave [MacRae] thanks for the best fuck of my life," and hung up. In the second call, a few minutes later, she said, "Tell Dave I'm going to go for the whole rape thing," and hung up.

Haverhill police responded to the complainant's 911 calls at about 3:30 A.M. and convinced her to go to the hospital for a sexual assault examination. Two female officers who assisted the complainant that morning testified as fresh complaint witnesses; they described the complainant as quite upset and still intoxicated. The vaginal swab taken from the complainant as part of the examination contained sperm cells, but the oral swab did not. The deoxyribonucleic acid (DNA) of the sperm cells collected matched a blood sample submitted by the defendant. Sperm was also detected in a stain on the zipper area of the defendant's uniform pants but not in the back seat of the cruiser. The complainant's blood was drawn at 7:30 A.M.; testing revealed a blood alcohol level at that time of 0.14 per cent, as well as evidence of marijuana. Using retrograde extrapolation, a toxicology expert testified that the complainant's blood alcohol level at 2:30 to 3 A.M. would have been between 0.176 and 0.24 per cent, a level that typically causes disorientation, loss of judgment, impaired perception, lethargy, imbalance, slurred speech, loss of memory, impaired comprehension, and confusion.

In her charge to the jury, the judge touched on the issue of intoxication twice, first in defining the element of force required for the crime of rape, and later in explaining the crime's additional element of lack of consent on the part of the complainant. In explaining force, the judge instructed that "[t]he crime of rape may be accomplished through the use of actual physical force or violence," but explained that this need not always be the case. She went on to say, "for example, if [a complainant's] condition as a result of being intoxicated or unconscious or asleep is such that she is wholly insensible so as to be incapable of consenting, then the Commonwealth need only prove that amount of force which was necessary to accomplish the natural or unnatural sexual intercourse." In her separate explanation of the crime's element of lack of complainant consent, however, the judge told the jury only that they might consider evidence of the complainant's "sobriety" in assessing her capacity to consent. The judge did not repeat that the complainant's level of insobriety or intoxication must be such that she was "wholly insensible" in order for the jury to find her incapable of consenting.

During their deliberations, the jury submitted a question to the judge asking, "Could you please clarify the definition of 'wholly' insensible?" The judge worked with the prosecutor and defense counsel in an attempt to frame a response, but she ultimately determined that the instruction was sufficiently clear as given. She accordingly instructed the jury, over the defendant's objection, to "apply your collective understanding of what those words mean in our ordinary discourse and ... with some discussion among yourselves, decide the meaning of those words. Each word by itself is plain and are words that are used in ordinary discourse, and I cannot give you any further legal definition or clarification."

....

In challenging the judge's instruction on rape, the defendant argues that the judge erred in her explanation concerning the circumstances in which a complainant may be found to lack the capacity to consent, and compounded the error by refusing to explain her instruction further in response to the jury's question about the meaning of her words....

When the judge told the jury that the complainant's "condition as a result of being intoxicated or unconscious or asleep [may be] such that she is wholly insensible so as to be incapable of consenting" (emphasis supplied), she was quoting language from this court's decision in *Burke*. *Burke* was a case involving a defendant charged with aiding and assisting in the rape of an extremely intoxicated woman. After reviewing English common-law precedents defining the crime of rape as "the carnal knowledge of a woman by force and against her will," and demonstrating that the phrase "against her will" was synonymous with "without her consent," the court held as follows: "We are therefore unanimously of opinion that the crime, which the evidence in this case tended to prove, of a man's having carnal intercourse with a woman, without her consent, while she was, as he knew, wholly insensible so as to be incapable of consenting, and with such force as was necessary to accomplish the purpose, was rape."

....

While generally for the crime of rape the Commonwealth must prove that the alleged sexual intercourse occurred by force and without the complainant's consent, where the complainant is "wholly insensible so as to be incapable of consenting," (a) the element of lack of consent is satisfied; and (b) the only force required for proof of the crime is "such force as was necessary to accomplish" the act of intercourse – that is, only the force necessary to effect penetration. The second premise is perhaps more implicit than explicit. It is this: Where the Commonwealth uses proof that the complainant has been rendered "incapable of consenting" to establish the necessary element of her lack of consent and to reduce the degree of required force, the Commonwealth should also prove the defendant's knowledge of the complainant's incapacitated state.

Over the years, *Burke* has continued to be cited in Massachusetts decisions, and to be reflected in the rape instructions that trial judges give. However, in cases after *Burke*, instructions used by trial judges (and implicitly approved by appellate decisions) have been less than clear in defining what must be shown in order for the jury to find the complainant was incapable of consenting, particularly in relation to the complainant's consumption of alcohol and drugs....

[W]here drugs or alcohol are concerned, it is important to emphasize that, as *Burke* makes clear, consumption or even intoxication by itself is not the issue. It is a matter of common

knowledge that there are many levels of intoxication, and the fact of intoxication, by itself, does not necessarily mean that the individual in question is incapable of deciding whether to assent to a sexual encounter. The question instead is whether, as a result of the complainant's consumption of drugs, alcohol, or both, she was unable to give or refuse consent.

The defendant argues that a complainant should only be considered incapable of giving or refusing consent when she "was intoxicated to the extent that ... she was rendered unconscious or nearly so, and was temporarily incapable of making any decisions regarding sexual activity." He proposes to measure this level of impairment by looking to the complainant's capacity to communicate consent: The legal results of *Burke* should apply, he asserts, only where the complainant was "unable to communicate his [or] her lack of consent to the defendant (verbally, physically, or otherwise)."

The defendant's characterization of the degree of incapacity required to trigger the *Burke* rules regarding proof of force and lack of consent is too restrictive. The law does not require that the complainant have been rendered "unconscious or nearly so" before she may be deemed past the point of consent. We conclude that an instruction concerning capacity to consent should be given in any case where the evidence would support a finding that because of the consumption of drugs or alcohol or for some other reason (for example, sleep, unconsciousness, mental retardation, or helplessness), the complainant was so impaired as to be incapable of consenting to intercourse. If the jury find the Commonwealth has proved beyond a reasonable doubt the complainant's incapacity according to this standard, that finding satisfies the element of lack of consent, and as a corollary, the Commonwealth need only prove the amount of force necessary to accomplish intercourse.

We agree with the defendant, however, that the phrase "wholly insensible," used in *Burke* to describe the necessary level of incapacity, sounds archaic and confusing. While both words may be used in modern discourse, the word "insensible" does not have a single, unambiguous meaning. The dictionary definition of the word lists at least six possibilities, including: "incapable or bereft of feeling or sensation[;] ... deprived of consciousness[;] ... deprived of ... perception or ability to react[;] ... archaic: lacking sense or intelligence: stupid, senseless, unreasoning [;and] unaware." WEBSTER'S THIRD NEW INT'L DICTIONARY 1168 (1993). Some of these descriptions might suggest to jurors a lower bar than the law actually requires; others might suggest a higher bar. Even though, as the judge correctly pointed out to the lawyers, the complete phrase "wholly insensible so as to be incapable of consenting" (emphasis added) identifies the appropriate inquiry, the ambiguity of the word "insensible" indicates the need for greater clarity. The formulation of the standard set forth above seeks to provide a more easily understood statement of what is required....

The judge's instructions in this case failed to explain fully or with sufficient clarity the *Burke* principles that we have discussed above. The judge first summarized for the jury, correctly, that to prove the defendant guilty of rape, the Commonwealth was required to prove beyond a reasonable doubt the following elements: (1) the defendant engaged in sexual intercourse with the complainant; and (2) the sexual intercourse was accomplished by the defendant's compelling the complainant to submit (a) by force and (b) against her will. After defining the necessary proof of sexual intercourse, the judge turned to the element of force and its definition. It was in this

context that the judge gave her first instruction about the complainant's possible incapacity to consent:

"The crime of rape may be accomplished through the use of actual physical force or violence. Depending on the circumstances, however, the amount of force necessary may be only that which is needed to accomplish the act itself.

"So, for example, if [the complainant's] condition as a result of being intoxicated or unconscious or asleep is such that she is wholly insensible so as to be incapable of consenting, then the Commonwealth need only prove that amount of force which was necessary to accomplish the ... sexual intercourse" (emphasis supplied).

The instructions went on to a further discussion of the use of force, and then reached the element of "against her will." The judge began with the Commonwealth's burden to prove beyond a reasonable doubt that the complainant did not consent to the sexual intercourse, and then stated:

"You may consider evidence of [the complainant's] state of mind at the time of the alleged incident on the issue of whether or not she consented to sexual intercourse. If a person submits because of fear, it is not consent. The person has to be free to exercise her will without restraint.

"Now, there was some evidence presented in this case regarding the consumption of alcohol and marijuana and Klonopin by [the complainant] before the alleged incident occurred. You may take into consideration any evidence you find credible on the issue of her sobriety in assessing her ability to consent under such circumstances" (emphasis supplied).

From this order of the instructions, it is not clear that the jury would understand that the "wholly insensible so as to be incapable of consenting" instruction, given in connection with the element of force, also applied to the element of lack of consent. In other words, the jury may not have appreciated that for the Commonwealth to meet its burden of proof on the complainant's lack of consent by establishing that she was incapable of consenting, the Commonwealth must show not simply that she lacked sobriety or was intoxicated, but that as a result of the alcohol and drugs she consumed, the complainant's physical or mental condition was so impaired that she could not consent. Moreover, quite apart from the question of order, the jury indicated their confusion about the meaning of the specific phrase "wholly insensible" by asking the judge for a further explanation of the meaning of the phrase, but the judge ultimately decided not to provide clarification.

The record in this case reveals that with the fact of intercourse conceded, lack of consent was the principal if not only contested issue before the jury. The evidence presented conflicting views about whether the complainant was capable of consenting, and if she was capable, whether she did so. We cannot say that the errors in the charge were not prejudicial. The defendant is entitled to a new trial....

Accordingly, the judgment is reversed, the verdict set aside, and the case remanded to the Superior Court for a new trial....

SPINA, J. (concurring in part and dissenting in part, with whom Cowin, J., joins).

I agree that a new trial is required, but I disagree with the reasoning of the court....

I disagree with the court and believe that because the evidence does not support a finding that the complainant was "wholly insensible so as to be incapable of consenting," see *Commonwealth v. Burke*, 105 Mass. 376, 380 (1870), a *Burke* instruction should not have been given. In that case, the court held the Commonwealth may prove lack of consent if it shows the complainant was "wholly insensible," in a state of "utter stupefaction," or in a "state of unconsciousness," terms the court used interchangeably, "so as to be incapable of consenting." The evidence here fails to establish that the complainant had the requisite state of mind (or absence thereof) as exemplified by her testimony that she remembered telling the defendant at least three times that she did not want to have intercourse, and that she tried to kick him and she tried to push him off her.

The complainant here also testified that she remembered sitting in the front seat of the police car before being raped, and pushing buttons that activated the siren. She recalled that the defendant was angry, and that he told her to sit in the rear seat of the police car and not touch anything. She remembered that the defendant had removed his duty belt, climbed into the rear seat of the police car, and removed her clothing. Within thirty minutes, the complainant telephoned police and reported she had been raped by a Methuen police officer. She was taken to a hospital less than one hour later, where a nurse recorded her condition as "agitated," "upset," and "distraught," but "alert and oriented." This evidence is insufficient to meet the standard of showing the complainant was "wholly insensible," or in a state of "utter stupefaction," or a "state of unconsciousness" such that she was incapable of consenting. There is no evidence that the complainant had no capacity to consent.

Of course, an instruction is proper if it is supported by any hypothesis of the evidence. However, the evidence of the complainant's intoxication on which the judge presumably relied in deciding to give the *Burke* instruction also does not support a finding that she was incapable of consenting. An expert opined that, based on a retrograde analysis of the complainant's blood alcohol in a sample taken at the hospital approximately one and one-half hours after intercourse, and taking into consideration her body size and her lack of food consumption, her blood alcohol level at the time of the intercourse would have been between 0.176 and 0.240. The expert further opined that such an elevated blood alcohol level was likely to produce disorientation, loss of judgment, impaired perception, lethargy, imbalance, slurred speech, impaired comprehension, and confusion. Admittedly, the evidence shows she was highly intoxicated, but this is not enough. The evidence must show that the complainant's "state of insensibility" was such that she "had no power over her will" (emphasis added). *Commonwealth v. Burke, supra* at 379. In effect, there must be a showing of total incapacity to consent. Here, the evidence of intoxication does not support a finding beyond a reasonable doubt that this complainant had "no power" to consent. I would hold that the Commonwealth failed to produce evidence that could support a finding beyond a reasonable doubt that the complainant was totally incapable of consenting, and therefore a *Burke* instruction should not have been given....

I believe that this case significantly changes the law of rape. Hereafter, a person who has sexual intercourse with one who is highly intoxicated but capable of interacting with others, a common occurrence, does so at great risk that when the effects of the alcohol wear off, the other person will claim that intercourse occurred without consent. Moreover, where the standard had been

virtual unconsciousness, a defendant must have known there was no consent. Under the standard announced today, a defendant could not possibly know the complainant was in an incapacitated state that prevented giving or withholding consent. Indeed, in this case, the Commonwealth relied on scientific analysis of the complainant's blood alcohol level and expert testimony to show a state of mind that the court holds warranted a Burke instruction. If expert testimony is needed, a defendant could not possibly know, based on his or her untrained observations of the complainant's sobriety alone, that the complainant was incapable of consent.

The court makes clear that, as provocative as the evidence shows this complainant had been, the evidence also shows that her level of intoxication warrants a Burke instruction. This places a defendant who is as highly intoxicated as the complainant in the anomalous and unfair position of defending against evidence of a complainant's mental state, admitted in evidence to show the complainant's incapacity to consent to intercourse, an element of the Commonwealth's case, but unable to present the same type of evidence on the question of his or her own intent to have intercourse. *See Commonwealth v. Troy*, 405 Mass. 253, 262-263, 540 N.E.2d 162 (1989) (intoxication has no mitigating effect on general intent to have intercourse or other elements of rape charge). Where the defendant's intent to have intercourse and the complainant's intent not to have intercourse are both elements of the Commonwealth's proof, and where the intent to have intercourse either was mutual or it was not, the effects of intoxication should apply equally to the respective intent of each party to the intercourse. This should be so because the question of fact to be determined as to each is qualitatively the same: whether intercourse was intended. After today, however, the concept of diminished capacity and its relative, specific intent, see *Commonwealth v. Henson*, 394 Mass. 584, 592, 476 N.E.2d 947 (1985), will apply to the mental state of a rape complainant, but not to the mental state of a defendant....

The standard of "wholly insensible," "utter stupefaction," and "unconsciousness," by which a complainant has heretofore been deemed to be incapable of consenting to intercourse, is a fair and workable standard from which the court today departs in favor of a standard that needlessly complicates certain rape cases, and has great potential to produce unfair results for defendants and unwanted intrusions into the private affairs of complainants. In the future we can expect the Commonwealth to try rape cases, as here, like drunk driving cases. I respectfully dissent.

Discussion Questions and Notes

- 1) Do you agree with majority that the words "wholly insensible" are too archaic for modern juries to apply in determining incapacity to consent? What words do they propose to use instead? Is the alternative language better?
- 2) The partial dissent is certainly right that unconsciousness provides a brighter line for differentiating incapacity. However, do you think it is the better rule overall?
- 3) The partial dissent raises what seems like an unfair asymmetry under the majority's holding: defendants cannot introduce evidence of intoxication in their defense, but

the victim's intoxication can be used to prove incapacity to consent. Do you think this argument is persuasive? Assuming the inconsistency is troubling, are there other ways to resolve it besides through the dissent's proposed rule?

- 4) Should the court have affirmed the conviction solely on the grounds that a reasonable juror could have found that the victim did not consent to sexual intercourse?

C. Force

The traditional rule, which is still present in over half of the jurisdictions in the United States, is that the prosecution must show the defendant used or threatened force to prove rape. A basic question exists as to what the nature and quantum of the actual or constructive force has to be as a matter of law. If a victim only consents due to force or fear of force, such consent is abrogated. Nonetheless, some jurisdictions require such a high level of force be used or threatened that even highly threatening and/or violent encounters are not considered forcible rape.

Louisiana v. Touchet, 897 So. 2d 900 (La. Ct. App. 2005)

DECUIR, Judge.

The State of Louisiana alleges that the Defendant struck the victim with his fists, forced her to remove her clothing at knife point, and had sexual intercourse with the victim against her will.

The Defendant, Wilbert Touchet, Jr., was charged with aggravated rape committed in violation of La.R.S. 14:42...

The Defendant waived his right to a trial by jury. Following a bench trial, the trial judge found the Defendant guilty... The trial court sentenced the Defendant to a mandatory sentence of life imprisonment on the charge of aggravated rape...

The trial court found the Defendant guilty of aggravated rape in violation of La.R.S. 14:42(A)(3), which states, in pertinent part:

A. Aggravated rape is a rape committed upon a person sixty-five years of age or older or where the anal, oral, or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed under any one or more of the following circumstances:

....

(3) When the victim is prevented from resisting the act because the offender is armed with a dangerous weapon.

The victim testified that she met the Defendant around Mardi Gras 2002. The two subsequently spent several nights together. At some point, the Defendant left to go to work offshore. While he

was offshore, the victim rented a house for the two to live in together when he returned. All of this happened between Mardi Gras and the first week of March 2002. When the Defendant returned from working offshore, he moved in with the victim. The two slept together in a small bedroom in the rented house.

The victim stated that about two weeks after they had moved in together, she and the Defendant had gone on an outing and when they returned, the Defendant told the victim that she had been acting like a whore. Upon arriving at their home, they entered the home, and the Defendant locked the front door. The victim proceeded to go to the bathroom, which was through the bedroom. The Defendant met the victim and told her, "if you want to act like a whore, I'm going to treat you like a whore," and told the victim to remove her clothing. The victim testified that she told the Defendant no at first. At that point, the Defendant pulled out a pocket knife. Then the victim testified that she did not remember the knife being very close to her, but "he came to [her] with it." The victim stated that she believed that he was capable of using the knife and that she was scared that if she tried to get away, the Defendant would catch up to her.

After refusing once or twice, the victim removed her own clothing at the Defendant's prompting. She stated she probably would have removed her clothing even if he had not had the knife because she was the "underdog." After she removed her clothing, the Defendant "set the knife down" and "proceeded to come up on [her]." At that point the two had sexual intercourse.

The victim testified that she did not want to have sex. The victim stated that she resisted the Defendant verbally, but did not get up and leave the room because she was scared. On cross-examination, the victim stated that other than saying no, she did not resist the Defendant in any way.

The Defendant testified that he never held a knife to the victim's throat and raped her. The Defendant further testified that the victim never indicated to him that she did not want to have sex with him.

In *State v. Jackson*, 03-1079 (La. App. 3 Cir. 2/4/04), 866 So. 2d 358, writ denied, 04-1126 (La. 10/8/04), 883 So. 2d 1027, this court upheld the defendant's conviction of aggravated rape. In *Jackson*, the defendant forced two women upstairs at knife point, tied one of the women up with an electrical cord and put her in a hall closet. The victim testified that while he was tying up the other woman, the defendant told her to shut up "that he had killed a woman in Houston and he would not hesitate killing two more." *Id.* at 363. Then *Jackson* told the victim to go into a room. He approached the victim, twisted her shirt around her neck, placed the knife at her throat and said, "you do it or I do it." *Id.* at 364. The victim then requested that they go into another room, which she testified contained items that she could have used as a weapon. During the rape, the victim testified that *Jackson* did not have the knife, but still had a pair of scissors, which were either in his hand or on the floor near the victim's head during the rape. The victim stated that during the attack the defendant had one hand on his penis and the other hand on her shoulder holding her down; the scissors were on the floor next to her head. After raping the victim, *Jackson* forced her into a bathroom, took her shoes, tied the door shut from the outside and left in the victim's vehicle....

In the case at bar, unlike *Jackson*, the victim testified that the Defendant did not get near her with the knife. Also unlike *Jackson*, the victim did not testify that the knife or any other weapon

was accessible to the Defendant during the commission of the sexual act. Accordingly, we find that the evidence viewed in the light most favorable to the prosecution is not sufficient to uphold a conviction of aggravated rape....

We will, therefore, examine whether any responsive verdict was proven. Forcible rape is a proper responsive verdict for aggravated rape. We will review the evidence in order to determine if the evidence is sufficient for a conviction of forcible rape.

The definition of forcible rape is set forth in La.R.S. 14:42.1 as follows:

Forcible rape is rape committed when the anal, oral, or vaginal sexual intercourse is deemed to be without the lawful consent of the victim because it is committed under any one or more of the following circumstances:

(1) When the victim is prevented from resisting the act by force or threats of physical violence under circumstances where the victim reasonably believes that such resistance would not prevent the rape.

The victim stated that the Defendant pulled the knife out and opened it, but did not remember the knife being very close to her; she stated that she removed her own clothing and that the Defendant put the weapon down before approaching her. The victim also stated that other than saying no to removing her clothing, she offered no other resistance to the attack. In the case at bar, the victim and the Defendant were involved in an intimate relationship both before and after the incident.

The testimony of the victim, when viewed in the light most favorable to the prosecution left reasonable doubt as to whether the victim was "prevented from resisting the act by force or threats of physical violence." Therefore, the evidence does not meet the elements necessary for convicting the Defendant of forcible rape.

Because the evidence is insufficient to convict the Defendant of the responsive verdict of forcible rape, we will review the evidence to determine whether or not the next responsive verdict was proven. Sexual battery is listed by La.Code Crim.P. art. 814(A)(8) as the next proper responsive verdict for aggravated rape. Louisiana Revised Statutes 14:43.1 provides, in pertinent part:

A. Sexual battery is the intentional engaging in any of the following acts with another person where the offender acts without the consent of the victim, or where the act is consensual but the other person, who is not the spouse of the offender, has not yet attained fifteen years of age and is at least three years younger than the offender:

(1) The touching of the anus or genitals of the victim by the offender using any instrumentality or any part of the body of the offender.

The victim testified that she did not consent to having sex with the Defendant. The victim also testified that the Defendant's penis touched her vagina. We find that because the victim testified that she did not consent and because the victim testified that the Defendant touched her genitals, the elements for the offense of sexual battery have been met.

Accordingly, we reverse the Defendant's conviction of aggravated rape and substitute a conviction for sexual battery, a statutory responsive verdict pursuant to La.Code Crim.P. art. 814(A)(8), and remand this case for re-sentencing in conformity with the conviction of sexual battery....

The Defendant's conviction for the offense of aggravated rape is vacated and this court enters a conviction for the responsive offense of sexual battery and remands for sentencing....

Pickett, Judge, dissenting in part.

.... I respectfully dissent from the finding that the conviction for aggravated rape must be vacated. I would find that the evidence, when viewed in a light most favorable to the prosecution, is sufficient to uphold the trial court's finding that the defendant was guilty of aggravated rape as defined at La.R.S. 14:42(A)(3).

Discussion Questions and Notes

- 1) The court began its opinion with "The State of Louisiana alleges that the Defendant struck the victim with his fists, forced her to remove her clothing at knife point, and had sexual intercourse with the victim against her will." It is, thus, a surprise that the court overturned the conviction on both possible rape counts (aggravated and forcible). If the *Touchet* court was indicative of the approach used by modern courts, would the status of rape law be substantially different than it was in the early Twentieth Century (as embodied in the *Cowing* case at the opening of this Chapter)?
- 2) The court's quoting of the relevant aggravated rape statute was highly selective. Whereas the court only included subsection (3), subsections (1) and (2) also provided for aggravated rape when: "(1) When the victim resists the act to the utmost, but whose resistance is overcome by force ... [or] (2) When the victim is prevented from resisting the act by threats of great and immediate bodily harm, accompanied by apparent power of execution." Is there any doubt that (2) would have been met by the defendant's wielding of the knife?
- 3) Under the modern approach, although evidence of resistance can be used to prove force, it is not necessary to do so. Is there any way to reconcile that previous statement with the reasoning of the majority?

The threat of force has always focused on the threat of physical harm to the victim. In 2014, the Kansas Supreme Court opened the possibility of a broader rule by focusing on the word "fear" in the Kansas statute in constructive force cases.

Kansas v. Brooks, 317 P.3d 54 (Kan. 2014)

The opinion of the court was delivered by ROSEN, J.

George James Brooks, III, was convicted of one count of rape under K.S.A. 2005 SUPP. 21-3502(a)(1)(A) (defining rape as “[s]exual intercourse with a person who does not consent to the sexual intercourse” under circumstances “[w]hen the victim is overcome by force or fear”) ... The Court of Appeals reversed Brooks’ conviction[] for rape ... due to insufficient evidence.

We granted the State’s petition for review to determine whether the Court of Appeals erred when it determined that the evidence presented at Brooks’ trial failed to establish that the victim, J.P., was overcome by either force or fear....

[W]e disagree with the Court of Appeal’s analysis, which was based on an erroneous construction of the term “fear,” that no evidence was presented at trial showing that J.P. was overcome by fear. Accordingly, we reverse the Court of Appeals’ decision reversing Brooks’ rape conviction....

Because the parties do not dispute the accuracy of the statement of facts contained in the Court of Appeals’ opinion, we quote extensively from that section of the opinion.

“Brooks and J.P. married in 1996. They separated in May 2005 and were divorced 10 months later. On May 7, 2006, a Sunday, Brooks accessed J.P.’s e-mail account and forwarded to his own e-mail account copies of communications she had with a married male coworker in August and October 2005. The e-mails indicated J.P. and her coworker had been carrying on an extramarital affair.

“Later on May 7, Brooks telephoned J.P. and told her he had copies of the emails. He read portions of them to her during the conversation. J.P. testified at trial that hearing Brooks read the e-mails gave her a very sick feeling. She said Brooks concluded the conversation by saying he would be coming over to her house for sex that evening.

“Brooks arrived at the house about 8:30 p.m. with a folder containing copies of the e-mails. He told J.P. that he would give copies to her employer and to her coworker’s wife if she did not do as he said. J.P. asked Brooks to leave. But he told J.P. that he would carry out his threat to publicize her affair if she didn’t have sex with him. J.P. told Brooks in no uncertain terms that she did not want to have sex with him and it would be against her will. He said that wasn’t a problem. Brooks then directed J.P. to take off her underwear. When she hesitated, Brooks—in her words—‘started getting agitated.’ J.P. complied. Brooks took off his pants and put on a condom. J.P. sat in a chair, and Brooks had intercourse with her. Brooks had his hands on her legs during the act. J.P. said she had her hands over her face and her eyes closed so she would not have to look at Brooks.

“When Brooks was done, J.P. asked for the e-mails. He told her that their encounter had been a ‘test’ and he would be back on Friday for more sex.

“During her trial testimony, J.P. did not elaborate on Brooks’ agitation. And she did not indicate that she thought Brooks would have physically harmed her had she refused to have sex. But she did believe he would disclose the affair. When Brooks confronted J.P., she and her coworker remained romantically involved. J.P. told the jury she did not want the relationship publicized because they worked closely and many of their colleagues knew her coworker’s wife. J.P. said disclosure of the affair would have tainted the

workplace and created something that 'was not a good situation.' But J.P. testified that she had no reason to think she would have been fired or would have suffered any adverse change in the terms or conditions of her employment were the affair to come to light. J.P. told the jury she and Brooks had sex on May 7 only because he had the emails and threatened to expose her workplace affair if she did not submit.

"On Monday, May 8, J.P. told both her lawyer and her counselor what Brooks had done to her the evening before. They urged her to contact the police. She did. A detective with the Topeka Police Department took a statement from J.P. and gave her a recorder to tape any calls from Brooks. She taped a message from her answering machine and several calls with Brooks. In those communications, Brooks asked for money in addition to another sexual encounter. J.P. agreed to meet with Brooks on May 12. When Brooks arrived at her home, police officers arrested him....

On appeal before the Court of Appeals, Brooks argued that the State presented insufficient evidence to convict him of rape... Brooks argued that he was charged with alternative means of committing rape based on the language of K.S.A. 2005 SUPP. 21-3502(a)(1)(A), defining rape as sexual intercourse with a person who does not consent to the sexual intercourse, under circumstances "[w]hen the victim is overcome by force or fear." (Emphasis added.) ... Brooks argued that the State failed to present sufficient evidence that J.P. was overcome by either force or fear when she submitted to having sex with him. Accordingly, he argued that his conviction for rape had to be reversed due to insufficient evidence.

The Court of Appeals addressed Brooks' argument by first determining whether the phrase force or fear established alternative means of committing rape. The court noted that the issue was important because if force or fear established a single means, "then the evidence need only support one or the other to uphold a verdict of guilty." *Brooks*, 46 Kan. App. 2d 608. Conversely, if force or fear established alternative means, then the evidence presented at trial had to be sufficient to support each means. 46 Kan. App. 2d at 608-09.

Based on what it perceived as this court's construction of the phrase in *Wright*, the Court of Appeals concluded that force or fear should be construed as establishing a single means of committing rape....

With regard to "force," the court interpreted the term as requiring a victim to be overcome by the use of actual or physical force against the victim, another person, or property. Based on this construction of the term "force" and the belief that there must be some commonality or relationship between the terms force and fear, the court construed "fear" to mean fear resulting from the use or threat to use force—as that term was defined by the court.

With these definitions in place, the Court of Appeals proceeded to determine whether sufficient evidence was presented at trial to show that J.P. submitted to having sexual intercourse with Brooks based on either force or fear. Regarding force, the court noted that "the record is bereft of any evidence Brooks used force to compel J.P.'s compliance with his demand. To the contrary, he coerced her solely with threats to expose her workplace affair. Brooks did not touch J.P. at all until sexual intercourse occurred." 46 Kan. App. 2d at 611. With regard to fear, the court found that Brooks' threat to publicize J.P.'s affair "did not involve any present or future application of force and, in turn, the response it provoked in J.P., however disquieting or upsetting, did not constitute fear of the sort that supports a rape charge under the Kansas law." 46 Kan. App. 2d at 614. The court concluded that the evidence presented at trial failed to satisfy all the elements of

rape as defined in K.S.A. 2005 Supp. 21-3502(a)(1)(A) and, thus, reversed Brooks' rape conviction. 46 Kan. App. 2d at 614-15.

Judge Stephen Hill dissented, arguing that the term force should be broadly construed to include not only the use of physical force, but also the use of "psychological or emotional force to overcome" a victim. *Brooks*, 46 Kan. App. 2d at 628. Furthermore, he argued that based on *State v. Borthwick*, 255 Kan. 899, 913-14, 880 P.2d 1261 (1994), evidence that a victim was overcome by fear resulting from actions other than the use or threat to use physical force is sufficient to sustain a rape conviction under K.S.A. 2005 Supp. 21-3502(a)(1)(A). Judge Hill believed the evidence presented at trial was sufficient to affirm Brooks' rape conviction. *Brooks*, 46 Kan. App. 2d at 630....

The State contends, however, that the Court of Appeals erred when it reversed Brooks' rape conviction based on the lack of evidence showing that J.P. was overcome by fear resulting from the use or threat to use force. The State argues that the Court of Appeals erred in narrowly construing the term fear, resulting in the court's failure to consider evidence that J.P. was overcome by fear of Brooks publicly exposing her affair with a coworker. The State contends that if this evidence is considered, then sufficient evidence was presented at Brooks' trial to convict him of rape...

[I]t is helpful to look at the structure of K.S.A. 2005 Supp. 21-3502 before examining the specific language of subparagraphs (a)(1)(A). K.S.A. 2005 Supp. 21-3502(a) describes the various acts that constitute rape. The statute states:

"(a) Rape is: (1) Sexual intercourse with a person who does not consent to the sexual intercourse, under any of the following circumstances:

(A) When the victim is overcome by force or fear;

(B) when the victim is unconscious or physically powerless; or

(C) when the victim is incapable of giving consent because of mental deficiency or disease, or when the victim is incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or other substance, which condition was known by the offender or was reasonably apparent to the offender;

"(2) sexual intercourse with a child who is under 14 years of age;

"(3) sexual intercourse with a victim when the victim's consent was obtained through a knowing misrepresentation made by the offender that the sexual intercourse was a medically or therapeutically necessary procedure; or

"(4) sexual intercourse with a victim when the victim's consent was obtained through a knowing misrepresentation made by the offender that the sexual intercourse was a legally required procedure within the scope of the offender's authority." (Emphasis added.)

....

The State argues that it presented sufficient evidence to show that J.P. was, at the very least, overcome by fear as contemplated in K.S.A. 2005 Supp. 21-3502(a)(1)(A). As mentioned above, the Court of Appeals construed the term "fear" to mean fear resulting from the use or threat to use force against the victim, another person, or property. Construing the term fear in this manner led the court to conclude that J.P.'s fear—derived from Brooks' threat to publically reveal her affair with a married coworker—was insufficient to show that she was overcome by fear under K.S.A. 2005 Supp. 21-3502(a)(1)(A). The State contends that the Court of Appeals' construction of the term

fear is contradicted by this court's opinion in *State v. Borthwick*, 255 Kan. 899, 880 P.2d 1261 (1994), a case which explained what type of evidence is sufficient to establish fear in a rape case. The State contends that based on *Borthwick*, J.P.'s fear was sufficient to satisfy the statutory element of the victim being overcome by fear....

In construing the term "fear" in K.S.A. 2005 Supp. 21-3502, this court in *Borthwick* rejected the notion that the fear contemplated in the statute had to result from being threatened with a deadly weapon or even threatened with "force that would prevent resistance by a reasonable person." *Borthwick*, 255 Kan. at 913. The *Borthwick* court refused to define in absolute terms the degree of fear required to sustain a rape conviction, stating that "fear is inherently subjective" because "[w]hat renders one person immobilized by fear may not frighten another at all." 255 Kan. at 913. Similarly, we recently stated in *State v. Tully*, 293 Kan. 176, Syl. ¶ 12, 262 P.3d 314 (2011), that "[f]orce or fear within the definition of rape is a highly subjective concept that does not lend itself to definition as a matter of law." *Cf. State v. Chaney*, 269 Kan. 10, 20, 5 P.3d 492 (2000) ("Like force or fear, incapacity to consent is a highly subjective concept. It is not one which lends itself to definition as a matter of law.").

The victim in *Borthwick* suffered from extreme mobility disabilities; she could not walk without assistance or stand without support. She invited the defendant over to her house. After arriving at the victim's house, the defendant sat down behind the victim on the floor and began touching her despite her asking him to stop. The defendant eventually laid the victim on the floor, lifted up her legs, removed her shorts and underpants, and digitally penetrated her. She testified that she told him to stop and that she tried to keep her legs together, "'but they always c[a]me apart.'" *Borthwick*, 255 Kan. at 902. Finally, the victim said that during the encounter, she was afraid and felt powerless to stop what was happening. Despite the victim also testifying on cross-examination that the defendant did not "force her in any fashion and that he did not threaten her," the *Borthwick* court concluded that the evidence, when viewed in the light most favorable to the State, was sufficient to establish that the victim was overcome by both force and fear. 255 Kan. at 903, 914.

In reaching this conclusion, the *Borthwick* court distinguished a Pennsylvania case, *Com. v. Berkowitz*, 537 Pa. 143, 641 A.2d 1161 (1994), cited by the defendant to support his argument that the State presented insufficient evidence to show that the victim was overcome by force or fear. The *Borthwick* court found that the Pennsylvania case was distinguishable because:

"The Pennsylvania legislature defined rape differently than did our legislature. The pertinent portions of the Pennsylvania statute under which [the defendant] was charged required the State to prove that the intercourse occurred 'by forcible compulsion' or 'threat of forcible compulsion that would prevent resistance by a person of reasonable resolution.' [Citation omitted.] The Pennsylvania legislature did not permit a rape conviction when a victim is overcome by fear, except to the extent that it is fear induced 'by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution.' Fear in and of itself is inherently subjective. Unless otherwise limited in the statutory definition as it is in Pennsylvania, a finding that a particular victim is overcome by fear does not require proof that it is fear induced by threat of force that would prevent resistance by a reasonable person. What renders one person immobilized by fear may not frighten another at all. The reasonableness of a victim's claim that she was overcome by fear necessarily enters into the factfinder's determination about whether the victim is

telling the truth. There is then an important difference between nonconsensual intercourse with a victim overcome by fear (Kansas) and sexual intercourse 'by forcible compulsion' or 'threat of forcible compulsion that would prevent resistance by a person of reasonable resolution' (Pennsylvania)." (Emphasis added.) 255 Kan. at 912-13.

The above passage demonstrates that the *Borthwick* court refused to qualify the term "fear" by reading language into K.S.A. 21-3502 (Ensley 1988) that was not readily found within the statute. Because the legislature did not limit the type of fear that could support a rape conviction, the *Borthwick* court concluded that finding a particular victim is overcome by fear under Kansas' rape statute does not require proof that the victim's fear was "induced by threat of force that would prevent resistance by a reasonable person." 255 Kan. at 913. Instead, the *Borthwick* court noted that "fear is inherently subjective" because "[w]hat renders one person immobilized by fear may not frighten another at all." 255 Kan. at 913. Accordingly, the *Borthwick* court stated:

"Under Kansas law, when a victim testifies that she was overcome by fear, and her testimony is not 'so incredible as to defy belief,' [citation omitted] there is sufficient evidence to present the ultimate determination to the factfinder. The reasonableness of a particular victim's fear may affect the jury's assessment of the victim's credibility in arriving at its verdict." 255 Kan. at 913-14.

Notably, the Court of Appeals' construction of "fear" to mean fear resulting from the use or threat to use force against the victim, another person, or property directly conflicts with the *Borthwick* court's pronouncement that fear is an inherently subjective concept that is generally a question to be resolved by the finder of fact. See 255 Kan. 899, 880 P.2d 1261, Syl. ¶ 6. Furthermore, by defining "fear" in the manner that it did, the Court of Appeals clearly read language into the statute that was not readily found in it, violating a well-known rule of statutory construction....

For these reasons, we conclude that the Court of Appeals erred when it construed the term fear in K.S.A. 2005 Supp. 21-3502(a)(1)(A) to mean fear resulting from the use or threat to use force against the victim, another person, or property. In accordance with ... *Borthwick*, we refuse to qualify the term fear and instead note that fear is an inherently subjective concept because, as recognized by the *Borthwick* court, "[w]hat renders one person immobilized by fear may not frighten another at all." 255 Kan. at 913. As a result, whether a victim is overcome by fear for purposes of K.S.A. 2005 Supp. 21-3502(a)(1)(A) is generally a question to be resolved by the finder of fact....

Viewing this evidence in the light most favorable to the State, we conclude that sufficient evidence was presented at trial showing that Brooks had nonconsensual intercourse with J.P. under circumstances when she was overcome by fear. A rational factfinder could infer from the facts presented at trial that J.P. clearly feared Brooks would publicize the e-mails if she did not submit to having sex with him. And because of this fear, she ultimately submitted to having nonconsensual sex with Brooks. Furthermore, J.P.'s testimony indicates that Brooks' behavior and agitation inside her home contributed to J.P. being overcome by fear. J.P. stated that she initially refused Brooks' request for her to take off her underwear, but because Brooks became agitated, she ultimately complied. Finally, a rational factfinder could infer from J.P.'s actions while being sexually penetrated (i.e., closing her eyes and covering her face with her hands) that she was overcome by fear. Finding otherwise is to deny the legitimacy of J.P.'s justifiable fear and its effect on her behavior.

Both dissenting opinions are troubled by our conclusion that sufficient evidence supports Brooks' conviction for rape. Justice Moritz acknowledges that the evidence presented at trial established that Brooks' actions placed J.P. in fear. And because of this fear, J.P., against her will, submitted to being sexually assaulted by Brooks. In other words, she was overcome by fear. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1607 (1993) (defining "overcome" as "to get the better of" and "to affect or influence so strongly as to make physically helpless or emotionally distraught" and identifying "overpower," "conquer," and "subdue" as synonyms of overcome). But the dissent contends that the evidence does not establish that J.P. was overcome by fear because there was no evidence presented at trial that J.P. was "immobilized or paralyzed" by fear, terms it believes are synonymous with overcome.

In support of this position, Justice Moritz notes that we use the phrase "immobilized by fear" four times in our opinion in place of "overcome by fear," which the dissent takes as indicating our acceptance of the phrases' synonymous meanings. What the dissent fails to note is that the four instances where the phrase immobilized by fear appears in our opinion is when we are quoting from *Borthwick* for the purpose of explaining why the Court of Appeals erred in construing the term "fear" to mean "fear of force." Again, *Borthwick* rejected such a qualification of the term, instead concluding that "fear," as used in the rape statute, is a subjective concept because "[w]hat renders one person immobilized by fear may not frighten another at all." *Borthwick*, 255 Kan. at 913. The *Borthwick* court used the phrase immobilized by fear to merely illustrate the subjective nature of "fear." Nowhere in the opinion did the court state or imply that "immobilized" was synonymous with "overcome" in 21-3502. And based on the definition of immobilize, it is clear that the terms are not synonymous. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1130 (1993) (defining "immobilize" as "to make immobile" or "fix in place or position" or "render incapable of movement").

Concluding that the terms are synonymous, both Justice Johnson and Justice Moritz then point to J.P.'s behavior prior to and after the sexual intercourse as being indicative of someone who merely succumbed to conspiracy or blackmail and not someone who was overcome by fear. In making this argument, i.e., how a rape victim should act, both of the dissents take on the role of a jury, weighing the evidence and passing on the credibility of J.P., something that is clearly improper on appellate review. To make matters worse, the dissenting opinions completely ignore the evidence establishing that J.P. was overcome by fear immediately before and during the sexual intercourse, e.g., her compliance with Brooks' command for her to take off her underwear, her assumption of a submissive position in the chair, and her closing her eyes and covering her face with her hands so she did not have to look at Brooks as he penetrated her. Viewing this evidence in the light most favorable to the State, a rational factfinder could clearly conclude that J.P. did not consent to the sexual intercourse because she was overcome by fear, i.e., her fear got the better of her; her fear affected or influenced her so strongly as to make her physically helpless; her fear overpowered, conquered, and subdued her. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1607 (1993). Even under the dissent's construction of "overcome," a rational factfinder could conclude from this evidence that J.P. did not consent to the sexual intercourse because she was "immobilized or paralyzed" with fear. To find otherwise validates those who espouse a "legitimate rape" theory, i.e., rape as a result of physical violence as the sole means by which a rapist can be held criminally accountable.

Finally, the dissent points to facts present in *Borthwick* (victim testified that she felt “powerless” to stop the defendant’s actions) and *Cantrell* (victim testified that she resisted and struggled with defendant, cried, and begged for defendant to stop) as indicating that because those facts were not present in this case, insufficient evidence was offered to show that J.P. was overcome by fear. By making this argument, it appears the dissent is again contending that there are certain behaviors a victim must display—other than the ones J.P. displayed—to convey that he or she was overcome by fear. This assertion would be contrary to *Borthwick*, which stated: “In order to determine whether a rational factfinder could have found beyond a reasonable doubt that a victim of rape has been overcome by force or fear, we consider the record as a whole. Each case must be decided on its unique facts in arriving at this determination.” (Emphasis added.) *Borthwick*, 255 Kan. at 911. Notably, *Cantrell* exemplifies this rule; despite no testimony from the victim stating that she was afraid or in fear, the *Cantrell* court concluded that based on the circumstantial evidence highlighted above, a rational factfinder could infer that the victim was overcome by fear. 234 Kan. at 428-29.

Because we find that sufficient evidence was presented at trial showing that J.P. did not consent to the sexual intercourse because she was overcome by fear, we reverse the Court of Appeal’s decision reversing Brooks’ rape conviction and affirm that conviction.

JOHNSON, J., dissenting:

I agree with that part of my colleague’s dissent that opines that the evidence in this case is insufficient for a rational jury to find that the sexual intercourse between the defendant, Brooks, and the victim, J.P., occurred because J.P. was overcome with fear....

I fear that the majority’s interpretation—equating a woman who bargains away the potential for public embarrassment with a woman whose resistance to being raped has truly been overcome by an actual and immediate fear—might seem to trivialize the trauma and sense of violation that must surely accompany the latter actual-fear scenario.

Where I part company with both the majority and the dissent is with their apparent belief that the evidence established, beyond a reasonable doubt, the threshold requirement that J.P. was “a person who [did] not consent to the sexual intercourse.” K.S.A. 2005 Supp. 21-3502(a). In my view, the evidence established that J.P. did consent to having sexual intercourse with Brooks. The majority is misdirected by J.P.’s apparent attempt to thwart Brooks’ blackmailing scheme by telling him that she did not want to have sex and that the sex would be against her will. When that ploy failed, J.P. understood, as she recited at trial, that there was nothing else she could do, short of having sex with Brooks, to keep him from carrying out his threat to disclose her affair. Thus, she begrudgingly consented to have sex with Brooks in order to buy his silence. In other words, J.P. made the volitional choice to have sex with Brooks rather than having her extramarital affair disclosed to her boss and her paramour’s spouse. That circumstance refutes the nonconsensual element of rape.

In sum, the State proved that Brooks committed a reprehensible act, but it did not prove that he committed the statutory crime of rape. I would affirm the Court of Appeals and reverse the rape conviction.

MORITZ, J., dissenting:

... I respectfully dissent from the majority's holding that the State presented sufficient evidence to show that J.P. was overcome by fear. As explained below, the majority's rationale is fundamentally flawed in that it conflates the element of lack of consent with the requirement that the victim be overcome by force or fear and essentially renders the latter requirement meaningless. In this case, while the State presented evidence that the victim did not consent, I would find the evidence fell far short of establishing that the victim was overcome by force or fear. Therefore, I would affirm the Court of Appeals' decision reversing Brooks' rape conviction....

In rejecting Brooks' alternative means argument, the majority isolates the phrase "overcome by force or fear" and concludes the *actus reus* of K.S.A. 2005 Supp. 21-3502(a)(1)(A) is "overcome" and the phrase "force or fear" merely describes the material element. But then, in analyzing the sufficiency of the evidence, the majority devotes much attention to construing the material element of "fear," yet fails to fully discuss or apply the *actus reus* or "guilty act," which requires not simply that the victim was afraid, but that the victim was overcome by that fear. Put another way, the evidence discussed by the majority adequately supports that J.P.'s fear led her to have nonconsensual intercourse but fails to support that she was overcome by fear. The statute, however, requires proof of both.

Significantly, at several points in its opinion, the majority uses the phrase "immobilized by fear" in place of "overcome by fear," apparently accepting their meaning as synonymous. I do not object to this characterization as it is supported by our caselaw and comports with the meaning of the term "overcome." See *State v. Borthwick*, 255 Kan. 899, 913, 880 P.2d 1261 (1994) ("What renders one person immobilized by fear may not frighten another at all."); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1607 (1993) (defining "overcome" as "to get the better of" and "to affect or influence so strongly as to make physically helpless or emotionally distraught").

Nor do I disagree with the majority's conclusion that J.P. "clearly feared Brooks would publicize her affair if she did not submit to having sex with him" or that "because of this fear, she ultimately submitted to having nonconsensual sex with Brooks."

Where I diverge from the majority's analysis is with its conclusion that J.P. not only "submitted to" that fear and had nonconsensual intercourse, but that she did so because she was "overcome" by fear. To reach this holding, the majority makes assumptions not borne out by the evidence and ignores other evidence plainly establishing J.P. was never immobilized or paralyzed by her fear.

Namely, J.P. testified that earlier the day of the incident Brooks called her and read the incriminating e-mails to her and warned "everybody is going to pay." After hearing Brooks' threats, J.P. called the coworker with whom she was having the affair to tell him about the threats. J.P. testified that Brooks called again later and told her "this has to happen tonight, meaning that [Brooks] was going to come over for sex that night." Officer Patrick McLaughlin, who later investigated the incident, confirmed that J.P. told him that during her phone call with Brooks, Brooks told J.P. that if she had sex with him, he would not distribute the e-mails.

Thus, the record shows that Brooks made multiple phone calls to J.P. warning her of his plan to come to her home that evening and the reasons for his visit, and J.P. clearly took his threat seriously as evidenced by her call to her coworker. Yet J.P. did not contact law enforcement.

Instead, as expected, Brooks arrived at J.P.'s home about 8:30 p.m. that evening, and the two had a brief conversation in which Brooks repeated his threat that if she did not have sex with him, he would give the e-mails to her employer and to her coworker's wife.

J.P. did not immediately succumb to Brooks' threats but instead went upstairs to her bedroom, ostensibly trying to put her daughter to sleep, but actually "avoid[ing] having to go back downstairs and face him, and ... hop[ing] maybe that he would leave." Brooks came upstairs a couple of times to see if the couple's daughter was asleep, but otherwise he remained downstairs. J.P. remained upstairs until after midnight.

Again, despite knowing Brooks' demands, J.P. still did not contact police. J.P. acknowledged that she had a phone in her bedroom and could have called police at any time after Brooks arrived, but she did not do so.

Nor did J.P. contact the police immediately after the incident. Instead, she discussed the incident with a counselor the following day, and the counselor advised her to call the police. But J.P. did not contact the police until she visited with her attorney 3 days after the incident while trying to "get this situation under control" and secure a protection from abuse order. Her attorney also advised she contact the police and made an appointment with a detective for her.

Simply stated, while these may be the actions of someone who succumbed to conspiracy or blackmail, they are not the actions of someone immobilized or paralyzed by fear....

Moreover, the only case relied upon by the majority to support its conclusion that the State presented sufficient evidence that J.P. was overcome by fear, *Borthwick*, is critically distinguishable. Specifically, the defendant there challenged the sufficiency of the evidence of fear, and the court focused on that issue in its opinion. A review of the factual circumstances of that case demonstrates this distinction.

Most notably, *Borthwick*'s victim was unable to walk without assistance or stand without support because of an extreme disability. After arriving at the victim's home, the defendant sat on the floor behind her, rubbed her back, lifted her shirt and bra, and nibbled on her ear. Although the victim repeatedly asked *Borthwick* to stop, he continued, laying her down on the floor, lifting her legs, removing her shorts and underwear, and digitally penetrating her. *Borthwick*'s victim testified she told the defendant to stop and that she tried to keep her legs together, "'but they always c[a]me apart.'" 255 Kan. at 902. Finally, the physically disabled victim in *Borthwick* felt "powerless" to stop what was happening. 255 Kan. at 902 (discussing and summarizing victim's testimony).

Relying on the victim's testimony, the *Borthwick* court concluded the victim was overcome by her fear. See 255 Kan. at 913-14 (upholding rape conviction and stating that "when a victim testifies that she was overcome by fear, and her testimony is not 'so incredible as to defy belief' [citation omitted], there is sufficient evidence to present the ultimate determination to the factfinder"). In doing so the *Borthwick* court noted that "[w]hat renders one person immobilized by fear may not frighten another at all." (Emphasis added.) 255 Kan. at 913.

While *Borthwick* is similar to this case in that neither victim consented to sexual intercourse and both victims “feared” their aggressors, *Borthwick* is critically distinguishable in several respects, all of which pertain to the evidence of the *actus reus*, which requires that the victim be immobilized by that fear.

First, the victim in *Borthwick*, unlike J.P. here, was not threatened before the defendant appeared at her home, nor does the evidence indicate she had several hours, as did J.P., to contemplate that threat and contact law enforcement to prevent it.

Second, unlike the victim in *Borthwick*, J.P. never testified that her fear of Brooks’ threat to turn over the e-mails overwhelmed her, immobilized her, or paralyzed her. Rather, when asked about the nature of her concern she testified: “[I]t’s not something [an affair with a married coworker] you want public, you know.... I still, you know, he worked there, a lot of people know him and his wife, and a lot of people know me, and just it was not a good situation.”

At this juncture, I would note that I reject the majority’s characterization of the facts suggesting that Brooks physically overcame J.P. While the majority points out that J.P. testified Brooks became agitated before they had sex, J.P. never testified that this fact had anything to do with her decision to submit to intercourse or intensified her fear. In fact, she specifically clarified that Brooks’ threats remained the same despite his agitation.

Finally, while the majority points out that circumstantial evidence can be relied on to show that a rape victim was overcome by fear, the only case it cites to support that proposition, *State v. Cantrell*, 234 Kan. 426, 428-29, 673 P.2d 1147 (1983), cert. denied 469 U.S. 817, 105 S. Ct. 84, 83 L. Ed. 2d 31 (1984), is markedly distinguishable. In *Cantrell*, despite the lack of threats or force by the victim, there was ample evidence that the victim was overcome by her fear. Specifically, the victim testified she (1) resisted and struggled with defendant, (2) cried, and (3) begged for defendant to stop.

To be clear, I am not proposing that in order to convict a defendant of rape under K.S.A. 2005 Supp. 21-3502(a)(1)(A), the State must show that the victim physically resisted the defendant. Nor am I suggesting that the defendant is not criminally responsible for his actions here. Instead, I would hold that the State does not prove the *actus reus* of the crime of rape simply by establishing that the victim did not consent and that the victim feared the defendant. Instead, the State must present sufficient evidence that the victim did not consent, that she feared the defendant, and that she was immobilized or paralyzed by that fear. Because the State failed to present evidence of the latter element here, I would affirm the defendant’s two blackmail convictions and reverse his conviction of rape.

Discussion Questions and Notes

- 1) Do you agree with majority that the word “fear” in the Kansas statute includes fear from non-physical harm?

- 2) Are there circumstances when you think the majority's holding would criminalize conduct that you think should be legal?
- 3) What is the state's best evidence that the victim was "overcome" with fear? Do you think the dissent or majority has the better argument regarding the word "overcome" assuming that fear of non-physical harm is a viable theory under the Kansas statute?

II. *Mens Rea* Requirements

There is some variation among jurisdictions regarding the mistake of fact instructions to be used for analyzing *mens rea* issues in rape cases. Although most mistake cases revolve around issues of nonconsent, separate *mens rea* rules have also emerged for the other act requirements of rape.

A. *Mens Rea* of the Sex Act

Mistakes of fact as to the sex act are rare. Cases involving such mistakes invariably arise in attempted rape cases. In such scenarios, there can be unresolved ambiguity as to what sex acts the defendant was hoping to complete. Because jurisdictions sometimes only criminalize certain sex acts (or punish certain acts, such as sodomy, more harshly), *mens rea* mistakes can arise as demonstrated in the following case.

Louisiana v. Trackling, 609 So. 2d 206 (La. 1992)

PER CURIAM:

The defendant was convicted by a jury of aggravated battery and attempted aggravated rape... We granted the defendant's application to review his claim that the evidence at trial was insufficient to sustain his attempted aggravated rape conviction. The merits of the defendant's conviction for aggravated battery are not before the Court. As to that conviction, the judgment of the court of appeal is final. As to the defendant's conviction for attempted aggravated rape, we now reverse.

To convict the defendant of attempted aggravated rape, the state had to prove that he specifically intended to engage in an act of anal or vaginal sexual intercourse without his victim's lawful consent. Such proof is indispensable because specific intent to accomplish the offense is the *sine qua non* of the criminal offense of attempt, *State v. Parish*, 405 So.2d 1080 (La. 1981), and anal or vaginal sexual intercourse without lawful consent constitutes the act of rape. The record is replete with evidence that the defendant sought to overcome the resistance of his female

companion by using a knife to extort a sexual act from her. This proof was sufficient to establish that the sex act attempted was "aggravated." However, the only direct evidence indicating what sex act the defendant intended to consummate came from the defendant himself and it precluded a finding of guilt beyond reasonable doubt as to the charged offense.

The testimony of both the defendant and his victim established that the two met in a North Broad Street drug store and travelled some distance by bus to his Cohn Street home after agreeing on a "drugs for sex" exchange. The defendant, who maintained that oral sex was his goal, testified that upon arriving at the Cohn Street residence, the two smoked cocaine he had obtained just prior to entering his home, then the woman performed fellatio on him, as agreed. After a brief trip to the bathroom to wash, the defendant reentered his bedroom to witness the woman stealing his money, and a fight ensued during which each participant armed himself and cut the other. Hearing the disturbance, neighbors called the police, who confronted the disheveled woman and defendant when they knocked on the door of the residence to which the neighbors directed them.

For her part, the victim testified about her agreement to have "sex." In recounting events inside the defendant's home, however, she told jurors that after he reneged on his promise to give her drugs, the defendant insisted, as they began struggling, "You're going to suck my thing." The victim testified that when the police entered the house, "the only clothes I didn't have on was the top."

Evidence that the defendant forcibly grabbed the victim while announcing his intent to commit an act of sexual intercourse will support a conviction for attempted rape. In this case, however, the victim never clarified what she meant when she agreed to have "sex" with the defendant. The defendant's contemporaneous declaration of desire went no further than oral sex and the state's circumstantial evidence of his intent, as manifested by the physical struggle with the victim, was not so inconsistent with his announced purpose that it excluded the reasonable possibility that the defendant meant exactly what he said.

The record is bereft of evidence that the sexual act the defendant attempted to accomplish was either vaginal or anal intercourse.... When all the evidence in the instant case is taken in the light most favorable to the prosecution, it is insufficient to justify any rational juror in finding beyond a reasonable doubt that the defendant specifically intended to perpetrate an act of vaginal or anal intercourse. For this reason, the attempted aggravated rape conviction cannot stand....

Accordingly, the attempted aggravated rape conviction is reversed, the fifty year multiple offender sentence imposed by the trial court is vacated, and the defendant is ordered discharged from custody relating to this conviction.

Discussion Questions and Notes

- 1) Do you agree with the court that a reasonable juror could not have found that the defendant intended to engage in vaginal or anal intercourse?

B. Mistake of Consent or Incapacitation

Consent is the primary issue in the large majority of non-stranger rape cases that go to trial. The defendant will often make two related arguments: 1) the sex was consensual; and 2) if the sex was not consensual, the defendant made an honest and/or reasonable mistake that it was consensual. In the following case, focus on the court's discussion of the adequacy of the jury instruction regarding consent.

Utah v. Barela, 2015 UT 22 (Utah 2015)

JUSTICE LEE, opinion of the Court:

This is an appeal from a conviction of Robert Barela of first-degree rape....

Barela had sex with K.M. at a Massage Envy studio, where Barela was employed as a massage therapist and K.M. was a client. K.M. had received one previous massage from Barela at the studio. And when she arrived on the date in question, she had not requested Barela as her therapist. K.M. removed all of her clothing for the massage. During the massage she was covered only by a sheet and blanket.

That much is undisputed. But as to other details of the events leading to the sexual encounter, the jury heard two very different stories. In Barela's version of the encounter, K.M. became aroused and initiated sexual contact by humping the table and grabbing Barela's crotch. The two then began having sex, in which K.M. showed active engagement by giving him oral sex, rolling over on the table, and playing with her breasts.

In contrast, K.M. told the jury that she was receiving a massage from Barela when he unexpectedly started massaging her inner thigh. She testified that she felt "very uncomfortable" because she had never had a massage therapist do that in previous massages, and she "didn't know how to respond." Then, "before [she] knew it," Barela pulled her to the end of the table, dropped his pants and penetrated her vagina with his penis. K.M. testified that "everything happened very fast" and that Barela may have touched or penetrated her vagina with his finger, but that she wasn't sure. She testified that Barela went from rubbing her thigh to penetrating her vagina within "a matter of seconds."

K.M. testified that she had not "flirt[ed]" with Barela, and did not say or do anything to suggest that she wanted to have sex with him. She also testified that she did not physically resist or verbally tell Barela "no"; she said nothing at all. Instead, she clung to the blanket and "just froze." She said she felt fearful because she was alone, and because the only other person in the massage parlor was a male receptionist. She repeatedly stressed that "everything happened very fast." She elaborated that she "checked out," "kind of withdrew," and "was scared." When asked to explain what "checked out" meant, K.M. said she just "kind of froze."

K.M. testified that she heard Barela make an alarmed (and profane) exclamation, and then saw him looking at semen in his hand. Then he told her "this concludes your massage" and left the

room. K.M. got up as "quickly as [she] could," wiped herself with a towel, and got dressed. She testified that her main concern was "getting out of Massage Envy" as quickly as she could. Barela met her in the hallway, where he offered her water, which she accepted. She "checked out as normal," told the receptionist the massage was "fine," paid her bill (including a tip), and took a mint.

K.M. testified that she then drove away from the massage studio but pulled over a few blocks away. At that point she telephoned her friend, who described her as "frantic" and "very upset." She returned home to her partner, Trista, who said K.M. was sobbing, shaking, and hysterical. Trista drove K.M. to the hospital. At the hospital, K.M. was examined by a nurse trained in examining sexual assault victims. The nurse found semen in K.M.'s vagina, which was identified as Barela's through DNA testing. According to the nurse, K.M.'s physical condition was consistent with K.M.'s account. But she conceded that K.M.'s condition was also "consistent with consensual sex," as there was no genital injury, while explaining that only twenty to thirty percent of assault victims display genital injuries. The nurse also testified that sometimes victims of sexual assault or other shocks have a difficult time remembering the details of the event.

The defense's primary theory at trial was that K.M. had been the instigator and that the sex was consensual. In addition, the defense also asserted that K.M. had lied about the encounter in an effort to protect her relationship with Trista. In further explanation of this theory, the defense presented evidence that K.M. and Trista had one child together (conceived by K.M. through artificial insemination), and that at the time of the massage K.M. was taking fertility medication and had been artificially inseminated only a few days earlier. The evidence also indicated that the sperm donor was an African American friend of K.M. and Trista. Thus, the defense theory was that K.M. had consensual sex with Barela, worried that she had conceived and that the baby would resemble him (a "light-skinned Hispanic"), and that a "serious problem" would ensue when Trista realized that the baby did not resemble their African American donor.

The defense also challenged the plausibility of K.M.'s version of events. First, the defense highlighted elements of K.M.'s testimony that were allegedly inconsistent with her previous accounts of the rape: (a) that K.M. had told the nurse that Barela had massaged her genitals and told the police that he had penetrated her vagina with his finger, but at the preliminary hearing she could not remember whether he had penetrated her with his finger or with his penis and at trial could not remember whether he had touched her vagina at all; and (b) that K.M. had explained her freezing reaction in different ways at different times, characterizing it alternatively as a result of fear, surprise, or drowsiness.

The defense also asserted that K.M.'s actions after the sexual encounter were inconsistent with rape. It noted that K.M. had accepted water from Barela and checked out of the massage studio as normal and left a tip, without appearing (to the receptionist) to be upset. And the defense emphasized that K.M. had told Trista that she didn't know if she was raped because she didn't resist, a point arguably consistent with a statement she made to a police detective—that she didn't "necessarily ... even care if he's convicted of a crime." Counsel also reminded the jury that there was no evidence of vaginal trauma. And the defense argued that if the rape occurred quickly as K.M. had indicated, it would stand to reason that she would have suffered genital injury.

After closing arguments, the jury was given its instructions. Instruction 13 enumerated the elements of the offense of rape. It indicated that in order to find Barela guilty of rape the jury would have to find the following:

1. The defendant, Robert K. Barela,
2. Intentionally or knowingly;
3. Had sexual intercourse with K.M.;
4. That said act of intercourse was without the consent of K.M.

Instruction 14 quoted a large portion of Utah Code section 76-5-406, which lists "circumstances" in which "[a]n act of sexual intercourse ... is without the consent of the victim." The list in Instruction 14 did not make express reference to a circumstance in which the victim "freezes." But in closing argument the prosecutor asserted that Instruction 14 was not an "exhaustive list" that "tells you where as a matter of law consent doesn't exist." And the prosecutor told the jury that "ultimately it is up to you to determine if after listening to the facts consent exists in this case."

The jury found Barela guilty....

Barela then filed a motion for new trial. In support of that motion, Barela asserted first that the evidence of K.M.'s nonconsent was insufficient, particularly under Barela's reading of Utah Code section 76-5-406 (as providing an exclusive list of ways the prosecution may establish nonconsent). Second, Barela asserted that trial counsel had been ineffective in a variety of ways: in failing to introduce evidence corroborative of Barela's story, in failing to challenge evidence harmful to Barela, in failing to advance a mistake of fact defense, in failing to request a mistake of fact instruction, and in failing to object to Instruction 13 on the ground that it did not clearly require proof of *mens rea* as to K.M.'s nonconsent. The district court rejected each of these arguments and denied Barela's motion.

Barela challenges his conviction and the denial of his motion for new trial on grounds mirroring those asserted in support of his motion in the district court. We consider each of his arguments under well-settled standards of review – yielding deference to the jury's determination of the sufficiency of the evidence but addressing the legal questions he raises *de novo*

... Barela claims that his trial counsel was ineffective in limiting his defense to a "he-said, she-said" approach –in urging the jury simply to believe Barela's story that K.M. was the instigator and to reject K.M.'s contrary account. In Barela's view, counsel should instead have pressed an alternative theory, that even if Barela was the instigator, he was not guilty of rape because he was reasonably mistaken – or in other words lacked *mens rea* – as to K.M.'s nonconsent. And second, Barela also charges a related error in counsel's failure to object to the statement of the *mens rea* requirement in the elements instruction given to the jury (Instruction 13). We reject the first point but agree as to the second....

It is easy to second-guess counsel's trial strategy from the rearview mirror of an appeal. Given that the jury rejected Barela's account and apparently accepted K.M.'s, it is tempting to deem counsel's strategy faulty.... We may not evaluate counsel's conduct from the hind-sight-biased vantage point of the appeal. Instead, we must consider whether counsel's decision to proceed with the "he-said, she-said" approach was reasonable at the time he made this decision. Viewed in this light, there is no doubt that counsel's decisions were reasonable.

At the time of trial, counsel had ample reason to anticipate the meaningful possibility that the jury would reject K.M.'s account and accept Barela's. Some inconsistencies in K.M.'s story left some room for that hope, as, of course, did the high standard of proof beyond a reasonable doubt. And granted, counsel could legally have presented alternative theories to the jury. Thus, instead of just relying on Barela's account and discounting K.M.'s, counsel could have openly entertained the possibility that K.M. was telling the truth, and invited the jury (through witness examination and in closing) to nonetheless acquit on the ground that he might have been the instigator but mistaken as to whether she consented....

If counsel had pursued this alternative defense, it could reasonably have anticipated doing significant damage to its principal theory. The damage would ensue from the fact that the alternative theory would require counsel to openly entertain the possibility that his client was lying. Such a move is legally tenable, but strategically fraught with risk. We cannot properly fault defense counsel for avoiding this risk and sticking with a single, straightforward defense on appeal.

Yet that same analysis cannot excuse counsel's failure to object to Instruction 13. That instruction, as quoted above, identified four elements of rape: "1. The defendant, Robert K. Barela, 2. Intentionally or knowingly; 3. Had sexual intercourse with K.M.; 4. That said act of intercourse was without the consent of K.M."

This instruction was in error. In asking the jury to consider whether Barela "intentionally or knowingly" "had sexual intercourse with K.M." and whether the intercourse was "without [her] consent," the instruction implied that the *mens rea* requirement ("intentionally or knowingly") applied only to the act of sexual intercourse, and not to K.M.'s nonconsent. It conveyed that idea by coupling the *mens rea* requirement directly with the element of sexual intercourse, and by articulating the element of K.M.'s nonconsent without any apparent counterpart requirement of *mens rea*.³ That implication was error. After all, our criminal code requires proof of *mens rea* for each element of a non-strict liability crime, and the crime of rape unmistakably includes the element of nonconsent. So, as our court of appeals has held, the crime of rape requires proof not only that a defendant "knowingly, intentionally, or recklessly had sexual intercourse," but also that he had the requisite *mens rea* as to the victim's nonconsent.

Instruction 13 was in error. And reasonable trial counsel should have objected to it. On this point, there is no reasonable strategy that could explain trial counsel's performance. Again, a reasonable lawyer could well have decided not to present alternative theories to the jury – particularly where (as here) the fallback theory (reasonable mistake as to nonconsent) could have undermined the primary one (the victim was the instigator). But no reasonable lawyer would have found an advantage in understating the *mens rea* requirement as applied to the victim's nonconsent. There is only upside in a complete statement of the requirement of *mens rea*,

³ In response, the State asserts that the court of appeals upheld a similar instruction in *State v. Marchet*, 2009 UT App 262, ¶¶ 21-23, 219 P.3d 75. But the instruction in that case differed from the one here in a crucial respect: the *mens rea* element was listed last, after both the "sexual intercourse" and "nonconsent" elements. *id.* ¶ 21. That instruction at least arguably suggests that the *mens rea* element applies to all of the above-listed elements. So we proceed on the ground that *Marchet* is distinguishable, and without reaching the question of whether the instruction in that case was an accurate statement of law.

particularly in a case like this one where the jury could reasonably have decided to reject both the prosecution's case and the defense's case in a manner that could have led to an acquittal. Thus, trial counsel was ineffective in failing to object to Instruction 13.

That misstep, moreover, was reasonably likely to have affected the verdict. The jury apparently did not accept all of Barela's story – of K.M. being the sexual instigator. But that does not foreclose the possibility that a properly instructed jury might still have rendered a verdict in his favor. If Instruction 13 had clearly and correctly required the jury to find *mens rea* as to K.M.'s nonconsent, the jury could reasonably have acquitted Barela on the basis of a determination that he mistook K.M.'s reaction for consent. And on this record we conclude that that was reasonably likely.

The jury heard two different accounts of the events leading to Barela's sexual intercourse with K.M. – Barela's and K.M.'s. Barela painted K.M. as the instigator. K.M. had it the other way around (Barela as the instigator). But even in K.M.'s account, she never explicitly (in words) or openly (in physical resistance) rebuffed Barela's advances. Instead K.M. testified that she "froze" –neither actively participating in sex nor speaking any words.

On this record, we have no way of knowing how the jury processed these two stories. Thus, we cannot properly conclude that the jury found K.M.'s account "credible," as the dissent suggests. Because the instructions required *mens rea* only as to sexual intercourse, all we know from the jury's verdict is that it concluded (a) that Barela's intercourse with K.M. was intentional or knowing, and (b) that K.M. did not consent. But that does not at all mean that the jury accepted K.M.'s story lock, stock, and barrel. The jury could easily have thought that the truth fell somewhere in between the two accounts – that K.M. was somewhat flirtatious but not the clear instigator (and did not ultimately consent). And even in that event, the jury (as incorrectly instructed) could still have found Barela guilty upon a mere finding of intercourse that was intentional and nonconsensual – but without ever considering Barela's state of mind as to K.M.'s consent....

We reverse on this basis. A reasonable jury could have found the truth to lie somewhere between Barela's and K.M.'s accounts. And a reasonable jury viewing the evidence in that way could have acquitted Barela if correctly instructed – on the basis of a determination that Barela had neither knowledge nor recklessness as to K.M.'s nonconsent. We accordingly conclude that counsel's ineffective assistance was prejudicial, as it was reasonably likely to have changed the verdict.

JUSTICE DURHAM, dissenting:

I agree that Mr. Barela's counsel provided ineffective representation by failing to object to the jury instructions. The instructions were erroneous because they implied that the State had to prove only that K.M. did not consent to sexual intercourse rather than prove that Mr. Barela had the requisite *mens rea* as to the victim's lack of consent. In other words, the instructions did not convey the requirement that the State prove Mr. Barela's intentional, knowing, or reckless state of mind regarding the absence of K.M.'s consent. *See State v. Calamity*, 735 P.2d 39, 43 (Utah 1987) (crime of rape "may be proved by an intentional, knowing, or reckless mental state"); UTAH CODE § 76-2-102 ("[W]hen the definition of [an] offense does not specify a culpable mental state and the

offense does not involve strict liability, intent, knowledge, or recklessness shall suffice to establish criminal responsibility.")....

In my view, Mr. Barela cannot show a reasonable probability that, but for the deficiency of trial counsel in failing to object to the instructions, the jury's verdict would have been different.

"An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland v. Washington*, 466 U.S. 668, 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. "In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Id.* at 695....

In this case, Mr. Barela asserted that he was innocent because K.M. actively solicited a sexual encounter. Although the verdict demonstrates that the jury did not believe Mr. Barela's testimony, we must still evaluate the likelihood that a correctly instructed jury would have found that Mr. Barela lacked the required *mens rea* given K.M.'s version of what happened.

K.M. testified that Mr. Barela had given her a massage on one occasion prior to the day she was sexually assaulted. The first massage was uneventful, and K.M. did not request Mr. Barela for the second massage. During the second massage, the parties did not engage in conversation. Close to the end of the massage, Mr. Barela began to massage K.M.'s inner thigh while she was lying on her back. This made K.M. uncomfortable. Before K.M. could formulate a response, and within "a matter of seconds" of massaging her inner thigh, Mr. Barela pulled her to the end of the table without saying anything, dropped his pants, and penetrated K.M.'s vagina with his penis. K.M. testified that "it happened very fast" and that "before [she] knew it," Mr. Barela had penetrated her. Mr. Barela ejaculated within about thirty seconds to a minute and pulled up his pants. He then said, "Okay, this concludes your massage," and left the room.

Given this evidence, it is highly probable that a properly instructed jury would have concluded that Mr. Barela knew that K.M. had not consented to sex when he penetrated her vagina with his penis. And it is even more likely that a jury would conclude that Mr. Barela acted with criminal recklessness. A person acts with a reckless state of mind when that person engages in conduct

[r]ecklessly with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

UTAH CODE § 76-2-103(3). Thus, the test for determining whether a criminal defendant acted recklessly involves both a subjective and an objective element. First, the defendant must subjectively be "aware of but consciously disregard[] a substantial and unjustifiable risk" that a particular circumstance exists or that a particular result will occur. *Id.* Second, in order to determine whether disregarding the risk was "unjustifiable," the fact-finder must measure the defendant's conduct against an objective, reasonable person standard.

According to K.M.'s testimony, which the jury found credible, Mr. Barela inserted his penis into the vagina of a client who was a near-stranger to him within a matter of seconds of massaging her inner thigh. K.M. did not indicate her consent to Mr. Barela's actions in any way or even engage in conversation with him. The most that can be said is that K.M. did not actively object to Mr. Barela massaging her inner thigh within seconds of his doing so.² Thus the question presented to a correctly instructed jury would have been (1) whether Mr. Barela was "aware of but consciously disregarded a substantial and unjustifiable risk that" K.M. had not consented to sex and, if so, (2) whether Mr. Barela's assumption of the risk of being wrong about any conjecture that K.M. had consented to sex under these facts "constitute[d] a gross deviation from the standard of care that an ordinary person would exercise." *Id.*

Under this reckless state of mind standard, it is not reasonably probable that a correctly instructed jury would have acquitted Mr. Barela. When K.M. entered the establishment where Mr. Barela worked as a massage therapist, she did so as a paying client seeking a service at an established business. K.M. had no relationship with Mr. Barela other than that of a client, and she did not engage in flirtatious behavior or even friendly conversation with him. Although K.M. was required to undress and lie beneath a sheet, a reasonable massage therapist would not perceive this as an indication that K.M. consented to sex any more than a reasonable doctor would perceive a patient's state of undress as consent. Moreover, a reasonable massage therapist would not perceive the act of massaging the inner thigh of a client as an invitation for a sexual encounter in a place of business that is accepted when the client simply fails to object within a few seconds. In my view, a reasonable jury likely would find that Mr. Barela was aware of but consciously disregarded the risk that K.M. did not consent to sex. Moreover, a jury likely would not only find that Mr. Barela breached the standard of care that an ordinary massage therapist would observe by disregarding this risk, but also would conclude that any assumption that a client had consented to sex under these circumstances would be a gross deviation from this standard of care....

I conclude that the probability that a properly instructed jury would acquit Mr. Barela of rape is not sufficient to undermine my confidence in the verdict....

Discussion Questions and Notes

- 1) Is the majority right that the jury instruction was inadequate because it essentially implied strict liability as to the nonconsent element?

² In his brief before this court, the defendant focused on K.M.'s testimony that she was frozen with shock while she was being sexually assaulted, and that she did not do or say anything. This testimony, however, has no bearing on Mr. Barela's state of mind when he first inserted his penis into K.M.'s vagina. It is at this moment that Mr. Barela was guilty of rape if he acted with the requisite *mens rea* as to the absence of K.M.'s consent. Any events occurring after this moment are irrelevant to the question of whether Mr. Barela acted intentionally, knowingly, or recklessly.

- 2) Notice that the court is using MPC *mens rea* language. The dissent ultimately thinks there is adequate evidence of at least recklessness by the defendant. Do you think that should be a sufficient *mens rea* for a conviction of rape?
- 3) This is another case that we have read where the majority is reluctant to defer to the jury's judgment. In several instances, the majority of the court interweaves the defendant's version of the facts into their retelling of the alleged crime. Do you think the court's holding is driven in part by the fact that the charge at issue is rape?
- 4) Rape victims often exhibit a wide array of reactions during and after their attacks. As a result, it can be difficult to craft a singular *mens rea* rule when defendants might not be aware of the signals sent by the victim freezing or shutting down. Is there any effective way to address this problem?

The following case introduces some evidentiary rules that are beyond the scope of the course. However, the admissibility of the evidence is so heavily intertwined with the *mens rea* issue that it provides a particularly helpful demonstration of how often courts struggle to separate the victim's nonconsent (act requirement) from the defendant's intent (*mens rea* requirement).

Gonzales v. Virginia, 611 S.E.2d 616 (Va. 2005)

JOHANNA L. FITZPATRICK

OPINION

UPON REHEARING EN BANC

This matter comes before the Court on a rehearing en banc from an unpublished panel decision rendered July 13, 2004. In that decision, a divided panel of this Court reversed Gonzales' conviction for rape in violation of Code § 18.2-61 and forcible sodomy in violation of Code § 18.2-67.1, finding that the trial court erred in admitting evidence of prior crimes and that such error was not harmless.

By order dated August 10, 2004, we granted the Commonwealth's petition for a rehearing en banc, stayed the mandate of that decision, and reinstated the appeal. Upon rehearing this case en banc, we reverse Gonzales' convictions....

Under familiar principles of appellate review, we examine the evidence in the light most favorable to the Commonwealth, granting to it all reasonable inferences fairly deducible therefrom.

So viewed, the evidence established that appellant made an appointment with Naomi Parrish (Parrish) in response to her advertisement as a dancer performing "fantasy shows, private dancing,

bachelor parties." Parrish provided him with directions to her apartment. When appellant arrived at her apartment, Parrish took him to a bedroom where she told him the price for dancing was \$150 for one-half hour, and \$190 for an hour. She testified that sex was not discussed at this time. Appellant handed Parrish \$80, which she said was unacceptable, and she handed appellant's money back to him. He slammed the bedroom door shut. Parrish told him to leave. He said no and blocked the door. Appellant said he wanted "this sh.. now," which Parrish testified had a "sexual implication like he wanted to have intercourse with [her]." She asked him not to harm her, and tried to talk him into letting her leave, to which he responded "hell no." Appellant pushed her onto the bed, pinned her down, and told her to take the money. She responded "I don't do that, I'm just a dancer." He then raped and sodomized her. Afterwards appellant apologized, said a girlfriend had left him, and he had been abducted by his father.

Appellant later telephoned Parrish, and she provided his telephone number to police. Parrish and the police made a sting call to appellant during which he stated that he raped her as an "emotional outlet" after being "deceived" by his girlfriend and that he was very sorry. In a later phone call appellant asked her to forgive him and said that he had called a rape crisis hotline. When asked about his apologetic tone later, appellant stated that he was not apologizing for raping her, but because he still owed her \$130. At trial, appellant denied that he raped her and testified they had consensual sex.

During a pretrial motion in limine, the Commonwealth moved to admit the testimony of two women who described similar crimes allegedly committed by appellant. At the hearing, the prosecutor acknowledged that the evidence was not offered to show identity. Instead, the Commonwealth stated:

[COMMONWEALTH]: Your Honor, I'm seeking to have this evidence admitted to show the conduct of the Defendant towards the victim in this case, and I would ...

THE COURT: Is that intent?

[COMMONWEALTH]: It is intent being that this -defense -it's my belief, will be based on these statements -that this is a consensual encounter meaning that she's ...

THE COURT: She contracts for this and she is volunteering for it.

[COMMONWEALTH]: Absolutely -and that this would show - the fact that he has done this not with just Ms. Parrish but with two other escorts that he went there with the intent of raping her. Under the guise of going there as, you know, sort of a business deal if you will, but he goes there really with the intent -that's how he gains access is by making this arrangement for an appointment -and goes there and immediately jumps upon these women and rapes them and forces himself on them -that that is his intent is to go there to rape these women, to force himself on them.

The trial court allowed the evidence of the similar crimes. A jury convicted appellant of sodomy and rape and sentenced him to a total of twenty years.

On appeal, appellant contends the trial court erred in admitting evidence of similar crimes to show his intent to rape Parrish, because his intent is not an element of the crime charged. We agree.

"The admissibility of evidence is within the broad discretion of the trial court, and a ruling will not be disturbed on appeal in the absence of an abuse of discretion." *Blain v. Commonwealth*, 7 Va. App. 10, 16, 371 S.E. 2d 838, 842, 5 Va. Law Rep. 356 (1988). However, "by definition, when the

trial court makes an error of law, an abuse of discretion occurs." *Bass v. Commonwealth*, 31 Va. App. 373, 382, 523 S.E. 2d 534, 539 (2000).

Evidence that the accused committed other crimes is generally inadmissible to prove guilt of the crime for which the accused is on trial, even if the other crimes are of the same nature as the crime charged in the indictment. See *Kirkpatrick v. Commonwealth*, 211 Va. 269, 272, 176 S.E. 2d 802, 805 (1970). "The purpose of this rule is to prevent confusion of offenses, unfair surprise to the defendant and a suggestion of 'criminal propensity, 'thus preserving the 'presumption of innocence.'" *Crump v. Commonwealth*, 13 Va. App. 286, 289, 411 S.E. 2d 238, 240, 8 Va. Law Rep. 1460 (1991) (quoting *Lewis v. Commonwealth*, 225 Va. 497, 502, 303 S.E. 2d 890, 893 (1983)). However, this general rule "must sometimes yield to society's interest in the truth-finding process, and numerous exceptions allow evidence of prior misconduct whenever the legitimate probative value outweighs the incidental prejudice to the accused." *Dunbar v. Commonwealth*, 29 Va. App. 387, 390, 512 S.E. 2d 823, 825 (1999) (citing *Wilkins v. Commonwealth*, 18 Va. App. 293, 297, 443 S.E. 2d 440, 443, 10 Va. Law Rep. 1325 (1994)). Evidence of similar crimes may be admissible to show the intent, or identity of the accused when these are in issue.

This case is controlled by the recently decided case of *Minor v. Commonwealth*, 267 Va. 166, 591 S.E. 2d 61 (2004). On strikingly similar facts, the Supreme Court held that testimony of prior victims of similar sexual crimes was inadmissible to show the intent of the appellant toward the victim. As in this case, the only issue in dispute at trial was whether the sexual acts were consensual or forced. In addressing whether the evidence was admissible to show intent, the Court reasoned that "a defendant's intent to commit the crime of rape is not the same issue as whether a victim consented to sexual intercourse. Those two issues are distinct and should not be blurred." *Id.* at 173, 591 S.E. 2d at 66. Thus, the Court further held as follows:

"Although proof of rape requires proof of intent, the required intent is established upon proof that the accused knowingly and intentionally committed the acts constituting the elements of rape. The elements of rape ... consist of engaging in sexual intercourse with the victim, against her will, by force, threat, or intimidation."

Id. (quoting *Clifton v. Commonwealth*, 22 Va. App. 178, 184, 468 S.E. 2d 155, 158 (1996)). The Court in *Minor* thus recognized that the crime of rape does not require proof that the defendant harbor a specific intent to have intercourse without the victim's consent, only the general intent evidenced by the act of committing the offense itself. The lack of consent required for rape involves the victim's mental state, not the defendant's. The Court also noted that:

Evidence showing that a defendant committed similar sexual offenses against an individual other than the victim in a particular case is, on occasion, admissible to prove certain contested matters, such as a defendant's identity or the attitude of a defendant toward a victim, provided the probative value of the evidence outweighs its prejudicial effect. Indeed, if the evidence of other similar offenses had been offered as proof on a contested issue about the defendant's identity in these offenses, that evidence would likely have been admissible....

The Court thus held that the evidence of other crimes was inadmissible:

In our view, evidence showing that a defendant raped one or more individuals other than the victim in the crime charged is generally not relevant to the question whether that victim did or did not consent to sexual intercourse with the defendant. This is so

because the fact that one woman was raped has no tendency to prove that another woman did not consent.

Id. at 175, 591 S.E. 2d at 67 (internal citations and quotations omitted)....

For the foregoing reasons, we hold that the evidence of prior crimes was inadmissible in this case. Evidence of other similar crimes is inadmissible to show intent when it is not an element of the offense charged....

The Commonwealth contends that even if the trial judge erred, such error was harmless. We disagree.

[W]e cannot say on this record that the trial court's admission of the testimony of similar crimes was harmless. One of the witnesses, S. B., testified that she was a prostitute and appellant was a "regular customer" who on one occasion acted in a manner similar to that described at trial. She also testified that on other occasions he was "fine." The second witness, N. S., testified that she was an escort who had arranged a meeting with appellant and was attacked in a manner similar to that alleged in this case. The testimony of the two women was highly prejudicial and encouraged the inference that because appellant committed similar crimes in the past, he likely committed the crimes charged in this case.

Accordingly, we reverse the judgment of the trial court and remand for further proceedings consistent with this opinion.

Reversed.

McClanahan, J., with whom Kelsey, J., joins, dissenting.

Commonwealth v. Minor, 267 Va. 166, 591 S.E. 2d 61 (2004), held that other crimes evidence has no logical bearing on consent, a function of the rape victim's state of mind. *Minor* did not hold – and it specifically disclaimed any intention to hold – that such evidence can never have any bearing on *mens rea*, a function of the rapist's state of mind. By conflating the two, the majority has done just what *Minor* said could not be done. They have "blurred" two "distinct" concepts – the defendant's intent and the victim's consent. *Id.* at 173, 591 S.E. 2d at 66. As a consequence, the evidentiary admissibility principles are likewise confused.

There being no per se bar to the use of other crimes evidence on the issue of intent, the question presented then becomes whether the trial judge abused her discretion in admitting the evidence under the unique facts of this case. I do not believe she did. The prosecutor offered the evidence to show the defendant's intent to use force. The other crimes evidence showed a similar pattern of intent to use force. These factual similarities in the use of force take the proof of other crimes outside the maxim prohibiting its use as mere propensity evidence.

In any event, the great weight of the evidence before the jury renders harmless any ostensible error in admitting the other crimes evidence. The defendant admitted to raping the victim. Though he tried to later claim otherwise, his admissions and the victim's consistent description of the rape likely left the jury with an irrepressible conviction of his guilt. Under the governing harmless error standard for non-constitutional error, the defendant's conviction should not be overturned even if the trial court erred in admitting the contested other crimes evidence....

An accused cannot "intend" consent or nonconsent on the part of the victim, but he can intend to use force. The majority cites no cases where evidence of intent to use force, threat or intimidation was inadmissible where that element of the crime was at issue. Indeed, most appellate courts allow it, notwithstanding its potential misuse for other purposes.

In Virginia, lack of consent and force/threat/intimidation are separate elements of rape. In any case where rape is charged, the Commonwealth must establish 1) that the defendant had sexual intercourse with the victim; 2) that it was against her will and without her consent; and 3) that it was by force, threat or intimidation. *See* CODE § 18.2-61(A). In this case, the evidence of Gonzales's prior bad acts was offered on the issue of whether Gonzales had the intent to commit the crime with force, threat or intimidation. In seeking to have the evidence admitted, the prosecutor stated:

This would show – the fact that he has done this not with just Ms. Parrish but with two other escorts that he went there with the intent of raping her. Under the guise of going there as, you know, sort of a business deal if you will, but he goes there really with the intent – that's how he gains access is by making this arrangement for an appointment – and goes there and immediately jumps upon these women and rapes them and forces himself on them – that that is his intent is to go there to rape these women, to force himself on them.

(Emphases added.) The Commonwealth did not offer the evidence to show that the victim did not consent. In *Minor*, the Supreme Court expressly limited its holding to the issue of whether the victim consented. *Minor* explained that:

a defendant's intent to commit the crime of rape is not the same issue as whether a victim consented to sexual intercourse. Those two issues are distinct and should not be blurred.

"Although proof of rape requires proof of intent, the required intent is established upon proof that the accused knowingly and intentionally committed the acts constituting the elements of rape. The elements of rape ... consist of engaging in sexual intercourse with the victim, against her will, by force, threat, or intimidation."

Minor, 267 Va. at 173, 591 S.E. 2d at 66 (quoting *Clifton v. Commonwealth*, 22 Va. App. 178, 184, 468 S.E. 2d 155, 158 (1996)) (emphasis added).

The majority asserts that the only issue in *Minor* is the same issue in this case: "whether the sexual acts were consensual or forced." It then characterizes the *Minor* holding as saying, "that testimony of prior victims of similar sexual crimes was inadmissible to show the intent of the appellant toward the victim." However, that interpretation of *Minor* does exactly what the Supreme Court in *Minor* warned against; it blurs the defendant's intent to use force, threat or intimidation in committing the crime of rape with the issue of whether the victim consented.

In any case where intent is a genuinely controverted issue, evidence of other crimes is admissible when it is relevant to prove a material fact or element of the offense, and not unduly prejudicial. *Kirkpatrick v. Commonwealth*, 211 Va. 269, 272, 176 S.E. 2d 802, 805 (1970). In a rape case, the prosecution must prove the act of intercourse took place "against the complaining witness's will" and that it was accomplished by the use of "force, threat or intimidation." CODE § 18.2-61(A)(i). In *Minor*, the only issue in dispute at trial was whether the sexual acts were consensual. In contrast, in the case at bar, from before the time of his arrest, Gonzales's numerous statements regarding the act of intercourse and use of force were neither consistent nor clear.

Gonzales put his intent to use force, threat or intimidation at issue when he told the police and later testified that he went to the complainant's apartment for a massage with no plans for sexual contact, but that he eventually relented upon her suggestion to have intercourse. Consequently, the Commonwealth was required to provide evidence on each element of the rape offense.

Here, evidence that Gonzales previously raped women with the same acts of force, threat or intimidation is probative on the issue of whether he intended to use force, threat or intimidation in this case and is relevant evidence for the jury to consider in its determination....

Evidence of prior crimes or bad acts cannot be used merely to show the accused's propensity to commit the crime charged. In this case, however, the Commonwealth did not offer the evidence to assert "once a rapist, always a rapist." Instead, the prosecution used it to point out the strikingly similar uses of force, threat or intimidation in the earlier incidents and the one then before the court....

In each instance, the defendant chose as his victim an "escort" or prostitute. He would call for an appointment and, as soon as the woman arrived, use force just after the door closed. He slapped or hit each victim. He first got on top of the victims for vaginal penetration, later attempted anal intercourse, and accomplished oral sex by holding the back of the victims' heads. He demanded from each substantially similar sexual acts. Afterwards, the defendant would apologize. The trial court heard the details of the prosecutor's proffer, as well as the evidence as it was introduced, and found the similarities sufficient to rationally relate each incident into a parallel pattern of force, threat or intimidation. Nothing in *Minor* suggests the trial court erred in doing so. *Minor* specifically distinguishes the use of this type of evidence for the purpose of showing whether the victim consented from whether the "accused knowingly and intentionally committed ... rape ... by force, threat, or intimidation." *Minor*, 267 Va. at 173, 591 S.E. 2d at 66 (citation omitted)....

By rejecting the trial court's reasoning, the majority implies that other crimes evidence is only admissible to show intent to commit a specific intent crime, not to prove a general intent crime such as rape or forcible sodomy. It has never been supposed in law that evidence of specific intent is inadmissible to prove a general intent crime. No citation can be offered for that non sequitur. Merely because rape is a general intent crime does not make specific intent evidence inadmissible....

Even if the trial court erred in admitting the disputed evidence, the error is harmless....

The admission of testimony concerning the two prior offenses did not have "substantial influence" on the verdict in this case. The evidence of Gonzales's guilt was so overwhelming, and the weight of the disputed testimony so slight in comparison, that the alleged error did not affect the jury's verdict.

This Court must review the evidence in the "light most favorable" to the Commonwealth, the prevailing party in the trial court. *Commonwealth v. Hudson*, 265 Va. 505, 514, 578 S.E. 2d 781, 786 (2003). "On appeal this court must 'discard the evidence of the accused in conflict with that of the Commonwealth, and regard as true all the credible evidence favorable to the Commonwealth and all fair inferences to be drawn therefrom.'" *Parks v. Commonwealth*, 221 Va. 492, 498, 270 S.E. 2d 755, 759 (1980) (citation omitted and emphasis in original). The victim offered a consistent account of the rape and sodomy that she claimed occurred, and that account was

bolstered by Gonzales's numerous and compelling admissions that he raped and sodomized the victim. In a recorded exchange between Gonzales and the victim, which was introduced at trial, he expressed remorse, offered apologies, and requested the victim's forgiveness. During that exchange, he admitted at least four times that he raped the victim. He said that he had called a rape crisis hotline. When the victim asked Gonzales if raping her helped him in some way, he stated, "at that particular time it probably helped me. Yeah, it probably helped me to release my anger, I guess, emotionally." He admitted that he raped the victim as an "emotional outlet" because his girlfriend "was deceiving" him. He admitted to the victim, "I am sorry for raping you." A short time later, he again admitted to the victim, "I am very sorry for raping you." He said he "felt sorry" after he left her apartment, and had feared she "was going to call the police" over the incident. When the victim asked when Gonzales had decided to rape her, Gonzales said, "When did I decide? It was just, um, when I saw you, I guess." The victim also asked Gonzales if he raped her because of his lack of money or over his anger or because of her appearance. He replied: "I think it was probably. It was probably more a combination of all those things." When the victim asked, "why didn't you just, you know, ask me to sleep with you, rather than you know, slamming the door shut and hitting me and ripping off my panties?" Gonzales answered, "Why not? I had – it was very hard for me because I – I thought, well, you'd resist me." When the victim countered that she had, in fact, resisted him, Gonzales said, "Yeah, you did." Later, when interviewed by the police, Gonzales stated he slapped the victim because she didn't want to give him oral sex. At trial, when asked about his apologetic tone during the phone call, appellant stated that he "preferred" to apologize for raping her rather than "to send her the money" he still owed her.

Gonzales's numerous statements and admissions, as well as the consistency of the victim's account of the event, lead ineluctably to the conclusion that the verdict was not affected by the claimed error. When other evidence of the defendant's guilt is overwhelming, error may be deemed harmless. I would therefore affirm.

Discussion Questions and Notes

- 1) Do you think the majority or dissent was right regarding the use of the admitted evidence that is at issue?
- 2) Do you think the majority or dissent was more persuasive as to whether the error, assuming there was one, was harmless?

C. *Mens Rea* of Force

There has been little written about or opinions written specifically focused on the *mens rea* required for the force element. This is a little surprising because of its long history and continued relevance in many modern jurisdictions. The dearth of information about the

mens rea for force is likely due to the unusualness of fact patterns needed to make the specific rule relevant.

Hypothetically, one might imagine a fact pattern such as this:

A male police officer meets a woman at a bar after he has completed his work shift. He is still carrying his department-issued firearm in a holster during his conversations with the woman at the bar. As he and the woman have a few drinks, he becomes increasingly pushy and coercive in trying to get her to come home with him. However, the coercion and pushiness does not reach the legal threshold for establishing nonconsent. At some point, the officer opens his coat in a way that exposes his firearm while he tells the woman "you have to come home with me now." She interprets his words in combination with the exposure of the gun as a clear threat of violence if she does not comply. She goes with him to his apartment and alleges she was raped there (although the officer made no threats at the apartment). The officer contends that he did not intend to expose his gun and did not mean to threaten the woman.

Those facts seem to indicate a clear defense argument of mistake of force (or lack of *mens rea*). This is true whether the case is in a jurisdiction with or without a force element because the threat of force is being used to establish nonconsent as well. In such a case, what instruction do you think should be given to the jury?

III. Strict Liability Rape (Statutory Rape)

In this section, we will analyze statutes criminalizing sexual acts where at least one element of the crime is strict liability. The most well-known variation of such statutes is generally referred to as "statutory rape" wherein the state, in many jurisdictions, need not prove that the defendant had any *mens rea* regarding the victim's age. To understand the effects of such a rule, consider this case where the defendant was precluded from introducing any evidence that he was mistaken as to the victim's age.

Garnett v. Maryland, 632 A.2d 797 (Md. 1993)

MURPHY

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

"Second degree rape.

(a) What constitutes. – A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person:

(1) By force or threat of force against the will and without the consent of the other person; or

(2) Who is mentally defective, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know the other person is mentally defective, mentally incapacitated, or physically helpless; or

Who is under 14 years of age and the person performing the act is at least four years older than the victim.

(b) Penalty. – Any person violating the provisions of this section is guilty of a felony and upon conviction is subject to imprisonment for a period of not more than 20 years."

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

Raymond Lennard Garnett is a young retarded man. At the time of the incident in question he was 20 years old. He has an I.Q. of 52. His guidance counselor from the Montgomery County public school system, Cynthia Parker, described him as a mildly retarded person who read on the third-grade level, did arithmetic on the 5th-grade level, and interacted with others socially at school at the level of someone 11 or 12 years of age. Ms. Parker added that Raymond attended special education classes and for at least one period of time was educated at home when he was afraid to return to school due to his classmates' taunting. Because he could not understand the duties of the jobs given him, he failed to complete vocational assignments; he sometimes lost his way to work. As Raymond was unable to pass any of the State's functional tests required for graduation, he received only a certificate of attendance rather than a high-school diploma.

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

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

The court found Raymond guilty. It sentenced him to a term of five years in prison, suspended the sentence and imposed five years of probation, and ordered that he pay restitution to Erica and the Frazier family....

Raymond asserts that the events of this case were inconsistent with the criminal sexual exploitation of a minor by an adult. As earlier observed, Raymond entered Erica's bedroom at the girl's invitation; she directed him to use a ladder to reach her window. They engaged voluntarily in sexual intercourse. They remained together in the room for more than seven hours before Raymond departed at dawn. With an I.Q. of 52, Raymond functioned at approximately the same

level as the 13-year-old Erica; he was mentally an adolescent in an adult's body. Arguably, had Raymond's chronological age, 20, matched his socio-intellectual age, about 12, he and Erica would have fallen well within the four-year age difference obviating a violation of the statute, and Raymond would not have been charged with any crime at all.

The precise legal issue here rests on Raymond's unsuccessful efforts to introduce into evidence testimony that Erica and her friends had told him she was 16 years old, the age of consent to sexual relations, and that he believed them. Thus the trial court did not permit him to raise a defense of reasonable mistake of Erica's age, by which defense Raymond would have asserted that he acted innocently without a criminal design. At common law, a crime occurred only upon the concurrence of an individual's act and his guilty state of mind. In this regard, it is well understood that generally there are two components of every crime, the *actus reus* or guilty act and the *mens rea* or the guilty mind or mental state accompanying a forbidden act. The requirement that an accused have acted with a culpable mental state is an axiom of criminal jurisprudence. Writing for the United States Supreme Court, Justice Robert Jackson observed:

"The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

* * *

"Crime as a compound concept, generally constituted only from a concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil."

Morrisette v. United States, 342 U.S. 246, 250-252, 72 S.Ct. 240, 243-244, 96 L.Ed. 288 (1952).

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

Modern scholars generally reject the concept of strict criminal liability....

Conscious of the disfavor in which strict criminal liability resides, the Model Penal Code states generally as a minimum requirement of culpability that a person is not guilty of a criminal offense unless he acts purposely, knowingly, recklessly, or negligently, i.e., with some degree of *mens rea*. MODEL PENAL CODE § 2.02 (OFFICIAL DRAFT AND REVISED COMMENTS 1980). The Code allows generally for a defense of ignorance or mistake of fact negating *mens rea*. *Id.* at § 2.04. The Model Penal Code generally recognizes strict liability for offenses deemed "violations," defined as wrongs

subject only to a fine, forfeiture, or other civil penalty upon conviction, and not giving rise to any legal disability. *id.* at §§ 1.04, 2.05.²

....

The legislatures of 17 states have enacted laws permitting a mistake of age defense in some form in cases of sexual offenses with underage persons.... In addition, the highest appellate courts of four states have determined that statutory rape laws by implication required an element of *mens rea* as to the complainant's age....

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

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

Second, an examination of the drafting history of § 463 during the 1976 revision of Maryland's sexual offense laws reveals that the statute was viewed as one of strict liability from its inception and throughout the amendment process. As originally proposed, Senate Bill 358 defined as a sexual offense in the first degree a sex act committed with a person less than 14 years old by an actor four or more years older. The Senate Judicial Proceedings Committee then offered a series of amendments to the bill. Among them, Amendment # 13 reduced the stipulated age of the victim from less than 14 to 12 or less. Amendment # 16 then added a provision defining a sexual offense in the second degree as a sex act with another "under 14 years of age, which age the person performing the sexual act knows or should know." These initial amendments suggest that,

² With respect to the law of statutory rape, the Model Penal Code strikes a compromise with its general policy against strict liability crimes. The Code prohibits the defense of ignorance or a reasonable mistake of age when the victim is below the age of ten, but allows it when the critical age stipulated in the offense is higher than ten. MODEL PENAL CODE, *supra*, at §§ 213.1, 213.6(1). The drafters of the Code implicitly concede that sexual conduct with a child of such extreme youth would, at the very least, spring from a criminally negligent state of mind. The available defense of reasonable mistake of age for complainants older than ten requires that the defendant not have acted out of criminal negligence.

at the very earliest stages of the bill's life, the Legislature distinguished between some form of strict criminal liability, applicable to offenses where the victim was age 12 or under, and a lesser offense with a *mens rea* requirement when the victim was between the ages of 12 and 14.

Senate Bill 358 in its amended form was passed by the Senate on March 11, 1976. The House of Delegates' Judiciary Committee, however, then proposed changes of its own. It rejected the Senate amendments, and defined an offense of rape, without a *mens rea* requirement, for sexual acts performed with someone under the age of 14. The Senate concurred in the House amendments and S.B. 358 became law. Thus the Legislature explicitly raised, considered, and then explicitly jettisoned any notion of a *mens rea* element with respect to the complainant's age in enacting the law that formed the basis of current § 463(a)(3). In the light of such legislative action, we must inevitably conclude that the current law imposes strict liability on its violators.

This interpretation is consistent with the traditional view of statutory rape as a strict liability crime designed to protect young persons from the dangers of sexual exploitation by adults, loss of chastity, physical injury, and, in the case of girls, pregnancy. *See Michael M. v. Sonoma County Superior Court*, 450 U.S. 464, 470, 101 S.Ct. 1200, 1204-05, 67 L.Ed.2d 437 (1981)....

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

ELDRIDGE, Judge, dissenting:

Both the majority opinion and Judge Bell's dissenting opinion view the question in this case to be whether, on the one hand, Maryland Code (1957, 1992 Repl.Vol.), ART. 27, § 463(a)(3), is entirely a strict liability statute without any *mens rea* requirement or, on the other hand, contains the requirement that the defendant knew that the person with whom he or she was having sexual relations was under 14 years of age.

The majority takes the position that the statute defines an entirely strict liability offense and has no *mens rea* requirement whatsoever. The majority indicates that the defendant's "knowledge, belief, or other state of mind" is wholly immaterial. The majority opinion at one point states: "We acknowledge here that it is uncertain to what extent Raymond's intellectual and social retardation may have impaired his ability to comprehend imperatives of sexual morality in any case." Nevertheless, according to the majority, it was permissible for the trial judge to have precluded exploration into Raymond's knowledge and comprehension because the offense is entirely one of strict liability.

Judge Bell's dissent, however, argues that, under the due process clauses of the Fourteenth Amendment and the Maryland Declaration of Rights, any "defendant may defend on the basis that he was mistaken as to the age of the prosecutrix."

In my view, the issue concerning a *mens rea* requirement in § 463(a)(3) is not limited to a choice between one of the extremes set forth in the majority's and Judge Bell's opinions. I agree with the majority that an ordinary defendant's mistake about the age of his or her sexual partner

is not a defense to a prosecution under § 463(a)(3). Furthermore I am not persuaded, at least at the present time, that either the federal or state constitutions require that a defendant's honest belief that the other person was above the age of consent be a defense. This does not mean, however, that the statute contains no *mens rea* requirement at all.

The legislative history of § 463(a)(3), set forth in the majority opinion, demonstrates that the House of Delegates rejected the Senate's proposed requirement that an older person, having sexual relations with another under 14 years of age, know or should know that the other person was under 14. The House of Delegates' version was ultimately adopted. From this, the majority concludes that the enacted version was "without a *mens rea* requirement." The majority's conclusion does not necessarily follow. Although the General Assembly rejected one specific knowledge requirement, it did not decree that any and all evidence concerning a defendant's knowledge and comprehension was immaterial...

Neither the statutory language nor the legislative history of § 463(a)(3), or of the other provisions of the 1976 and 1977 sexual offense statutes, indicate that the General Assembly intended § 463(a)(3) to define a pure strict liability offense where criminal liability is imposed regardless of the defendant's mental state. The penalty provision for a violation of § 463(a)(3), namely making the offense a felony punishable by a maximum of 20 years imprisonment (§ 463(b)), is strong evidence that the General Assembly did not intend to create a pure strict liability offense.

In the typical situation involving an older person's engaging in consensual sexual activities with a teenager below the age of consent, and the scenario which the General Assembly likely contemplated when it enacted §§ 463(a)(3), 464A(a)(3), 464B(a)(3), 464C(a)(2), and 464C(a)(3), the defendant knows and intends that he or she is engaging in sexual activity with a young person. In addition, the defendant knows that the activity is regarded as immoral and/or improper by large segments of society. Moreover, the defendant is aware that "consent" by persons who are too young is ineffective. Although in a particular case the defendant may honestly but mistakenly believe, because of representations or appearances, that the other person is above the age of consent, the ordinary defendant in such case is or ought to be aware that there is a risk that the young person is not above the age of consent. As the majority opinion points out, "the traditional view [is] that those who engage in sex with young persons do so at their peril, assuming the risk that their partners are underage" It seems to me that the above-mentioned knowledge factors, and particularly the mental ability to appreciate that one is taking a risk, constitute the *mens rea* of the offenses defined by §§ 463(a)(3), 464A(a)(3), 464B(a)(3), 464C(a)(2) and 464C(a)(3). In enacting these provisions, the General Assembly assumed that a defendant is able to appreciate the risk involved by intentionally and knowingly engaging in sexual activities with a young person. There is no indication that the General Assembly intended that criminal liability attach to one who, because of his or her mental impairment, was unable to appreciate that risk.

It is unreasonable to assume that the Legislature intended for one to be convicted under § 463(a)(3), or under any of the other statutes proscribing sexual activity with underage persons, regardless of his or her mental state. Suppose, for example, that Raymond Garnett had not had an I.Q. of 52, but rather, had been more severely mentally retarded as was the young woman involved in *Wentzel v. Montgomery Gen. Hosp.*, 293 Md. 685, 447 A.2d 1244, cert. denied, 459 U.S. 1147, 103 S.Ct. 790, 74 L.Ed.2d 995 (1983). The mentally retarded person in *Wentzel* had an

I.Q. of 25-30, was physiologically capable of bearing a child, but was unable to comprehend the act of sexual intercourse, or even to understand the difference between the sexes. If someone so disabled, having reached Raymond's chronological age, then had "consensual" sexual intercourse with a person younger than fourteen years of age, I do not believe that he or she would have violated Art. 27, § 463(a)(3). Under the view that §§ 463(a)(3), 464A(a)(3), 464B(a)(3), etc., define pure strict liability offenses without any regard for the defendant's mental state, presumably a 20 year old, who passes out because of drinking too many alcoholic beverages, would be guilty of a sexual offense if a 13 year old engages in various sexual activities with the 20 year old while the latter is unconscious. I cannot imagine that the General Assembly intended any such result....

I would reverse and remand for a new trial.

ROBERT M. BELL, Judge, dissenting.

"It may be possible to conceive of legislation ... so flagrantly in conflict with natural right, that the courts may set it aside as unwarranted, though no clause of the constitution can be found prohibiting it. But the cases must be rare indeed; and whenever they do occur the interposition of the judicial veto will rest upon such foundations of necessity that there can be little or no room for hesitation."

Richard G. Singer, *The Resurgence of Mens rea: III – The Rise and Fall of Strict Criminal Liability*, 30 B.C.L.REV. 337, 368 (1989), quoting *State v. Clottu*, 33 Ind. 409, 410-11 (1870).

I do not dispute that the legislative history of Maryland Code (1957, 1992 Repl.Vol.), ART. 27, section 463 may be read to support the majority's interpretation that subsection (a)(3) was intended to be a strict liability statute. Nor do I disagree that it is in the public interest to protect the sexually naive child from the adverse physical, emotional, or psychological effects of sexual relations. I do not believe, however, that the General Assembly, in every case, whatever the nature of the crime and no matter how harsh the potential penalty, can subject a defendant to strict criminal liability. To hold, as a matter of law, that section 463(a)(3) does not require the State to prove that a defendant possessed the necessary mental state to commit the crime, i.e. knowingly engaged in sexual relations with a female under 14, or that the defendant may not litigate that issue in defense, "offends a principle of justice so rooted in the traditions of conscience of our people as to be ranked as fundamental" and is, therefore, inconsistent with due process.

In the case sub judice, according to the defendant, he intended to have sex with a 16, not a 13, year old girl. This mistake of fact was prompted, he said, by the prosecutrix herself; she and her friends told him that she was 16 years old. Because he was mistaken as to the prosecutrix's age, he submits, he is certainly less culpable than the person who knows that the minor is 13 years old, but nonetheless engages in sexual relations with her. Notwithstanding, the majority has construed section 463(a)(3) to exclude any proof of knowledge or intent. But for that construction, the proffered defense would be viable. I would hold that the State is not relieved of its burden to prove the defendant's intent or knowledge in a statutory rape case and, therefore, that the defendant may defend on the basis that he was mistaken as to the age of the prosecutrix....

Strict liability crimes are recognized exceptions to the "guilty mind" rule in that they do not require the actor to possess a guilty mind, or the mens rea, to commit a crime. His or her state of

mind being irrelevant, the actor is guilty of the crime at the moment that he or she does the prohibited act....

In the evolution of the statutory criminal law, two classes of strict liability crimes have emerged. One of them consists of "public welfare" offenses. Typical of this class are statutes involving, for example, the sale of food, drugs, liquor, and traffic offenses, designed to protect the health, safety, and welfare of the community at large; violation of such statutes "depend on no mental element but consist[s] only of forbidden acts or omissions." *Morrisette*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288. In the case of public welfare offenses, strict liability is justified on several bases, including: (1) only strict liability can deter profit-driven manufacturers from ignoring the well-being of the consuming public; (2) an inquiry into mens rea would exhaust the resources of the courts; (3) imposition of strict liability is not inconsistent with the moral underpinnings of the criminal law because the penalties are small and carry no stigma; and (4) the legislature is constitutionally empowered to create strict liability crimes for public welfare offenses....

The second class of strict liability offenses, having a different justification than public welfare offenses, consists of narcotic, bigamy, adultery, and statutory rape crimes. State legislatures have historically used two theories to justify imposing strict liability in this class of offense: "lesser legal wrong" and "moral wrong."

The lesser legal wrong theory posits that a defendant who actually intended to do some legal or moral wrong is guilty not only of the crime intended but of a greater crime of which he or she may not have the requisite mental state. The elimination of a mens rea element for statutory rape is rationalized by focusing on the defendant's intent to commit a related crime. In other words, if fornication, engaging in sexual intercourse out of wedlock is a crime, a defendant intending to engage in sex out of wedlock is made to suffer all of the legal consequences of that act. Statutory rape is such a legal consequence when the other participant is below the age of consent. The theory is premised, in short, upon the proposition that, as to certain crimes, "a 'guilty mind' in a very general sense, should suffice for the imposition of penal sanctions even when the defendant did not intentionally or knowingly engage in the acts proscribed in the statute."

....

In utilizing the moral wrong theory, State legislatures seek to justify strict criminal liability for statutory rape when nonmarital sexual intercourse is not a crime on the basis of society's characterization of it as immoral or wrong, i.e., malum in se. The intent to commit such immoral acts supplies the mens rea for the related, but unintended crime; the outrage upon public decency or good morals, not conduct that is wrong only because it is prohibited by legislation, i.e., malum prohibitum, is the predicate.

There are significant problems with the moral wrong theory. First, it is questionable whether morality should be the basis for legislation or interpretation of the law. Immorality is not synonymous with illegality; intent to do an immoral act does not equate to intent to do a criminal act. Inferring criminal intent from immorality, especially when the accused is not even aware that the act is criminal, seems unjustifiable and unfair. In addition, the values and morals of society are ever evolving. Because sexual intercourse between consenting unmarried adults and minors who have reached the age of consent is not now clearly considered to be immoral, the moral wrong theory does not support strict criminal liability for statutory rape.

Second, classifying an act as immoral, in and of itself, divorced from any consideration of the actor's intention, is contrary to the general consensus of what makes an act moral or immoral. Ordinarily, an act is either moral or immoral depending on the intention of the actor.

Third, the assertion that the act alone will suffice for liability without the necessity of proving criminal intent is contrary to the traditional demand of the criminal law that only the act plus criminal intent is sufficient to constitute a crime....

Therefore, although in the case sub judice, the defendant engaged in sexual relations with a girl 13 years old, a minor below the age of consent, his conduct is not *malum in se*, and, so, strict liability is not justified....

A girl 13 years old may appear to be, and, in fact, may represent herself as being, over 16. If she should appear to be the age represented, a defendant may suppose reasonably that he received a valid consent from his partner, whom he mistakenly believes to be of legal age, only to find that her consent is legally invalid. In this situation, the majority holds, his reasonable belief as to the girl's age and consequent lack of criminal intent are no defense; the act alone suffices to establish guilt. But it is when the minor plausibly may represent that she has attained the age of consent that need for a defendant to be able to present a defense based on his or her belief that the minor was of the age to consent is the greatest.

Due process, whether pursuant to that clause of the Fourteenth Amendment or the corresponding clause in a state constitution, protects an accused from being convicted of a crime except upon proof beyond a reasonable doubt of every element necessary to constitute the crime with which the accused is charged. It thus implicates the basic characteristics, if not the fundamental underpinnings, of the accusatorial system....

Irrebuttable, mandatory, presumptions have long been disfavored and held to be violative of due process. One of the bases for the disfavor is that they may conflict with the overriding presumption of innocence which the law accords to the accused and invade the fact finding process, which, in a criminal case, is the exclusive province of the jury....

In the case sub judice, by consciously and intentionally excluding from section 463(a)(3) any requirement that the defendant's knowledge of the victim's age be proven, the Legislature has relieved the State of that obligation; without that legislation, of course, the State's burden would have included proving, at the very least, that the defendant knew the prosecutrix's age. On the issue of the defendant's intent, section 463(a)(3) only requires proof of the victim's age and its differential with that of the defendant. As such, once those facts have been proven, it is conclusively established that the defendant's intent was to have sexual relations with a girl of the proscribed age. As we have seen, not requiring proof of the defendant's intent has been accomplished by so defining the crime, not by means of an express presumption. Again, that is of no real consequence, however. By defining the crime, the Legislature prescribes what must be proven. In other words, by that process, it has determined what the rule of substantive law will be – by defining the crime so as to exclude proof of knowledge or intent, the Legislature naturally precludes the admission of any evidence bearing on the element, the proof of which it has excused. In so doing, it has made that element – intent or knowledge of the victim's age – irrelevant to the definition of the crime and, hence, irrebuttable. Wigmore, § 2492 at 307-08. It follows, therefore, that, once the other elements are proven, the defendant's knowledge or intent

is necessarily established as well. It does not necessarily follow, however, that simply because the victim is 13 years old, the defendant had knowledge of her age or intended to have sexual relations with a 13 year old girl. He may have had knowledge or intent, to be sure, but, by the same token, he may not have. The defendant should have been permitted to present evidence on the issue....

Where there is no issue as to sexual contact, which is more likely than not to be the case in statutory rape prosecutions, proof of the prosecutrix's age is not only proof of the defendant's guilt, it is absolutely dispositive of it and, at the same time, it is fatal to the only defense the defendant would otherwise have. So interpreted, section 463(a)(3) not only destroys absolutely the concept of fault, but it renders meaningless, in the statutory rape context, the presumption of innocence and the right to due process.

I respectfully dissent.

After the Supreme Court issued its ruling in *Lawrence v. Texas*, some defendants tried to argue that the Fourteenth Amendment required the state prove *mens rea* for the age of the victim. As the following case illustrates, such claims have failed.

New Hampshire v. Holmes, 920 A.2d 632 (N.H. 2007)

DALIANIS, J.

The defendant, Martin Holmes, appeals his conviction by a jury for felonious sexual assault for engaging in sexual penetration with a person who was thirteen years of age or older but less than sixteen years of age. He argues that the Superior Court (Fauver, J.) erred when it ruled that the State did not have to prove that he knew that the victim was under the age of legal consent. We affirm.

The parties do not dispute the following facts: The defendant is twenty-four years old. The victim met the defendant while walking with a friend in Rochester. Although she was fifteen years old, she told the defendant that she was seventeen. The victim and the defendant exchanged telephone numbers and spoke on the phone a few days later. Approximately a week later, after consuming alcohol, the victim phoned the defendant and arranged to meet him at a local park, where they eventually had sexual intercourse.

The defendant was charged by grand jury indictment with felonious sexual assault for having engaged in sexual penetration with a person, other than his legal spouse, who was then fifteen years old. At the close of the State's case, he moved to dismiss the charge on the ground that the State had failed to prove that he knew that the victim was less than sixteen years of age. Relying upon our prior case law, the trial court denied the motion, ruling that the State did not have to

prove beyond a reasonable doubt that the defendant knew that the victim was less than sixteen years old.

On appeal, the defendant invites us to overrule our prior precedent, which holds that the offense of felonious sexual assault with a person who is under the age of legal consent (statutory rape) "is a strict liability crime in that an accused cannot assert as a legal defense that he did not know the complainant was under the age of legal consent when penetration occurred." *State v. Carlson*, 146 N.H. 52, 58-59, 767 A.2d 421 (2001)... For the reasons that follow, we decline his invitation....

The defendant ... asserts that because adult consensual sexual relationships are not as regulated as they were when we decided our prior cases, there is no longer any justification for permitting strict liability for statutory rape. The defendant notes, for instance, that fornication is no longer a crime. Additionally, the United States Supreme Court ruled in *Lawrence v. Texas*, 539 U.S. 558, 562, 564, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003), that substantive due process precludes the State from criminalizing private consensual sexual conduct between adults. Thus, the defendant reasons, "Assuming that the accused has no reason to believe that a consensual sexual partner has not reached the age of consent, ... his mental state is that of a person engaging in conduct that is not only lawful, but constitutionally protected." As he explains: "In an age where there is no fornication law and the federal constitution would forbid any such law, one who engages in sex with a person not his or her spouse cannot be said necessarily to have a 'culpable' *mens rea*."

[I]ntent to commit the then-legally wrongful act of fornication was only one of the rationales for statutory rape laws. The other rationale concerned the need for strict accountability to protect young [people]... This justification for making statutory rape a strict liability crime remains viable, despite decreased regulation of adult consensual sexual activity.

Statutory rape laws are based upon "a policy determination by the legislature that persons under the age of sixteen are not competent to consent to sexual contact or sexual intercourse." *State v. Jadowski*, 2004 WI 68, 272 Wis. 2d 418, 680 N.W.2d 810, 817 (Wis. 2004)... "The statutes are designed to impose the risk of criminal penalty on the adult, when the adult engages in sexual behavior with a minor." *Jadowski*, 680 N.W.2d at 817... In this way, these statutes accomplish deterrence. *Owens v. State*, 352 Md. 663, 724 A.2d 43, 54 (Md.), cert. denied, 527 U.S. 1012, 119 S. Ct. 2354, 144 L. Ed. 2d 250 (1999). "The reason that mistake of fact as to the [child]'s age constitutes no defense is, not that these crimes like public welfare offenses require no *mens rea*, but that a contrary result would strip the victims of the protection which the law exists to afford." *State v. Yanez*, 716 A.2d 759, 769 (R.I. 1998) (quotation omitted); see *Owens*, 724 A.2d at 54 ("The legislature's decision to disallow a mistake-of-age defense to statutory rape furthers its interest in protecting children in ways that may not be accomplished if the law were to allow such a defense.")....

The defendant next ... notes that "several state courts have overruled prior precedent and have required either a culpable *mens rea* or have allowed for some kind of reasonable mistake of age defense." To the contrary, "[i]n most states ... a mistake of age, no matter how reasonable, is no defense." Loewy, *Statutory Rape in a Post Lawrence v. Texas World*, 58 SMU L. REV. 77, 88-89 (Winter 2005); see Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 316-17 (2003)....

To the extent that a reasonable mistake of age defense exists in certain states, it is generally because the legislature has amended the applicable statute, not because the judiciary has engrafted this defense onto a statute that does not contain it. Indeed, at oral argument, the defendant conceded that hardly any states have a reasonable mistake of age defense....

While these legitimate policy concerns might support a reasonable mistake of age defense, we believe that it is up to the legislature, not us, to create one....

Discussion Questions and Notes

- 1) After reading those two cases, do you think defendants should be allowed to argue mistake of age to negate their *mens rea*? Is there another way you think cases such as Garnett should be addressed?
- 2) The age of consent and difference and age requirements vary between states. Do you think those differences implicate how statutory rape laws should be enforced?
- 3) Although the age of consent for sex is ordinarily below 18, the age for child pornography is fixed at 18. This means most people are allowed to consent to sex before they can consent to being photographed nude. How can we persuasively explain that difference?

Review Exercise 1

Analyze the following example:

Dianne is charged with "having intentional sexual relations: with a person under the age of 16; and the person charged is at least 2 years older than the victim." Dianne argues that the victim was her student in her high school calculus class and she thought he was 18 (as were all of the other students in the class). She further contends that she was seduced by the victim and only succumbed to his advances after many months of pursuit.

Evaluate the charges against Dianne both under the MPC and in a common law jurisdiction. Would your analysis be different if Dianne contends that the underaged student forcibly raped her? Why or why not?

Review Exercise 2

Analyze the following example:

A 16-year old boy, Dennis, and girl, Denise have sex and record their intimate encounter. Denise sends the recording to a friend who turns the recording over to the police.

Dennis and Denise are charged in a common law jurisdiction with "intentionally having sexual relations with someone under the age of 17" and "intentional distribution of child pornography." "Child pornography" is defined as "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture of a minor engaging in sexually explicit conduct."

CHAPTER 10: GENERAL AFFIRMATIVE DEFENSES

In this Chapter, we explore instances when a defendant fulfills the act and *mens rea* requirements but is nonetheless deemed not guilty for her criminal transgression. These situations are narrow and the defendant must affirmatively raise such defenses (although will not always have the burden of proof). In particular, we focus on three defenses which can be used to escape convictions of most any crime under particular circumstances: justification (necessity), defense of self and others, and duress.

The three major categories of general affirmative defenses differ in the burden of proof applied. Under the traditional common law approach, for the defenses of justification and duress, the burden of proof is on the defendant with a preponderance of evidence standard. For self-defense and defense of others, the government must prove beyond a reasonable doubt that the defendant was not exercising lawful, justified defense. The Model Penal Code only differed from the common law allocations in that it put the burden on the government beyond a reasonable doubt in duress cases. The following opinion from the Supreme Court of the United States discusses why the burden of proof in duress and self-defense is different under federal law (following the traditional common law approach).

Dixon v. United States, 548 U.S. 1 (2006)

Justice Stevens delivered the opinion of the Court.

In January 2003, petitioner Keshia Dixon purchased multiple firearms at two gun shows, during the course of which she provided an incorrect address and falsely stated that she was not under indictment for a felony. As a result of these illegal acts, petitioner was indicted and convicted on one count of receiving a firearm while under indictment in violation of 18 U.S.C. § 922(n) and eight counts of making false statements in connection with the acquisition of a firearm in violation of § 922(a)(6). At trial, petitioner admitted that she knew she was under indictment when she made the purchases and that she knew doing so was a crime; her defense was that she acted under duress because her boyfriend threatened to kill her or hurt her daughters if she did not buy the guns for him.

Petitioner contends that the trial judge's instructions to the jury erroneously required her to prove duress by a preponderance of the evidence instead of requiring the Government to prove beyond a reasonable doubt that she did not act under duress....

The duress defense, like the defense of necessity that we considered in *United States v. Bailey*, 444 U.S. 394, 409-410, 100 S. Ct. 624, 62 L. Ed. 2d 575 (1980), may excuse conduct that would otherwise be punishable, but the existence of duress normally does not controvert any of the elements of the offense itself. As we explained in *Bailey*, "[c]riminal liability is normally based upon

the concurrence of two factors, 'an evil-meaning mind [and] and evil-doing hand....'" *Id.*, at 402, 100 S. Ct. 624, 62 L. Ed. 2d 575 (quoting *Morissette v. United States*, 342 U.S. 246, 251, 72 S. Ct. 240, 96 L. Ed. 288 (1952)). Like the defense of necessity, the defense of duress does not negate a defendant's criminal state of mind when the applicable offense requires a defendant to have acted knowingly or willfully; instead, it allows the defendant to "avoid liability ... because coercive conditions or necessity negates a conclusion of guilt even though the necessary *mens rea* was present." *Bailey*, 444 U.S., at 402, 100 S. Ct. 624, 62 L. Ed. 2d 575.....

The jury instructions in this case were consistent with this requirement and, as such, did not run afoul of the Due Process Clause when they placed the burden on petitioner to establish the existence of duress by a preponderance of the evidence.

Having found no constitutional basis for placing upon the Government the burden of disproving petitioner's duress defense beyond a reasonable doubt, we next address petitioner's argument that the modern common law requires the Government to bear that burden. In making this argument, petitioner recognizes that, until the end of the 19th century, common-law courts generally adhered to the rule that "the proponent of an issue bears the burden of persuasion on the factual premises for applying the rule." Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 YALE L. J. 880, 898 (1967-1968). In petitioner's view, however, two important developments have established a contrary common-law rule that now prevails in federal courts: this Court's decision in *Davis v. United States*, 160 U.S. 469, 16 S. Ct. 353, 40 L. Ed. 499 (1895), which placed the burden on the Government to prove a defendant's sanity, and the publication of the Model Penal Code in 1962.

Although undisputed in this case, it bears repeating that, at common law, the burden of proving "affirmative defenses—indeed, 'all ... circumstances of justification, excuse or alleviation'—rested on the defendant." *Patterson [v. New York]*, 432 U.S., at 202, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (quoting 4 W. BLACKSTONE, COMMENTARIES *201).... This common-law rule accords with the general evidentiary rule that "the burdens of producing evidence and of persuasion with regard to any given issue are both generally allocated to the same party." 2 J. STRONG, MCCORMICK ON EVIDENCE § 337, p 415 (5th ed. 1999). And, in the context of the defense of duress, it accords with the doctrine that "where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue." *Id.*, at 413. Although she claims that the common-law rule placing the burden on a defendant to prove the existence of duress "was the product of flawed reasoning," petitioner accepts that this was the general rule, at least until this Court's decision in *Davis*. According to petitioner, however, *Davis* initiated a revolution that overthrew the old common-law rule and established her proposed rule in its place.

Davis itself, however, does not support petitioner's position. In that case, we reviewed a defendant's conviction for having committed murder "feloniously, wilfully, and of his malice aforethought." 160 U.S., at 474, 16 S. Ct. 353, 40 L. Ed. 499. It was undisputed that the prosecution's evidence, "if alone considered, made it the duty of the jury to return a verdict of guilty of the crime charged"; the defendant, however, adduced evidence at trial tending to show that he did not have the mental capacity to form the requisite intent. *Id.*, at 475, 16 S. Ct. 353, 40 L. Ed. 499. At issue before the Court was the correctness of the trial judge's instruction to the jury that the law "'presumes every man is sane, and the burden of showing it is not true is upon the party who asserts it.'" *Id.*, at 476, 16 S. Ct. 353, 40 L. Ed. 499. Under this instruction, "if the evidence was in

equilibrio as to the accused being sane, that is, capable of comprehending the nature and effect of his acts, he was to be treated just as he would be if there were no defence of insanity or if there were an entire absence of proof that he was insane." *Id.*, at 479, 16 S. Ct. 353, 40 L. Ed. 499.

....

Also undermining petitioner's argument is the fact that, in 1970, the National Commission on Reform of Federal Criminal Laws proposed that a defendant prove the existence of duress by a preponderance of the evidence. Moreover, while there seem to be few, if any, post-*Davis*, pre-1968 cases placing the burden on a defendant to prove the existence of duress, 10 or even discussing the issue in any way, this lack of evidence does not help petitioner. The long-established common-law rule is that the burden of proving duress rests on the defendant. Petitioner hypothesizes that Davis fomented a revolution upsetting this rule. If this were true, one would expect to find cases discussing the matter. But no such cases exist.

It is for a similar reason that we give no weight to the publication of the Model Penal Code in 1962. As petitioner notes, the Code would place the burden on the government to disprove the existence of duress, beyond a reasonable doubt. *See*, MODEL PENAL CODE § 1.12, 10A U.L.A. 88 (2001) (hereinafter Model Penal Code or Code) (stating that each element of an offense must be proved beyond a reasonable doubt); § 1.13(9)(c), at 91 (defining as an element anything that negatives an excuse for the conduct at issue); § 2.09, at 131-132 (establishing affirmative defense of duress). Petitioner argues that the Code reflects "well established" federal law as it existed at the time. But, as discussed above, no such consensus existed when Congress passed the Safe Streets Act in 1968. And even if we assume Congress' familiarity with the Code and the rule it would establish, there is no evidence that Congress endorsed the Code's views or incorporated them into the Safe Streets Act.

In fact, the Act itself provides evidence to the contrary. Despite the Code's careful delineation of mental states, *see* MODEL PENAL CODE § 2.02, at 94-95, the Safe Streets Act attached no explicit *mens rea* requirement to the crime of receiving a firearm while under indictment, § 924(a), 82 Stat. 233 ("Whoever violates any provision of this chapter ... shall be fined not more than \$5,000 or imprisoned not more than five years, or both"). And when Congress amended the Act to impose a *mens rea* requirement, it punished people who "willfully" violate the statute, *see* § 104(a), 100 Stat. 456, a mental state that has not been embraced by the Code, *see* Model Penal Code § 2.02(2), 94-95 (defining "purposely," "knowingly," "recklessly," and "negligently"); Explanatory Note, *id.*, at 97 ("Though the term 'willfully' is not used in the definitions of crimes contained in the Code, its currency and its existence in offenses outside the criminal code suggest the desirability of clarification"). Had Congress intended to adopt the Code's structure when it enacted or amended the Safe Streets Act, one would expect the Act's form and language to adhere much more closely to that used by the Code. It does not, and, for that reason, we cannot rely on the Model Penal Code to provide evidence as to how Congress would have wanted us to effectuate the duress defense in this context....

Justice Breyer, with whom Justice Souter joins, dissenting.

Courts have long recognized that "duress" constitutes a defense to a criminal charge....

My disagreement with the majority in part reflects my different view about how we should determine the relevant congressional intent. Where Congress speaks about burdens of proof, we must, of course, follow what it says. But suppose, as is normally the case, that the relevant federal statute is silent. The majority proceeds on the assumption that Congress wished courts to fill the gap by examining judicial practice at the time that Congress enacted the particular criminal statute in question.

To believe Congress intended the placement of such burdens to vary from statute to statute and time to time is both unrealistic and risks unnecessary complexity, jury confusion, and unfairness. It is unrealistic because the silence could well mean only that Congress did not specifically consider the "burden of persuasion" in respect to a duress defense. It simply did not think about that secondary matter. Had it done so, would Congress have wanted courts to freeze current practice statute by statute? Would it have wanted to impose different burden-of-proof requirements where claims of duress are identical, where statutes are similar, where the only relevant difference is the time of enactment? Why? Indeed, individual instances of criminal conduct often violate several statutes. In a trial for those violations, is the judge to instruct the jury to apply different standards of proof to a duress defense depending upon when Congress enacted the particular statute in question? What if in this very case the defendant's boyfriend had given her drug money and insisted (under threat of death) not only that she use some of the money to buy him a gun, but that she launder the rest?

I would assume instead that Congress' silence typically means that Congress expected the courts to develop burden rules governing affirmative defenses as they have done in the past, by beginning with the common law and taking full account of the subsequent need for that law to evolve through judicial practice informed by reason and experience....

My approach leads me to conclude that in federal criminal cases, the prosecution should bear the duress defense burden of persuasion. The issue is a close one. In Blackstone's time the accused bore the burden of proof for all affirmative defenses. And 20th-century experts have taken different positions on the matter. The Model Penal Code, for example, recommends placing the burden of persuasion on the prosecution. The Brown Commission recommends placing it upon the defendant. And the proposed revision of the federal criminal code, agnostically, would have turned the matter over to the courts for decision. Moreover, there is a practical argument that favors the Government's position here, namely, that defendants should bear the burden of persuasion because defendants often have superior access to the relevant proof.

Nonetheless, several factors favor placing the burden on the prosecution. For one thing, in certain respects the question of duress resembles that of *mens rea*, an issue that is always for the prosecution to prove beyond a reasonable doubt. The questions are not the same. The defendant's criminal activity here was voluntary; no external principle, such as the wind, propelled her when she acted. Moreover, her actions were intentional. Whether she wanted to buy the guns or not, and whether she wanted to lie while doing so or not, she decided to do these things and knew that she was doing them. Indeed, her action was willful in the sense that she knew that to do them was to break the law.

Nonetheless, where a defendant acts under duress, she lacks any semblance of a meaningful choice. In that sense her choice is not free. As Blackstone wrote, the criminal law punishes "abuse[s] of th[e] free will"; hence "it is highly just and equitable that a man should be excused for

those acts, which are done through unavoidable force and compulsion." 4 COMMENTARIES *27. And it is in this "force and compulsion," acting upon the will, that the resemblance to lack of *mens rea* lies. Cf. AUSTIN, IFS AND CANS, IN PROCEEDINGS OF THE BRITISH ACADEMY 123-124 (1956) (noting difference between choosing to do something where one has the opportunity and ability to do otherwise and choosing to do something where one lacks any such opportunity or ability)....

For another thing, federal courts (as a matter of statutory construction or supervisory power) have imposed the federal-crime burden of persuasion upon the prosecution in respect to self-defense, insanity, and entrapment, which resemble the duress defense in certain relevant ways. In respect to both duress and self-defense, for example, the defendant's illegal act is voluntary, indeed, intentional; but the circumstances deprive the defendant of any meaningful ability or opportunity to act otherwise, depriving the defendant of a choice that is free. Insanity, as I said, may involve circumstances that resemble, but are not identical to, a lack of *mens rea*. And entrapment requires the prosecution to prove that the defendant was "predisposed" to commit the crime—a matter sometimes best known to the defendant....

It is particularly difficult to see a practical distinction between this affirmative defense and, say, self-defense. The Government says that the prosecution may "be unable to call the witness most likely to have information bearing on the point," namely, the defendant. But what is the difference in this respect between the defendant here, who says her boyfriend threatened to kill her, and a battered woman who says that she killed her husband in self-defense, where the husband's evidence is certainly unavailable? Regardless, unless the defendant testifies, it could prove difficult to satisfy the defendant's burden of production; and, of course, once the defendant testifies, cross-examination is possible....

For these reasons I believe that, in the absence of an indication of congressional intent to the contrary, federal criminal law should place the burden of persuasion in respect to the duress defense upon the prosecution, which, as is now common in respect to many affirmative defenses, it must prove beyond a reasonable doubt. With respect, I dissent.

[Separate concurring opinions by Justices Kennedy and Scalia omitted]

Discussion Questions and Notes

- 1) Why is the burden of proof on the prosecution in self-defense but the burden of proof is on the defense for duress in most jurisdictions? Do you think that rationale is a sound one?

I. Justification (Necessity)

Under historical common law, the defense of necessity was narrowly applied such that defendants could argue that they averted a greater evil by causing a lesser one. In many jurisdictions, necessity was codified under the label "justification." The following article excerpt shows the most common formulation of the justification defense in American jurisdictions.

Paul H. Robinson, Matthew G. Kussmaul, Camber M. Stoddard, Ilya Rudyak and Andreas Kuersten, *The American Criminal Code: General Defenses*, 7 J. LEGAL ANALYSIS 37 (2015)

The majority view of the Lesser Evils defense among American jurisdictions might be stated as follows:

Section 301. Lesser Evils.

(1) An actor is justified in engaging in otherwise criminal conduct if [he reasonably believes] his conduct is necessary to avoid an imminent harm or evil to himself or to another, and:

(a) the harm or evil [sought to be] avoided is greater than that sought to be prevented by the law prohibiting the actor's conduct;

(b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and

(c) a contrary legislative balance does not otherwise plainly appear.

(2) The defense is not available when the actor was culpable in creating the harm or evil to be avoided.

At least forty-five jurisdictions and the MPC recognize a lesser evils defense. This defense requires that the actor's conduct be to prevent a harm or evil greater than that caused by violating the law.

When reading the following opinion, focus on whether Flowers should have been afforded an opportunity to present the affirmative defense of justification.

Flowers v. Mississippi, 51 So. 3d 911 (Miss. 2010)

OPINION

EN BANC.

DICKINSON, JUSTICE, FOR THE COURT:

The defendant in this house-burglary prosecution testified that someone was trying to shoot him, so he ran to a house, broke in, and hid. The trial court refused his request to instruct the jury on the defense of necessity, the jury found him guilty, and the Court of Appeals affirmed. We find that Flowers's testimony was sufficient to entitle him to the instruction, so we reverse and remand for a new trial.

A neighbor who saw Flowers breaking into a house grabbed a hunting rifle, ran to the scene, and held Flowers captive until the police arrived and arrested him. Flowers was indicted and tried for house burglary. During his trial, Flowers testified that someone had been trying to shoot him, so he ran to a nearby house, knocked on the door, and broke in to escape the would-be attacker.

Flowers submitted a jury instruction on the defense of necessity, but the trial judge, without comment, refused to give it. The jury found him guilty, and the trial court sentenced him to ten years in prison. He appealed, the Court of Appeals affirmed, and we granted certiorari....

The necessity defense entered Mississippi's jurisprudence in 1992 in *Knight v. State*,⁸ which held "that where a person reasonably believes that he is in danger of physical harm he may be excused for some conduct which ordinarily would be criminal,"⁹ and set forth the defense's three elements: "(1) the act charged was done to prevent a significant evil; (2) there must [have been] no adequate alternative; and (3) the harm caused was not disproportionate to the harm avoided."¹⁰

Flowers testified that he broke in the house because someone was trying to shoot him. The prosecutor closely cross-examined him about other options, but Flowers insisted someone was after him with a gun, and he had no time to do anything but break into the house. This testimony, if believed, established a prima facie showing of the necessity defense.

In a criminal prosecution, trial and appellate judges do not always find the defendant's testimony believable, credible, or consistent with other evidence. Still, it is evidence. And no citation of authority is necessary for the bedrock legal principle that juries, not judges, determine the weight and credibility of the evidence – including the defendant's testimony.

And it is the jury's responsibility, after determining the facts, to apply them to the law provided by the trial court. Yet, had the jurors believed Flowers's testimony, they could not have done so, because the trial judge provided them no instruction on the law of necessity. Because the trial court failed properly to instruct the jury on the law of the defense of necessity, we must reverse Flowers's conviction and remand this case for a new trial....

PIERCE, JUSTICE, DISSENTING:

....

This is not a defense-of-necessity case.

⁸ *Knight v. State*, 601 So. 2d 403 (Miss. 1992).

⁹ *Id.* at 405.

¹⁰ *Stodghill v. State*, 892 So. 2d 236, 238 (Miss. 2005).

Before anything else, the Majority's opinion is incomplete without a fuller account of the testimony of James Funches, the citizen-arrester. According to Funches, approximately a week before Christmas, Flowers, a neighborhood resident familiar to Funches, walked up to the home of Alvera Jones, knocked once, and then broke down the door. When Flowers emerged from the house, he carried with him certain items. Jones testified that the Christmas presents in Jones's home had been foraged through, moved, and placed in bags near the doorway. Funches testified that when Flowers had seen him (and, more importantly, his hunting rifle), the perceived burglar had laid down those personal items he was carrying, assumed a surrendering position, and exclaimed that he "done messed up." Suffice it to say, the evidence against Flowers is overwhelming....

...Flowers is not admitting that he committed burglary in the home of Alvera Jones. His theory is that he lacked the necessary intent when he entered the home, so he is, pointedly, denying that he committed the indicted crime. His is not an affirmative defense; it is just an ordinary one. And so, instructing the jury on necessity would not have been right on point.

... [H]is actual theory of defense was covered elsewhere in the instructions in the elements instruction. The jury was told that it must find beyond a reasonable doubt that Flowers entered the home [w]ith the intent to commit a crime of larceny[.] Had the jury believed that Flowers had entered the house out of fear for his life, it could have had reasonable doubt that he had entered with the intent to commit larceny and it could have found him not guilty. Flowers's defense was not an affirmative one of necessity; it was that the State had not proven an essential element of burglary. Therefore, his theory is built into the elements instruction. Flowers's proposed instruction would have repeated the applicable law, applied the facts to it, and erroneously injected the elements of necessity.

The proposed instruction also is without foundation in the evidence. In murder trials, we have said that simply claiming self-defense does not make it so. Mississippi defendants regularly are denied self-defense instructions predicated solely upon self-serving testimony. Why the Majority would employ a different standard in this, a less-serious crime, I do not know. If self-serving, wholly unsubstantiated stories such as this are sufficient evidence to merit a jury instruction, then, trial court judges in Mississippi should think long and hard about denying any instruction....

For the foregoing reasons, I dissent.

WALLER, C.J., RANDOLPH AND LAMAR, JJ., JOIN THIS OPINION.

Discussion Questions and Notes

- 1) The majority and dissent substantially on how realistic the defendant's argument was. Do you think he should have been able to argue it to the jury?
- 2) Why should we have a defense of necessity? Why not?

Among other defendants who have tried to employ the defense of justification, those engaged in civil disobedience are particularly notable. Those protesting wars, abortion, and nuclear power have all sought to argue that their criminal conduct was justified by stopping a greater harm. Such claims have almost always failed before courts who often bar such arguments before juries. The following case helps to illustrate why courts bar defendants from introducing justification arguments.

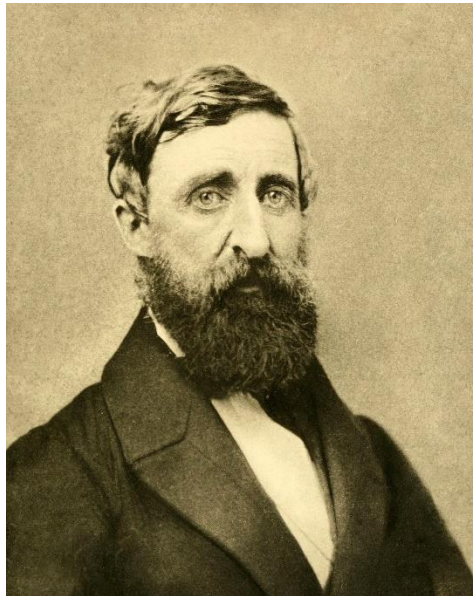


Figure 24: Henry David Thoreau (Edward Sidney Dunshee, 1861)

Pennsylvania v. Markum, 541 A.2d 347 (Pa. Super. Ct. 1988)

OPINION BY: CIRILLO

Appellants take this appeal from a judgment of sentence of one day to three months imprisonment imposed by the Honorable John J. Poserina of the Court of Common Pleas of Philadelphia County following their conviction for defiant trespass. We affirm.

On August 10, 1985, as part of an anti-abortion demonstration, appellants pushed their way into the Northeast Women's Center on Roosevelt Boulevard in Philadelphia, and occupied several rooms there. Once inside, they damaged two aspirator machines and other medical instruments, threw equipment out of a third floor window, and placed "pro-life" stickers on the doors, walls, and ceilings. Appellants refused to leave, even after several requests by the Center's staff, and were ultimately removed when police arrived and carried them from the scene....

Following sentencing, the appellants were immediately paroled on the condition that they each perform fifty hours of community service, not to be served in any pro-life agencies, and refrain from trespassing on medical facilities that perform abortions. Post-trial motions were filed and denied and this timely appeal followed.

Appellants raise one issue on appeal: whether the trial judge erred in not allowing appellants to present the defense of justification to the jury.

In Pennsylvania, the defense of justification is grounded in statute. 18 Pa.C.S. §§ 501-10...

Section 503 states:

(a) General rule. – Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable if:

(1) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged;

(2) neither this title nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and

(3) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

(b) Choice of evils. – When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability...

The Pennsylvania Supreme Court, in *Commonwealth v. Capitolo*, 508 Pa. 372, 498 A.2d 806 (1985) ... addressed the applicability of the justification provision[] ... §[] 503.

In *Capitolo*, Patricia Capitolo and four others crept under a fence enclosing the Shippingsport Nuclear Power Plant. Once through, they sat down about ten to twelve feet inside of the fence and held hands. They were placed under arrest after refusing requests of plant representatives that they leave the premises. The five sought to present a justification defense under § 503, the general justification provision OF the statute, but were refused by the trial judge because they would not have been able to prove that their trespass was justified. They were subsequently convicted of trespass in the Court of Common Pleas of Beaver County.

On appeal, a majority of this court reversed the decision of the trial court, concluding that appellants' offer of proof met the requirements of § 503 and that they should have been able to present to the jury evidence in support of the defense.

Our supreme court reversed and reinstated the convictions, holding that the defense of justification is available only when the appellee is able to make an offer of proof which establishes:

(1) that the actor was faced with a clear and imminent harm, not one which is debatable or speculative;

(2) that the actor could reasonably expect that the actor's actions would be effective in avoiding this greater harm;

(3) there was no legal alternative which will be effective in abating the harm; and

(4) the Legislature had not acted to preclude the defense by a clear and deliberate choice regarding the matter at issue.

Capitolo, 508 Pa. at 378, 498 A.2d at 809 (emphasis ours). The court went even further in stating that

it is essential that the offer meet a minimum standard as to each element of the defense so that if a jury finds it to be true, it would support the affirmative defense – here that of necessity Where the proffered evidence supporting one element of the defense is insufficient to sustain the defense, even if believed, the trial court has the right to deny use of the defense and not burden the jury with testimony supporting other elements of the defense.

Id.

After applying these basic principles to the facts of the trespass action, the court concluded that the danger at the nuclear plant was not imminent and that the appellees “could not establish that their criminal conduct was necessary to avoid harm or evil to themselves or others.” *Id.*...

[T]here must be a threat of an imminent and public disaster. Appellants’ offer of proof was insufficient as a matter of law to satisfy this four-part test. The use of justification as a defense could be precluded on this ground alone, regardless of the fact that abortion is legally sanctioned....

Appellants’ first argument, that abortion constitutes a public disaster, fails. As we have noted, pre-viability abortion is lawful by virtue of state statute and federal constitutional law. The United States Supreme Court, from *Roe* through its progeny, has consistently held that the state’s interest in protecting fetal life does not become compelling, and cannot infringe on a woman’s right to choose abortion, until the fetus is viable. Appellants do not suggest that viability and conception are simultaneous occurrences. We find that a legally sanctioned activity cannot be termed a public disaster.

Appellants’ second argument, that the disaster was imminent and that their actions were effective in averting it, similarly must fail. It is unreasonable for appellants to believe that their brief occupation of one center would effectively put an end to the practice of abortion. Appellants’ occupation of the Women’s Center did not stop its operation. Legal abortions continued to be performed in the Center and were available in other medical facilities throughout Pennsylvania.

Appellants’ third contention, that there was no legal alternative to their actions, is misguided. As Judge Poserina noted, “[t]here are obviously numerous means in a democratic society to express a point of view or to attempt to prevent a perceived harm without resorting to criminal behavior.” Appellants were free to peacefully demonstrate outside of the center in an effort to prevent the harm that they perceived from occurring.

Finally, appellants’ offer of proof was insufficient to show that no legislative purpose exists to exclude the justification defense, nor could they, because Pennsylvania law is to the contrary. The Abortion Control Act specifically provides that “[i]n every relevant civil and criminal proceeding in which it is possible to do so without violating the Federal Constitution, the common and statutory law of Pennsylvania shall be construed to extend to the unborn the equal protection of the laws” 18 PA.C.S. § 3202(c) (emphasis ours). Clearly, to permit private citizens the right to prevent women from exercising their right to abortion would be a violation of both state statute and federal constitutional law....

The appellants are actually requesting that this court countenance civil disobedience, which is defined as:

A form of lawbreaking employed to demonstrate the injustice or unfairness of a particular law and indulged in deliberately to focus attention on the allegedly undesirable law.

Black's Law Dictionary 223 (1st ed. 1979).

Though, our nation has a long and proud history of civil disobedience, appellants are not in that tradition. From the Boston Tea Party to the abolitionists to conscientious objectors to the sit-ins of Martin Luther King, civil disobedience has often stirred our nation's collective conscience and spurred us to change or repeal unjust laws. Often, juries refused to convict good men of conscience whose love of justice had motivated them to violate the law. On some occasions, a jury would convict but the judge in recognition of the righteousness of the underlying cause would suspend sentence or issue a nominal find. Abortion demonstrators argue that they are in this tradition and should be treated accordingly. They overlook the key distinction between their actions and the behavior of those cited above.

The true conscientious objector refuses to obey the very law which he claims is unjust. Rosa Parks refused to sit in the back of the bus and "draft dodgers" refused to register for the draft. When prosecuted, they challenged the wisdom, morality and constitutionality of the law in question. They did not employ their objections to that law as an excuse to engage in general or targeted violence. But that is what the demonstrators in this case have done. On this appeal, the demonstrators challenge the applicability of our criminal trespass laws to their activities. But they do not assert that those laws are unconstitutional or unjust. Rather they believe that because they disagree with the practice of abortion they are entitled to deface and occupy property belonging to other persons. How sad that their sense of justice and outrage is so narrowly focused.

Judge Poserina correctly determined that the justification defense would not lie. The action sought to be prevented by appellants was lawful, and as such, could not be prevented by unlawful conduct.... For these reasons, we affirm the judgment of sentence.

McEWEN, Judge, concurring and dissenting:

Since the rulings of both the United States Supreme Court, in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), and the Pennsylvania Supreme Court, in *Commonwealth v. Berrigan*, 509 Pa. 118, 501 A.2d 226 (1985), preclude the presentation by appellants of the defense of justification, I am compelled to join in the ruling of my distinguished colleague, President Judge Vincent A. Cirillo, the author of the lead opinion affirming the judgment of sentence. I write, nonetheless, so as to express the view that appellants have surmounted three of the four obstacles to presentation of the defense – a view which is, of course, measurably different from the conclusion of the lead opinion that appellants failed to meet any of the four requirements.

While the defense of justification has a number of synonyms, it is "often expressed in terms of choice of evils: When the pressure of circumstances presents one with a choice of evils, the law prefers that he avoid the greater evil by bringing about the lesser evil." *State v. Olsen*, 99 Wis.2d 572, 576, 299 N.W.2d 632, 634 (1980) quoting LaFave & Scott, Criminal Law § 50, at 382 (1972).

"Determination of the issues of competing values and, therefore, the availability of the defense of necessity is precluded, however, when there has been a deliberate legislative choice as to the values at issue." *State v. Warshow*, 138 Vt. 22, 27, 410 A.2d 1000, 1003 (1979) (Hill, J., concurring)....

The disaster which appellants sought to prevent was the abortions that would be completed in a very brief time after the women entered the building. While it is to be conceded that a certain number of the women entering the building sought but information, a significant number of women were entering the clinic to effect an abortion. The danger perceived by appellants was, therefore, clear and imminent. Further, were appellants able to prevent the women from entering into the building, their action would have been quite effective in thwarting the immediate disaster appellants perceived as awaiting the women and their unborn children in the clinic. And, of course, appellants had no legal alternative available. Therefore, I conclude that appellants complied with three of the conditions precedent to presentation of the defense of justification.

It is the fourth and final element that impedes the presentation of the defense of justification by the appellants. The fourth condition prescribed by the Pennsylvania Supreme Court in *Commonwealth v. Berrigan*, *supra*, 509 Pa. at 124, 501 A.2d at 229, required appellants to establish that "no legislative purpose exists to exclude the justification from the particular situation faced by the actor." The Pennsylvania Abortion Control Act, 18 Pa.C.S. §§ 3201 et seq., enacted as a consequence of the *Roe v. Wade* decision of the United States Supreme Court, evinced the intention of the Pennsylvania Legislature to exclude the defense of justification in the situation confronting appellants. Thus, the appellants here did not – in fact, could not – establish the absence of a legislative purpose to exclude the defense of justification....

TAMILIA, Judge, dissenting:

I follow and support the reasoning of the majority in its analysis of the justification defense to the point where it holds that justification defense in abortion is precluded by legislative and constitutional protection. Abortion is constitutionally protected but it is a qualified protection. The significant distinction between this case and *Commonwealth v. Capitola*, 508 Pa. 372, 498 A.2d 806 (1985) and *Commonwealth v. Berrigan*, 509 Pa. 118, 501 A.2d 226 (1985) is that there was no imminent danger in constructing atomic warheads. Abortion stands on an entirely different footing. I believe the defense is available in two respects despite statutory and constitutional limitations. First, if the clinic was processing abortions beyond the time of viability, as established by *Roe*, the right to protect the life of a fetus in those circumstances would exist within the present legislative and constitutional parameters. While the appellants would base their defense on proof that life begins at conception and that there are measurable brain waves in a fetus as young as eight weeks of age, the Supreme Court in *Roe*, having established the right to intervene by the state only at the point of viability, their argument as to life beginning as determined by brain wave activity is irrelevant. However, the Supreme Court, in fixing viability at a point supported by medical knowledge as it existed at that time, in my opinion has left open the question of when the state may intervene, to be dependent on medical evidence as to viability at the time at issue. *Roe v. Wade* was promulgated in 1973. In the intervening years, enormous strides have been made

in sustaining life of fetuses outside the womb, who, at the time of *Roe*, were considered nonviable....

This case, therefore, cannot be decided on the law promulgated under *Capitola*... There, the danger to life was not imminent and there were no specific individuals who could be identified as being in danger nor could the actions of the protesters be effective in avoiding the greater harm.

In this case, the appellants conceivably could have produced evidence that viability had significantly advanced from the 28 weeks' criterion of *Roe*, that a viable fetus, who would survive under the advanced medical technology available, would be terminated and that the actions of the appellants would be effective in avoiding the greater harm as the fetus in that class would have been aborted before legal action would be taken. It is also clear that no legal alternative would have been effective in abating the harm. Thus the denial of the right to pursue the justification defense precluded the appellants from attempting to establish the proof of viability and the inherent right to protect life under the circumstances of this case.

It is acknowledged that this will be a difficult task and the proof may not be forthcoming, despite the offer. However, by rejecting the offer out of hand as to proof of conception, appellants were also precluded from pursuing proof of earlier viability than recognized by the clinic under *Roe*.

It must be left for another day and to a higher court to pass on the right to intervene under the justification defense as it relates to conception. As of now, this Court, as an intermediate appellate court, is powerless to do so.

I would vacate the judgment of sentence and grant a new trial to permit the appellants the opportunity to invoke the justification defense in respect to the viability standard utilized by the clinic and the likelihood that viable fetuses might be aborted.

Discussion Questions and Notes

- 1) The politics of the protestors can often serve to undermine the legal reasoning of judges in such cases. Try to focus just of the legal rule at issue. Do you agree with the majority or dissenting opinions regarding the first three parts of the Pennsylvania statute in both *Markum* and *Capitolo*?
- 2) The majority attempts to distinguish "good" civil disobedience (such as the Boston Tea Party) from "bad" civil disobedience like the conduct of the defendants. Do you find their distinction persuasive?

This next case is one of the most famous in the Western legal canon. It stands for the rule that necessity cannot excuse or justify homicide. However, the reasoning of the court has been highly influential beyond that particular legal statement.



Figure 25: Richard Parker Tombstone (Hethurs, 2008)

The Queen v. Dudley and Stephens, 14 Queens Bench Division 273 (1884)

INDICTMENT for the murder of Richard Parker on the high seas within the jurisdiction of the Admiralty:

At the trial before Huddleston, B., at the Devon and Cornwall Winter Assizes, November 7, 1884, the jury, at the suggestion of the learned judge, found the facts of the case in a special verdict which stated "that on July 5, 1884, the prisoners, Thomas Dudley and Edward Stephens, with one Brooks, all able-bodied English seamen, and the deceased also an English boy, between seventeen and eighteen years of age, the crew of an English yacht, a registered English vessel, were cast away in a storm on the high seas 1600 miles from the Cape of Good Hope, and were compelled to put into an open boat belonging to the said yacht. That in this boat they had no supply of water and no supply of food, except two 1 lb. tins of turnips, and for three days they had nothing else to subsist upon. That on the fourth day they caught a small turtle, upon which they subsisted for a few days, and this was the only food they had up to the twentieth day when the act now in question was committed. That on the twelfth day the turtle were entirely consumed, and for the next eight days they had nothing to eat. That they had no fresh water, except such rain as they from time to time caught in their oilskin capes. That the boat was drifting on the ocean, and was probably more than 1000 miles away from land. That on the eighteenth day, when they had been seven days without food and five without water, the prisoners spoke to Brooks as to what should be done if no succour came, and suggested that some one should be sacrificed to save the rest, but Brooks dissented, and the boy, to whom they were understood to refer, was not consulted. That on the 24th of July, the day before the act now in question, the prisoner Dudley proposed to Stephens and Brooks that lots should be cast who should be put to death to save the rest, but Brooks refused consent, and it was not put to the boy, and in point of fact there was no drawing of lots. That on that day the prisoners spoke of their having families, and suggested it would be better to kill the boy that their lives should be saved, and Dudley proposed that if there was no vessel in sight by the morrow morning the boy should be killed. That next day, the 25th of July, no vessel appearing, Dudley told Brooks that he had better go and have a sleep, and

made signs to Stephens and Brooks that the boy had better be killed. The prisoner Stephens agreed to the act, but Brooks dissented from it. That the boy was then lying at the bottom of the boat quite helpless, and extremely weakened by famine and by drinking sea water, and unable to make any resistance, nor did he ever assent to his being killed. The prisoner Dudley offered a prayer asking forgiveness for them all if either of them should be tempted to commit a rash act, and that their souls might be saved. That Dudley, with the assent of Stephens, went to the boy, and telling him that his time was come, put a knife into his throat and killed him then and there; that the three men fed upon the body and blood of the boy for four days; that on the fourth day after the act had been committed the boat was picked up by a passing vessel, and the prisoners were rescued, still alive, but in the lowest state of prostration. That they were carried to the port of Falmouth, and committed for trial at Exeter. That if the men had not fed upon the body of the boy they would probably not have survived to be so picked up and rescued, but would within the four days have died of famine. That the boy, being in a much weaker condition, was likely to have died before them. That at the time of the act in question there was no sail in sight, nor any reasonable prospect of relief. That under these circumstances there appeared to the prisoners every probability that unless they then fed or very soon fed upon the boy or one of themselves they would die of starvation. That there was no appreciable chance of saving life except by killing some one for the others to eat. That assuming any necessity to kill anybody, there was no greater necessity for killing the boy than any of the other three men. But whether upon the whole matter by the jurors found the killing of Richard Parker by Dudley and Stephens be felony and murder the jurors are ignorant, and pray the advice of the Court thereupon, and if upon the whole matter the Court shall be of opinion that the killing of Richard Parker be felony and murder, then the jurors say that Dudley and Stephens were each guilty of felony and murder as alleged in the indictment."

....

The judgment of the Court (Lord Coleridge, C.J., Grove and Denman, JJ., Pollock and Huddleston, B-B.) was delivered by LORD COLERIDGE, C.J.

The two prisoners, Thomas Dudley and Edwin Stephens, were indicted for the murder of Richard Parker on the high seas on the 25th of July in the present year. They were tried before my Brother Huddleston at Exeter on the 6th of November, and under the direction of my learned Brother, the jury returned a special verdict, the legal effect of which has been argued before us, and on which we are now to pronounce judgment.

The special verdict as, after certain objections by Mr. Collins to which the Attorney General yielded, it is finally settled before us is as follows. (His Lordship read the special verdict as above set out.) From these facts, stated with the cold precision of a special verdict, it appears sufficiently that the prisoners were subject to terrible temptation, to sufferings which might break down the bodily power of the strongest man and try the conscience of the best. Other details yet more harrowing, facts still more loathsome and appalling, were presented to the jury, and are to be found recorded in my learned Brother's notes. But nevertheless this is clear, that the prisoners put to death a weak and unoffending boy upon the chance of preserving their own lives by feeding upon his flesh and blood after he was killed, and with the certainty of depriving him of any possible chance of survival. The verdict finds in terms that "if the men had not fed upon the body of the boy they would probably not have survived," and that, "the boy being in a much weaker condition

was likely to have died before them." They might possibly have been picked up next day by a passing ship; they might possibly not have been picked up at all; in either case it is obvious that the killing of the boy would have been an unnecessary and profitless act. It is found by the verdict that the boy was incapable of resistance, and, in fact, made none; and it is not even suggested that his death was due to any violence on his part attempted against, or even so much as feared by, those who killed him. Under these circumstances the jury say that they are ignorant whether those who killed him were guilty of murder, and have referred it to this Court to determine what is the legal consequence which follows from the facts which they have found.

There remains to be considered the real question in the case – whether killing under the circumstances set forth in the verdict be or be not murder. The contention that it could be anything else was, to the minds of us all, both new and strange, and we stopped the Attorney General in his negative argument in order that we might hear what could be said in support of a proposition which appeared to us to be at once dangerous, immoral, and opposed to all legal principle and analogy. All, no doubt, that can be said has been urged before us, and we are now to consider and determine what it amounts to. First it is said that it follows from various definitions of murder in books of authority, which definitions imply, if they do not state, the doctrine, that in order to save your own life you may lawfully take away the life of another, when that other is neither attempting nor threatening yours, nor is guilty of any illegal act whatever towards you or any one else. But if these definitions be looked at they will not be found to sustain this contention.

...

Now, except for the purpose of testing how far the conservation of a man's own life is in all cases and under all circumstances an absolute, unqualified, and paramount duty, we exclude from our consideration all the incidents of war. We are dealing with a case of private homicide, not one imposed upon men in the service of their Sovereign and in the defence of their country. Now it is admitted that the deliberate killing of this unoffending and unresisting boy was clearly murder, unless the killing can be justified by some well-recognised excuse admitted by the law. It is further admitted that there was in this case no such excuse, unless the killing was justified by what has been called "necessity." But the temptation to the act which existed here was not what the law has ever called necessity. Nor is this to be regretted. Though law and morality are not the same, and many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequence; and such divorce would follow if the temptation to murder in this case were to be held by law an absolute defence of it. It is not so. To preserve one's life is generally speaking a duty, but it may be the plainest and the highest duty to sacrifice it. War is full of instances in which it is a man's duty not to live, but to die. The duty, in case of shipwreck, of a captain to his crew, of the crew to the passengers, of soldiers to women and children, as in the noble case of the Birkenhead; these duties impose on men the moral necessity, not of the preservations but of the sacrifice of their lives for others, from which in no country, least of all, it is to be hoped, in England, will men ever shrink as indeed, they have not shrunk. It is not correct, therefore, to say that there is any absolute or unqualified necessity to preserve one's life. "*Necesse est ut eam, non ut vivam,*" is a saying of a Roman officer quoted by Lord Bacon himself with high eulogy in the very chapter on necessity to which so much reference has been made. It would be a very easy and cheap display of commonplace learning to quote from Greek and Latin authors, from Horace, from Juvenal, from Cicero, from Euripides, passage after passages, in which the duty

of dying for others has been laid down in glowing and emphatic language as resulting from the principles of heathen ethics; it is enough in a Christian country to remind ourselves of the Great Example whom we profess to follow. It is not needful to point out the awful danger of admitting the principle which has been contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own. In this case the weakest, the youngest, the most unresisting, was chosen. Was it more necessary to kill him than one of the grown men? The answer must be "No" -

"So spake the Fiend, and with necessity,
The tyrant's plea, excused his devilish deeds."

It is not suggested that in this particular case the deeds were devilish, but it is quite plain that such a principle once admitted might be made the legal cloak for unbridled passion and atrocious crime. There is no safe path for judges to tread but to ascertain the law to the best of their ability and to declare it according to their judgment; and if in any case the law appears to be too severe on individuals, to leave it to the Sovereign to exercise that prerogative of mercy which the Constitution has intrusted to the hands fittest to dispense it.

It must not be supposed that in refusing to admit temptation to be an excuse for crime it is forgotten how terrible the temptation was; how awful the suffering; how hard in such trials to keep the judgment straight and the conduct pure. We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy. But a man has no right to declare temptation to be an excuse, though he might himself have yielded to it, nor allow compassion for the criminal to change or weaken in any manner the legal definition of the crime. It is therefore our duty to declare that the prisoners' act in this case was wilful murder, that the facts as stated in the verdict are no legal justification of the homicide; and to say that in our unanimous opinion the prisoners are upon this special verdict guilty, of murder.

THE COURT then proceeded to pass sentence of death upon the prisoners.

Discussion Questions and Notes

- 1) Do you think the defendants should have been found guilty of homicide?
- 2) Would your opinion change if the victim was included in the drawing of lots? If everyone agreed in advance to comply with the results of drawing of lots? If the oldest was selected for death? If the meatiest person was killed? Why would your thinking change (or not change) under such circumstances?
- 3) The MPC does not disallow necessity arguments in homicide cases. Do you think the common law or MPC rule is better in this regard?

Review Exercise 1

Watch [this film clip](#) and answer these questions:

The defendant is being blackmailed because of his use of phone sex line. Do you think his threat of battery is justified in a moral sense? A legal one?

II. Self-Defense and Defense of Others

In this section, we explore a particular form of the justification defense which has developed its own doctrine and rules. In instances where a person is protecting himself or others, the law allows such a person to use force. These acts of force are themselves crimes but are deemed justified as an act of defense.

There are, however, significant complications to the general rule. One important distinction is that the rules governing self-defense and defense of others vary depending upon whether a person is using deadly or non-deadly force in defense. Further, jurisdictions vary substantially on the subjective factors that are relevant to the defense as well as how broadly a reasonable person should be construed. In general, the MPC jurisdictions focus on the subjective fear of a defendant whereas common law jurisdictions are concerned with whether such fear is reasonable. The reality, however, is more confused. Every jurisdiction incorporates subjective and objective factors in determining if a defendant was justified in using force in defense.

Another issue integral to self-defense has become prominent in the public discourse, so-called “Stand Your Ground” laws. Such laws have been common throughout the United States for some time. “Stand Your Ground” laws replace the historical rule of retreat which required persons to retreat from violence if they could safely do so. In contrast, standing your ground allows a defendant to use deadly force even when safe retreat is possible. Under either rule, however, a person has no obligation to retreat from her home under the Castle Doctrine.

A distillation of the most common construction of the affirmative defense of self-defense and defense of others is as follows:

Paul H. Robinson, Matthew G. Kussmaul, Camber M. Stoddard, Ilya Rudyak and Andreas Kuersten, *The American Criminal Code: General Defenses*, 7 J. LEGAL ANALYSIS 37 (2015)

The majority view of the Defense of Persons justification among American jurisdictions might be stated as follows:

Section 303. Defense of Persons.

(1) An actor is justified in using force that [he reasonably believes] is necessary to defend himself or a third person against imminent unlawful force by an aggressor.

(2) The use of deadly force in self-defense is justified if [the actor reasonably believes that] such force is necessary to protect himself or a third person against death, serious bodily injury, sexual intercourse compelled by force, or kidnapping.

(3) An actor is not justified in using force against another person:

(a) if he intentionally provoked unlawful action by the other person in order to cause bodily injury to the person;

(b) if he is the initial aggressor, unless he has withdrawn from the encounter and effectively communicated his withdrawal to the other person, but the other person persists in continuing the conflict by force;

(c) if the force was the product of mutual combat by agreement not specifically authorized by law; or

(d) to resist an arrest that the actor knows is being made by a peace officer, even if the arrest is unlawful, except force may be used to resist an arrest that is unlawful because the officer is using excessive force.

(4) An actor has no duty to retreat from a place he has a right to be before using deadly or non-deadly force that is necessary to defend himself or a third person.

The following case helps to illustrate the complexities of modern self-defense provisions in application to particular fact patterns.

Connecticut v. Singleton, 974 A.2d 679 (Conn. 2009)

ZARELLA, J.

The state appeals, on the granting of certification, from the judgment of the Appellate Court reversing the conviction of the defendant, Ronald M. Singleton, of manslaughter in the first degree.¹ The Appellate Court concluded that the trial court failed to instruct the jury properly on self-defense by removing from its consideration the disputed factual issue of whether the

¹ The defendant was charged with murder under General Statutes § 53a-54 (a), but the trial court also instructed the jury on the lesser included offense of manslaughter in the first degree under General Statutes § 53a-55 (a), of which the defendant was found guilty. General Statutes § 53a-54a provides in relevant part: "(a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person" General Statutes § 53a-55 provides in relevant part: "(a) A person is guilty of manslaughter in the first degree when: (1) With intent to cause serious physical injury to another person, he causes the death of such person"

defendant had used deadly or nondeadly physical force during an altercation with the victim, Leonard Cobbs, that resulted in the victim's death. On appeal to this court, the state claims that the trial court correctly instructed that the defendant had used deadly physical force in defending himself against the victim because his claim of self-defense required a jury determination as to whether he was justified in killing the victim with a knife, thus making his theoretical use of nondeadly force during the preceding struggle irrelevant. The defendant responds that the instructions were improper because the use of deadly or nondeadly physical force during the struggle was a disputed factual issue for the jury to decide. The defendant alternatively contends that the trial court improperly instructed the jury on the "initial aggressor" exception to the law of self-defense and on the offense of manslaughter in the first degree. We agree with the state that the court's instructions on self-defense were proper and reject the defendant's alternative grounds for affirmance. Accordingly, we reverse the judgment of the Appellate Court.

The following facts, which the jury reasonably could have found, are set forth in the opinion of the Appellate Court. "The defendant and the victim ... had used illegal drugs together. The victim purchased these drugs with the defendant's money. The defendant was angry that the victim had failed to reimburse him for his share of the drugs. On December 18, 2002, the defendant attempted to find the victim to collect this debt and traveled to both West Haven and New Haven in order to locate him. He eventually found the victim in the Newhall area of West Haven.

"The two men spoke, and the defendant demanded that the victim pay him. The victim indicated that he did not have the money. The victim agreed to go to the defendant's apartment later that day to repay his debt of \$180. After arriving at the apartment, the victim again informed the defendant that he did not have the money but offered to perform oral sex as an alternative means to settle the debt. The defendant rejected this proposal and became angry. The defendant then threatened the victim by stating: 'Yo, I'll fuck you up.' At approximately 6:45 p.m., a physical altercation between the two men commenced. The victim and the defendant moved around the room while engaged in this physical altercation. During this encounter, the defendant stabbed the victim several times with both a knife and a screw-driver. The stab wound that caused the victim's death was seven and one-half inches deep, running from left to right, and was caused by a downward strike. This wound penetrated the chest wall, a portion of the left lung, the pericardium and the heart, and the diaphragm, terminating in the liver. The length, depth and size of the wound all were consistent with having been caused by the knife blade.

"The defendant did not call the police or paramedics immediately but, instead, disposed of the knife blade, which had broken off from the handle, and attempted to clean up the apartment. More than thirty minutes after the altercation had ended, at approximately 7:22 p.m., the defendant called his girlfriend, Victoria Salas. After arriving at the apartment, Salas attempted to revive the victim and called 911. At approximately 8:51 p.m., the defendant, using Salas' cellular telephone, called the building maintenance supervisor, Richard McCann. McCann helped the defendant retrieve the knife blade that he had thrown down the garbage chute. At 9:06 p.m., Salas telephoned the police department, and officers arrived more than two hours after the fight. The officers discovered blood throughout the defendant's apartment. The knife had the victim's blood on it. The screwdriver had DNA from the victim on the handle, blood from the defendant on the shaft, and a mixture of blood on the tip with the defendant's DNA as the major contributor. One

of the detectives observed that the defendant was bleeding from the middle of his chest and that there was a bloodstain on his shirt approximately the size of a fifty cent piece. This wound later was determined to have been caused by the screw-driver.

"The defendant raised the issue of self-defense at trial. The defense was premised on the defendant's version of the fight. The defendant testified that after he had asked the victim to repay him in the apartment, the victim became verbally aggressive and pulled out the screwdriver and threatened him. The victim then stabbed the defendant in the chest, and a struggle ensued. The defendant managed to disarm the victim, and they continued to struggle. Eventually, the victim grabbed the knife. The defendant managed to grab the victim's wrists, and, at some point, the knife went into the victim's body, ending the struggle." *State v. Singleton*, 97 Conn. App. 679, 680-82, 905 A.2d 725 (2006).

Both parties requested jury instructions on self-defense. In the state's request to charge, it proposed instructions referring to "deadly physical force" ... The defendant proposed instructions that did not refer to "deadly physical force" but, rather, to "reasonable physical force" and the use of "a dangerous instrumentality" The trial court followed the state's approach and instructed the jury to consider whether the defendant's use of "deadly physical force" was justified under a theory of self-defense. It did not instruct on the use of nondeadly physical force, nor did it instruct that the jury was required to decide the degree of force that the defendant had used. The jury subsequently rejected the defendant's claim of self-defense and found him guilty of the lesser included offense of manslaughter in the first degree. Thereafter, the court rendered judgment, sentencing the defendant to a term of twenty years incarceration.

On appeal to the Appellate Court, the defendant claimed that the trial court's instructions were improper because the trial court had failed to submit to the jury the factual question of whether the defendant had used deadly or nondeadly force during his struggle with the victim prior to the stabbing. The Appellate Court agreed, concluding that "[t]he defendant testified that he [had] grabbed the victim's wrists and that during this physical encounter, the knife ended up wounding the victim. We cannot conclude, as a matter of law, that such actions constituted deadly physical force. The defendant was entitled to have the jury, rather than the court, make that factual determination.... Simply put, the jury did not have the opportunity to consider the factual issue of whether the defendant used deadly or nondeadly physical force." The Appellate Court further observed that, "[h]ad the jury been instructed to determine whether the defendant used nondeadly force, it could have found that the defendant's grabbing of the victim's wrists and the ensuing struggle constituted an appropriate level of force to repel the victim. The option never was afforded to the defendant.... [T]he improper instructions [thus] prejudiced the defendant by making it easier for the state to disprove the claim of self-defense." The Appellate Court also concluded that the evidence was not "so overwhelming as to render the improper instruction[s] harmless" and ordered a new trial. This appeal followed....

The state claims that the Appellate Court improperly reversed the defendant's conviction on the ground that the jury should have been instructed to consider the issue of nondeadly force. The state contends that there was no dispute that the defendant inflicted the fatal stab wound with the knife and that, once the jury determined that he had done so intentionally, all that was left to decide regarding his claim of self-defense was whether his actions were justified, thereby rendering irrelevant the issue of whether he had used deadly or nondeadly force during the

struggle that preceded the stabbing. The defendant responds that the only intentional force he used was when he fought with the victim over the knife and that the actual stabbing was an unintended consequence of the altercation. Accordingly, he argues that the jury, in considering his claim of self-defense, was required to resolve the factual question of whether he used deadly or nondeadly force during the struggle. The defendant contends that the resolution of this factual question was crucial because it affected the state's burden of disproving his claim of self-defense by making it easier to refute a claim of self-defense predicated on the use of deadly rather than nondeadly force. We agree with the state....

General Statutes § 53a-19 (a) provides in relevant part: "[A] person is justified in using reasonable physical force upon another person to defend himself ... from what he reasonably believes to be the use or imminent use of physical force, and he may use such degree of force which he reasonably believes to be necessary for such purpose; except that deadly physical force may not be used unless the actor reasonably believes that such other person is (1) using or about to use deadly physical force, or (2) inflicting or about to inflict great bodily harm."

Under our Penal Code, self-defense ... is a defense ... rather than an affirmative defense. ... Consequently, a defendant has no burden of persuasion for a claim of self-defense; he has only a burden of production. That is, he merely is required to introduce sufficient evidence to warrant presenting his claim of self-defense to the jury.... Once the defendant has done so, it becomes the state's burden to disprove the defense beyond a reasonable doubt.... Accordingly, [u]pon a valid claim of self-defense, a defendant is entitled to proper jury instructions on the elements of self-defense so that the jury may ascertain whether the state has met its burden of proving beyond a reasonable doubt that the assault was not justified.... As these principles indicate, therefore, only the state has a burden of persuasion regarding a self-defense claim....

"Our statutes distinguish between deadly and non-deadly force used in self-defense. See General Statutes § 53a-19. Additionally, [this court] has recognized that when instructing a jury on self-defense under § 53a-19, there is a distinction between deadly and nondeadly force. The state may defeat a defendant's claim of self-defense involving deadly physical force by proving, beyond a reasonable doubt, any of the following: (1) the defendant did not reasonably believe that the victim was using or about to use deadly physical force or inflicting or about to inflict great bodily harm; or (2) the defendant knew that he could avoid the necessity of using deadly physical force with complete safety by retreating,¹¹ or surrendering possession of property to a person asserting a claim of right or by complying with a demand that he ... abstain from performing an act that he is not obligated to perform. See GENERAL STATUTES § 53a-19. In other words, the General Assembly has created specific legislation that limits the use of deadly physical force in the context of self-defense when compared to the use of reasonable physical force. If the state can carry its burden of proof with respect to any of the enumerated situations ... the defendant's claim of self-defense [involving the use of] deadly physical force will fail. In contrast, the right to use reasonable physical force is, by legislative fiat, much broader in scope. In order to defeat a claim of self-defense [involving] the use of reasonable physical force, the state must prove beyond a reasonable doubt

¹¹ "Retreat is not required if the defendant is in his or her dwelling, or in his or her place of work, and was not the initial aggressor, or is a peace officer or assisting a peace officer in the performance of the officer's duties. See General Statutes § 53a-19 (b)."

that the defendant did not reasonably believe that he or she was subject to the use or imminent use of physical force and did not use a degree of force that was reasonable for that purpose. Simply put, it is much easier for the state to disprove [a claim of] self-defense when [it is predicated on the use of] deadly physical force" *State v. Singleton, supra*, 97 Conn. App. 692-93....

Mindful of these principles, we agree with the state that the trial court's instructions on self-defense were not improper under the circumstances of this case. We begin our analysis by observing that the defendant's claim of self-defense is not, in actuality, a justification defense. Although the defendant cloaks his claim in the language of self-defense, he does not seek "justification for engaging in otherwise criminal conduct"; (emphasis added) but repeatedly characterizes his fatal stabbing of the victim as the unintended consequence of the struggle over the knife. Thus, the defendant never concedes in his appellate brief that he may have stabbed the victim during their struggle; rather, he maintains that he "never denied that the death of [the victim] had occurred, unintentionally, during a struggle over a knife...." He likewise declares that (1) the victim's death occurred when the victim was "unintentionally stabbed during the struggle as [he] was defending himself from [the victim's] knife attack," (2) "[he] was not aware during the struggle that [the victim] got injured," (3) "the stabbing of [the victim] was not an intended result but had unintentionally occurred during the struggle," (4) "the stabbing of [the victim] was unintended and ... happened unintentionally during the defendant's intentional and justified self-defense struggle with [the victim] over the knife," (5) he testified that "the only intentional force used was to struggle over the knife and that the actual stabbing occurred unintentionally during the struggle," and (6) "he struggled with [the victim] over the knife in self-defense but ... the actual stabbing occurred unintentionally" In other words, the defendant repeatedly claims that the stabbing was, for all intents and purposes, accidental.

The defendant's argument on appeal is consistent with his testimony at trial that he did not know that the victim had been wounded by the knife, even when the victim suddenly stopped struggling and staggered over to the bed. In fact, the defendant testified that he thought that the victim "was kidding" after he ceased fighting and sat down on the bed, and that it was only after the victim rolled off the bed and onto the floor that the defendant saw a bloodstain on the front of the victim's sweater and discovered the stab wound. The defendant also makes no claim that, even if the jury found that he intentionally had stabbed the victim, he acted in self-defense. Indeed, he contends that his claim differs from that of an accused claiming self-defense who acknowledges intentionally firing a gun or intentionally stabbing the victim but who maintains that it was necessary to do so in self-defense. Instead, the defendant repeatedly emphasizes that the stabbing in this case was "unintended," or that it "happened unintentionally" during his "intentional and justified self-defense struggle with [the victim] over the knife" and, thus, did not involve any criminal conduct. Consequently, his claim is more properly viewed as a claim of accident, or failure of proof, which raises the entirely different question of whether he intended to commit the crime, not whether he was justified in committing it....

The state claims that the trial court's instructions on self-defense were proper because, once the jury found that the defendant had the requisite intent to commit the charged offense, it necessarily would have rejected his claim of accident, or unintended consequences, thus, completely removing from the jury's consideration the issue of whether the defendant used deadly or nondeadly force during the preceding struggle. We agree.

The trial court instructed the jury on the elements of murder and of the lesser included offense of manslaughter in the first degree in accordance with the state's substitute information, which charged that the defendant, "with the intent to cause the death of [the victim], caused the death of [the victim] by stabbing him with a knife, in violation of General Statutes § 53a-54 (a)." The court specifically instructed the jury that the state must prove beyond a reasonable doubt that (1) the defendant intended to cause the victim's death or, with respect to the lesser offense of manslaughter in the first degree, that he intended to cause the victim to suffer serious physical injury, (2) the defendant, acting with that specific intent, caused the death of the victim by stabbing him with a knife, and (3) the defendant was not justified in using deadly physical force. 15 The instruction on self-defense thus required the jury to consider the force that the defendant used in stabbing the victim, not the force that he used in the struggle over the knife, because the struggle apart from the stabbing was irrelevant to the charge of murder and the lesser included offense of manslaughter in the first degree.

The defendant's and the Appellate Court's focus on the struggle preceding the stabbing is improper in this case. Once the jury found that the state had met its burden of proving beyond a reasonable doubt that the defendant intended to cause the victim serious physical injury and had caused his death by stabbing him with the knife, there was no disputed factual issue that required the jury to determine whether the defendant had used deadly or nondeadly physical force during the struggle. The defendant's intentional use of force during the struggle had no bearing on the ultimate question of whether he was guilty of murder or manslaughter in the first degree because both offenses were predicated on the fact that the defendant intentionally had stabbed the victim....

The defendant also claims that the Appellate Court's judgment may be affirmed on the alternative ground that the trial court improperly had instructed the jury on the initial aggressor exception to the law of self-defense. He specifically claims that the instructions failed to make clear that (1) a person cannot be considered an initial aggressor on the basis of words alone, and (2) a person who uses nondeadly force as the initial aggressor may be justified in using deadly force in response to an unjustified escalation from nondeadly to deadly force by the victim of the attack. The state responds that the court's instructions, when considered in the context of the testimony at trial, "did not have the effect of directing the jury to conclude" that the defendant was the initial aggressor or that he unlawfully escalated the level of violence from nondeadly to deadly force....

The defendant first claims that the Appellate Court's judgment should be affirmed on the ground that the trial court improperly failed to instruct that a person cannot be deemed the initial aggressor as a matter of law on the basis of words alone and that the qualifying act must be physical rather than verbal. He claims that such an instruction was necessary because the court's instructions suggested that a person could be deemed the initial aggressor on the basis of words alone, even though the law is clearly to the contrary. The defendant also contends that the requested instruction was important because the state misled the jury and caused it to reject his claim of self-defense on an improper ground when the senior assistant state's attorney (prosecutor) indicated to the jury that it could, and should, find that the defendant was the initial aggressor when he threatened the victim by stating, "[y]o, I'll fuck you up," after the victim had offered to perform oral sex as a means of settling his drug debt. The state responds that the facts

do not support this view and that the jury was not misled by the trial court's instructions. We agree with the state....

General Statutes § 53a-19 (c) provides in relevant part: "[A] person is not justified in using physical force when ... (2) he is the initial aggressor"

....

Read according to its plain language, and as a whole, doubtlessly § 53a-19 contemplates that a person may respond with physical force to a reasonably perceived threat of physical force without becoming the initial aggressor and forfeiting the defense of self-defense. Otherwise, in order to avoid being labeled the aggressor, a person would have to stand by meekly and wait until an assailant struck the first blow before responding. If an assailant were intending to employ deadly force or [to] inflict great bodily harm, such an interpretation of the statute would be extremely dangerous to one's health. Such a bizarre result could not have been intended by the legislature.

During closing argument, the prosecutor did not argue that the defendant should be considered the initial aggressor on the basis of words alone, as the defendant contends. In discussing whether the defendant was the initial aggressor, the prosecutor referred to a diagram of the defendant's apartment and reminded the jurors that the defendant had threatened the victim by blocking his egress, by telling him, "I'll fuck you up," and by advancing toward him. The prosecutor thus argued that the defendant was the initial aggressor not simply because of what he had said to the victim but also because of his physical conduct. Accordingly, we conclude that, to the extent that the defendant claims that the trial court improperly instructed the jury because the court failed to clarify or correct the mistaken impression conveyed by the prosecutor's closing argument that the defendant was the initial aggressor on the basis of his words alone, his claim must fail because the prosecutor made no such argument, and, accordingly, there was no misunderstanding to correct.

We also conclude that the trial court's instructions that "[t]he initial aggressor is the person who first acts in such a manner that creates a reasonable belief in another person's mind that physical force is about to be used upon that other person" and that "[t]he first person to use physical force is not necessarily the initial aggressor" were entirely consistent with the law and thus were proper. The instructions did not advise or imply that a person could be considered the initial aggressor on the basis of words alone. In addition, neither party argued that a person could be considered the initial aggressor on the basis of words alone. As we indicated in the preceding discussion, the prosecutor argued that the defendant was the initial aggressor as a result of the combination of verbal and physical conduct. Similarly, the defense argued that the victim was the initial aggressor because he had used threatening language and brandished a screwdriver. Accordingly, there was no suggestion by the court or by either party that the person who was the initial aggressor had threatened the other person on the basis of words alone. As a result, we conclude that there was no reasonable possibility that the jury was misled or that it rejected the defendant's claim of self-defense on improper grounds....

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to affirm the judgment of the trial court.

PALMER, J., with whom KATZ, J., joins, dissenting.

I agree with the defendant, Ronald M. Singleton, that the Appellate Court correctly concluded that the trial court had violated his constitutional right to present a defense by failing to instruct the jury on the defendant's primary theory of defense. *See State v. Singleton*, 97 Conn. App. 679, 680, 696-97, 905 A.2d 725 (2006). I also agree with the defendant and the Appellate Court that the instructional impropriety constituted harmful error requiring a new trial. *Id.*, 697-98. Accordingly, I respectfully dissent.

The majority opinion sets forth the facts that the jury reasonably could have found. The following additional facts and procedural history, however, also are relevant to the issue on appeal. At trial, the defendant testified that the victim came to his apartment to pay him for a quantity of drugs that the defendant had provided to the victim. After the two men spoke for a few minutes, and without mentioning his drug debt, the victim indicated that he was leaving. The defendant told the victim that he wanted to be paid for the drugs. The victim began "babbling," and the defendant moved toward the victim, stating that he was "going to fuck [him] up." The victim then removed a screwdriver from his pocket, prompting the defendant to back away. The victim continued toward the defendant and stabbed him in the chest with the screwdriver. The defendant then grabbed the victim, causing him to drop the screwdriver. The physical altercation between the defendant and the victim continued, but, eventually, they separated. At that time, the victim grabbed a knife from the defendant's kitchen counter. The defendant then told the victim that he was "going to jail," at which point the victim came at the defendant with the knife. According to the defendant, he "grabbed" and "bent" the victim's wrist in an effort to take the knife away from him. The defendant further testified that the two men struggled over the knife, but that, at some point, the victim stopped resisting. The victim staggered, sat down on the defendant's bed and then rolled onto the floor. When the victim did not move, the defendant approached him and observed that the knife had entered his body. The defendant insisted that he had intended only to disarm the victim and that he otherwise had not intended to cause him any harm.

The defendant raised a claim of self-defense predicated on his version of how the victim was killed. In particular, the defendant sought an instruction on the use of nondeadly physical force against the victim based on his claim that he was justified in using the degree of force necessary to disarm the victim. The defendant also sought an instruction on the use of deadly physical force in self-defense, presumably to account for the possibility of a jury finding that, contrary to the testimony of the defendant, he had stabbed the victim with the intent to do so. In light of the defendant's trial testimony, however, it is apparent that the defendant's principal claim involved his use of nondeadly force against the victim, which, according to the defendant, resulted in his altercation with the victim that led to the victim's accidental stabbing death. The trial court, however, did not instruct the jury on the defendant's claim that he had used, and was justified in using, nondeadly force against the victim; the court instructed the jury only on the use of deadly force in self-defense. The jury found the defendant not guilty of murder but found him guilty of the lesser included offense of manslaughter in the first degree under General Statutes § 53a-55 (a) (1)....

I now turn to the reason for my disagreement with the majority, which stems primarily from the fact that the trial court, in instructing the jury, repeatedly explained, in clear and unequivocal language, that the defendant's sole claim was that he had, in fact, used deadly physical force against the victim, that is, he had intentionally stabbed the victim, but that he was justified in doing so. As I have indicated, however, that was not the defendant's primary claim. Indeed, it was not the claim that the defendant raised in his trial testimony. At trial, the defendant steadfastly maintained that he had used nondeadly force in attempting to wrest the knife away from the victim, that he was justified in using such force, and that the victim accidentally was stabbed to death during the ensuing altercation. The trial court, however, never instructed the jury on this primary theory of defense, that is, that the victim was killed accidentally when the defendant justifiably used nondeadly force in defending himself against what he reasonably believed was the victim's imminent knife attack against him. Instead, the trial court repeatedly asserted in its jury instructions that the defendant's claim was predicated on his contention that his use of deadly force was justified. By instructing the jury in this manner, the trial court effectively removed the defendant's principal defense from the jury's consideration.

The contrary conclusion of the majority is flawed because that conclusion is founded on the state's argument that, "once the jury found that the defendant had the requisite intent to commit the charged offense, it necessarily would have rejected his claim of accident, or unintended consequences, thus, completely removing from the jury's consideration the issue of whether the defendant used deadly or nondeadly force during the preceding struggle." This contention ignores the import of the trial court's instructions on the defendant's claimed use of deadly force in self-defense. The court repeatedly instructed the jury that the defendant was claiming to have used deadly force in self-defense, and the court did so before instructing the jury on the elements of homicide. In other words, the court first explained to the jury that "[t]he defendant claims [that] he acted in self-defense. In claiming that he acted in self-defense, the defendant is claiming that his use of deadly physical force was justified.

"'Deadly physical force' means physical force which can be reasonably expected to cause death or serious physical injury.... 'Serious physical injury' means physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or serious loss or impairment of any bodily organ." (Emphasis added.) The court further explained that, "[a]lthough the defendant raised the defense of justification, the state has the burden to prove beyond a reasonable doubt that the defendant was not justified in using deadly physical force." (Emphasis added.)

Thereafter, and before instructing the jury on what the state was required to prove to establish the elements of the crime of intentional first degree manslaughter, the trial court repeatedly underscored for the jury that the defendant affirmatively was asserting that he had used deadly physical force against the victim in self-defense. In light of these instructions, the jury necessarily was led to believe that the defendant's sole claim was predicated on his acknowledgement that he had, in fact, used deadly force against the victim, that is, he intentionally had stabbed the victim, but was justified in doing so. For example, the court explained: (1) "a person is not justified in using deadly physical force when, at the time he uses deadly physical force, he does not reasonably believe [that] the other person is about to use deadly physical force against him or about to inflict great bodily harm to him"; (emphasis added); (2) "[i]n deciding whether or not the

state has proved beyond a reasonable doubt that the defendant was not justified in using deadly physical force, you will first focus on the defendant"; (emphasis added); (3) "[y]ou first focus on what he, in fact, believed at the time he used deadly physical force ... [and] then ... focus on whether the defendant's belief was reasonable under all the circumstances that existed when he used deadly physical force"; (emphasis added); (4) "[t]he act of [the victim] leading to the defendant's use of deadly physical force need not be an actual threat or assault"; (emphasis added); (5) "you must ... decide whether the defendant reasonably believed that deadly physical force as opposed to a lesser degree of force was necessary to repel [the victim's] attack"; (emphasis added); (6) "you must decide whether, on the basis of all the evidence presented ... the defendant, in fact, believed that he needed to use deadly physical force as opposed to some lesser degree of force in order to repel the [victim's] attack"; (emphasis added); (7) "[i]f you decide [that] the defendant did not ... believe [that] he needed to use deadly physical force to repel the [victim's] attack, your inquiry ends, and the defendant's self-defense claim must fail"; (emphasis added); (8) "[i]f ... you find [that] the defendant ... did believe that the use of deadly physical force was necessary, you must then decide whether that belief was reasonable under the circumstances"; (emphasis added); (9) "[i]f you find [that] the state has proved ... that the defendant was the initial aggressor and [that] the defendant did not effectively withdraw from the encounter or abandon it in such a way that [the victim] knew he was no longer in any danger from the defendant, you shall then find [that] the defendant was not justified in using deadly physical force"; (emphasis added); and (10) "the state has the burden to prove ... [that] ... the defendant did not ... believe he needed to use deadly physical force to repel the [victim's] attack ... or ... [that] the defendant did not have a reasonable basis for his belief that he needed to use deadly physical force to repel the [victim's] attack." (Emphasis added.)

Following these instructions on the defendant's use of deadly physical force in self-defense—instructions that comprised six full pages of transcript—the trial court finally explained the elements of the crime of intentional manslaughter. In doing so, however, the court again expressly repeated the state's burden of disproving the defendant's claim that he justifiably had used deadly force against the victim. Thus, the court instructed the jury that, "[i]n order to prove the defendant guilty of intentional manslaughter in the first degree, the state has the burden to prove beyond a reasonable doubt [that], one, the defendant had the specific intent to cause serious physical injury to a person, and, two, acting with that specific intent, the defendant caused the death of [the victim] by stabbing him with a knife, and, three, the defendant was not justified in using deadly physical force." By this point in the instructions, the jury already had been instructed repeatedly that the defendant himself was claiming that he had used deadly force against the victim by stabbing him with the knife, but that his use of such force was justified. In other words, the court effectively had instructed the jury that the defendant had conceded the elements of the crime of intentional manslaughter—that is, he had stabbed the victim, thereby causing his death, with the specific intent to cause serious physical injury to the victim—and that his sole claim was that he was justified in doing so because he reasonably believed that the victim intended to kill him with the knife or to cause him serious bodily injury with it.

The majority contends that the defendant's real claim is one of accident, and that such a claim does not warrant a special instruction. According to the majority, a defense theory of accident is adequately covered by the court's instructions on intent. It may be true that it is not always

necessary for a court to instruct the jury expressly on a defendant's claim of accident because such a theory generally will be explained adequately by the court's instructions on intent. That certainly is not the case here, however, because, as I previously explained in detail, by the time the trial court instructed the jury on the element of intent, the jury already had been apprised, on numerous occasions, of the defendant's own contention that he did indeed engage in conduct intended to cause the defendant to suffer serious physical injury, but that he was justified in doing so. Consequently, for purposes of the present case, it is manifestly unreasonable to presume that the trial court's instructions on intent were sufficient to provide the jury with a fair and understandable explanation of the defendant's principal theory of defense, that is, that the victim was stabbed accidentally in the altercation arising out of the defendant's justified use of nondeadly force against the victim. In other words, the majority is misguided in concluding that the court's instructions on intent were sufficient to inform the jury of the defendant's primary theory of defense because those instructions unambiguously informed the jury that the defendant was not contesting the element of intent in light of his claim that he intentionally had used deadly physical force against the victim in self-defense.

It therefore is unfair for the majority to assert that the defendant's primary theory of defense was adequately addressed by the trial court's instructions on the element of intent. Without question, the trial court's repeated instructions concerning the defendant's claim that he intentionally had used deadly physical force against the victim made it clear to the jury that the defendant was conceding the elements of intentional manslaughter, but that his use of deadly force was justified. In light of these instructions—and in light of the court's complete failure to instruct the jury on the theory of defense raised by the defendant's testimony at trial—it cannot reasonably be maintained that the court's charge on intent was sufficient to guide the jury as to the defendant's claim concerning the manner in which the victim had been killed....

This claim represented the defendant's theory of defense, and there was ample evidence to support it, namely, the defendant's own testimony. The trial court therefore was obligated to instruct the jury on that defense theory. In failing to do so, the court effectively removed that defense from the jury's consideration. Instead, the court instructed the jury only on the defendant's use of deadly physical force. Because the defendant expressly testified that he had used nondeadly force and not deadly force, the court's failure to explain to the jury the significance of the defendant's claim that he justifiably had used nondeadly force, coupled with the court's initial instructions, in which it repeatedly characterized the defendant as acknowledging his use of deadly force, necessarily was prejudicial. In fact, the court provided the jury with no guidance for evaluating the version of the facts set forth by the defendant in his testimony.

Thus, contrary to the majority's assertion, the defendant's claimed use of nondeadly force was not "theoretical" at all because the defendant expressly testified to the use of nondeadly force. Moreover, the defendant had a constitutionally protected right to have a properly instructed jury consider his claim that he had used nondeadly force in attempting to disarm the victim inasmuch as his alleged use of such force was essential to his theory of defense. Because the jury was not so instructed, the Appellate Court was correct in concluding that the defendant is entitled to a new trial. I therefore dissent.

Discussion Questions and Notes

- 1) The facts of *Singleton* highlight the initial aggressor problem. Often fights resulting in death begin with the use of non-deadly force. At some point, the fight escalates and someone dies. Because laws are divided between justifications for deadly and non-deadly force, it is possible the initial aggressor of the non-deadly force is different the initial aggressor of deadly force. Why might this be a problem? Is there a viable solution to any difficulties associated with the initial aggressor problem?
- 2) The case also illustrates that a self-defense argument requires the factfinder to explore both the acts and *mens rea* of the defendant in a different context, through the lens of an affirmative defense. In *Singleton*, the defendant argued that he did not intend to use deadly force. Assuming that it is the case, should the jury be read the instruction for 1) non-deadly force self-defense; 2) deadly force self-defense; or 3) deadly and non-deadly force self-defense?
- 3) Ordinary self-defense rules require a defendant to show fear of imminent harm. What situations can you think of where a defendant's fear of harm is honest and reasonable, but the harm is not imminent?
- 4) What are the benefits and drawbacks to using subjective or objective factors in determining whether a defendant's self-defense claim is legitimate?

Consider the subjective contextual factors in the following case to decide if you think the defendant should have been able to introduce a self-defense claim based upon the proposed expert testimony.

Peraita v. Alabama, 897 So. 2d 1161 (Ala. Crim. App. 2003)

BASCHAB, JUDGE

The appellant, Cuhuatemoc Hinricky Peraita, was convicted of two counts of capital murder for the murder of Quincy Lewis. The murder was made capital because the appellant committed it while he was under sentence of life imprisonment, and because the appellant had been convicted of murder within the twenty years preceding the capital offense. Pursuant to § 13A-5-44(c), ALA. CODE 1975, the appellant and the State waived the right to have the jury participate in the sentencing hearing, and the trial court accepted the waiver. The trial court then conducted a sentencing hearing, received a presentence investigation, and sentenced the appellant to death.

The appellant filed a motion for a new trial, which was overruled by operation of law. This appeal followed....

The State presented evidence that the appellant, Michael Castillo, and Quincy Lewis were incarcerated at Holman Prison on December 10 and 11, 1999. Around midnight, an incident occurred in which Lewis was stabbed several times. Shortly thereafter, he died as a result of his injuries.

Kevin James Bishop was employed as a correctional officer at Holman Prison and worked from 10 p.m. on December 10, 1999, until 6 a.m. on December 11, 1999. At approximately 11:43 p.m., as officers were doing a body count to make sure all of the inmates who were assigned to Dorm 4 were accounted for, he saw the appellant in the dorm. The appellant said, "'What's up Bishop,'" and did not indicate that he was scared for himself or Castillo. Bishop testified that, if the appellant had asked to be removed from the dorm, he would have been placed in segregation in a cell by himself for his protection until the situation could be investigated. After the body count was completed, the lights were turned down for the night so that only about one-half of the lights were on.

Charles Smith was incarcerated at Holman Prison on the night of the offense and knew the appellant, Castillo, and Lewis. Five or six days before the offense occurred, he had seen the knife that was used to stab Lewis in a paper bag at the foot of Lewis' bed. He testified that he had heard Lewis tell the appellant to get the knife out of the bag and that the appellant had taken the knife and hidden it under his clothes.

Shortly before midnight and after the body count on the night the offense occurred, Smith saw Castillo and Lewis together. Lewis was walking toward the television room, but he stopped and sat on a bed across from Castillo's bed, where Castillo was sitting. When he did, the appellant, who was sitting on a box that was between the beds, got up to walk away. As the appellant walked between Castillo and Lewis, Lewis slapped him. The appellant continued to walk to his own bed. Smith testified that, after Lewis slapped the appellant, the other inmates were expecting something else to happen. He explained that some sort of response is common in a prison when one inmate slaps another inmate.

Smith testified that the appellant stayed at his bunk for two or three minutes and then returned to the box on which he had previously been sitting. After about three to five minutes, the appellant stood up and started out like he was going to leave again. However, he spun around, grabbed Lewis around the neck, and "snatched his neck back." Castillo then started stabbing Lewis in the neck and in several other places. In the process, he also stabbed the appellant in the arm. Eventually, Lewis put a towel to his neck and staggered out of the dorm. As he was doing so, Castillo gave the knife to the appellant. The appellant then "hit [Lewis] in the side" and said, "'Die, nigger.'"

Smith testified that the appellant and Castillo had paid Lewis two cartons of cigarettes to leave them alone and that he had asked Lewis several times to leave them alone. He also testified that Lewis could not stand the idea of the appellant being with Castillo. Finally, he stated that the appellant had been sleeping in the bed above Lewis' bed, but that he had changed to a different bed.

Alvin Hamner was also incarcerated at Holman Prison on the night of the incident and knew the appellant, Castillo, and Lewis. During the night, he heard some movement and turned to look at what was happening. At that time, he saw the appellant "holding Quincy Lewis around the neck and Castillo standing over him." He first thought Castillo was punching Lewis in the neck, chest, and stomach. However, after more lights were turned on, he saw blood and realized that Castillo had been stabbing Lewis. He testified that Castillo had the knife, but handed it to the appellant when the lights came on and officers entered the dorm. He further testified that, as Lewis was falling to the floor, he saw the appellant stab Lewis in the side. Lewis subsequently walked out of the dorm and into the hallway, where he again fell to the floor. As the appellant walked by Lewis, Hamner heard him say, "M____ f____, die."

Alphonso Burroughs was also employed as a correctional officer at Holman Prison and worked from 10 p.m. on December 10, 1999, until 6 a.m. on December 11, 1999. When he walked into Dorm 4, he saw Lewis, who was covered with blood, walking from the area around Castillo's bed. The appellant and Castillo, who were also covered with blood, were in the same area only a few feet from Lewis, and the appellant had a knife in his hand.

Lewis walked out of the dorm and collapsed during the time Burroughs was escorting the appellant and Castillo out of the dorm. Burroughs went to help Lewis, and he told the appellant and Castillo to "go on up the hall." The appellant and Castillo complied, and Burroughs, another officer, and two inmates picked up Lewis to carry him to the infirmary to get medical attention. Part of the way there, the appellant, who was still holding the knife, and Castillo turned around. The appellant waved the knife and said, "Drop the bastard and let the bastard die." The appellant, who appeared to be mad, continued to swing the knife and said, "Y'all get back too or we'll cut you too."

Bishop also saw the appellant and Castillo standing side by side in the dorm. Both were covered with blood, and the appellant had a knife in his hand. Shortly thereafter, Lewis walked out of the dorm and collapsed. As others helped Lewis, Bishop stayed between the appellant and Castillo and Lewis. He testified that he told the appellant several times to put the knife down. However, the appellant said he would not do so until he and Castillo were in segregation. The appellant and Castillo walked part of the way down the hall, but then they turned around, the appellant swung his knife toward Bishop, and said, "Put the bastard down and let the son-of-a-bitch die."

Kevin Dale Boughner was also employed as a correctional officer at Holman Prison on December 10 and 11, 1999. He saw the appellant, who had a knife in his hand, walking toward the segregation area. The appellant and Castillo were "covered with blood, arm [in] arm, walking down the hall at a very brisk pace" toward him. The appellant looked at him and said, "If you get us to a safe place I'll give you the knife." Boughner put them in a holding cell and locked the door, and the appellant threw the knife out. Boughner described the appellant as "really pumped up, hyper, adrenaline flowing, just really pumped up, hyped up." He also stated that, on two occasions, the appellant asked, "Is he dead?"

Bishop remained with the appellant and Castillo while Burroughs, the other officer, and the two inmates carried Lewis to the infirmary. Burroughs testified that, while he was going toward the infirmary, Bishop and Boughner tried to lock the appellant and Castillo in separate holding cells. However, he heard the appellant say that he and Castillo would not give up the knife unless

they were locked up together. Burroughs testified that, after he and Castillo were locked in a holding cell together, the appellant threw the knife to the floor.

Sergeant William James, the shift commander for the segregation area, saw the appellant and Castillo, who he described as "covered from head to toe with blood," as they were approaching the holding cell. After he was secured in the holding cell, the appellant asked, "Is he dead?"

Dr. William John McIntyre treated Lewis in the emergency room at Atmore Community Hospital approximately one hour after the offense occurred. He testified that Lewis had six wounds, including a very large wound to his neck, and that he was close to death because he had lost so much blood. He further testified that medical personnel tried to revive Lewis, that they were not able to because the blood loss was irreversible, and that he pronounced Lewis dead.

Dr. Leroy Riddick, a medical examiner employed by the Alabama Department of Forensic Sciences, performed an autopsy on Lewis' body. He testified that Lewis had a total of eighteen separate injuries, including six stab wounds. One stab wound to his neck cut his carotid artery. Another stab wound to the chest went through the chest cavity and caused a lung to collapse. He also had several superficial incised wounds. Dr. Riddick concluded that the cause of death was sharp force injuries from stab wounds and cuts.

The defense called several inmates to testify on the appellant's behalf. Michael Best testified that he knew the appellant, Castillo, and Lewis and had seen them interact; that the three seemed to get along well at first, but that the situation deteriorated over time; that Lewis had admitted to him that he had made threats against the appellant and Castillo; and that he had discussed those threats with the appellant and Castillo. Finally, he testified that Lewis had a reputation for being sexually violent in Holman Prison.

James Jones testified that he knew the appellant, Castillo, and Lewis; that he had seen them interact; that they initially did not have problems; and that eventually problems developed. He explained that the appellant and Lewis "were partners" before Castillo arrived at Holman Prison; that Castillo came between the appellant and Lewis; that the appellant and Castillo "paid" Lewis two cartons of cigarettes to leave them alone; that Lewis left them alone for seven or eight days; and that problems started again. Finally, he stated that Lewis made a threat against the appellant in his presence and that he told the appellant about the threat.

Darwin Knight testified that he knew the appellant, Castillo, and Lewis; that the appellant and Lewis had been "partners"; and that there was "a major change" in the relationship between the appellant and Lewis after Castillo arrived at Holman Prison....

The appellant's first argument is that the trial court improperly prevented him from presenting his defense of self-defense.... [T]he appellant asserts that the trial court improperly prevented him from calling Dr. Craig Haney, an expert on prison psychology. Specifically, he argues that Haney would have testified that his response to being assaulted or threatened by Lewis was reasonable under the circumstances at Holman Prison; that the prison made it reasonable for him to believe that he was in imminent danger of physical harm because Lewis had threatened and then assaulted him; and that it would have been extremely risky for him to ask prison authorities for help or placement in protective custody because he allegedly would have then been subject to further victimization by other prisoners. Therefore, he concludes that Haney's testimony would have established that he acted reasonably in self-defense.

Dr. Craig Haney testified that he had an M.A. and a Ph.D. in psychology, as well as a J.D., from Stanford University; that he was a professor of psychology at the University of California at Santa Cruz; and that he had previously testified regarding prison psychology. He further testified that prison psychology is "the study of how people adapt to prison environment, people who live there as well as people who work there and the way in which the nature of the environment creates special sets of psychological reactions in people, primarily the people who are confined." Haney stated that he was familiar with Alabama's correctional system for two reasons. First, he explained that anyone who had studied correctional psychology had read about Alabama's system because the system was prominently involved in litigation in the late 1970s. He added that he had also gotten to know some of the people who were involved in that litigation and had continued to receive information from them about the system. Second, he explained that, in the mid- 1990s, he had been involved in a case in California in which a young man who had been in prison in Alabama had subsequently gone to California. In an effort to determine how the young man had been affected by the prison conditions in Alabama, he had come to Alabama; interviewed several dozen Alabama prisoners; and toured several prisons in 1993, 1994, and 1995. Haney also testified that he was familiar with Holman Prison because the young man in California had been confined there, because he had interviewed some other prisoners who had been confined there, and because the prison is prominent in Alabama's history regarding corrections. He stated that he had been to Holman several times, but that the only time he had toured it was in the early 1990s.

Haney testified that he had studied institutionalization or prisonization, explaining that "psychologists and sociologists use [the term] to explain the process that people go through when they go into institutional settings and the ways that they are [changed] by being in an institutional setting." He explained that

"the main purpose of [his research] is to examine and try to understand how they are affected by the conditions of confinement that they are exposed to and part of that is looking at how the process of institutionalization operates on them; how it has changed them; how they think and react to things differently as a result of having been in a prison environment."

He also stated:

"People are changed in significant ways by being in institutional settings and particularly in prison. People learn to think and react differently in prison settings than people do in the free world. Reactions which look abnormal or extreme or unusual, in prison settings are often times normal reactions to very extreme environments. People who have been in prisons for awhile and who have become institutionalized react in these ways automatically. They react almost intuitively to certain events that take place in prison and so the process of institutionalization is a very powerful one in prisons. ... It shapes much of how people think and how they react."

However, he admitted that

"not everybody is changed in exactly the same way and sometimes it depends on the nature of the environment and nature of the conditions. Not all prisons are exactly the same, not all institutions are exactly like prisons so you need to be specific about what kind of environment you're in, about what are, for example, the dangers; what are the norms; what is the level of protection; what is the culture that has grown up within this environment. People have to adapt to different sets of things in different environments and so also part of understanding

institutionalization is understanding exactly what the culture is and exactly what the nature of the institutional conditions are to which people are trying to adapt.”

Haney also testified that there are common patterns that are associated with institutionalization. Specifically, he testified as follows:

“One of the things that takes place when people go into prison settings is that they learn very quickly that prisons are or can be very dangerous environments. So part of the process of institutionalization is adapting your life around that particular observation and that recognition of that fact of life in prison. But there are more dangerous places and there are places where there are threats that are potentially life threatening that you adapt to. Psychologists sometimes call it hypervigilance, but it is basically a term associated with the fact that prisoners are on alert. They watch. They are careful. They are sensitive to the potential threats that exist in their environment.

“They learn also very quickly that reputation is important in prison settings. That part of what makes a prison environment, particularly a maximum security prison environment, dangerous is that people are invested in their reputation and that if you develop a reputation for being somebody who can be taken advantage of or someone who is weak or someone who does not respond to threats then that serves as an indication for other people to take advantage of you or to exploit you and so prisoners learn very quickly that they have very limited number of choices in terms of how to respond to or stand up to threats that may be directed at them.

“Prisoners also learn that as part of the prison culture it is not acceptable and not appropriate, for the most part, for them to go to authorities to request assistance if they have a problem with someone threatening them or someone attacking them or someone taking advantage of them. Part of the prison culture involves an understanding that people who do that, who ask for assistance of authorities are regarded themselves as weak, not capable of taking care of themselves. That too serves as an indication for future exploitation.

“Prisoners also learn that they may be regarded by other prisoners as being snitches if they go and ask for help. As part of the prison culture, people who ask for help are essentially telling on the person who is threatening them and that is regarded among many prisoners as not only a sign of weakness but a sign of disloyalty, a sign that you yourself in the future can be a target of incrimination or aggression by other people who disapprove of that kind of behavior. Prisoners who seek assistance in these environments are typically placed in protective custody housing and prisoners who are put in protective custody housing have that label which comes from being essentially in the prisoners’ eyes, officially labeled as someone who cannot take care of themselves. They have that label for a lifetime. It’s not something which you can dispense with. It becomes part of your reputation, it becomes part of who you are. So prisoners avoid, at virtually all cost, seeking that solutions to problems of interpersonal conflict which would be the typical and accepted solution in the world outside the prison.

“The longer you’re in a prison environment the more you learn these things, the more these reactions become second nature. Typically young people incorporate these views of perspective early on. There’s a hierarchy in prison. You learn about that hierarchy. Bigger and stronger people pose more significant threats and the other thing you learn in a prison environment because reputations are so important is that no threat is to be taken as an idle threat. People who make idle threats who don’t follow through on their threats also, in an odd way, sometimes risk being

labeled as somebody who is weak because it is a very pressurized and intense environment. People typically don't threaten one another unless they mean to carry that out. So when someone threatens you or if someone threatens you, prisoners learn to take that very, very seriously."

Haney testified that, if an institutionalized inmate had been slapped, the slap would be an assault and the inmate would be expected to respond accordingly. He further testified that an inmate who had been institutionalized would be more likely to respond physically than an inmate who had not been institutionalized.

Haney testified that he interviewed the appellant for three or four hours in a visiting area near the front of Holman Prison on May 8, 2001. Based on his questions and the appellant's answers, as well as information defense counsel had provided and information about Alabama's prison system, he concluded that the appellant had undergone the process of institutionalization or institutional adjustment. He also concluded that that process would have affected the appellant's behavior on the night of the incident.

On cross-examination by the State, Haney admitted that the amount of time it takes an inmate to undergo the institutionalization process varies. Although he stated that most people start to undergo the process almost immediately, he conceded that the time it takes to complete the process also varies according to the environment an inmate is in. He also conceded that, without talking to the inmate personally, he could not tell at what part of the process an inmate was at a certain time. He further conceded that he could not testify specifically as to what transformation in the institutionalization process the appellant had experienced between the time of the incident in December 1999 and the time he interviewed the appellant in May 2001. Finally, he admitted that he was not saying that it was reasonable for the appellant and Castillo to take Lewis' life in response to Lewis slapping the appellant.

After Haney testified, the following occurred:

"THE COURT: ... [Defense counsel], just so I understand your proffer, this testimony is relevant as to what? What are you offering it for?

"[DEFENSE COUNSEL]: Judge, we expect there's going to be evidence of threats. [The prosecutor] put on a witness that there was a slap.

"THE COURT: Self defense?

"[DEFENSE COUNSEL]: Yes, sir.

"THE COURT: In the context of self defense in a prison setting?

"[DEFENSE COUNSEL]: Yes, sir. We're not going to ask Dr. Haney to draw a legal conclusion. We're going to ask him to discuss the process and simply whether [the appellant], in his opinion, has undergone this process. The rest will be up for the jury to decide about whether he was reasonable under the circumstances. We understand that Dr. Haney can't get on the witness stand and say that but we believe that he can certainly talk about this process and whether [the appellant] underwent this process and whether it would have influenced his state of mind.

"THE COURT: Well, I'm trying to assimilate all of this in light of the self defense law, and the law is specific. It says that you can use physical force in order to defend yourself from what you reasonably believe to be the use or imminent use of unlawful physical force by that other person, and you may use a degree of forces...

"I understand the testimony about institutionalization. I'm just having a hard time fitting that into the context of the self defense issues. I don't believe we can set a different standard for people in prison than we do for people who are not in prison. ...

"[DEFENSE COUNSEL]: ... We're just trying to give the jury a picture of [the appellant's] state of mind. It is going to be an issue for the jury to decide if he had a reasonable belief, and we believe Dr. Haney's testimony will help the jury understand.

"THE COURT: The law is very specific that there must be a reasonable belief that someone is about to use deadly physical force upon you. I understand the impact of institutionalization on his state of mind but that's pretty specific. That's pretty fact specific. Ultimately it is going to be up to the jury to determine whether it is reasonable, whether the facts rose to the level to constitute self defense as the law provides. I think it must be a reasonable belief. I don't think it's a subjective test necessarily. I think it's objective test as to whether it's a reasonable belief and to me institutionalization and putting this on would turn it into a subjective test for each individual because of this process, because of what he's been in, because of the unique prison culture. I understand that, but I don't think it changes to a subjective test. I think it's an objective test as to whether reasonable appearance in that situation justifies the actions of the Defendant."

....

Defense counsel specifically stated that Haney's testimony was being offered to help the jury understand the appellant's state of mind at the time of the offense. However, Haney had toured Holman Prison only once several years before the offense occurred; he was not familiar with the conditions at Holman Prison in 1999; he admitted that institutionalization occurs at different rates in different inmates; he could not testify as to what stage of the institutionalization process the appellant had reached in 1999; he admitted that he could not testify as to the appellant's state of mind in 1999; and he admitted that he could not testify that the appellant's and Castillo's actions were reasonable. Also, defense counsel admitted that Haney could not testify as to whether the appellant's actions were reasonable. Any testimony about the appellant's state of mind at the time of the offense and about his reactions to the conditions in Holman Prison at that time would have consisted only of conjecture and speculation. Such conjecture and speculation would not have made it more probable or less probable that the appellant acted in self-defense. Therefore, Haney's testimony was not relevant to the defense of self- defense, and the trial court properly excluded it...

For these reasons, the trial court did not err when it refused to allow the defense to call Dr. Haney as a witness during the guilt phase of the trial....

Accordingly, we affirm the appellant's convictions and sentence of death.

COBB, JUDGE, dissenting.

I disagree with the determination ... that no error occurred when the trial court precluded Dr. Craig Haney from testifying at the guilt phase. Although the issue regarding the admissibility of the testimony of an expert in prison psychology appears to be one of first impression in this State, Alabama cases on self- defense and cases from other jurisdictions involving this type of testimony support what I believe to be the correct resolution of this issue – Dr. Haney's testimony should

have been admitted. Because Peraita was precluded from presenting this testimony, his right to fully present his defense was violated and he is entitled to a reversal of his conviction and sentence, and a new trial should be ordered....

Defense counsel sought to present Dr. Haney's testimony to support Peraita's claim of self-defense by, as the trial court acknowledged, placing the issue of self-defense in the context of a prison setting. Defense counsel proposed to have Dr. Haney testify about the process of institutionalization, whether Peraita had undergone the process, and whether it had influenced his state of mind. Counsel stated that he believed that Dr. Haney's testimony would assist the jury in determining whether Peraita had a reasonable belief that Lewis intended to use deadly force against him. Defense counsel correctly acknowledged, "The rest will be up for the jury to decide about whether he was reasonable under the circumstances."

....

This expert testimony would have provided information far beyond the knowledge of the average juror.

Additionally, the average juror has no knowledge that the dormitory setting, such as the location where this killing occurred, is considered by many corrections experts to be the most unsafe environment in which to place prisoners because it is difficult to protect inmates and because it maximizes the opportunity for sexual, physical, and other kinds of exploitation. This testimony, and the additional information Dr. Haney would have provided to the jury would have allowed the jurors to make an informed decision on whether Peraita had an honest and reasonable belief that he was in imminent danger. Without Dr. Haney's testimony, the jury was unprepared to fully evaluate the reasonableness of Peraita's claim of self-defense. Without the testimony, Peraita was, in fact, denied his right to present his defense adequately. Without the information from the defense expert, the jury could have believed that Peraita was free to retreat or seek assistance from the guards in response to Lewis's threat. Just as expert testimony regarding a woman's belief that she could not safely retreat from her abuser is relevant to a claim of self-defense, the proffered testimony here was necessary to evaluate the reasonableness of Peraita's belief that he was in imminent danger. Dr. Haney's testimony should have been admitted.

The main opinion holds that Dr. Haney's testimony about Peraita's state of mind at the time of the crime and about his reactions to the conditions at Holman Prison would have consisted only of conjecture and speculation because, among other things, Dr. Haney had toured the prison years before the offense, because he admitted that institutionalization occurs at different rates in different inmates, and that he could not testify to Peraita's state of mind in 1999. I cannot agree that Dr. Haney's proffered testimony was based at all on conjecture or speculation. To the contrary, Dr. Haney testified that he reached his conclusion that Peraita had become institutionalized and that this affected his behavior on the day of the killing as follows:

"I reached [my conclusion] based on my understanding of the nature of the process of institutional logistics; my own study and the study of other people of how people are changed and react to institutional settings, particularly prison settings; my understanding of the conditions of confinement at Holman Prison and similar prisons; conditions under which Mr. Peraita was living, and I reached it also based on the information that both he provided me in the course of the interview and additional information that I was able to obtain from documents you provided

me and additional documentation about the Alabama Prison System, which I was able to obtain or again what your office provided to me.”

Dr. Haney’s testimony was based on information precisely like the information we have found psychologists to use in dozens of other cases, that is, documents, an interview with the defendant, and the expert’s knowledge of previous studies of individuals in similar situations. Based on similar information, trial courts routinely consider experts’ testimony regarding such issues as whether a defendant was competent at the time of the crime, whether a defendant was under the influence of an extreme mental or emotional disturbance at the time of the crime, and whether a defendant suffered from the battered woman syndrome and had a reasonable belief that she was in imminent danger when she committed the crime. Therefore, I simply cannot agree that Dr. Haney’s testimony was inadmissible because it was based on conjecture and speculation. Dr. Haney’s testimony was proper, and the evidence should have been admitted....

This appellant does not generate much sympathy. He was imprisoned in a maximum security facility serving six sentences of life imprisonment for murder, attempted murder, and robbery when he committed this crime. Nonetheless, even a convicted murderer who is on trial is entitled to present his defense. Peraita’s defense in this case was self-defense, and the reasonableness of that defense turned in significant part on the fact that he and the victim were inmates in an overcrowded maximum security prison. The proffered testimony of a recognized expert would have allowed Peraita to fully present his self-defense claim and it could have aided the jury in evaluating that claim. While I understand the trial court’s reluctance to admit the testimony, I believe that Alabama law on self-defense, and particularly the legal principles related to battered-woman syndrome, soundly support the admission of Dr. Haney’s testimony. By excluding this testimony, the trial court denied Peraita his right to a fair trial. Therefore, the judgment should be reversed.

For the foregoing reasons, I dissent.

Discussion Questions and Notes

- 1) Is the defendant proposing a wholly subjective test for self-defense or are their objective factors proposed as well?
- 2) Prisons present a particular problem in that a defendant can never truly escape or retreat from danger. As a result, a defendant is more or less always forced to stand his ground. Do cases like this illustrate some potential problems with the stand-your-ground approach to self-defense in deadly force cases?

The next case focuses on the proportionality of violence used by the defendant in the course of self-defense and defense of others.

Illinois v. Green, 2013 IL App (1st) 103697-U (Ill. App. Ct. 2013)

MASON

Held: The State proved beyond a reasonable doubt that defendant did not have a reasonable belief the force he used was necessary to protect himself from the victim, who initially struck defendant with a bat. Defendant's belief was unreasonable where the evidence showed that although the victim was initially the aggressor, defendant took the bat from the victim and had subdued him prior to the time defendant struck the prone victim several times with the bat.

Following a bench trial, defendant Lawrence Green was convicted of second degree murder of the victim Johnny Johnson. Green was initially sentenced to 15 years' imprisonment, which was later reduced to 10 1/2 years after reconsideration. On appeal, Green contends that he was not proved guilty of second degree murder beyond a reasonable doubt because the State failed to prove that he did not act in self-defense where Johnson: (1) was the initial aggressor by hitting Green with a baseball bat; (2) continued to try to fight Green; and (3) exhibited combativeness even after Green left the scene. For the following reasons, we affirm the judgment of the trial court.

Lawrence Green was charged with two counts of first degree murder of Johnny Johnson stemming from an altercation that occurred on March 15, 2008, at 3749 West Augusta Boulevard in Chicago, Illinois. As a result of complications from injuries sustained in the attack, Johnson died on February 24, 2009.

At trial, Dr. Ponni Arunkumar, an assistant medical examiner, testified that the cause of Johnson's death was broncho pneumonia. The autopsy revealed Johnson had multiple healed contusions indicative of blunt head trauma. Because the injuries caused Johnson to be hospitalized for a long period of time, he was prone to infections such as pneumonia. In Dr. Arunkumar's opinion, the manner of death was homicide given that the pneumonia resulted from a prolonged hospital stay due to blunt head trauma sustained as a result of Green's assault.

Zucchini McCoy, Johnson's neighbor, testified that on March 15, 2008, she was watching television in her second story apartment, when she heard Johnson yelling repeatedly. She then went to the window and saw Green entangled with Johnson near the entrance of the alley between the apartment buildings. Nothing obstructed the view from McCoy's window and the alley was well lit from the street light and passing cars.

At that point, McCoy went to retrieve her phone and came back to see Green kneeling on Johnson's chest. Green then began hitting Johnson in the head at least three to four times with clenched fists, and Johnson tried to fight back, moving his arms and feet. Neither man had any object in his hands. McCoy turned away to call the police and when she looked back, Green, now standing, was repeatedly striking Johnson in the head with a wooden object. At this time, Johnson remained on the ground and continued to struggle. McCoy testified that everything happened "in a matter of seconds."

McCoy further testified that Catherine Green, who was Green's mother and Johnson's girlfriend, came out of her house and yelled something at her son. Green then dropped the object

and went to his car as Catherine kneeled next to the victim who had a pool of blood running from his head. McCoy did not see Johnson hit Green.

Catherine Green testified that she was Johnson's girlfriend and the two lived together with her daughter, LaShonda Smith, and two granddaughters. On March 15, 2008, Catherine went to Indiana during the afternoon and returned home around 7 p.m. Johnson came home later that evening and an argument ensued. During the argument, Johnson threatened Catherine, took her cellular phone, hit and pushed her, and hit her one-year old granddaughter whom Catherine was holding. Following this exchange, Johnson left to retrieve a bat from his car and soon returned threatening everyone in the house. Johnson then went back outside while Catherine stayed in the house with her daughter and grandchildren.

Catherine did not go outside until a woman ran in the house and told her Green and Johnson were fighting. When she went outside, Catherine testified that she saw Johnson lying on the ground bleeding with a bat nearby as Green was getting into his car without anything in his hands. Catherine denied telling Detective Sharre Hendricks the following day that she saw Green with a bat in his hands when she went outside and that she screamed at him to stop hitting Johnson. She also denied telling Hendricks that she saw Green throw the bat to the sidewalk, walk to his car, get into his car, and drive away. Catherine testified that she only screamed at Green asking him "what did you do?"

On cross-examination, Catherine testified that she previously told the grand jury that the bat was on ground next to Johnson when she first went outside. Catherine also stated that Johnson had been drinking since about 1 p.m. that day.

The parties then stipulated that Detective Hendricks would testify that Catherine told her she went outside after hearing a loud commotion and saw Green holding a bat in his hand standing over Johnson, who was lying on the pavement. She screamed at Green to stop hitting Johnson at which point he threw the bat down on the sidewalk, walked to his car, and drove away.

Defense witness Gregg Baghdade, a paramedic for the Chicago Fire Department, testified that about 9:24 p.m. on March 15, 2008, he responded to a call at 3749 West Augusta Boulevard. Baghdade testified that Johnson was conscious on arrival and his breath, as well as his behavior, was consistent with intoxication as he yelled, cursed, spit, and bit the paramedics on the scene. Paramedics used soft restraints to protect themselves from Johnson, who was "moving all around," and it took three paramedics to secure him to the back board. Johnson's combativeness, which lasted the entire duration of the ride to Mt. Sinai Hospital, prevented Baghdade from applying advanced life support care on the way there. Baghdade reported that in his experience, he has not seen a patient become as combative as Johnson merely due to severe pain.... The parties also stipulated that personnel from Mt. Sinai Hospital would testify that Johnson remained combative while in the trauma bay and that he was so agitated that emergency department personnel had to intubate him....

On October 21, 2010, the trial court found Green not guilty of first degree murder, as charged in count I, based on the court's finding that there was insufficient evidence that the killing was intentional. On count II, under which Green was charged with first degree murder based on a strong probability of death or great bodily harm, the court found that the State had proved the offense, but further found that there were sufficient mitigating factors to support the lesser

included offense of second degree murder. The court denied Green's motion for a new trial and sentenced him to 15 years' imprisonment, a term that was later reduced to 10 1/2 years. Green timely filed this appeal, and now challenges the sufficiency of the evidence to sustain his conviction.

The standard of review on a challenge to the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224, 920 N.E.2d 233, 336 Ill. Dec. 223 (2009)....

Self-defense is an affirmative defense raised by a defendant. *People v. Young*, 187 Ill. App. 3d 977, 984, 543 N.E.2d 986, 135 Ill. Dec. 418 (1989). The defendant must establish the following elements: (1) force was threatened against a person; (2) the person threatened was not the aggressor; (3) the danger of harm was imminent; (4) the threatened force was unlawful; (5) defendant actually believed a danger existed that required the use of the force applied; and (6) his belief was objectively reasonable. *People v. Jeffries*, 164 Ill. 2d 104, 127-28, 646 N.E.2d 587, 207 Ill. Dec. 21 (1995). Once self-defense has been raised, the State has the burden of disproving it beyond a reasonable doubt. *People v. Hooker*, 249 Ill. App. 3d 394, 400, 618 N.E.2d 1074, 188 Ill. Dec. 504 (1994). If the state negates any one of the self-defense elements, the defendant's claim of self-defense must fail. *Id.* In this case, we focus on whether the evidence shows that defendant's subjective belief that his use of the force employed was objectively reasonable.

In reviewing the sufficiency of the evidence, the issue of self-defense is a question of fact to be determined by the trier of fact. *People v. Young*, 347 Ill. App. 3d 909, 920, 807 N.E.2d 1125, 283 Ill. Dec. 284 (2004). In a bench trial, when the testimony of witnesses conflicts, the trial judge must determine their credibility, draw reasonable inferences from their testimony, and resolve conflicts in the evidence to determine whether the defendant's actions were reasonable. *People v. Felella*, 131 Ill. 2d 525, 534, 546 N.E.2d 492, 137 Ill. Dec. 547 (1989); see *Hooker*, 249 Ill. App. 3d at 401 (in resolving conflicts in the evidence, the trial judge noted that she must take the defense's witnesses' credibility into consideration since one was the defendant's wife and the other was the defendant's brother who told a different story at trial than when interviewed by police). Here, for the following reasons, we conclude that the State satisfied its burden of proving beyond a reasonable doubt that Green did not have a reasonable belief that the use of deadly force was necessary to protect himself.

It is undisputed that Johnson was the initial aggressor. The testimony of Catherine Green and Lashonda Smith established that Johnson, heavily intoxicated, first threatened the residents of his household and later Green, while wielding a bat. After Johnson struck Green, who was unarmed, on the back with the bat without provocation, the altercation ensued. Although McCoy testified that the altercation did not last long, the trial court had before it evidence that after Green took the bat away from Johnson and struck him with closed fists several times in the head, Johnson was lying on the ground. There was no evidence that after Green struck Johnson (so that he appeared "knocked out" according to Smith's statement to Hendricks), Johnson ever struck back or was able to get up from the ground. Further, although Johnson was later combative with paramedics who arrived on the scene, there is no evidence in the record regarding the amount of time that elapsed between Green's departure and the paramedics' arrival and no one testified that Johnson was ever able to get up. The trial court was also entitled to discount the trial testimony

of Green's mother and sister (who, after Johnson's passing, were clearly motivated to protect their son and brother), which contradicted their statements to Hendricks immediately after the occurrence and, in Smith's case, her testimony before the grand jury.

While we acknowledge the points made by the dissent and readily recognize that a reasonable trier of fact could have reached the opposite conclusion in this case, to do so on appeal would be to improperly substitute our judgment for that of the trial court. Although the dissent observes that McCoy never testified that Johnson was rendered defenseless, McCoy also did not observe the entire altercation and particularly, she turned away after she saw Green kneeling on Johnson's chest punching him and when she returned, Green was hitting Johnson with the bat. The evidence showed that Smith told both Detective Hendricks and the grand jury that Johnson appeared "knocked out" and was not moving after Green dealt him several blows to the head with closed fists. Based on the record, McCoy would not have observed this.

The defense further posits that Green's concern for the safety of other family members motivated him to continue striking Johnson with the bat (with such force that he broke it) until it was "safe" to leave. Not only is there no evidence in the record to support this conclusion, but the dissent also emphasizes how combative Johnson remained even after being hit with the bat, thus begging the question why Green would have believed it was safe to leave his family members behind....

Viewing these surrounding facts and circumstances in the light most favorable to the State as we must (*Siguenza-Brito*, 235 Ill. 2d at 224), we find that the State sustained its burden of disproving defendant's affirmative defense of self-defense beyond a reasonable doubt (see *Brown*, 78 Ill. App. 2d at 330-31), and affirm the judgment of the circuit court of Cook County.

Affirmed.

PRESIDING JUSTICE HYMAN, dissenting:

I respectfully dissent. The critical issue is whether the State proved beyond a reasonable doubt that Lawrence Green acted on a reasonable belief that the physical force he used was necessary to protect himself from Johnny Johnson. When a defendant raises evidence of self-defense, the burden of proof does not shift to the defendant, but remains with the State. Unlike the majority, I find that Green's belief was reasonable where the evidence showed that: (i) Johnson retrieved the bat from his car and initiated the threats, (ii) Johnson initially struck Green twice in the back with a baseball bat, (iii) the fight between Green and Johnson lasted a matter of seconds, (iv) throughout the fight Green was forced to continue defending himself, and (v) this was a single ongoing incident throughout which Green remained exposed to peril.

Green had to react quickly to an aggressive situation not of his making, and although he managed to wrest the baseball bat from Johnson during their tussling, Johnson remained a formidable and dangerous adversary. While it is unknown how long Johnson was lying on the ground—for seconds or a bit longer—this defect in the evidence is on an issue for which the State bears the burden of proof, and the State did not sustain its burden. Even relying on the stipulation of Detective Hendricks suggests that at best Johnson "appeared" to be knocked out. "Appeared" is a far cry from incapacitated or unconscious. If Johnson was stung for an instant, that still does

not preclude Green from having to defend himself. Testimony established that Johnson posed extreme personal risk of injury for the paramedics who arrived to transport him to the hospital and for the doctors and staff at the hospital, all of which belies that he was "knocked out," powerless to strike back, or unable to get up from the ground. In sum, the evidence presented by the State does not prove that Johnson was ever completely incapacitated or that Green was unjustified in his use of force.

The majority, as I read its recitation of the altercation ... faults Green for not knowing ahead of time whether the punches to the head were enough to subdue a heavily intoxicated, violent individual. The law does not expect Green to be clairvoyant or possess psychic powers as to what Johnson's next move might be. Green had to deal with the stark reality of what was occurring in real time. On the other hand, the majority benefits from the clarity of hindsight and can freely speculate on Johnson's condition in the moments after Green hit him with his fist and what might have happened had Green walked away at that point....

The State's evidence was spotty at best, and insufficient to dispose of the defense. It is undisputed that Johnson was the initial aggressor and Green was confronted by a peril not of his own making. The evidence showed that Johnson was inebriated and attacked Green, without provocation, with a baseball bat to his back. Johnson was, therefore, required to defend himself.

The State argues that "the fight was over" once Green was lying on the ground and no longer had the bat, yet, the evidence does not support this myopic conclusion. To the contrary, witness McCoy testified that the fight between Johnson and Green was over "in a matter of seconds." Thus, the court should view the altercation as a whole.

The evidence shows that Johnson and Green were engaged in ongoing combat for a matter of seconds, during which Green pulled the baseball bat away from Johnson and struck him with the bat. McCoy testified that Johnson continued to struggle, swinging his arms and legs, and fought with Green the entire time. This description by McCoy belies the assertion that Johnson was incapacitated, and McCoy never testified that Johnson had been knocked out. The evidence also shows that Johnson remained combative for a significant period of time after the fight concluded. Paramedic Baghdade testified that due to Johnson's combativeness, which included yelling, cursing, spitting, and biting while at the scene of the fight, Baghdade and his fellow paramedics had to use soft restraints to protect themselves from Johnson. Baghdade further testified that it took three paramedics to subdue Johnson. Not only do Johnson's actions towards the paramedics demonstrate that Johnson posed a threat even when disarmed and on the ground, but it also indicates Johnson's strength, providing further support to the reasonableness of Green's belief. See *People v. Lynch*, 104 Ill. 2d 194, 200, 470 N.E.2d 1018, 83 Ill. Dec. 598 (1984) (when theory of self-defense raised, victim's aggressive and violent character "tends to support defendant's version of facts").

The parties stipulated that hospital personnel would testify that Johnson was also extremely combative while in the trauma bay and, as a result, he had to be incubated. Therefore, the evidence shows that Johnson remained violent, even after Green was able to take away the baseball bat. This was not a case in which the initial aggressor was lying helplessly on the ground and the defendant could simply walk away. See *People v. Balfour*, 148 Ill. App. 3d 215, 223, 498 N.E.2d 547, 101 Ill. Dec. 223 (1986) (evidence supported trial court's conclusion that once victim was lying motionless on ground and defendant had turned away, defendant was not justified in returning

to victim and using force likely or intended to cause great bodily harm or death). Because Johnson continued to pose a danger of violence to Green, under these circumstances, Green could reasonably believe that force used in striking Johnson with the baseball bat was necessary to protect himself. See *People v. Hawkins*, 296 Ill. App. 3d 830, 836, 696 N.E.2d 16, 231 Ill. Dec. 287 (1998) ("The reasonableness of an individual's belief that the use of deadly force was necessary depends on the surrounding facts and circumstances and is a question of fact"); *People v. Sawyer*, 115 Ill.2d 184, 192, 503 N.E.2d 331, 104 Ill. Dec. 774 (1986) ("In the context of self-defense, it is the defendant's perception of the danger, and not the actual danger, which is dispositive").

While the majority finds that Green was not in an enclosed space and could have fled to his vehicle, the ongoing struggle with Johnson precluded this action. Green's mother, sister, and young nieces were at risk just inside the house. Requiring Green to just walk away during the course of the fight, instead of defending himself with reasonable force, would have left Green and his family vulnerable and exposed to Johnson, who continued to act in an erratic, aggressive, and combative manner. This is why it is inconsequential that Johnson did not have a weapon to pose a continuing threat to Green—Johnson's very presence in his then disturbed state of mind posed a threat. See *People v. Estes*, 127 Ill. App. 3d 642, 651, 469 N.E.2d 275, 82 Ill. Dec. 741 (1984) (Defendant needs only the subjective belief of imminently suffering great bodily harm or death to justify using deadly force.)

Further, the only evidence supporting a conclusion otherwise, *i.e.*, that Johnson was lying defenselessly on the ground at the time Green hit him with the baseball bat, was submitted through stipulation. Specifically, the parties stipulated that Officer Hendricks would testify that Smith told her that after Green hit Johnson in the face, Johnson fell down hard and appeared to be "knocked out." The parties also stipulated that ASA Spizzirri would testify that Smith testified before the grand jury that Johnson was not talking or moving in any way after being punched by Green. But, Smith did not provide similar testimony at trial and denied making those earlier statements. Although it is the province of the trier of fact to resolve any conflicts in evidence and to weigh witness credibility, this evidence was presented via stipulations and not live testimony. The trier of fact could not assess the credibility of Officer Hendricks and ASA Spizzirri. Under these circumstances, this evidence is of diminished significance in determining whether Johnson continued to pose a threat to Green after he was disarmed and on the ground....

The majority characterizes the State's failure to meet its burden of proof as an improper attempt of substituting another judgment for that rendered by the trial court. But the law is that "[w]here the record on appeal leaves a grave and substantial doubt as to the guilt of the defendant, the judgment of the trial court will be reversed. [Citation.]" *People v. Estes*, 127 Ill. App. 3d 642, 653-54, 469 N.E.2d 275, 82 Ill. Dec. 741 (1984). Under the circumstances presented, I cannot say that Green's belief that he was in danger of death or great bodily harm was unreasonable beyond a reasonable doubt. *Id.*

Courts of review should set aside a defendant's conviction when the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt. As explained above, this is such a case, and if *Beauchamp* and similar pronouncements of principles consistent with our constitutional duty have true meaning, then, on the record before us, Green's conviction and sentence should be reversed.

Discussion Questions and Notes

- 1) Do you think the defendant exceeded the force allowable by Illinois law?
- 2) Do you think Illinois law is too restrictive in allowing force to be used?

An exception to the imminence requirement for self-defense emerged in the context of what is now generally referred to as Battered Spouse Syndrome (BSS). Based upon the following case, consider when you think the defendant should be able to introduce evidence of BSS to buttress a self-defense affirmative defense.

Michigan v. Sandoval-Ceron, 2010 Mich. App. LEXIS 1493 (Mich. Ct. App. 2010)

PER CURIAM

Defendant appeals as of right her jury conviction for voluntary manslaughter. MCL 750.321. On appeal, we must determine whether the trial court erred when it precluded defendant from calling an expert to testify about battered woman syndrome, erred when it limited defendant's ability to offer evidence concerning the decedent's aggressive character, and erred when it refused to instruct the jury on self-defense. Because we conclude that there were no errors warranting relief, we affirm....

Defendant's conviction stems from an altercation with Ricardo Prieto. Defendant and Prieto had had a stormy relationship. However, that stormy relationship took place in Texas two years earlier and prior to the two of them marrying other people and moving to Michigan. Although the testimony conflicted as to whether and how long Prieto had moved in with defendant prior to the night of his death—defendant denied that he stayed with her at all, but her children from a different relationship put the time at two days and two weeks respectively—there was no testimony that there were any fights during this period.

Prieto and defendant attended a wedding at the home of Jesus and Michelle Estrada on September 9, 2006. After the wedding they were drinking beer while sitting on the porch. Testimony indicated that they were both intoxicated. They began to argue and Michelle Estrada saw Prieto strike defendant with the back of his hand, causing her lip to bleed. Estrada asked her husband to intervene and he did, successfully separating the two and telling Prieto not to touch defendant.

Prieto then left the porch and stood in front of the Estradas' van. Defendant angrily pursued Prieto to the van and threw a beer bottle at him, but missed. As she tried to throw another bottle, Jesus Estrada took it away. Defendant next picked up a ceramic pot to throw, but it became caught in her finger and she missed again. After these unsuccessful attempts to strike Prieto, defendant went into the Estradas' home and grabbed the butcher knife that was used to cut the wedding

cake. According to defendant's daughter, Angelica, defendant said she "wanted to kill him because ... she was tired of him hitting her." Angelica told her to quit, but she would not listen.

Defendant then went out on to the porch with the knife briefly before going toward Jesus and Prieto. Prieto ran from defendant while Jesus Estrada told her to stop. However, defendant refused to stop and grabbed Prieto's collar. She began swinging the knife at him with Estrada between them trying to stop her. Estrada eventually tired and defendant chased Prieto to the back of the van screaming that she was going to kill him. Defendant, who was both taller and heavier than Prieto, eventually succeeded in killing Prieto by stabbing him in the heart....

"In Michigan, the killing of another person in self-defense is justifiable homicide if the defendant honestly and reasonably believes that [her] life is in imminent danger or that there is a threat of serious bodily harm." *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990). However, a defendant is not entitled to use any more force than is necessary to defend herself. *People v Roper*, 286 Mich App 77, 88; 777 NW2d 483 (2009). And deadly force may not be used if it reasonably appears that it would be safe to retreat. *People v Riddle*, 467 Mich 116, 119, 128; 649 NW2d 30 (2002).

Under the evidence adduced at trial, no reasonable person could conclude that defendant was under an imminent threat of death or great bodily harm. Jesus Estrada broke up the original altercation wherein Prieto struck defendant with the back of his hand and Prieto moved from the area of the altercation. At this point, defendant became the aggressor. She pursued Prieto and began to throw objects at him. There is no evidence that Prieto physically attacked her again and there is no evidence that he was ever armed. Indeed, the evidence shows that defendant was the one who had to be restrained. After her attempts to use projectiles against Prieto failed, she retreated to the safety of the Estrada's home only to return to the porch with a butcher knife after announcing that she was going to kill Prieto. She then chased him down and stabbed him to death. Under these facts, defendant cannot plausibly claim that she was acting in self-defense.

Moreover, the facts of this case do not implicate the holding in *Riddle* that "a person is never required to retreat from a sudden, fierce, and violent attack; nor is he required to retreat from an attacker who he reasonably believes is about to use a deadly weapon ... as long as he honestly and reasonably believes that it is necessary to exercise deadly force in self-defense, the actor's failure to retreat is never a consideration" and "he may stand his ground and meet force with force." *Riddle*, 467 Mich at 119 (emphasis supplied). Here, defendant was not standing her ground against a sudden and deadly attack; rather, she decided to physically attack Prieto after the initial altercation had ended. And when her attacks were unsuccessful, she decided to escalate the violence by arming herself with a deadly weapon, running Prieto down, and stabbing him to death.

The trial court did not err when it refused to give a self-defense instruction that was not supported by the facts....

Defendant also argues that the trial court deprived her of her right to present a defense when it excluded the testimony of an expert witness on battered woman syndrome....

In this case, defendant wanted to present an expert on battered woman syndrome. Michigan courts have recognized that expert testimony on this syndrome can be relevant to the defense of self-defense; specifically, it can be offered to explain how a defendant might have a reasonable

belief that danger or great bodily harm is imminent. It is not, however, an independent justification or excuse for homicide....

Here, the trial court heard the expert's proposed testimony and determined that the witness did not apply the principles and methods reliably to the facts of the case. The trial court did not rule that evidence of battered woman syndrome was inherently inadmissible, or that the proposed expert lacked the knowledge, skill, or experience to qualify as an expert. Rather, the expert failed to close the "analytical gap" between her expertise on battered woman syndrome and the facts of the particular case. We agree that there was a gap between the proposed testimony and the facts of this case. Because the facts did not support a claim of self-defense, the proposed testimony would not have assisted the jury in understanding the evidence or in determining a fact in issue. Therefore, the trial court did not abuse its discretion in excluding the expert's testimony and the exclusion did not violate defendant's right to present a defense....

There was no evidence to support defendant's claim of self-defense. Once the initial altercation ended—and especially after she retreated to the relative safety of the Estrada's home—defendant was no longer in imminent danger.¹ Accordingly, the trial court did not err in refusing to instruct the jury on self-defense. Likewise, given that self-defense did not apply under the facts of this case, defendant's expert's proposed testimony would not have been relevant or helpful to the jury. For that reason, the trial court did not err in refusing to allow defendant's expert to testify about battered woman syndrome. Finally, the trial court did not abuse its discretion when it limited a portion of the evidence concerning Prieto's character for aggression.

There were no errors warranting relief.

Affirmed.

GLEICHER, J. (dissenting).

I respectfully dissent. In my view, the trial court abused its discretion when it refused to permit the introduction at trial of proposed expert testimony regarding a battered woman syndrome

¹ Although there may be cases where a woman affected by battered woman syndrome might reasonably believe that she is in imminent danger even with a separation in both time and space, this is not such a case. At some point, courts must be able to state that a defendant's separation in time and space from the victim precludes a reasonable finder of fact from finding that defendant held a reasonable belief of imminent danger notwithstanding her claim that she was affected by battered woman syndrome. To hold otherwise would give rise to troubling questions regarding the application of this defense. For instance, how much time can elapse between the initial altercation and the defendant's subsequent decision to use deadly force? Can the defendant retreat to safety for twenty minutes and then decide to arm herself and attack her assailant? Can she wait two hours, two days, or even two months before killing her assailant and still present the defense? Does the physical proximity to her assailant alter the analysis? Here, defendant retreated into the home where the altercation occurred and armed herself. Could she still have presented the defense if she had driven home, armed herself there, and then driven back to the Estradas' home to kill Prieto? Does the possible influence of the syndrome always render such questions a matter for the jury? Indeed, is there ever a circumstance where someone allegedly affected by the syndrome could be prevented from presenting self-defense as justification for homicide?

(BWS) defense. The exclusion of this evidence contravened longstanding Michigan case law concerning syndrome evidence ... and denied defendant her constitutional right to pursue a self-defense theory....

On September 9, 2006, defendant and Prieto attended a wedding at the home of Michelle and Jesus Estrada. As defendant and Prieto sat together on the Estradas' porch after most of the other wedding guests had departed the reception, defendant and Prieto began to argue. Jesus Estrada recalled that Prieto was drunk. Prieto suddenly struck defendant in the face, and within minutes she fatally stabbed him....

The trial court conducted an evidentiary hearing at which VanHorn offered testimony. VanHorn described the "common characteristics of battered women" identified in the literature on this subject. VanHorn explained the "cycle of violence" endured by abused women, and opined that as a result of "being battered and being loved, being battered and being loved," a battered woman's "perception of what is going on around" her is "skewed." According to VanHorn, when an abused woman receives a blow, and particularly a blow to the face, "she believes that she's in danger. She believes she's going to die. She believes that this is it for her." In a bench opinion, the trial court found VanHorn qualified to express opinions about BWS, and observed "that in some circumstances" it would find VanHorn's testimony to be "the product of reliable principles and methods." However,

in this particular case, the Court is not satisfied that the witness as she testified was able to apply the principles and methods reliably to the facts of this particular case. While she had reviewed police reports and the transcript of the preliminary examination, interviewed or had summaries of other witnesses' testimony, that she relied particularly upon her interview with the defendant. And what the Court's fear is that in this—with the facts of this particular case, that the proffering of Dr. VanHorn as an expert would be unfairly and improperly prejudicial or confusing to the trier of facts.

Subsequently, the trial court refused to allow the jury to hear the testimony of several witnesses familiar with defendant's relationship with Prieto, who would have supplied details concerning episodes of physical abuse that Prieto inflicted on defendant. After these rulings, the defense opted not to present a self-defense claim.

The majority reasons that because VanHorn "failed to close the 'analytical gap' between her expertise on battered woman syndrome and the facts of the particular case," the trial court did not abuse its discretion by barring her testimony.... I believe that the majority and the trial court have misapprehended the legal standard governing the admission of syndrome evidence, and that the trial court abused its discretion when it excluded VanHorn's testimony under an incorrect legal standard. Furthermore, this error mandates a new trial because it deprived defendant of a substantial defense and undermined the reliability of the verdict....

In *People v Wilson*, 194 Mich App 599, 602; 487 NW2d 822 (1992), the defendant contended that "the jury should consider the fact she suffered from the [Battered Spouse Syndrome (BSS)] in evaluating her self-defense claim because it relates to the question whether she reasonably believed her life was in danger." [T]his Court concluded "that in cases such as this one expert testimony regarding the BSS will give the trier of fact a 'better understanding of the evidence or assist in determining a fact in issue.'" *Id.* at 604....

Defendant sought to introduce VanHorn's expert testimony about BWS to support a self-defense claim at trial. As in *Wilson*, 194 Mich App at 602, defendant "argues the jury should consider the fact that she suffered from the BSS in evaluating her self-defense claim because it relates to the question whether she reasonably believed her life was in danger." In *Wilson*, this Court affirmed an interlocutory order permitting the defendant to introduce "expert testimony regarding a description of the general syndrome and that certain behavior of the defendant already in evidence is characteristic of battered spouse victims generally" *Id.* at 605. However, the Court cautioned that testimony "regarding whether the defendant suffers from the syndrome and whether the defendant's act was the result of the syndrome" must be excluded. *Id.*

The trial court in this case concluded that VanHorn qualified as an expert in BWS, and that "in some circumstances" her testimony "would be the product of reliable principles and methods." But the trial court excluded VanHorn's testimony on the basis of the court's application of MRE 702(3), a provision added in 2004, which requires that the proponent of expert testimony demonstrate that "the witness has applied the principles and methods reliably to the facts of the case." Although the trial court's reasons for rejecting VanHorn's testimony on this ground are not entirely clear, the court expressed concern about the fact that VanHorn "relied particularly upon her interview with the defendant," and opined that "with the facts of this particular case, ... the proffering of Dr. VanHorn as an expert would be unfairly and improperly prejudicial or confusing to the trier of facts." The trial court failed to elucidate any specific reason for its determination that BWS evidence would unfairly or improperly prejudice the prosecutor in this case, and I can discern none. I cannot meaningfully distinguish this case from *Wilson*, 194 Mich App 599. In *Wilson*, the defendant admitted "shooting the victim while he slept, but claim[ed] she acted in self-defense following forty-eight hours of abuse and death threats and years of battery." *Id.* at 601. This Court concluded that "expert testimony regarding the BSS will give the trier of fact a 'better understanding of the evidence or assist in determining a fact in issue.'" *Id.* at 604...

Several witnesses testified about the altercation that resulted in Prieto's death. Michelle Estrada, at whose home the wedding reception took place, recalled seeing defendant and Prieto sitting on the back porch, talking and drinking beer. Michelle left her home briefly, and when she returned she saw defendant and Prieto arguing and asked her husband, Jesus Estrada, to intercede. Michelle "glanced back up to the porch," and saw Prieto's "hand come across [defendant's] face, and that's when I seen the blood on her lip, and that's when the argument got heated more, I guess." Michelle could not specifically recall if Prieto hit defendant with his "open hand" or his fist; she explained, "I just know it was the back of his hand is what made contact with her mouth." The prosecutor does not dispute that Prieto initiated the affray.

After Prieto struck defendant's face, Michelle Estrada again urged her husband to step in and deescalate the situation. Michelle remembered that Prieto left the porch and defendant threw a beer bottle and a flowerpot at him, but missed. Defendant went inside the house and came out with a knife in her hand. Prieto and defendant continued fighting in the yard, and Jesus Estrada attempted to separate them, until Jesus tired and put his hands on his car. When Jesus turned to find defendant and Prieto, the knife lay on the ground and Prieto had been stabbed. Neither of the Estradas saw defendant stab Prieto.

VanHorn's testimony at the evidentiary hearing focused primarily on the general characteristics of battered women and the "cycle of violence" in which they live:

Q. Does—in this cycle of violence, does the violence repeat itself typically?

A. Well, it does, and sometimes ... the relationship could last for a year and nothing happen[s] or months and nothing happen[s], so it's not like it happens all the time one after another. The person, the woman doesn't know when it's going to happen.

Q. Does the violence always or typically escalate?

A. Yes.

Q. How so?

A. It's the power and control that the man has.... It's a pattern of coercion and control that the man has on the woman. And so it's ... [a] repeated number of assault[s], one after another sometimes, but most of the time it's—you know, it stay—it's quiet and then it's the cycle start[s] again. And the woman tries all her best not to let this happen. She's very much attune[d] of the clues of what will trigger this range [sic] in the men. She is always in constant fear of her life. She's always looking out. She's always feel [sic] that she's in danger.

VanHorn averred that physical abuse can distort a victim's perception of harm, and affect "her ability to make rational decision[s] and use good judgment."

Expert testimony concerning BWS bore direct relevance to a critical element of self-defense: the honesty and reasonableness of defendant's belief that she faced imminent danger of death or great bodily harm during her fight with Prieto. VanHorn's explanation of BWS would have assisted the jury in assessing whether defendant honestly believed that at the time of the altercation with Prieto she faced imminent death or serious bodily injury, and in assessing the reasonableness of defendant's actions after Prieto hit her in the face. VanHorn posited that physical abuse in a battering relationship alters a victim's state of mind and her perceptions of danger. This testimony would have enhanced the jury's ability to consider whether defendant's actions in obtaining and using the knife constituted a reasonable effort at self-defense, derived from an honest belief in the imminence of life threatening danger.

The majority rejects that the facts of this case support self-defense, in part because the majority divides the relevant events of September 9, 2006 into two separate brawls. As the majority would have it, defendant "became the aggressor" in a second affray when she threw objects at Prieto, and "decided to physically attack Prieto after the initial altercation had ended." According to the majority, during the second series of events, defendant formed the intent to "escalate the violence by arming herself with a deadly weapon, running Prieto down, and stabbing him to death." (emphasis in original). The majority's characterization of events supports that defendant could not have harbored a reasonable belief in the imminence of death or serious bodily harm. But the majority ignores that a jury must view the events as they appeared to defendant, rather than to a panel of appellate judges reading a cold record...

Introduction of expert testimony concerning BWS would have permitted the jury to view the evidence through the lens of defendant's experience as a victim of Prieto's violence, and to determine, on the basis of the circumstances as they presented to defendant following her blow to the face, whether defendant's belief in imminent death or serious bodily harm qualified as reasonable. A jury could reasonably have concluded that defendant did not perceive two separate, distinct affrays, but one continuous, unrelenting peril in the course of which the threat of serious bodily injury never abated. "[T]he expert's testimony might also enable the jury to find that the

battered [woman]... is particularly able to predict accurately the likely extent of violence in any attack on her. That conclusion could significantly affect the jury's evaluation of the reasonableness of defendant's fear for her life." *State v Kelly*, 97 NJ 178, 207; 478 A2d 364 (1984)....

Had Prieto been the first to draw a knife, defendant would have had no need of testimony explaining her perception of imminent death or great bodily harm. Here, however, defendant claimed that the threat Prieto posed could only be fully understood in the context of a battered woman's past experience. The notion that an abused woman could reasonably and honestly fear death or serious bodily harm absent immediate and obvious deadly force directed against her is hardly new in the annals of Michigan law....

In my judgment, the improper exclusion of BWS evidence undermined the reliability of the verdict. When a criminal defendant asserts self-defense, "the reasonableness of a defendant's belief that his life is in danger must be judged on the basis of the circumstances as they were perceived by the defendant, and not as they actually existed." *People v Green*, 113 Mich App 699, 704; 318 NW2d 547 (1982). VanHorn's testimony would have afforded a window into defendant's mind, permitting the jury to understand and potentially validate her claim that when she entered the Estrada home and grabbed a knife, she honestly and reasonably believed that deadly force was necessary to prevent her death or grave bodily injury. The jury's decision to convict defendant of voluntary manslaughter reinforces that the exclusion of VanHorn's testimony affected the outcome of defendant's trial. "The elements of voluntary manslaughter are (1) the defendant must kill in the heat of passion, (2) the passion must be caused by an adequate provocation, and (3) there cannot be a lapse of time during which a reasonable person could control his passions." *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998), aff'd 461 Mich 992 (2000). "The provocation must be adequate, namely, that which would cause a reasonable person to lose control." *Id.* (emphasis in original).

Here, the jury's verdict embodies its belief that Prieto provoked defendant's rage, and that defendant lacked the ability to control her passion. VanHorn would have advised the jury that a battered woman might honestly fear for her life under these same circumstances. And in the face of a self-defense claim, the prosecutor would have borne the burden of proving beyond a reasonable doubt that despite Prieto's provocation and his history of violence toward defendant, defendant unreasonably and dishonestly believed Prieto had threatened her life. Had the jury heard evidence explaining that physical abuse distorts perceptions of the immediacy of danger and "skews" a woman's ability to assess threats, I firmly believe that a different result would have obtained.

Discussion Questions and Notes

- 1) The allowance of BSS evidence has opened the door for other similar theories of exaggerated fear of harm to be introduced. One obvious example is that many states allow for evidence from battered children who attack and/or kill their

parent(s). Are there other situations where such evidence might exist to allow for a viable self-defense argument?

- 2) The social science underlying BSS has been extensively documented and peer reviewed. However, for other, similar claims, it is difficult to know whether a particular expert willing to proffer a particular theory of heightened fear is sufficiently supported in research. Rules of evidence are the primary means of keeping such arguments out of the courtroom. However, courts can also deny defendants the requested affirmative defense instruction and accomplish the same exclusion. Do you think the majority in the above case were skeptical of BSS in general or the defendant's particular claim of BSS?
- 3) Do you think it is better for judges to prevent the jury from hearing the evidence in cases similar to the one above or allow the jury to evaluate the evidence?

Review Exercise 1

Instead of viewing a film clip, for this exercise you should consider the real Florida statutes that applied in the case of George Zimmerman shooting and killing Trayvon Martin. These were the relevant statutory provisions at the time of the shooting:

776.012. Use of force in defense of person

A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that such conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. However, a person is justified in the use of deadly force and does not have a duty to retreat if:

(1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony; or

(2) Under those circumstances permitted pursuant to s. 776.013.

776.013. Home protection; use of deadly force; presumption of fear of death or great bodily harm

... (3) A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony.

776.041. Use of force by aggressor

The justification described in the preceding sections of this chapter is not available to a person who:

... (2) Initially provokes the use of force against himself or herself, unless:

(a) Such force is so great that the person reasonably believes that he or she is in imminent danger of death or great bodily harm and that he or she has exhausted every reasonable means to escape such danger other than the use of force which is likely to cause death or great bodily harm to the assailant; or

(b) In good faith, the person withdraws from physical contact with the assailant and indicates clearly to the assailant that he or she desires to withdraw and terminate the use of force, but the assailant continues or resumes the use of force.

Although certain facts in the case were in dispute, focus on this distilled version of the shooting adapted from Wikipedia (http://en.wikipedia.org/wiki/Shooting_of_Trayvon_Martin) in applying the above statutes:

On the evening of February 26, 2012, George Zimmerman observed Trayvon Martin as he returned to the Twin Lakes housing community after having walked to a nearby convenience store. At the time, Zimmerman was driving through the neighborhood on a personal errand.

At approximately 7:09 PM Zimmerman called the Sanford police non-emergency number to report what he considered a suspicious person in the Twin Lakes community. Zimmerman stated, "We've had some break-ins in my neighborhood, and there's a real suspicious guy." He described an unknown male "just walking around looking about" in the rain and said, "This guy looks like he is up to no good or he is on drugs or something." Zimmerman reported that the person had his hand in his waistband and was walking around looking at homes. On the recording, Zimmerman is heard saying, "these assholes, they always get away."

About two minutes into the call, Zimmerman said, "he's running." The dispatcher asked, "He's running? Which way is he running?" The sound of a car door chime is heard, indicating Zimmerman opened his car door. Zimmerman followed Martin, eventually losing sight of him. The dispatcher asked Zimmerman if he was following him. When Zimmerman answered, "yeah," the dispatcher said, "We don't need you to do that." Zimmerman responded, "Okay." Zimmerman asked that police call him upon their arrival so he could provide his location. Zimmerman ended the call at 7:15 p.m.

After Zimmerman ended his call with police, a violent encounter took place between Martin and Zimmerman, which ended when Zimmerman fatally shot Martin 70 yards from the rear door of the townhouse where Martin was staying.

Police officer Timothy Smith arrived at the scene at approximately 7:17 PM. He reported finding Zimmerman standing near Martin, who was lying face down in the grass and unresponsive. At that time, Zimmerman stated to Smith that he had shot Martin and was still armed. Smith handcuffed Zimmerman and removed his weapon from him. Smith observed that Zimmerman's back was wet and covered with grass and he was bleeding from the nose and the back of his head.

Based upon the described facts above, was George Zimmerman guilty of homicide of Trayvon Martin? What degree did the stand-your-ground provisions of Florida law factor

into your analysis? Who was the initial aggressor as a matter of law? What facts were critical to your opinion on the proper application of the law in the case?

III. Duress

Duress is a narrow defense wherein defendants can argue that they were threatened with imminent physical harm that created duress sufficient to cause them to commit the crime for which they were charged. As with justification defenses, defendants arguing duress must show that they averted a greater harm than the one caused by their criminal actions. In other words, the imminent threat of punch does not create sufficient duress to excuse or justify a bank robbery. Duress is not a defense to a homicide charge.

There is substantial variation among jurisdictions regarding the design of the duress defense, but this is a restatement of the core elements in the majority of jurisdictions.

Paul H. Robinson, Matthew G. Kussmaul, Camber M. Stoddard, Ilya Rudyak and Andreas Kuersten, *The American Criminal Code: General Defenses*, 7 J. LEGAL ANALYSIS 37 (2015)

The majority view of the Duress defense among American jurisdictions might be stated as follows:

Section 404. Duress. In a prosecution for an offense other than murder, it is a defense that the actor engaged in the proscribed conduct because he was coerced to do so by what he reasonably believed was an unlawful threat of imminent death or severe bodily injury to himself or another. This defense is not available if the actor culpably placed himself in a situation where duress was foreseeable. At least fifty of the fifty-two jurisdictions recognize some type of Duress defense.

The narrowness of and difficulties associated with arguing a defense of duress are well illustrated in the following case.

United States v. Nwoye, 824 F.3d 1129 (D.C. Cir. 2016)

Kavanaugh, Circuit Judge

A woman named Queen Nwoye was convicted of conspiring with her boyfriend, Adriane Osuagwu, to extort money from a prominent doctor with whom Nwoye had previously had an affair. At trial, Nwoye testified that she acted under duress: She said that Osuagwu repeatedly beat her and forced her to participate in the extortion scheme. Despite asserting a duress defense based on Osuagwu's repeated abuse of Nwoye, Nwoye's counsel did not introduce expert testimony on battered woman syndrome. At the close of trial, Nwoye's counsel requested a jury instruction on duress, but the District Court denied the request. A jury then convicted Nwoye of conspiracy to commit extortion....

In January 2007, a woman named Queen Nwoye was indicted for conspiring with her then-boyfriend, Adriane Osuagwu, to extort money from Ikemba Iweala. Iweala was a prominent doctor. He and Nwoye had previously had an affair. Over the course of 49 days in 2006, Osuagwu and Nwoye repeatedly threatened Iweala that they would publicize his prior relationship with Nwoye unless Iweala paid them. Their threats were effective. Iweala made six separate payments to Osuagwu and Nwoye, totaling almost \$200,000.

At Nwoye's trial, Nwoye admitted to engaging in the alleged extortion but testified that Osuagwu had coerced her participation through his physically abusive and controlling behavior. According to Nwoye, her relationship with Osuagwu turned abusive shortly after they started dating in 2005. Osuagwu would frequently slap Nwoye with his hand, hit her with his shoe, and beat her on her face and body. Later, Osuagwu's physical violence escalated. Osuagwu beat Nwoye when she initially refused to introduce him to Iweala. Whenever she objected to the extortion, Osuagwu would beat her "like a drum." And on one occasion when Nwoye did not play her part in the extortion scheme, Osuagwu slapped Nwoye and threatened to "strangle" and "kill" her if the scheme were exposed.

Nwoye further testified that Osuagwu exerted financial and psychological control over her. Osuagwu forced Nwoye to hand over her ATM card and PIN. In addition, Nwoye and her children lived with Osuagwu at Osuagwu's home in Maryland. Nwoye testified that Osuagwu — the only person who knew that she lived at the house — would often threaten to kill Nwoye and bury her inside the house. Nwoye also testified that she was afraid to report Osuagwu to the police because Osuagwu had told her that he was a former FBI agent.

At the same time, Nwoye's testimony revealed that Osuagwu did not have direct physical control over Nwoye at all times. While Nwoye attended nursing school or worked at a hospital for three days a week, she was apart from Osuagwu. And Osuagwu spent at least a few days in California while Nwoye remained in Maryland.

But even while they were apart, Osuagwu constantly monitored Nwoye. He forced Nwoye to keep her phone with her and demanded that she answer promptly, even going so far as to require Nwoye to wear a Bluetooth earpiece during class at nursing school.

Despite the significant evidence of Nwoye's abusive relationship with Osuagwu, Nwoye's trial counsel did not seek to introduce expert testimony on battered woman syndrome.

Battered woman syndrome is a term that was coined by Dr. Lenore Walker in the late 1970s to describe the psychological and behavioral traits common to women who are exposed to severe, repeated domestic abuse. *See* LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* (1984); LENORE E. WALKER, *THE BATTERED WOMAN* (1979). Dr. Walker's theory was that women subject to cyclical

domestic abuse develop psychological paralysis — or “learned helplessness” — that renders them unable to escape abusive relationships. See WALKER, BATTERED WOMAN SYNDROME at 86-97.

Since the advent of Dr. Walker’s influential research, courts have admitted expert testimony on battered woman syndrome to support claims of duress and self-defense. See Jane Parrish, *Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases*, in DEPARTMENT OF JUSTICE ET AL., THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS PT. II, at 19, 21-22, 28 (1996) (hereinafter DOJ REPORT)....

At the close of trial, Nwoye’s counsel requested a jury instruction on duress. To be entitled to an instruction on duress, Nwoye had to present sufficient evidence (i) that she acted under an unlawful threat of imminent death or serious bodily injury and (ii) that there was no reasonable alternative to participating in the extortion scheme.

The District Court ruled that Nwoye had not presented sufficient evidence on the second prong of duress — the no-reasonable-alternative prong — and therefore declined to give the duress instruction. The jury then convicted Nwoye of conspiracy to commit extortion, and the District Court sentenced Nwoye to 20 months in prison, followed by three years of supervised release.

The Court also stressed that although Nwoye had testified about the abuse she suffered, she failed to present “other usual indicia supporting a BWS defense — expert witnesses testifying to the effects of isolation, financial dependence, or estrangement from family members.” Therefore, the Court concluded that Nwoye was not entitled to a jury instruction on duress....

The question, put simply, is whether expert testimony on battered woman syndrome would have moved the evidentiary needle enough to entitle Nwoye to a duress instruction. To answer that question, we must initially assess whether, in general, expert testimony on battered woman syndrome can be admissible to prove duress — that is, whether it can be reliable and can be relevant to the duress defense. If so, then we next must assess whether the particular expert testimony proffered by Nwoye in her post-conviction proceeding was reliable and would have provided relevant evidence at Nwoye’s trial. Finally, if Nwoye’s expert testimony would have been admissible, we must determine whether the introduction of such testimony at Nwoye’s trial would have entitled her to a jury instruction on duress...

We agree with the majority of the courts that expert testimony on battered woman syndrome can be relevant to the duress defense. The reason, put simply, is that the duress defense requires a defendant to have acted reasonably under the circumstances, and expert testimony can help a jury assess whether a battered woman’s actions were reasonable.

Reasonableness is the touchstone of a duress defense. To satisfy the first prong of the duress defense, the defendant must have acted under the influence of a *reasonable* fear of imminent death or serious bodily harm at the time of the alleged crime. Whether an alternative is reasonable turns on whether a reasonable person would have availed herself of it.

Reasonableness — under both the imminence prong and the no-reasonable-alternative prong — is not assessed in the abstract. Rather, any assessment of the reasonableness of a defendant’s actions must take into account the defendant’s “particular circumstances,” at least to a certain extent.

The circumstances that juries have historically considered in assessing reasonableness have been factors "that differentiate the actor from another, like his size, strength, age, or health," as well as facts known to the defendant at the time in question, such as the defendant's knowledge of an assailant's violent reputation. On the other hand, courts have typically precluded juries from considering factors such as the defendant's particular "psychological incapacity" or her "clarity of judgment, suggestibility or moral insight." MODEL PENAL CODE § 2.09 cmt. at 373-74 (1985).

Thus, whether expert testimony on battered woman syndrome is relevant to the duress defense turns on whether such testimony can identify any aspects of the defendant's "particular circumstances" that can help the jury assess the reasonableness of her actions. Examination of the particulars of the duress defense shows that expert testimony on battered woman syndrome can indeed identify relevant aspects of a battered woman's particular circumstances.

With respect to the first prong of the duress defense — the imminent-harm prong — women in battering relationships are often "hypervigilant to cues of impending danger and accurately perceive the seriousness of the situation before another person who had not been repeatedly abused might recognize the danger." Lenore E.A. Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321, 324 (1992). Remarks or gestures that may seem harmless to the average observer might be reasonably understood to presage imminent and severe violence when viewed against the backdrop of the batterer's particular pattern of violence....

Regarding the second prong of the duress defense — the no-reasonable-alternative prong — battered women face significant impediments to leaving abusive relationships. Most importantly, battered women who leave their abusers risk a retaliatory escalation in violence against themselves or those close to them — sometimes termed "separation abuse." Mary Ann Dutton, *Validity of "Battered Woman Syndrome" in Criminal Cases Involving Battered Women*, in DOJ REPORT PT. I, at 14-15; Desmond Ellis, *Post-Separation Woman Abuse: The Contribution of Lawyers as "Barracudas," "Advocates," and "Counsellors,"* 10 INT'L J.L. & PSYCHIATRY 403, 408 (1987). For example, studies have suggested that women in battering relationships are more likely to be killed by their batterers after separating from them. See Dutton, *Validity of "Battered Woman Syndrome" in Criminal Cases Involving Battered Women* (citing Margo Wilson et al., *Uxoricide in Canada: Demographic Risk Patterns*, 35 CANADIAN J. CRIMINOLOGY 263, 263-91 (1993)), in DOJ Report pt. I, at 14. In addition, batterers often isolate their victims and exert financial control over them, rendering separation a significant burden. See LENORE E. WALKER, *THE BATTERED WOMAN*, 129-32 (1979). Expert testimony on those impediments to separation can help explain why a battered woman did not take advantage of an otherwise reasonable-sounding opportunity to avoid committing the alleged crime.

In short, expert testimony on battered woman syndrome can be relevant to both prongs of the duress defense.

Our conclusion is further supported by the decisions of the vast majority of courts that have long held that expert testimony on battered woman syndrome can be relevant in the analogous context of self-defense. The elements of self-defense are similar to the elements of duress: To establish a claim of self-defense in most jurisdictions, a defendant must prove that she reasonably believed her use of force was necessary to prevent imminent death or serious bodily harm. See 2 LAFAYETTE, SUBSTANTIVE CRIMINAL LAW § 10.4. Thus, if battered woman syndrome can be

relevant to prove self-defense (as virtually all courts accept), it likewise should be relevant to prove duress.

In sum, we conclude that expert testimony on battered woman syndrome may be admissible as a general matter to prove duress because such testimony can be reliable and can be relevant to both prongs of the duress defense....

Nwoye's expert testimony, moreover, would certainly have been relevant to Nwoye's defense. This Court suggested as much on Nwoye's direct appeal by noting the conspicuous absence of expert testimony on battered woman syndrome at Nwoye's trial. And the Government does not dispute that Nwoye's trial testimony strongly suggested that she had been a victim of a battering relationship. An expert on battered woman syndrome could therefore have helped the jury assess the reasonableness of Nwoye's actions, as we described above....

Perhaps most critically, expert testimony on the likelihood of retaliatory violence upon separation could have provided a plausible explanation for why Nwoye failed to extricate herself from the extortion scheme. Nwoye may have feared that any attempt to leave Osuagwu would have resulted in still greater violence. Moreover, Nwoye may have reasonably believed that reporting Osuagwu to the police (or others) would have been unlikely to result in his immediate arrest and would have therefore placed her at greater risk in the interim. Thus, Nwoye's testimony concerning Osuagwu's abuse, supplemented by expert testimony on battered woman syndrome, would have constituted sufficient evidence from which a reasonable jury could find for Nwoye on a theory of duress.

It may be helpful here to take a step back so that the reader does not miss the forest for the trees. The concept of battered woman syndrome fits this case to a T. A woman was beaten repeatedly by her boyfriend. Some outsiders may question why she didn't just leave her boyfriend. But the expert testimony would help explain why. For the Government to come in now and say that such expert testimony, combined with Nwoye's own testimony about the beatings, still would not entitle her to a duress instruction is to say in essence that battered woman syndrome does not matter, at least in duress cases. We do not agree with that suggestion....

We reverse the judgment of the District Court and remand for further proceedings.

So ordered.

Sentelle, Senior Circuit Judge, dissenting:

....

To be entitled to an instruction on the defense of duress, a defendant must introduce at least some evidence on the two elements of the defense: (1) that the defendant acted under the threat of immediate death or serious bodily injury, and (2) that the defendant had no reasonable legal alternative to committing the crime. Importantly, in the context of the present case, defendant must not only show some evidence on these two elements, she must also establish that if counsel had proffered the evidence (which he did except for the expert testimony), the judge had allowed it in, and the judge had based instruction thereon, the jury result would have been different. The record simply does not support the majority's conclusion on this cluster of issues.

As the district court put it, the trial judge provided the defendant with ample opportunity to present evidence in support of both of these necessary elements. She permitted the defendant to testify at length about the abuse that she said she had suffered at the hands of Mr. Osuagwu. In addition to Ms. Nwoye's testimony about her abuse, the judge also heard evidence that undercut defendant's theory of the case, including evidence that (1) Mr. Osuagwu frequently left the D.C.-Maryland area without her, taking trips to California that lasted days or weeks; (2) Ms. Nwoye left Mr. Osuagwu and returned to her husband in the summer of 2006 without incident; and (3) Ms. Nwoye eventually contacted the Nigerian security services regarding Mr. Osuagwu's criminal behavior.

Based on this evidence, the district court did not submit the duress instruction as requested. The jury returned a verdict of guilty. Then, as the district court noted, this court reviewed and affirmed the district court's decision.

In so doing, we noted that Ms. Nwoye regularly left her home to attend nursing school classes and to work at the hospital and was thus "physically separated" from Osuagwu. She also met alone with Dr. Iweala and did not tell him that she was being forced to extort money from him.... Osuagwu spent nearly two weeks in California, thousands of miles away from Nwoye, giving her more than enough opportunity to notify law enforcement.

Further, with direct reference to Nwoye's claim that she may have suffered from BWS ... Nwoye suggests the mere whiff of [BWS] arising from these facts should alter the duress determination.... [But] her theory is devoid of the other usual indicia supporting a BWS defense—expert witnesses testifying to the effects of isolation, financial dependence, or estrangement from family members. Indeed, as discussed earlier, Nwoye had many alternative sources of protections and support[,] ... [including] access to relatives, classmates, and teachers with whom she could seek refuge. [Furthermore,] [s]he was not under constant visual surveillance. The conspiracy in which she participated lasted for months, ... [and there were] weeks in which Osuagwu was thousands of miles away.

I therefore respectfully dissent.

Discussion Questions and Notes

- 1) Do you think the defendant had offered sufficient evidence to at least allow the jury to assess the defense of duress?
- 2) The obligation to notify law enforcement if given any moment when such notification is possible serves to short-circuit a large number of duress defenses. Do you think the requirement should be so harsh? If not, what would you propose instead?

Review Exercise 1

Watch [this film clip](#) and address the following:

Before his escape, Dufresne was wrongfully convicted of murder. The warden had a witness who could exonerate Dufresne killed. The warden also forced Dufresne to be part of a fraudulent enterprise. In addition, Dufresne was repeatedly attacked and raped by other prisoners and received no protection from the guards. Dufresne is charged in an with Escape: "A person commits an offense if he unlawfully removes himself from official detention or fails to return to official detention following temporary leave granted for a specific purpose or limited period. 'Official detention' means arrest, detention in any facility for custody of persons under charge or conviction of crime or alleged or found to be delinquent, detention for extradition or deportation, or any other detention for law enforcement purposes; but 'official detention' does not include supervision of probation or parole, or constraint incidental to release on bail." Evaluate the charges against Dufresne considering all possible affirmative defenses.