

4.1: Criminal Elements

Learning Objectives

1. List the elements of a crime.
2. Define the criminal act element.
3. Identify three requirements of criminal act.
4. Describe an exception to the criminal act element.
5. Ascertain three situations where an omission to act could be criminal.
6. Distinguish between actual and constructive possession.
7. Identify the criminal intent element required when possession is the criminal act.

Crimes can be broken down into **elements**, which the prosecution must prove beyond a reasonable doubt. Criminal elements are set forth in criminal statutes, or cases in jurisdictions that allow for common-law crimes. With exceptions, *every* crime has at least three elements: a **criminal act**, also called actus reus; a criminal **intent**, also called mens rea; and **concurrency** of the two. The term **conduct** is often used to reflect the criminal act and intent elements. As the Model Penal Code explains, “‘conduct’ means an action or omission and its accompanying state of mind” (Model Penal Code § 1.13(5)).

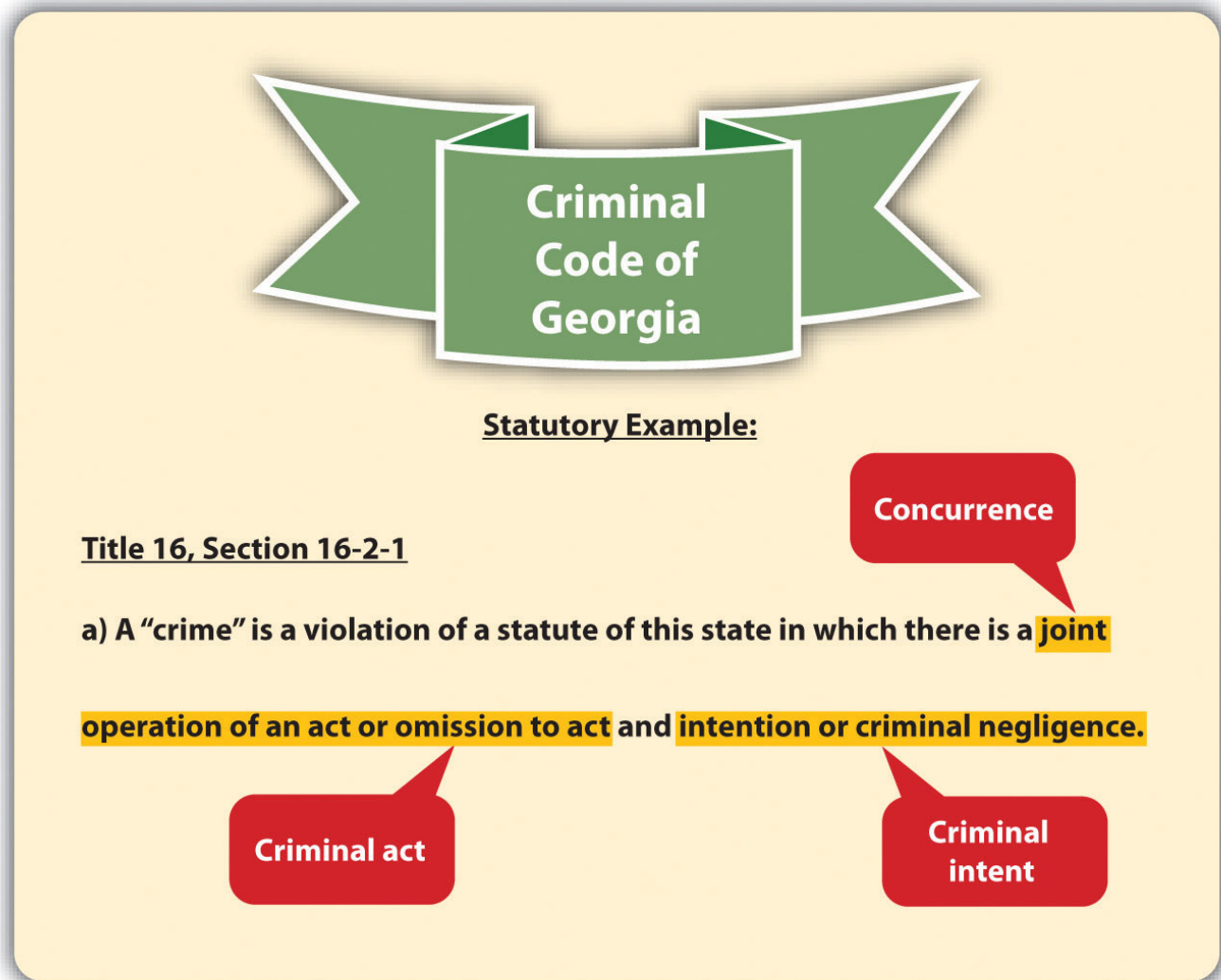


Figure 4.1 Criminal Code of Georgia

Recall from Chapter 1 that not all crimes require a bad *result*. If a crime *does* require a bad result, the prosecution must also prove the additional elements of **causation** and **harm**.

Another requirement of some crimes is **attendant circumstances**. Attendant circumstances are specified factors that must be present when the crime is committed. These could include the crime's methodology, location or setting, and victim characteristics, among others.

This chapter analyzes the elements of every crime. Chapter 7 through Chapter 13 analyze the elements of specific crimes, using a general overview of most states' laws, the Model Penal Code, and federal law when appropriate.

4.1.1 Example of a Crime That Has Only Three Elements

Janine gets into a fight with her boyfriend Conrad after the senior prom. She grabs Conrad's car keys out of his hand, jumps into his car, and locks all the doors. When Conrad strides over to the car, she starts the engine, puts the car into drive, and tries to run him down. It is dark and difficult for Janine to see, so Conrad easily gets out of her way and is unharmed. However, Janine is thereafter arrested and charged with attempted murder. In this case, the prosecution has to prove the elements of **criminal act**, **criminal intent**, and **concurrence** for attempted murder. The prosecution does *not* have to prove **causation** or that Conrad was **harmed** because attempt crimes, including attempted murder, do not have a bad result requirement. Attempt and other incomplete or inchoate crimes are discussed in Chapter 8.

4.1.2 Criminal Act

Criminal act, or **actus reus**, is generally defined as an unlawful bodily movement. N.Y. Penal Law § 15.00, accessed October 25, 2010, http://law.onecle.com/new-york/penal/PEN015.00_15.00.html. The criminal statute, or case in jurisdictions that allow common-law crimes, describes the criminal act element.



Alabama Criminal Code

Statutory Example:

Section 13A-6-43 – Kidnapping in the first degree.

(a) A person commits a crime of kidnapping in the first degree if he **abducts another person** with intent to

- (1) Hold him for ransom or reward; or
- (2) Use him as a shield or hostage; or
- (3) Accomplish or aid the commission of any felony or flight therefrom; or
- (4) Inflict physical injury upon him, or to violate or abuse him sexually; or
- (5) Terrorize him or a third person; or
- (6) Interfere with the performance of any governmental or political function.



Criminal act

Figure 4.2 Alabama Criminal Code

4.1.3 The Requirement of Voluntariness

One requirement of criminal act is that the defendant perform it *voluntarily*. In other words, the defendant must *control* the act. It would not serve the policy of specific deterrence to punish the defendant for irrepressible acts. The Model Penal Code gives the following examples of acts that are not voluntary and, therefore, not criminal: reflexes, convulsions, bodily movements during unconsciousness or sleep, conduct during hypnosis or resulting from hypnotic suggestion, or a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual (Model Penal Code § 2.01 (2)). *One voluntary act* is enough to fulfill the voluntary act requirement. Thus if a *voluntary* act is followed by an *involuntary* one, the court may still

impose criminal liability depending on the circumstances. *Govt. of Virgin Islands v. Smith*, 278 F.2d 169 (1960), accessed October 26, 2010, <http://openjurist.org/278/f2d/169/government-of-the-virgin-islands-v-smith>.

4.1.4 Example of an Involuntary and Noncriminal Act

Perry is hypnotized at the local county fair. The hypnotist directs Perry to smash a banana cream pie into his girlfriend Shelley's face. Smashing a pie into a person's face is probably *battery* in most states, but Perry did not commit the act *voluntarily*, so he should not be convicted of a crime. Punishing Perry for battery would not specifically deter Perry from performing the act again while hypnotized because he is not in control of his behavior when experiencing this mental state.

4.1.5 Example of a Voluntary Act Followed by a Nonvoluntary Act

Timothy attends a party at a friend's house and consumes several glasses of red wine. Timothy then attempts to drive his vehicle home. While driving, Timothy passes out at the wheel and hits another vehicle, killing its occupant. Timothy can probably be convicted of one or more crimes in this situation. Timothy's acts of drinking several glasses of wine and then driving a vehicle are *voluntary*. Thus even though Timothy got into a car accident while unconscious, his involuntary act was preceded by conscious, controllable, and voluntary action. A punishment in this instance could *specifically deter* Timothy from drinking and driving on another occasion and is appropriate based on the circumstances.

4.1.6 Status as a Criminal Act

Generally, a defendant's **status** in society is not a criminal act. Status is *who* the defendant is, not what the defendant *does*. Similar to punishment for an involuntary act, when the government punishes an individual for status, it is essentially targeting that individual for circumstances that are outside his or her control. This punishment may be cruel and unusual pursuant to the Eighth Amendment if it is disproportionate to the defendant's behavior.

In *Robinson v. California*, 370 U.S. 660 (1962), the US Supreme Court held that it is unconstitutional as cruel and unusual punishment pursuant to the Eighth Amendment to punish an individual for the **status** of being a drug addict—even if the drugs to which the defendant is addicted are *illegal*. The Court compared drug addiction to an illness, such as leprosy or venereal disease. Punishing a defendant for being sick not only is inhumane but also does *not* specifically deter, similar to a punishment for an involuntary act.

If the defendant can control the actions at issue in spite of his or her status, the defendant's conduct can be constitutionally criminalized and punished pursuant to the Eighth Amendment. In *Powell v. Texas*, 392 U.S. 514 (1968), the US Supreme Court upheld the defendant's conviction for "drunk in public," in spite of the defendant's status as an alcoholic. The Court held that it is difficult *but not impossible* for an alcoholic to resist the urge to drink, so the behavior the statute criminalized was voluntary. Also, the Court ruled that the state has an interest in treating alcoholism and preventing alcohol-related crimes that could injure the defendant and others. Pursuant to *Powell*, statutes that criminalize *voluntary acts* that *arise* from status are constitutional under the Eighth Amendment.

4.1.7 Example of a Constitutional Statute Related to Status

Refer to the example in [Section 4](#), where Timothy drives under the influence of alcohol and kills another. A state statute that criminalizes killing another person while driving under the influence is constitutional as applied to Timothy, even if Timothy is an alcoholic. The state has an interest in treating alcoholism and preventing alcohol-related crimes that could injure or kill Timothy or another person. Timothy's act of driving while intoxicated is *voluntary*, even if his status as an alcoholic makes it more difficult for Timothy to control his drinking. Thus Timothy and other alcoholic defendants can be prosecuted and punished for killing another person while driving under the influence without violating the Eighth Amendment.

4.1.8 Thoughts as Criminal Acts

Thoughts are a part of **criminal intent**, *not* **criminal act**. Thoughts cannot be criminalized.

4.1.9 Example of Noncriminal Thoughts

Brianna, a housecleaner, fantasizes about killing her elderly client Phoebe and stealing all her jewelry. Brianna writes her thoughts in a diary, documenting how she intends to rig the gas line so that gas is pumped into the house all night while Phoebe is sleeping. Brianna includes the date that she wants to kill Phoebe in her most recent diary entry. As Brianna leaves Phoebe's house, her diary accidentally falls out of her purse. Later, Phoebe finds the diary on the floor and reads it. Phoebe calls the police, gives them

Brianna's diary, and insists they arrest Brianna for attempted murder. Although Brianna's murder plot is sinister and is documented in her diary, an arrest is improper in this case. Brianna cannot be punished for her *thoughts alone*. If Brianna took substantial steps toward killing Phoebe, an attempted murder charge might be appropriate. However, at this stage, Brianna is only *planning* a crime, not *committing* a crime. Phoebe may be able to go to court and get a restraining order against Brianna to prevent her from carrying out her murder plot, but Brianna cannot be incapacitated by arrest and prosecution for attempted murder in this case.


4.1.10 Omission to Act

An exception to the requirement of a criminal act element is **omission to act**. Criminal prosecution for a *failure to act* is rare because the government is reluctant to compel individuals to put themselves in harm's way. However, under certain specific circumstances, omission to act can be criminalized.

An omission to act can only be criminal when the law imposes a *duty to act*. N.Y. Penal Law § 15.00, accessed October 25, 2010, http://law.onecle.com/new-york/penal/PEN015.00_15.00.html. This legal duty to act becomes an **element** of the crime, and the prosecution must prove it beyond a reasonable doubt, along with proving the defendant's inaction under the circumstances. Failure or omission to act is only criminal in three situations: (1) when there is a **statute** that creates a legal duty to act, (2) when there is a **contract** that creates a legal duty to act, or (3) when there is a **special relationship between the parties** that creates a legal duty to act. Legal duties to act vary from state to state and from state to federal.

4.1.11 Duty to Act Based on a Statute

When a duty to act is statutory, it usually concerns a government interest that is *paramount*. Some common examples of statutory duties to act are the duty to file state or federal tax returns,²⁶ U.S.C. § 7203, accessed October 25, 2010, http://www.law.cornell.edu/uscode/26/uscode_sec_26_00007203----000-.html, the duty of health-care personnel to report gunshot wounds, Fla. Stat. Ann. § 790.24, accessed October 25, 2010, law.onecle.com/florida/crimes/790.24.html, and the duty to report child abuse. Ky. Rev. Stat. Ann. § 620.030, accessed October 25, 2010, www.lrc.ky.gov/krs/620-00/030.pdf.



Kentucky Revised Statutes

Statutory Example:

620.030 Duty to report dependency, neglect, or abuse — Husband-wife and professional-client/patient privileges not grounds for refusal to report — Exceptions — Penalties.

(1) Any person who knows or has reasonable cause to believe that a child is

dependent, neglected, or abused shall immediately cause an oral or

written report to be made to a local law enforcement agency or the

Department of Kentucky State Police; the cabinet or its designated

representative; the Commonwealth's attorney or the county attorney; by

telephone or otherwise.

Statutory duty to act

Figure 4.3 Kentucky Revised Statutes

At common law, it was not criminal to stand by and refuse to help someone in danger. Some states *supersede* the common law by enacting **Good Samaritan statutes** that create a duty to assist those involved in an accident or emergency situation. Good Samaritan statutes typically contain provisions that insulate the actor from liability exposure when providing assistance. Minnesota Code § 604A.01, accessed October 25, 2010, <http://law.justia.com/minnesota/codes/2005/595/604a-s01.html>.

Read the Minnesota Good Samaritan Law:

604A.01 GOOD SAMARITAN LAW.

Subdivision 1. **Duty to assist.**

A person at the scene of an emergency who knows that another person is exposed to or has suffered grave physical harm shall, to the extent that the person can do so without danger or peril to self or others, **give reasonable assistance** to the exposed person. Reasonable assistance may include obtaining or attempting to obtain aid from law enforcement or medical personnel. A person who violates this subdivision is guilty of a petty misdemeanor.

Subd. 2. **General immunity from liability.**

(a) A person who, without compensation or the expectation of compensation, renders emergency care, advice, or assistance at the scene of an emergency or during transit to a location where professional medical care can be rendered, is **not liable for any civil damages** as a result of acts or omissions by that person in rendering the emergency care, advice, or assistance, unless the person acts in a willful and wanton or reckless manner in providing the care, advice, or assistance. This subdivision does not apply to a person rendering emergency care, advice, or assistance during the course of regular employment, and receiving compensation or expecting to receive compensation for rendering the care, advice, or assistance.

Note: Although the statute imposes a duty to rescue, it also protects individuals from civil liability. **Minn. Stat. Ann. § 604A.01;**

Figure 4.4 Minnesota Good Samaritan Law

4.1.11.1 Good Samaritan Law Video

Good Samaritan Sued after Rescuing Woman in an Accident

This video is a news story on a California Supreme Court case regarding the civil liability of a Good Samaritan:

[\(click to see video\)](#)

4.1.12 Duty to Act Based on a Contract

A duty to act can be based on a contract between the defendant and another party. The most prevalent examples would be a physician's contractual duty to help a patient or a lifeguard's duty to save someone who is drowning. Keep in mind that *experts* who are *not* contractually bound can ignore an individual's pleas for help without committing a crime, no matter how morally abhorrent that may seem. For example, an expert swimmer can watch someone drown if there is no statute, contract, or special relationship that creates a legal duty to act.

4.1.13 Duty to Act Based on a Special Relationship

A special relationship may also be the basis of a legal duty to act. The most common special relationships are parent-child, spouse-spouse, and employer-employee. Often, the rationale for creating a legal duty to act when people are in a special relationship is the *dependence* of one individual on another. A parent has the obligation by law to provide food, clothing, shelter, and medical care for his or her children, because children are dependent on their parents and do not have the ability to procure these items themselves. In addition, if someone puts another person *in peril*, there may be a duty to *rescue* that person. *State ex rel. Kuntz v. Thirteenth Jud. Dist.*, 995 P.2d 951 (2000), accessed October 25, 2010, <http://caselaw.findlaw.com/mt-supreme-court/1434948.html>. Although this is not exactly a special relationship, the victim may be dependent on the person who created the dangerous situation because he or she may be the only one present and able to render aid. On a related note, some jurisdictions also impose a duty to *continue to provide aid*, once aid or assistance has started. *Jones v. U.S.*, 308 F.2d 307 (1962), accessed October 25, 2010, http://scholar.google.com/scholar_case?case=14703438613582917232&hl=en&as_sdt=2002&as_vis=1. Similar to the duty to rescue a victim the defendant has put in peril, the duty to continue to provide aid is rooted in the victim's dependence on the defendant and the unlikely chance that another person may come along to help once the defendant has begun providing assistance.

4.1.14 Example of a Failure to Act That Is Noncriminal

Recall the example from Chapter 1, [Section 1.2.1 "Example of Criminal Law Issues"](#), where Clara and Linda are shopping together and Clara stands by and watches as Linda shoplifts a bra. In this example, Clara does *not* have a duty to report Linda for shoplifting. Clara does not have a *contractual* duty to report a crime in this situation because she is not a law enforcement officer or security guard obligated by an employment contract. Nor does she have a *special relationship* with the store mandating such a report. Unless a *statute* or ordinance exists to force individuals to report crimes committed in their presence, which is extremely unlikely, Clara can legally observe Linda's shoplifting without reporting it. Of course, if Clara assists Linda with the shoplifting, she has then performed a criminal act or *actus reus*, and a criminal prosecution is appropriate.

4.1.15 Example of a Failure to Act That Is Criminal

Penelope stands on the shore at a public beach and watches as a child drowns. If Penelope's state has a Good Samaritan law, she may have a duty to help the child based on a *statute*. If Penelope is the lifeguard, she may have a duty to save the child based on a *contract*. If Penelope is the child's mother, she may have a duty to provide assistance based on their *special relationship*. If Penelope threw the child in the ocean, she may have a duty to rescue the child she *put in peril*. If Penelope is just a bystander, and no Good Samaritan law is in force, she has no duty to act and cannot be criminally prosecuted if the child suffers harm or drowns.

4.1.16 Possession as a Criminal Act

Although it is passive rather than active, possession is still considered a criminal act. The most common objects that are criminal to possess are illegal contraband, drugs, and weapons. There are two types of possession: **actual possession** and **constructive possession**. Actual possession indicates that the defendant has the item on or very near his or her person. Constructive possession indicates that the item is not on the defendant's person, but is within the defendant's area of control, such as inside a house or automobile with the defendant. *State v. Davis*, 84 Conn. App. 505 (2004), accessed February 13, 2011, http://scholar.google.com/scholar_case?case=12496216636522596448&hl=en&as_sdt=2&as_vis=1&oi=scholar. More than one defendant can be in possession of an object, although this would clearly be a constructive possession for at least one of them.

Because it is passive, possession should be *knowing*, meaning the defendant is aware that he or she possesses the item. Connecticut Jury Instructions No. 2.11-1, accessed February 13, 2011, www.jud.ct.gov/ji/criminal/part2/2.11-1.htm. As the Model Penal Code states in § 2.01(4), "[p]ossession is an act, within the meaning of this Section, if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession." In the vast majority of states, a statute permitting a conviction for possession *without* this knowledge or awareness lacks the criminal intent element and would be unenforceable.

4.1.17 Example of an Unenforceable Possession Statute

A state has a criminal statute that prohibits "being within 100 feet of any quantity of marijuana." Ricardo sits next to Jean on the subway. A law enforcement officer smells marijuana and does a pat-down search of Jean. He discovers that Jean has a large baggie of marijuana in his jacket pocket and arrests Jean and Ricardo for marijuana possession. Ricardo was within one hundred feet of marijuana as prohibited by the statute, but Ricardo *should not* be prosecuted for marijuana possession. No evidence exists to

indicate that Ricardo knew Jean, or knew that Jean possessed marijuana. Thus Ricardo does not have the **criminal intent** or mens rea for possession, and the state's possession statute should not be enforced against him.

4.1.18 Key Takeaways

- The elements of a crime are criminal act, criminal intent, concurrence, causation, harm, and attendant circumstances. Only crimes that specify a bad result have the elements of causation and harm.
- Criminal act is usually an unlawful bodily movement that is defined in a statute, or a case in jurisdictions that allow common-law crimes.
- The criminal act must be voluntary and cannot be based solely on the status of the defendant or the defendant's thoughts.
- An exception to the criminal act element is omission to act.
- Omission to act could be criminal if there is a statute, contract, or special relationship that creates a legal duty to act in the defendant's situation.
- Actual possession means that the item is on or very near the defendant's person. Constructive possession means that the item is within the defendant's control, such as inside a house or vehicle with the defendant.
- In most states, the defendant must be aware that he or she possesses the item to be convicted of possession.

4.1.19 Exercises

Answer the following questions. Check your answers using the answer key at the end of the chapter.

1. Jacqueline is diagnosed with epilepsy two years after receiving her driver's license. While driving to a concert, Jacqueline suffers an epileptic seizure and crashes into another vehicle, injuring both of its occupants. Can Jacqueline be convicted of a crime in this situation? Why or why not?
2. Read *Oler v. State*, 998 S.W.2d 363 (1999). In *Oler*, the defendant was convicted of possession of a controlled substance by misrepresentation. The defendant solicited and received prescriptions for Dilaudid, a controlled substance, from four different physicians without informing them that he already had a prescription for Dilaudid. The defendant appealed, arguing that he had no *legal duty* to disclose his previous receipt of the drug to the physicians, and was therefore unlawfully punished for an **omission to act**. Did the Texas Court of Appeals uphold the defendant's conviction? Why or why not? The case is available at this link: http://scholar.google.com/scholar_case?case=460187562193844690&q=998+S.W.2d+363&hl=en&as_sdt=100000000000002.
3. Read *Staples v. U.S.*, 511 U.S. 600 (1994). In *Staples*, the defendant was convicted of possession of an unregistered automatic weapon in violation of the National Firearms Act. The defendant claimed the conviction was improper because the prosecution did not prove that *he knew* the weapon was automatic, and the prosecution must prove this knowledge to convict under the statute. Did the US Supreme Court reverse the defendant's conviction? Why or why not? The case is available at this link: <http://www.law.cornell.edu/supct/html/92-1441.ZO.html>.

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