CRIMINAL LAW

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The General Principles of Criminal Liability

Actus Reus

CHAPTER OUTLINE

Did Mrs. Cogdon Voluntarily Kill Pat?

Mrs. Cogdon went to sleep. She dreamed that "the war was all around the house," that soldiers were in her daughter Pat's room, and that one soldier was on the bed attacking Pat. Mrs. Cogdon, still asleep, got up, left her bed, got an ax from a woodpile outside the house, entered Pat's room, and struck her with two accurate forceful blows on the head with the blade of the ax, thus killing her.

(Morris 1951, 29)

> No one should be punished except for something she does. She shouldn't be punished for what wasn't done at all; she shouldn't be punished for what someone else does; she shouldn't be punished for being the sort of person she is, unless it is up to her whether or not she is a person of that sort. She shouldn't be punished for being blond or short, for example, because it isn't up to her whether she is blond or short. Our conduct is what justifies punishing us. One way of expressing this point is to say that there is a voluntary act requirement in the criminal law. (Corrado 1994, 1529)

The voluntary act requirement is called the *first* principle of criminal liability. You'll learn why in this chapter. But, before we get to that, refresh your memory about how the voluntary act requirement fits into the analytic framework of criminal liability introduced in Chapter 1. Recall the definition of **criminal conduct**: "Conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests" (MPC § 1.02(1)(a), Chapter 1, p. 6). And the three elements of criminal conduct consist of:

1. Conduct that is
2. Without justification *and*
3. Without excuse

"Criminal liability," which we define as criminal conduct that qualifies for criminal punishment, falls only on those whose cases proceed through all the following analytic steps. We express them here as questions:

1. Is there criminal conduct? (This chapter, the criminal act; see Chapter 4, criminal intent, and causation.) If there's no criminal conduct, there's no criminal liability. If there is, there *might* be criminal liability. To determine if there is, we proceed to the second question,
2. Is the conduct justified? (See Chapter 5, the defenses of justification.) If it is, then there's no criminal liability. If it isn't justified there *might* be criminal liability. To determine if there is, we proceed to the third question,
3. Is the conduct excused? (See Chapter 6, the defenses of excuse.) If it is, then there's no criminal liability.

This scheme applies to almost everything you'll learn not just in the rest of this chapter, and Chapters 4 through 6. It applies to the crimes covered in Chapters 7 through 13. Furthermore, the scheme applies whether you're learning about criminal liability under the federal government or the government of the state, city, or town you live, or are going to school in; or whether it's the common law, a criminal code, or the MPC being analyzed. (The "Elements of Crime" boxes that you'll find throughout the book reflect the scheme.)

The Elements of Criminal Liability

The drafters of criminal codes have four building blocks at their disposal when they write the definitions of the thousands of crimes and defenses that make up their criminal codes. These building blocks are the **elements of a crime** that the prosecution has to prove beyond a reasonable doubt to convict individual defendants of the crimes they're charged with committing:

1. Criminal act *(actus reus)*
2. Criminal intent *(mens rea)*
3. Concurrence
4. Attendant circumstances
5. Bad result (causing a criminal harm)

LO 1

All crimes have to include, at a minimum, a criminal act (***actus reus*** or "evil act"). That's why it's the *first* principle of criminal liability. The vast majority of minor crimes against public order and morals (the subject of Chapter 12) don't include either criminal intent (***mens rea***) or causing a bad result. But it's a rare crime that includes only a criminal act. This is partly because without something more than an act, a criminal statute would almost certainly fail to pass the test of constitutionality (Chapter 2).

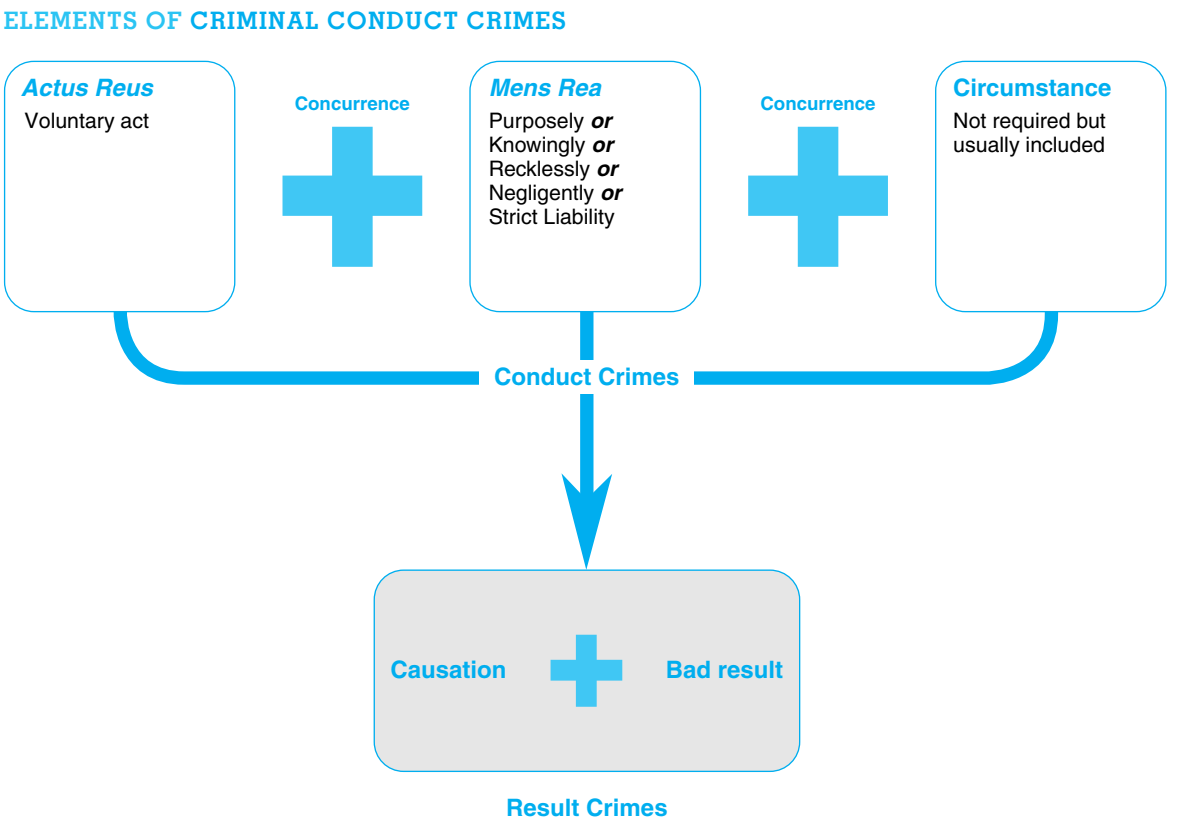
For example, a criminal statute that made the simple act of "driving a car" a crime surely would be void for vagueness or for overbreadth; a ban on "driving while

TABLE 3.1 Useful Definitions

Criminal act (also called *actus reus*)	The physical element of a crime; a bodily movement, muscular contraction
Criminal conduct	Criminal act + criminal intent (also called *mens rea*)
Criminal liability	Criminal conduct that qualifies for criminal punishment

intoxicated" just as surely would pass the constitutional test (Dubber 2002, 44). That's why most of the offenses that don't require a *mens rea* do include what we call an **attendant circumstances element**. This element isn't an act, an intention, or a result; rather, it's a "circumstance" connected to an act, an intent, and/or a result. In our driving example, "while intoxicated" is the circumstantial element.

Serious crimes, such as murder (Chapter 9), sexual assault (Chapter 10), robbery (Chapter 11), and burglary (Chapter 11), include both a criminal act and a second element, the mental attitudes included in *mens rea* ("evil mind;" You'll learn about *mens rea* in Chapter 4 and apply it to specific crimes in Chapters 7 through 13.) Crimes consisting of a criminal act *and* a *mens rea* include a third element, **concurrence**, which means that a criminal intent has to trigger the criminal act. Although concurrence is a critical element that you have to know exists, you won't read much about it as an element in crimes because it's practically never a problem to prove it in real cases. (See Table 3.1 for some useful definitions.)



This is a good time to review also what you learned in Chapter 1 about proving criminal behavior, especially proving the pesky commonly misunderstood and misused ***corpus delicti*** (Latin "body of the crime"). The misunderstanding arises from applying "body of the crime" *only* with the body of the victim in homicides, where the use of *corpus delicti* most often appears. However, it also properly applies to the elements of criminal conduct crimes (like stealing someone's property in theft) and bad result crimes (like burning a house in arson) that you're encountering here, and will again in Chapters 4 and 9 through 13.

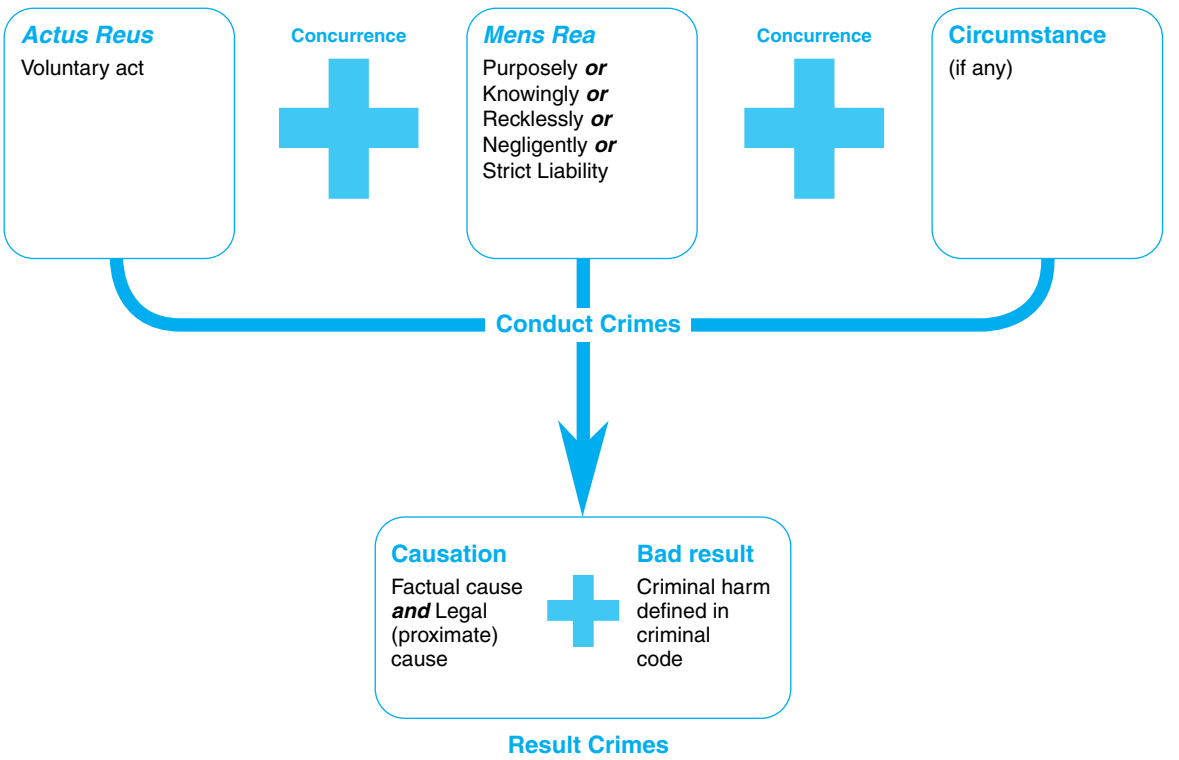
We call crimes requiring a criminal act triggered by criminal intent "**conduct crimes**." Let's look at burglary as an example of a criminal conduct crime. It consists of the act of breaking and entering a house, triggered by the *mens rea* of, say, intending to steal an iPod once inside the house. The crime of burglary is complete whether or not the burglar actually steals the iPod. So the crime of burglary is criminal conduct *whether or not it causes any harm beyond the conduct itself*.

LO 2

Don't confuse criminal *act* with criminal *conduct* as we use these terms. **Criminal acts** are voluntary bodily movements (Holmes 1963, 45–47); criminal conduct is the criminal act triggered by a *mens rea*.

Some serious crimes include all five elements; in addition to (1) a voluntary act, (2) the mental element, and (3) circumstantial elements, they include (4) causation and (5) criminal harm. We call these crimes **bad result crimes** (we'll usually refer to them simply as **result crimes**). There are a number of result crimes (LaFave 2003b, 1:464–65), but the most prominent, and the one most discussed in this and most criminal law books, is criminal homicide—conduct that causes another person's death (Chapter 9).

ELEMENTS OF BAD RESULT CRIMES



For example, murder consists of (1) a criminal act (it can be any act—shooting, stabbing, running down with a car, beating with a baseball bat), (2) triggered by (3) the intent to kill, (4) which causes (5) someone's death.

Now, at last, let's turn to the main topic of the chapter: the requirement of a criminal act (*actus reus*).

The Criminal Act (*Actus Reus*): The *First* Principle of Liability

LO 1, LO 4

We punish people for what they *do*, not for who they *are*. This idea is phrased variously, such as "we punish acts not status" or "we punish actions not intentions." However expressed, the phrase must capture the idea of the first principle of criminal liability. So it's not a crime to *wish* your cheating boyfriend would die; to *fantasize* about nonconsensual sex with the person sitting next to you in your criminal law class; or to *think about* taking your roommate's wallet when he's not looking. "Thoughts are free," a medieval English judge, borrowing from Cicero, famously remarked.

Imagine a statute that makes it a crime merely to intend to kill another person. Why does such a statute strike us as absurd? Here are three reasons: First, it's impossible to prove a mental attitude by itself. In the words of a medieval judge, "The thought of man is not triable, for the devil himself knoweth not the thought of man." Second, a mental attitude by itself doesn't hurt anybody. Although the moral law may condemn you if you think about committing crimes, and some branches of Christianity may call thoughts "sins" ("I have sinned exceedingly in thought, word, and deed"), the criminal law demands conduct—a mental attitude that turns into action. So punishing the mere intent to kill (even if we could prove it) misses the harm of the statute's target—another's death (Morris 1976, ch. 1).

A third problem with punishing a state of mind is that it's terribly hard to separate daydreaming and fantasy from intent. The angry thought "I'll kill you for that!" rarely turns into actual killing (or for that matter even an attempt to kill; discussed in Chapter 8), because it's almost always just a spur of the moment way of saying, "I'm really angry." Punishment has to wait for enough action to prove the speaker really intends to commit a crime (Chapter 8).

Punishing thoughts stretches the reach of the criminal law too far when it brings within its grasp a "mental state that the accused might be too irresolute even to begin to translate into action." The bottom line: we don't punish thoughts because it's impractical, inequitable, and unjust (Williams 1961, 1–2). Now you know why the first principle of criminal liability is the requirement of an act. This requirement is as old as our law. Long before there was a principle of *mens rea*, there was the requirement of a criminal act.

The requirement that attitudes have to turn into deeds is called **manifest criminality**. Manifest criminality leaves no doubt about the criminal nature of the act. The modern phrase "caught red-handed" comes from the ancient idea of manifest criminality. Then it meant catching murderers with the blood still on their hands; now, it means catching someone in the act of wrongdoing. For example, if bank customers see several people enter the bank, draw guns, threaten to shoot if the tellers don't hand over money, take the money the tellers give them, and leave the bank with the money, their criminality—the *actus reus* and the *mens rea* of robbery—is manifest (Fletcher 1978, 115–16).

The *actus reus* requirement serves several purposes. First, acts help to prove intent. We can't observe states of mind; we can only infer them from actions. Second, it reserves the harsh sanction of the criminal law for cases of actual danger. Third, it protects the privacy of individuals. The law doesn't have to pry into the thoughts of individuals unless the thinker crosses "the threshold of manifest criminality." Many axioms illustrate the *actus reus* principle: "Thoughts are free." "We're punished for what we do, not for who we are." "Criminal punishment depends on conduct, not status." We're punished for what we've done, not for what we might do." Although simple to state as a general rule, much in the principle of *actus reus* complicates its apparent simplicity (Fletcher 1978, 117). We'll examine four of these: the requirement that the act be voluntary; status or condition and the Constitution; criminal omissions; and criminal possession.

The "Voluntary" Act Requirement

LO 3

Only *voluntary* acts qualify as criminal *actus reus*. In the words of the great justice and legal philosopher Oliver Wendell Holmes, "An act is a muscular contraction, and something more. The contraction of muscles must be willed" (Holmes 1963, 46–47). The prestigious American Law Institute's Model Penal Code's (MPC) widely adopted definition of "criminal act" provides: "A person is not guilty of an offense unless his liability is based on conduct that *includes* a *voluntary* act . . ." (emphasis added) (ALI 1985, § 2.01).

Why do only voluntary acts qualify as criminal acts? The rationale goes like this:

1. Criminal law punishes people.
2. We can only punish people we can blame.
3. We can only blame people who are responsible for their acts.
4. People are responsible only for their voluntary acts.

The MPC, and many state criminal codes, define "voluntary" by naming involuntary acts. Most commonly, the list includes reflexes or convulsions; movements during sleep (sleepwalking) or unconsciousness (automatism); and actions under hypnosis. The MPC adds a fourth catchall category that (sort of) defines voluntary acts: "a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual" (ALI 1985 § 2.01(2)).

Notice that according to the MPC, not all "bodily movements" have to be voluntary; conduct only has to "*include* a voluntary act." So as long as there's one voluntary act, other acts surrounding the crime may be involuntary. For example, a person who's subject to frequent fainting spells voluntarily drives a car; he faints while he's driving, loses control of the car, and hits a pedestrian. The driver's voluntary act is the one that counts, so the fainting spell doesn't relieve the driver of criminal liability (*Brown v. State* 1997, 284). Most statutes follow the MPC's **one-voluntary-act-is-enough** definition.

But, what if after a defendant's voluntary act, someone else's act triggers an involuntary act of that defendant? There was some evidence of that in *Brown v. State* (the case excerpt included here). Aaron Brown pulled a gun, which he admitted was a voluntary act. Then, his friend, Ryan Coleman, bumped into Brown; the gun fired and killed Joseph Caraballo. The majority of the Court found there was enough evidence to require the trial judge to give a voluntary act instruction. The dissent disagreed.