Criminal Law of Air Transport

As Interpreted Through Treaties

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This book first published 2025

Ethics International Press Ltd, UK

British Library Cataloguing in Publication Data

A catalogue record for this book is available from the British Library

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Print Book ISBN: 978-1-83711-205-0

eBook ISBN: 978-1-83711-206-7

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Preface

From the perspective of international law, one of the earliest pronouncements on criminal law and punishment can be found in the monumental work of Emer de Vattel who wrote in 1760. Vattel says: " It would be dangerous to leave the punishment of transgressors entirely to the discretion of those who are invested with authority. The passions might interfere in a business which ought to be regulated only by justice and wisdom. The punishment, preordained for an evil action, lays a more effectual restraint on the wicked, than a vague fear, in which they may deceive themselves… Every well governed State ought then to have its laws for the punishment of criminals. It belongs to the legislative power, whatever that be, to establish them with justice and wisdom".[1]

Emer de Vattel articulates a principle central to the integrity of governance and the administration of justice, asserting that the punishment of transgressors cannot prudently be left solely to the discretion of those vested with authority. Such an approach, he warns, is fraught with the peril of interference by passions and subjective inclinations, which ought not to encroach upon matters that require the dispassionate application of justice and wisdom. The existence of preordained sanctions for specific wrongful acts operates as a more effective deterrent against malefactors than the nebulous apprehension of discretionary punishment, which might be subject to self-deception or miscalculation by potential offenders.

It follows as an imperative that a state governed by the principles of law must enshrine within its legislative framework a codified corpus of laws delineating the consequences of criminal conduct. The formu-

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[1] Emer de Vattel, *The Law of Nations*, Knut Haarkonssen Ed., Liberty Fund: Indianapolis, 2008 at 191.

lation and enactment of such laws lie within the purview of the legislative authority, which must exercise its mandate with a fidelity to justice and a sagacious appreciation of societal needs. The certainty provided by predefined legal penalties ensures not only the equitable administration of justice but also the predictability essential to the rule of law.

The assertion by Emer de Vattel – that the punishment of transgressors should not rest solely on the discretionary powers of those in authority, but rather be codified through preordained laws, resonates deeply with the fundamental principles underlying international legal instruments such as the Tokyo Convention of 1963, the Hague Convention of 1970, and the Montreal Convention of 1971. These conventions, established under the aegis of the International Civil Aviation Organization (ICAO), underscore the necessity of uniformity and predictability in addressing offenses that threaten the safety and order of international civil aviation. They also epitomize the legal philosophy that criminal acts, particularly those with cross-border implications, must be governed by clear, harmonized frameworks to ensure justice and the rule of law.

The Tokyo Convention of 1963, formally known as the Convention on Offences and Certain Other Acts Committed on Board Aircraft, seeks to address the challenges posed by unlawful acts occurring during international flights. Reflecting the ethos of Vattel's insistence on preordained legal consequences, the Tokyo Convention articulates the jurisdictional principles and duties of states to ensure that offenses on board aircraft do not escape legal scrutiny. It establishes that the state of aircraft registration has primary jurisdiction over acts committed on board, thereby providing a clear legal locus to avoid the uncertainties that might arise from discretionary enforcement. This approach serves to prevent the arbitrariness that Vattel cautions against, as it anchors the response to such acts in predetermined legal authority.

Furthermore, the Convention provides the aircraft commander with defined powers to take necessary measures, including the restraint of individuals, thereby institutionalizing a balance between discretion and codified legal safeguards.

The Hague Convention of 1970, or the Convention for the Suppression of Unlawful Seizure of Aircraft, advances this principle by addressing the specific crime of aircraft hijacking. In alignment with Vattel's principles, the Hague Convention mandates state parties to criminalize hijacking through their domestic legal frameworks and to prescribe severe penalties for such offenses. The harmonization of legal standards across jurisdictions ensures that perpetrators cannot exploit disparities in national laws to evade justice. By requiring states to establish jurisdiction over offenses committed on board their registered aircraft, within their territory, or by their nationals, the Convention reinforces the predictability and consistency that Vattel advocates. Moreover, the Hague Convention's requirement for states to either prosecute offenders or extradite them reflects the principle that justice must not be left to the caprice of political or discretionary considerations. Such provisions align with the Enlightenment-era legal ideal of universality in the administration of justice, transcending individual state interests.

The Montreal Convention of 1971, formally the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, further exemplifies the principle of codifying offenses and penalties to address acts that threaten international civil aviation. This Convention broadens the scope of unlawful acts to include sabotage, attacks on airports, and the use of devices to destroy or damage aircraft. Consistent with the legal philosophy articulated by Vattel, the Montreal Convention requires state parties to establish jurisdiction over these offenses and to adopt measures ensuring the effective prosecution or extradition of offenders. The precision with which these obligations

are delineated mitigates the risk of discretionary or arbitrary enforcement, reinforcing the primacy of legal certainty in deterring and addressing crimes against aviation safety.

A salient feature of these conventions is their recognition of the transnational nature of aviation-related offenses and the necessity for coordinated legal responses. The codification of jurisdictional principles and the obligation to criminalize specific acts across national legal systems reflect the universality of the rule of law, which Vattel deemed essential for a well-governed state. The conventions collectively ensure that perpetrators of aviation-related crimes are subject to the legal authority of states, thereby minimizing the potential for legal lacunae or impunity. This aligns with Vattel's contention that predefined legal consequences provide a more effective restraint on wrongdoers than vague or uncertain threats of punishment.

Furthermore, the procedural safeguards and obligations enshrined in these conventions exemplify the balance between discretion and legal codification. While aircraft commanders and state authorities are afforded certain discretionary powers to respond to immediate threats, such powers are circumscribed by the overarching legal frameworks established by the conventions. This ensures that responses to offenses are guided by justice and wisdom, as Vattel espouses, rather than being subject to the arbitrary inclinations of individuals. The requirement for states to prosecute or extradite offenders underscores the principle that justice must be consistent and impartial, irrespective of the political or personal interests of those in power.

The interplay between these conventions and domestic legal systems further underscores their alignment with Vattel's principles. By obligating states to incorporate the conventions' provisions into their national laws, they ensure that the punishment of offenses is not left to ad hoc decisions but is grounded in established legal norms. This harmonization of international and domestic legal frameworks

not only facilitates cooperation among states but also reinforces the predictability and fairness essential to the rule of law. It ensures that the enforcement of legal consequences is not subject to the variability of national practices, thereby upholding the principle of equal treatment before the law.

In addressing the complexities of modern aviation-related offenses, these conventions also embody the wisdom that Vattel regards as indispensable to the legislative process. The detailed provisions concerning jurisdiction, extradition, and mutual legal assistance reflect a sophisticated understanding of the challenges posed by transnational crimes. By anticipating potential legal and procedural obstacles, the conventions provide a comprehensive framework that minimizes the scope for ambiguity or discretionary misapplication. This forward-thinking approach exemplifies the principle that laws should be crafted with a view to ensuring their effectiveness and fairness in addressing the specificities of the conduct they seek to regulate.

The codification of offenses and penalties under the Tokyo, Hague, and Montreal Conventions represents a practical realization of Vattel's legal philosophy in the realm of international civil aviation. By establishing clear, harmonized frameworks for the prevention, prosecution, and punishment of aviation-related crimes, these conventions embody the principles of justice, predictability, and wisdom that Vattel deems essential to the governance of a well-ordered state. They demonstrate that the rule of law, when anchored in codified legal instruments, provides the most effective safeguard against the arbitrariness and subjectivity that threaten the equitable administration of justice. In so doing, they reaffirm the enduring relevance of Vattel's insights to the challenges of contemporary international law.

The Protocol to the Tokyo Convention of 1963, adopted in Montreal in 2014, marks a pivotal evolution in the framework of international air law. It addresses the pressing need to combat contemporary threats

to aviation security while ensuring that the principles of state sovereignty and individual rights are respected. As an amendment to the foundational Tokyo Convention, this Protocol reflects the global commitment to adapt to the challenges of modern aviation. A significant feature of this instrument is the recognition and regulation of the role of the Inflight Security Officer (IFSO), whose presence is vital to the protection of flights.

The Tokyo Convention of 1963 was an initial attempt to harmonize legal responses to offenses and acts committed aboard aircraft. Its primary objectives were to delineate jurisdictional boundaries and establish procedures for managing disruptive or criminal behavior. However, as air travel expanded and threats such as terrorism became more sophisticated, it became evident that the Convention required revision to address emerging vulnerabilities. The tragic incidents of the early 21st century further highlighted the gaps in aviation security, underscoring the urgency for a more robust legal framework. The Protocol adopted in Montreal in 2014 seeks to fill these gaps with forward-looking provisions.

One of the most notable amendments introduced by the Protocol is the extension of jurisdiction over offenses committed onboard aircraft. Beyond the state of registration, jurisdiction now includes the state where the aircraft lands and the state of the operator. This expansion is crucial for ensuring that offenders are not able to exploit jurisdictional ambiguities to evade justice. The Protocol also addresses the increasing issue of unruly and disruptive passengers, strengthening states' abilities to impose penalties and enforce measures against such behavior. By clarifying the scope of offenses and ensuring accountability, the Protocol enhances the safety and orderliness of flights.

The formal recognition of the Inflight Security Officer (IFSO) represents another groundbreaking development. IFSOs, commonly referred to as air marshals, are integral to modern aviation security.

Operating covertly onboard aircraft, they are trained to neutralize threats that endanger passengers, crew, and the integrity of the flight. The Protocol sets out principles governing the deployment and operation of IFSOs, emphasizing rigorous training, adherence to international legal standards, and cooperation between states to facilitate their effective deployment. The authority of IFSOs is carefully delineated, ensuring that their actions align with the principles of proportionality and necessity while respecting the rights of passengers and crew. The Protocol underscores the importance of maintaining a delicate balance between enforcing security and protecting fundamental human rights.

In acknowledging the role of the IFSO, the Protocol demonstrates the international community's resolve to address the realities of aviation security in a manner that is both pragmatic and principled. At the same time, it places significant responsibility on states to ensure that IFSOs operate within a framework of accountability and transparency. The presence of IFSOs adds a critical layer of security but must be governed by safeguards to prevent abuse or overreach.

The Protocol to the Tokyo Convention of 1963 exemplifies the adaptability of international air law in the face of new challenges. It reinforces the need for collaboration among states to implement and enforce its provisions effectively. As aviation continues to evolve, this instrument serves as a foundation for further innovation in safeguarding the skies. By addressing contemporary threats with foresight and unity, the Protocol ensures that the freedom and safety of air travel are preserved. As the International Civil Aviation Organization (ICAO) aptly states, "Aviation is the business of freedom," and the Protocol ensures that this freedom is guarded with vigilance and unwavering resolve.

This book examines the principles of criminal law in the perspectives of the various treaties that address criminal behavior in the air transport industry.

Montreal, March 2025

Chapter One

General Principles of Criminal Law

Introduction

A. The Age of Preemption

Criminal law is essentially reactive, in that penal sanctions are imposed generally after a crime has been committed. However, in criminal law applicable to air transport, there is a preemptive element that has been embodied by treaty which gives the aircraft commander the discretion to take reasonable action if he/she has "reason to believe" that a criminal act could be committed on board. In the chapters to follow, this aspect will be discussed in some detail. As a prelude it can be mentioned that with the age of predictive and generative artificial intelligence upon us, particularly predictive AI may prove to be a useful tool in this regard.

Predictive Artificial Intelligence (AI) has emerged as a transformative tool in various sectors, ranging from healthcare to finance and transportation. In the context of aviation, its potential to forecast crimes on board aircraft presents a fascinating yet challenging proposition. As aviation law and operations increasingly intersect with advancements in AI, the implications of predictive technology in safeguarding passengers and crew demand careful examination. This chapter explores the utility of predictive AI in forecasting crimes aboard aircraft, examining its strengths, limitations, and the legal and ethical considerations associated with its deployment.

Criminal acts on board aircraft, ranging from disruptive passenger behavior to more severe offenses such as terrorism, pose unique challenges. Aircraft operate in confined spaces, often at altitudes exceeding 30,000 feet, limiting the immediate availability of law enforcement. Additionally, international flights traverse multiple jurisdictions, complicating the application of laws under conventions such as the Tokyo Convention of 1963. In this context, predictive AI offers an opportunity to anticipate and mitigate criminal acts before they escalate, enhancing the safety and security of passengers and crew.

Predictive AI leverages data analytics, machine learning, and behavioral algorithms to identify patterns and forecast potential risks. In the aviation domain, its applications could include behavioral analysis, where systems analyze passenger behavior in real-time using inputs from surveillance cameras, biometric data, and social media activity. Passengers exhibiting signs of agitation, stress, or aggression could be flagged for closer monitoring. Risk profiling is another application, integrating data from ticket purchases, travel histories, and no-fly lists to generate risk profiles for passengers. Such profiling, when conducted within the bounds of privacy laws, can help identify individuals with a higher likelihood of engaging in unlawful conduct. AI can also analyze historical data on in-flight incidents to identify trends and high-risk scenarios, such as certain flight routes, times of day, or seating configurations correlating with increased disruptive behavior. Furthermore, predictive AI can provide real-time alerts and recommendations to flight crews, enabling them to address potential threats proactively. For instance, if a passenger exhibits behavior consistent with intoxication or aggression, the AI system could recommend early intervention.

Predictive AI offers several advantages in the context of crime prevention on board aircraft. By identifying risks before they materialize, predictive AI enables proactive security measures, reducing the like-

lihood of incidents. AI systems can process vast amounts of data in real-time, providing immediate insights to crew and ground-based security teams. By focusing attention on high-risk individuals or scenarios, predictive AI allows for more efficient allocation of limited security resources. While not immune to bias, AI systems can mitigate the impact of subjective human judgments, ensuring a more objective approach to risk assessment.

Despite its potential, predictive AI is not without limitations. The use of predictive AI requires access to sensitive personal data, raising significant privacy concerns. Compliance with laws such as the General Data Protection Regulation (GDPR) is essential to avoid infringing on individual rights. Predictive systems are not infallible and may generate false positives, incorrectly identifying individuals as threats, or false negatives, failing to identify actual threats. Such errors could lead to unwarranted interventions or overlooked risks. AI systems are only as unbiased as the data they are trained on. Historical biases in datasets could perpetuate discriminatory practices, undermining the fairness and equity of security measures. The application of predictive AI must navigate the intricate web of international aviation law. Issues such as jurisdiction, liability, and adherence to conventions like the Montreal Convention of 1999 require careful consideration. Implementing predictive AI systems on board aircraft necessitates significant technological infrastructure, including advanced sensors and secure data transmission capabilities. These requirements may not be feasible for all airlines, particularly smaller carriers.

The deployment of predictive AI in aviation security intersects with several legal and ethical issues. Passengers must be informed about the use of predictive AI and consent to the collection and analysis of their data. Transparency is crucial to maintaining public trust. Clear guidelines must be established to determine responsibility for decisions made by AI systems. Airlines, AI developers, and regulatory

authorities all have roles to play in ensuring accountability. Predictive AI systems must be designed and tested to prevent discrimination based on race, gender, nationality, or other protected characteristics. Robust auditing mechanisms are essential to identify and address biases. The use of predictive AI must be proportionate to the risks it seeks to mitigate. Overreach, such as intrusive surveillance or overly aggressive interventions, could erode civil liberties.

While predictive AI in aviation security is still an emerging field, analogous applications in other domains provide insights into its potential. Airports worldwide have adopted AI-driven facial recognition technology for passenger screening. These systems, which identify individuals on watchlists, demonstrate the feasibility of integrating predictive tools into aviation security. Programs like the U.S. Transportation Security Administration's (TSA) Screening of Passengers by Observation Techniques (SPOT) rely on behavioral analysis to identify potential threats. Predictive AI could enhance such programs by automating and refining behavioral assessments. Law enforcement agencies have used predictive AI to forecast criminal activity in urban settings. While controversial, these initiatives highlight the potential of AI to anticipate and prevent unlawful conduct.

Achieving an optimal balance between security and privacy is paramount. Regulatory frameworks such as the GDPR and the International Civil Aviation Organization's (ICAO) guidelines provide a foundation for ensuring that predictive AI respects individual rights. Airlines and regulators must collaborate to establish clear policies on data usage, retention, and sharing. Given the global nature of aviation, international collaboration is essential to the effective implementation of predictive AI. Organizations such as ICAO and the International Air Transport Association (IATA) play critical roles in developing harmonized standards and best practices. Cross-border cooperation can also facilitate the sharing of intelligence and technological expertise.

Predictive AI holds significant promise for forecasting crimes on board aircraft, offering the potential to enhance security and prevent incidents. However, its implementation must be approached with caution, addressing challenges related to accuracy, bias, privacy, and legal compliance. By balancing innovation with ethical considerations, the aviation industry can harness the power of predictive AI to create safer skies while upholding the principles of justice and human rights.

B. *Actus Reus* and *Mens Rea*

The most fundamental principle of criminal liability at common law is that the accused is presumed innocent until proven guilty. Needless to say, this would apply to ai law as well. This general principle was well articulated by Dickson J in 1974 Canadian case: " It is unnecessary to emphasize the importance of clarity and certainty when freedom is at stake. No authority is needed for the proposition that if real ambiguities are found, or doubts of substance arise, in the construction and application of a statute affecting the liberty of a subject, then that statute should be applied in such a manner as to favour the person against whom it is sought to be enforced. If one is to be incarcerated, one should at least know that some Act of Parliament requires it in express terms, and not, at most, by implication"[1].

The case of *Morissette* v. *United States*[2], decided by the U.S. Supreme Court in 1952, remains a cornerstone in the understanding of criminal liability. At its heart, the case interrogates the interplay between two fundamental principles of criminal law: *mens rea* (the guilty mind) and *actus reus* (the guilty act). Justice Robert H. Jackson's opinion provides a seminal analysis, emphasizing the necessity of intent in the adjudication of criminal responsibility.

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[1] *Marcotte v. Deputy Attorney General* (Canada) et al., [1976] 1 S.C.R. 108 at 115. Date: 1974-11-27

[2] 342 U.S. 246 (1952).

Joseph Morissette, a scrap metal collector, was charged with the theft of bomb casings left on a U.S. Air Force bombing range. The casings, abandoned after military exercises, were deemed government property. Morissette openly admitted to taking the casings, asserting that he believed them to be discarded and of no value to the government. Nonetheless, he was convicted under a federal statute prohibiting the theft of government property.

The trial court upheld his conviction, instructing the jury that Morissette's intent was immaterial to the charge. On appeal, however, the U.S. Supreme Court reversed the lower court's ruling, finding that criminal liability could not be imposed absent proof of intent.

The doctrine of *mens rea* occupies a central position in criminal law, reflecting the principle that culpability requires a convergence of wrongful intent and wrongful conduct. The *actus reus* represents the external manifestation of the offense, while the *mens rea* ensures that punishment is reserved for those whose actions are morally blameworthy.

Justice Jackson's opinion in Morissette articulates this duality with clarity. He underscores that the omission of intent from criminal liability would transform the law from a tool of justice into an instrument of oppression. The principle "*actus non facit reum nisi mens sit rea*"—an act does not make one guilty unless the mind is also guilty—serves as the bedrock of this reasoning.

The statute under which Morissette was charged, 18 U.S.C. §641, criminalizes the knowing conversion of government property. The government argued that the term "knowingly" referred solely to the physical act of conversion and did not require an intent to steal or permanently deprive the owner of property. Justice Jackson rejected this narrow interpretation, emphasizing that intent is implicit in the common law understanding of theft.

In his analysis, Jackson CJ distinguished between malum in se (inherently wrongful acts) and malum prohibitum (acts made unlawful by statute). He noted that while strict liability may apply to regulatory offenses—often malum prohibitum—traditional crimes like theft demand proof of intent due to their moral and ethical dimensions.

Morissette's defense centered on his belief that the bomb casings were abandoned and thus no longer constituted government property. Justice Jackson's opinion implicitly recognizes the doctrine of mistake of fact, which negates the *mens rea* necessary for criminal liability. If Morissette genuinely believed that the casings were discarded, he lacked the requisite intent to commit theft.

This aspect of the case illustrates the interplay between subjective and objective elements of criminal liability. The court's willingness to consider Morissette's perception of the facts aligns with the broader principle that culpability must account for the defendant's state of mind.

The decision in Morissette has far-reaching implications for both the development of criminal law and the administration of justice. It reaffirms the principle that statutes codifying common law crimes must be interpreted in light of their historical context, preserving the requirement of intent. By doing so, the Court ensures that criminal sanctions remain proportionate and morally justified.

Moreover, Morissette underscores the judiciary's role as a guardian of individual rights against overreach by legislative or executive authorities. The case highlights the danger of expanding strict liability offenses beyond their limited regulatory context, cautioning against a drift toward punitive excess.

In the modern era, the principles elucidated in Morissette continue to resonate. The proliferation of regulatory offenses has raised ques-

tions about the proper balance between strict liability and the preservation of *mens rea* requirements. Justice Jackson's insistence on intent as a cornerstone of criminal liability serves as a valuable guidepost for courts navigating these challenges.

Additionally, the case has informed the development of defenses such as mistake of fact and claim of right. By recognizing the importance of subjective intent, Morissette provides a framework for addressing cases involving honest misunderstandings or disputes over property ownership.

The decision in *Morissette* v. *United States* represents a triumph of principle over expediency. Justice Jackson's opinion eloquently articulates the necessity of intent in the adjudication of criminal liability, grounding this requirement in both legal tradition and moral philosophy. The case reaffirms the centrality of *mens rea* and *actus reus* to the concept of justice, ensuring that criminal law remains a tool for safeguarding individual rights rather than a mechanism of arbitrary punishment.

By grounding its reasoning in fundamental principles, the decision serves as a bulwark against the erosion of justice in the face of shifting legislative and societal priorities. It reminds us that the true measure of a legal system lies in its fidelity to the ideals of fairness and human dignity.

Neil Gorsuch and Janie Nitze, in their book on over legislation and too much regulation[3] echoes this distinction by emphasizing the divergence between traditional criminal offenses, which require proof of *mens rea*, and regulatory or social policy offenses, often categorized as strict liability crimes. Gorsuch argues that the absence of intent in regulatory offenses reflects a broader social policy objective rather than a determination of moral blameworthiness. He observes that such

[3] Neil Gorsuch and Janie Nitze, *Over Ruled: The Human Toll of Too Much Law,* Harper Collins: 2024.

offenses—frequently termed malum prohibitum—are designed to enforce societal norms or administrative compliance. However, their proliferation risks conflating civil penalties with criminal sanctions, leading to an erosion of the moral underpinnings of criminal law.

Gorsuch and Nitze underscore that the overextension of strict liability offenses could undermine the legal system's integrity by imposing penalties on individuals who lack culpable intent. He stresses the importance of preserving the distinction between criminal and civil liability, cautioning against a trend toward punitive measures that fail to account for individual circumstances or intent. This reasoning resonates with Justice Jackson's insistence on intent as a cornerstone of criminal responsibility. By ensuring that traditional crimes like theft demand proof of both *mens rea* and *actus reus*, the courts safeguard the principle that punishment must correspond to moral culpability.

The authors' analysis further elaborates on the societal implications of strict liability offenses, particularly in regulatory contexts. He argues that while such offenses may serve legitimate public safety objectives, they must be narrowly construed to avoid overreach[4]. The imposition of criminal sanctions for regulatory violations—absent proof of intent—risks criminalizing ordinary behavior and eroding public trust in the legal system. In this context, the decision in Morissette serves as a critical counterbalance, reaffirming the judiciary's role in ensuring that criminal liability remains tethered to moral blameworthiness.

While the ruling in *Morissette v. United States* stands as a testament to the supremacy of principle over pragmatism, and Justice Jackson's opinion masterfully underscores the indispensable role of intent in determining criminal responsibility, firmly anchoring this criterion in the dual foundations of legal precedent and moral reasoning, Similarly, Gorsuch's and Nitze's reflections in their book highlight the

[4] *Id*. 114-117.

critical importance of distinguishing between traditional criminal offenses and regulatory or social policy crimes. Together, these analyses reaffirm the centrality of *mens rea* and *actus reus* to the concept of justice, ensuring that criminal law remains a tool for safeguarding individual rights rather than a mechanism of arbitrary punishment.

In *Ratzlaf v. United States*[5], the Supreme Court examined whether a defendant must know that structuring financial transactions to evade reporting requirements is illegal to be convicted under 31 U.S.C. § 5324. Ratzlaf had structured transactions to avoid triggering reporting thresholds but claimed ignorance of the law. The Court held that the government must prove the defendant knew his actions were unlawful. Justice Ruth Bader Ginsburg stated:"To establish that a defendant 'willfully violat[ed]' the anti-structuring law, the Government must prove that the defendant acted with knowledge that his conduct was unlawful."[6] This case reinforced the principle that *mens rea* encompasses knowledge of the unlawfulness of one's actions.

In *R v. Brown*[7] – a Canadian case – the details of which elucidate the significance of *actus reus* and *mens rea* as integral elements of a crime, the details are as follow: During a social gathering, B consumed alcohol along with magic mushrooms, the latter containing psilocybin, a prohibited substance known to induce hallucinatory effects. Under the influence of these substances, B entered a state of psychosis, losing his capacity to exercise conscious control over his actions. Although able to physically move, B's actions were devoid of voluntary intent. He left the party and unlawfully entered a nearby residence, where he assaulted an occupant, inflicting lasting injuries. Subsequently, he intruded upon another property, prompting its residents to contact law enforcement. B was subsequently charged with break and enter

5 510 U.S. 135 (1994).

6 *Id*. 137.

7 2022 SCC 18 (CanLII), [2022] 1 SCR 374.

accompanied by aggravated assault, as well as break and enter alongside mischief to property exceeding $5,000 in value.

At trial, B advanced a defense of automatism, attributing his involuntary actions to the effects of psilocybin consumption. Expert testimony corroborated B's claim, establishing that he lacked voluntary control over his conduct during the incidents in question. However, the prosecution invoked section 33.1 of the Criminal Code, aiming to preclude B from relying on the defense of self-induced intoxication akin to automatism in response to the charges.

Justice Khullar, in her analysis, recognized the significant and troubling implications of section 33.1 of the Criminal Code. This provision permits conviction for violent offenses even when the conduct constituting the *actus reus* is involuntary and the accused lacks the *mens rea* required for general intent crimes. Nevertheless, Justice Khullar emphasized the outweighing benefits, including *safeguarding* vulnerable individuals such as women and children, thereby reinforcing their equality rights as victims. Additionally, section 33.1 serves a deterrent purpose, discouraging the reckless use and combination of intoxicants that might precipitate automatism and violent behavior.

The central issue pertained to the absence of voluntary bodily movement, which precludes the Crown from proving *actus reus* beyond a reasonable doubt. The majority expressed concern that an accused experiencing extreme intoxication akin to automatism could be convicted for actions that, due to their involuntary nature, fail to meet the requirements of *actus reus*. Such a conviction would infringe upon the principle of voluntariness in criminal law, a fundamental element of justice protected under section 7 of the Charter. Furthermore, the choice to become intoxicated cannot be substituted for the mental element necessary to establish *mens rea* for the alleged offense. Equating self-induced intoxication with *mens rea* contravenes the presumption of innocence.

Section 33.1 essentially holds an accused criminally accountable for involuntary actions. Since involuntariness negates *actus reus*, such conduct cannot be deemed criminal under Canadian law, which enshrines voluntariness as a principle of fundamental justice. Despite this, section 33.1 imposes full criminal liability for the underlying offense, even where neither the *actus reus* nor *mens rea* criteria are satisfied.

On appeal, the defendant, B, was acquitted of all charges, as the prosecution failed to establish beyond a reasonable doubt that his actions fulfilled the necessary elements of *actus reus* and *mens rea* required for conviction.

In the 2020 case of *R. v. Zora*[8] – a Canadian case – Z was charged with drug-related offenses and released on bail under conditions, including a curfew and a requirement to present himself at his residence door within five minutes of any visit by a peace officer or bail supervisor. On two occasions, Z failed to appear at the door when the police attended, resulting in charges under section 145(3) of the Criminal Code for breaching his curfew and failing to comply with the condition to present himself. At trial, Z presented evidence indicating that he had been in his bedroom during the visits and was unlikely to have heard the doorbell or knocks at the door. The trial judge acquitted him on the curfew violations but convicted him on the failure-to-present charges. Z's appeal to the summary conviction court was dismissed, with the court affirming that *mens rea* an objective *mens rea* standard was sufficient under section 145(3), and that Z's conduct represented a marked departure from what a reasonable person would have done to meet the conditions of their bail.

On further appeal, the majority of the Court of Appeal upheld the lower courts' application of an objective standard, characterizing section

8 2020 SCC 14, [2020] 2 S.C.R. 3.

145(3) as a duty-based offense. However, the Supreme Court held otherwise, determining that section 145(3) requires proof of subjective mens rea. The Crown must demonstrate that the accused knowingly or recklessly breached the conditions of their bail. The Supreme Court emphasized that Parliament's intent, absent clear legislative language to the contrary, is presumed to align with a subjective fault standard for criminal offenses.

The Court reasoned that the text of section 145(3) does not explicitly indicate a shift to an objective fault standard. The neutral language neither supports nor overrides the presumption of subjective mens rea. Moreover, the individualized nature of bail conditions, tailored to the unique circumstances of each accused, undermines the applicability of a uniform societal standard, as is characteristic of duty-based offenses requiring objective fault. Unlike regulated activities with broad societal implications, bail conditions focus on personalized compliance. The offense of failing to comply with bail conditions, akin to breaching probation, therefore aligns with the requirement for subjective fault.

Subjective mens rea was found consistent with the significant repercussions arising from a conviction under section 145(3). These include imprisonment, the creation of a criminal record, and the imposition of additional or more restrictive conditions. Moreover, repeat breach charges often escalate to pre-trial detention, placing the accused in a cycle of increasingly punitive conditions. The gravity of these consequences necessitates a finding that the accused knowingly or recklessly breached their bail terms, rather than inadvertently doing so.

The Court clarified the elements of subjective *mens rea* for section 145(3). The Crown must prove that the accused: had knowledge of their bail conditions or was willfully blind to them; and knowingly or recklessly failed to comply with those conditions. Recklessness requires that the accused perceived a substantial and unjustified risk

of non-compliance and persisted in their conduct despite awareness of that risk. Genuine forgetfulness or misunderstanding of the conditions may negate *mens rea* as a mistake of fact.

Ultimately, the Court determined that the trial and appellate courts erred in applying an objective fault standard. A new trial was ordered to reassess the charges against Z under the proper standard of subjective fault.

In *R. v. Javanmardi*[9] the facts were as follow: On June 12, 2008, M and his wife attended the naturopathic clinic operated by the accused. M, an 84-year-old individual with heart disease, had become dissatisfied with conventional medical treatments and sought alternative care. During a one-hour consultation, the accused recommended an intravenous administration of nutrients. Following the injection, M experienced a severe adverse reaction, culminating in endotoxic shock, which led to his death several hours later.

The accused was subsequently charged with criminal negligence causing death and unlawful act manslaughter. While the trial court acquitted the accused of both charges, the Court of Appeal overturned these acquittals, substituting a conviction for unlawful act manslaughter and ordering a retrial on the charge of criminal negligence causing death.

The court held that the *actus reus* of criminal negligence causing death requires proof that the accused either committed an act or failed to fulfill a legal duty, and that this act or omission directly resulted in death. The *mens rea* for the offense demands that the conduct display wanton or reckless disregard for the lives or safety of others. In cases involving negligence-based offenses, the degree of fault must be assessed by determining the extent to which the accused's behavior

[9] 2019 SCC 54 (CanLII), [2019] 4 SCR 3.

deviates from that of a reasonable person in the same situation. Criminal negligence causing death requires a "marked and substantial" departure, a higher threshold than the "marked departure" standard applicable to offenses such as dangerous driving.

Under section 222(5)(a) of the Criminal Code, the *actus reus* of unlawful act manslaughter necessitates that the Crown establish the commission of an unlawful act and a causal connection between that act and the death. The underlying unlawful act serves as the predicate offense, which must involve a marked departure from the standard expected of a reasonable person in similar circumstances. However, the Crown is not required to demonstrate that the predicate offense was objectively dangerous, as this criterion is subsumed within the requirement to prove that the act posed a foreseeable risk of bodily harm that was neither trivial nor transitory.

The fault elements for both offenses mandate evaluation of the accused's conduct against the benchmark of a reasonable person in analogous circumstances, taking into account the activity in question. An activity-sensitive approach to the modified objective standard is appropriate, allowing consideration of the accused's training, expertise, and qualifications to rebut allegations of incompetence or to contextualize their actions. In the present case, the trial judge appropriately considered the accused's qualifications and concluded that the intravenous injection, as administered, did not present an objectively foreseeable risk of harm, given the adherence to proper protocols and precautions.

The offense of unlawful act manslaughter requires three elements for the *actus reus*: (1) the commission of an unlawful act; (2) the objective dangerousness of the act; and (3) causation linking the act to the death. Additionally, the offense entails two cumulative fault elements: the *mens rea* of the predicate offense and the *mens rea* specific to manslaughter. The objective dangerousness of the act is assessed

independently of the accused's personal attributes, focusing instead on whether a reasonable person would have recognized a substantial risk of bodily harm arising from the conduct.

The American case of *Rehaif v. United States*[10], drew an interesting distinction between an offence per se and one which is "knowingly" committed. Petitioner Rehaif entered the United States on a nonimmigrant student visa to attend university but was later dismissed due to poor academic performance. Subsequently, he discharged two firearms at a shooting range. The Government charged him under 18 U.S.C. §922(g), which prohibits firearm possession by certain categories of individuals, including those unlawfully present in the United States, and under §924(a)(2), which prescribes penalties of up to 10 years' imprisonment for anyone who "knowingly violates" §922(g).

The Court observed that the statutory framework of §924(a)(2) stipulates that "[w]hoever knowingly violates" specific provisions of §922, including §922(g), is subject to the prescribed penalties. Section 922(g) itself declares it unlawful for individuals, including aliens unlawfully present in the United States, to "possess in or affecting commerce, any firearm or ammunition." The term "knowingly" in §924(a)(2) applies to the act of violating §922(g) and thus modifies the components of the offense defined in §922(g).

It was the Court's view that to ascertain the meaning of "knowingly" within this context, it is essential to consider the elements of the offense under §922(g), which include: (1) the defendant's status as an alien unlawfully in the United States; (2) the act of possession; (3) the jurisdictional nexus of possession "in or affecting commerce"; and (4) the presence of a firearm or ammunition.

[10] 588 U.S. (2019).

This interpretation aligns with a fundamental principle of criminal law emphasizing the necessity of a culpable state of mind, or what Blackstone termed a "vicious will." As recognized by this Court, criminal liability generally requires that the injury be inflicted with knowledge, reflecting a broader principle of moral accountability grounded in the capacity to choose between lawful and unlawful behavior. The court cited *Morissette v. United States*[11] in this regard.

The court cited precedent[12] to support the view that the requirement of scienter—knowledge or intent—serves to distinguish wrongful acts from those undertaken innocently and said that such precedent illustrate the Court's tendency to interpret statutes as incorporating scienter requirements, even where the statutory text does not explicitly mandate them, in order to uphold the principle of criminal culpability.

The Court concluded that applying the scienter requirement to the status element of §922(g) furthers the objective of distinguishing culpable conduct from innocent behavior. For instance, the possession of a firearm, when compliant with licensing regulations, is not inherently unlawful. Thus, the inclusion of a knowledge requirement ensures that criminal liability is imposed only on those who are aware of the circumstances rendering their conduct unlawful.

In *Elonis v. United States*[13], the Court noted the following facts. Following the departure of his wife, petitioner Anthony Douglas Elonis, under the pseudonym "Tone Dougie," utilized the social media platform Facebook to disseminate self-proclaimed rap lyrics. These lyrics contained vividly violent language and imagery, directed toward his estranged wife, his co-workers, a kindergarten class, and both state and federal law enforcement officials. Interspersed within these posts

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[11] *Supra*, note 2.

[12] *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994); *Staples v. United States*, 511 U.S. 600 (1994); and *Liparota v. United States*, 471 U.S. 419 (1985).

[13] 575 U.S. 723 (2015).

were disclaimers asserting that the lyrics were fictional and not reflective of actual persons, alongside claims that his postings constituted an exercise of his First Amendment rights. Despite these disclaimers, individuals familiar with Elonis perceived his posts as threatening, including his employer, who dismissed him for making threats against co-workers, and his wife, who obtained a protection-from-abuse order from a state court.

Subsequently, Elonis's employer reported his posts to the Federal Bureau of Investigation, which initiated surveillance of his Facebook activity. This culminated in Elonis's arrest and his indictment on five counts of violating 18 U.S.C. §875(c). This statute criminalizes the transmission of "any communication containing any threat . . . to injure the person of another" via interstate commerce.

In addressing the requisite *mens rea* under 18 U.S.C. §875(c), the Court's analysis aligned with the principle articulated in the Morissette case, which holds that "wrongdoing must be conscious to be criminal," and that a defendant must exhibit a "blameworthy mind" to incur criminal liability. The omission of explicit language concerning criminal intent within a statute does not imply its exclusion; instead, a presumption in favor of requiring scienter is established[14].

The Court recognized – quoting precedent[15] – that federal criminal statutes are generally construed to include scienter requirements, even in instances where the statute is silent on the matter.. This interpretation does not necessitate that a defendant has knowledge of the illegality of their conduct but requires awareness of the facts that render the conduct criminal.

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[14] Morissette, *supra* note 2 at 252.

[15] As articulated in United States v. Balint, 258 U.S. 250, and reaffirmed in United States v. X-Citement Video, Inc., 513 U.S. 64

The Court further clarified that statutes silent on mental state should be interpreted to incorporate only the level of *mens rea* necessary to distinguish wrongful acts from innocent behavior[16]. For certain offenses, a general knowledge requirement suffices, as was the case in Carter, where the forcible taking of bank property under 18 U.S.C. §2113(a) inherently satisfied the presumption of scienter. However, where a statute risks encompassing seemingly innocent conduct—such as taking money under a mistaken belief of ownership—additional specific intent requirements may be warranted to safeguard innocent actors.

In the context of Elonis's prosecution, the Court's emphasis on interpreting §875(c) to include a scienter element ensures that culpability hinges on the defendant's knowledge of the threatening nature of his communications, thereby distinguishing wrongful acts from constitutionally protected speech or innocent conduct.

In *United States v. Bailey*[17], the Court drew a link between *mens rea* and duress and necessity. The Court observed that under common law, crimes were traditionally divided into two categories: those requiring "general intent" and those requiring "specific intent." However, this distinction has led to significant confusion. As explained in one legal text, the term "general intent" is sometimes used synonymously with "criminal intent" to represent the broader idea of *mens rea*, while "specific intent" refers to the mental state needed for a specific offense. In other instances, "general intent" may cover all forms of mental states required for crimes, whereas "specific intent" focuses on a singular intent. Alternatively, "general intent" might describe an intent to act at some indefinite future time, with "specific intent" referring to an intent to act at a specific time and place.

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[16] See *Carter v. United States*, 530 U.S. 255, 269.

[17] 444 U.S. 394 (1980).