A number of recent revisions treat possession similarly.[36]

Section 2.02. General Requirements of Culpability.*

(1) Minimum Requirements of Culpability. 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.

(2) Kinds of Culpability Defined.

(a) Purposely.

A person acts purposely with respect to a material element of an offense when:

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

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

(b) Knowingly.

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

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[36] *See* Del. tit. 11, § 243; Haw. § 702-202; Ill. ch. 38, § 4-2; Me. tit. 17-A, § 51(3); Mo. § 562.011(3); Mont. § 94-2-102; N.H. § 626:1(II); N.J. § 2C:2-1(c); Ohio § 2901.21(c)(1); Pa. tit. 18, § 301(c); Tex. § 6.01(b); S.C. (p) § 10.1; Tenn. (p) § 402.

The following codes and proposals follow the Model Code treatment of possession, except that they omit the clause "knowingly procured or received the thing possessed or": Ala. § 13A-2-1(2); Colo. § 18-1-501(9); Ind. § 35-41-2-1(b); Ky. § 501.010(3); Neb. § 28-109(23); N.Y. § 15.00(2); Alas. (p) § 11.81.900(b)(41) (H.B. 661, Jan. 1978); Md. (p) § 15.00(2); Mich. (p) S.B. 82 § 301(b); Vt. (p) § 1.1.4; W. Va. (p) § 61-2-1(3). Two codes provide that a voluntary act includes the "conscious possession or control of property." Ark. § 41-201(1); Ore. § 161.085(2). One provides that " 'possession' means a voluntary act if the defendant knowingly exercised dominion or control over property." Ariz. § 13-105(26). One code and two proposals include possession in their preliminary liability provisions, but do not expand upon the term. N.D. § 12.1-02-01(1); Brown Comm'n Final Report § 301(1); Mass. (p) ch. 263, § 15. Two codes provide that "possess" means to have or exercise physical dominion or control over property, without incorporating the term in the preliminary liability provisions. Conn. § 53a-3(2); Utah § 76-1-601(7). Finally, the proposal for the District of Columbia provides that the required "conduct" may include "possession" and that "[t]he term 'possession' means that one has the thing possessed on one's person, in one's custody, or otherwise under one's control." D.C. (1977 p) §§ 22-102, -103(4) & (22). The remaining fifteen codes and proposals cited in note 14, *supra*, have no general provisions on possession.

* *History.* Presented to the Institute in Tentative Draft No. 4 and considered at the May 1955 meeting. *See* ALI Proceedings 149-62 (1955). Presented again to the

(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.

(c) Recklessly.

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

(d) Negligently.

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.

(3) 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 purposely, knowingly or recklessly with respect thereto.

(4) 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.

(5) 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 purposely, knowingly or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts purposely or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts purposely.

Institute with minor verbal changes in the Proposed Official Draft and approved at the May 1962 meeting. *See* ALI Proceedings 226–27 (1962). For original detailed commentary, *see* T.D. 4 at 123 (1955).

(6) Requirement of Purpose Satisfied if Purpose Is Conditional. When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense.

(7) Requirement of Knowledge Satisfied by Knowledge of High Probability. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.

(8) Requirement of Wilfulness Satisfied by Acting Knowingly. A requirement that an offense be committed wilfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears.

(9) Culpability as to Illegality of Conduct. Neither knowledge nor recklessness or negligence as to whether conduct constitutes an offense or as to the existence, meaning or application of the law determining the elements of an offense is an element of such offense, unless the definition of the offense or the Code so provides.

(10) Culpability as Determinant of Grade of Offense. When the grade or degree of an offense depends on whether the offense is committed purposely, knowingly, recklessly or negligently, its grade or degree shall be the lowest for which the determinative kind of culpability is established with respect to any material element of the offense.

Explanatory Note

Subsection (1) articulates the Code's insistence that an element of culpability is requisite for any valid criminal conviction and that the concepts of purpose, knowledge, recklessness and negligence suffice to delineate the kinds of culpability that may be called for in the definition of specific crimes. The only exception to this general requirement is the narrow allowance for offenses of strict liability in Section 2.05, limited to cases where no severer sentence than a fine may be imposed.

The requirement of culpability applies to each "materi lement" of the crime. The term "material element" is defined in Section 1.13(10) to encompass only matters relating to the harm or evil sought to be prevented by the law defining an offense or to the existence of a justification or excuse for the actor's conduct. Facts that relate to other matters, such as jurisdiction, venue or limitations are not "material" within this definition.

Which of the four kinds of culpability suffices to establish a particular material element of a particular offense is determined either by the definition of the offense or by the other provisions of this section.

Subsection (2) defines each of the four kinds of culpability—purpose, knowledge, recklessness and negligence.

Subsection (3) is included as an aid to drafting the definitions of specific crimes. When it is intended that purpose, knowledge or recklessness suffice for the establishment of culpability for a particular offense, the draftsmen need make no provision for culpability; it will be supplied by this subsection. There is a rough correspondence between this provision and the common law requirement of "general intent."

Subsection (4) is addressed to a pervasive ambiguity in definitions of offenses that include a culpability requirement, namely, that it is often difficult to determine how many of the elements of the offense the requirement is meant to modify. Subsection (4) provides that if the definition is not explicit on the point, as by prescribing different kinds of culpability for different elements, the culpability statement will apply to all the elements, unless a contrary purpose plainly appears.

Subsection (5) makes it unnecessary to state in the definition of an offense that the defendant can be convicted if it is proved that he was *more* culpable than the definition of the offense requires. Thus, if the crime can be committed recklessly, it is no less committed if the actor acted purposely.

Subsection (6) is in accord with present law in that it declines to give defensive import to the fact that the actor's purpose was conditional unless the condition negatives the harm or evil sought to be prevented by the law defining the offense.

Subsection (7) elaborates on the definition of "knowledge" when the issue is whether the defendant knew of the existence of a particular fact. It is enough that the actor is aware of a high probability of its existence, unless he actually believes that the fact does not exist.

Subsection (8) defines the term "wilfully" to mean "knowingly," in the absence of a legislative purpose to impose further requirements. Though the term "wilfully" 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. It is unusually ambiguous standing alone.

Subsection (9) establishes the basic proposition that knowledge of the law defining the offense is not itself an element of the offense. This is the sense in which the maxim "ignorance of the

law is no excuse" is accurate and should be applied. Subsection (9) provides the foundation, it should be noted, for the further provisions on mistake and ignorance of law in Section 2.04.

Subsection (10) applies when the grade or degree of an offense depends on the culpability with which the offense is committed. It states the important principle reaffirmed in the context of justification defenses by Section 3.09(2), that the defendant's level of culpability should be measured by an examination of his mental state with respect to all elements of the offense. Thus, if the defendant purposely kills but does so in the negligent belief that it is necessary in order to save his own life, his degree of liability should be measured by assimilating him to one who is negligent rather than to one who acts purposely. The grade of his offense thus should be measured by the lowest type of culpability established with respect to any material element of the offense.

Comment[†]

1. *Objective.* This section 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. This requirement is subordinated only to the provision of Section 2.05 for a narrow class of strict liability offenses that are limited to those for which no severer sentence than a fine may be imposed.

The section further attempts the extremely difficult task of articulating the kinds of culpability that may be required for the establishment of liability. It delineates four levels of culpability: purpose, knowledge, recklessness, and negligence. It requires that one of these levels of culpability must be proved with respect to each "material element" of the offense, which may involve (1) the nature of the forbidden conduct, (2) the attendant circumstances, or (3) the result of conduct.[1] The question of which level

[†] With a few exceptions, research ended Jan. 1, 1979. For the key to abbreviated citations used for enacted and proposed penal codes throughout footnotes, see p. xliii *supra*.

[1] Section 1.13(9) defines an "element of an offense" to include conduct, attendant circumstances or results that are included in the description of the offense, that negative an excuse or justification for an offense, or that negative a defense under the statute of limitations or establish jurisdiction or venue. Section 1.13(10) defines the concept of "material element" to include all elements except those that relate exclusively to statutes of limitation, jurisdiction, venue, and the like. The "material elements" of offenses are thus those characteristics (conduct, circumstances, result) of the actor's behavior that, when combined with the appropriate level of culpability, will constitute the offense.

of culpability suffices to establish liability must be addressed separately with respect to each material element, and will be resolved either by the particular definition of the offense or the general provisions of this section.

The purpose of articulating these distinctions in detail is to advance the clarity of draftsmanship in the delineation of the definitions of specific crimes, to provide a distinct framework against which those definitions may be tested, and 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. What Justice Jackson called "the variety, disparity and confusion" of judicial definitions of "the requisite but elusive mental element" [2] in crime should, insofar as possible, be rationalized by a criminal code.[3]

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[2] Morissette v. United States, 342 U.S. 246, 252 (1952).

[3] The background study that led to the federal proposals on this subject revealed some 76 different methods of stating the requisite mental element in present federal criminal statutes, supporting the conclusion that

> Unsurprisingly, the courts have been unable to find substantive correlates for all these varied descriptions of mental states, and, in fact, the opinions display far fewer mental states than the statutory language. Not only does the statutory language not reflect accurately or consistently what are the mental elements of the various crimes; there is no discernable pattern or consistent rationale which explains why one crime is defined or understood to require one mental state and another crime another mental state or indeed no mental state at all.

I Brown Comm'n Working Papers 119–20. Commentary to the Hawaii proposals enacted in 1972 reveals the following variations in prior Hawaii law:

> For example, assault required that the defendant act intentionally and maliciously, whereas battery required that the defendant act unlawfully and intentionally. Crimes involving bribery of officials or influencing of jurors required that the defendant act "corruptly." Child stealing required that the defendant act "maliciously by fraud, force or deception." . . . When the courts have dealt with the requisite state of mind, their suggestions have not always been helpful. In a case of extortion where the statutory language read "wilfully and corruptly extorts," the court suggested that a correct indictment should read "unlawfully, wilfully, corruptly, feloniously and extorsively did extort . . ."

Haw. § 702–204 Commentary at 210 (footnotes omitted). The commentator went on to conclude that "[i]t is safe to say that, for the purpose of the penal law, there are no subtleties of meaning in the language used in the prior law which cannot be achieved in a clear, lucid fashion" by reform along the lines suggested in this section of the code. *Id.*

At the time Section 2.02 was drafted, it was not common for legislation to speak generally to culpability questions. The latest legislation prior to the drafting of the Model Code was the 1942 Louisiana Code, the provisions of which define "specific criminal intent," "general criminal intent" and "criminal negligence" as follows:

> § 10. Criminal intent may be specific or general:
>
> (1) Specific criminal intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act.

The Model Code's approach is based upon the view that clear analysis requires that the question of the kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of the crime. The Code provision on rape will afford an illustration. Under Section 213.1(1), a purpose to effect the sexual relation is clearly required. But other circumstances are also made relevant by the definition of the offense. The victim must not have been married to the defendant and her consent to sexual relations would, of course, preclude the crime. Must the defendant's purpose have encompassed the facts that he was not the husband of the victim and that she opposed his will? These are certainly entirely different questions. Recklessness may be sufficient for these circum-

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(2) General criminal intent is present whenever there is specific intent, and also when the circumstances indicate that the offender, in the ordinary course of human experience, must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act.

§ 11. The definitions of some crimes require a specific criminal intent, while in others no intent is required. Some crimes consist merely of criminal negligence that produces criminal consequences. However, in the absence of qualifying provisions, the terms "intent" and "intentional" have reference to "general criminal intent."

§ 12. Criminal negligence exists when, although neither specific nor general criminal intent is present, there is such disregard of the interest of others that the offender's conduct amounts to a gross deviation below the standard of care expected to be maintained by a reasonably careful man under like circumstances.

La. §§ 14:10 to :12. The four distinctions embodied in the Model Penal Code were believed to be more useful than the three permitted by the Louisiana formulation, particularly since Louisiana preserved the concept of "general intent," which has been such an abiding source of confusion and ambiguity in the penal law.

For general discussions of the Model Code's approach, see W. LaFave & A. Scott, Criminal Law 191–218, 237–46 (1972); Danforth, Jr., *The Model Penal Code and Degrees of Criminal Homicide*, 11 Am.U.L.Rev. 147 (1962); Packer, *The Model Penal Code and Beyond*, 63 Colum.L.Rev. 594, 601 (1963); Packer, *Mens Rea and the Supreme Court*, 1962 Sup.Ct.Rev. 107, 137–42 (1962); Smith, *The Guilty Mind in the Criminal Law*, 76 Law Q.Rev. 78 (1960); Wechsler, *On Culpability and Crime: The Treatment of Mens Rea in the Model Penal Code*, 339 Annals 24 (1962); Williams, *The Mental Element in Crime*, 27 Rev.Jur.U.P.R. 193 (1957–58). For general treatments of culpability, see Codification of the Criminal Law, General Principles: The Mental Element in Crime (G.B. Law Comm'n Working Paper No. 31) (1970); P. Brett, An Inquiry into Criminal Guilt (1963); A. Denning, Responsibility Before the Law (1961); J. Edwards, Mens Rea in Statutory Offenses (1955); J. Hall, General Principles of Criminal Law 70–211 (2d ed. 1960); H.L.A. Hart, Punishment and Responsibility (1968); Freedom and Responsibility 158–281 (H. Morris ed. 1961); H. Packer, The Limits of the Criminal Sanction 103–35 (1968); G. Williams, The Mental Element in Crime (1965); G. Williams, Criminal Law: The General Part 30–124 (2d ed. 1961); Acimovic, *Conceptions of Culpability in Contemporary American Criminal Law*, 26 La.L.Rev. 28 (1965); Dubin, *Mens Rea Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility*, 18 Stan.L.Rev. 322 (1966); H. Hart, *The Aims of the Criminal Law*, 23 Law & Contemp.Prob. 401 (1958); Mueller, *On Common Law Mens Rea*, 42 Minn.L.Rev. 1043 (1958); Stuart, *The Need to Codify Clear, Realistic and Honest Measures of Mens Rea and Negligence*, 15 Crim.L.Q. 160 (1973).

stances of the offense, although purpose is required with respect to the sexual result that is an element of the offense.

It should also be noted that, as indicated in Section 1.13, the concept of "material element" to which these requirements adhere includes facts that negative an excuse or justification as well as the facts included in the definition of the crime. Thus, in a charge of murder, the level of culpability required to be proved normally focuses upon that element of the crime that involves the result of the defendant's conduct, namely the death of the victim. The law requires knowledge or purpose, as the case may be, usually with that element in view. However, when one considers the defense of self-defense, it is not unusual to provide that the defendant's belief in the necessity to save himself must have rested upon reasonable grounds. As to the element of death of the victim, in short, purpose or knowledge will suffice for conviction; as to the elements of self-defense, negligence will deprive the defendant of his defense.

Failure to face the question of culpability separately with respect to each of these ingredients of the offense results in obvious confusion, as does the failure to consider the defense as a "material element" in the total description of the crime. To call murder a "specific intent" crime or to say that it requires an "intent to kill" does not speak with clarity to the issue of what the defendant must have believed, and how carefully he must have formed his belief, in order to successfully claim self-defense. Considering facts that negative an excuse or justification as material elements of the offense, moreover, focuses attention on an obviously relevant grading factor when it comes to assessment of the seriousness of the crime the defendant has committed. As Section 2.02(10) and Section 3.09(2) reflect, the judgment of the Institute is that homicide should be graded as negligent rather than purposeful if the defendant acted in the unreasonable belief that his conduct was necessary to save his own life. That choice does not, of course, follow automatically from an analytical posture that requires thought about the defenses to a crime as well as its basic definition when the level of culpability is fixed and the offense is graded for purposes of punishment. But the analytical posture does invite attention to the wisdom of stark distinctions as to culpability respecting different elements of an offense.

Under the Code, therefore, the problem of the kind of culpability that is required for conviction must be faced separately with respect to each material element of the offense, although the answer may in many cases be the same with respect to each element.

In contrast with the legislative approach before the Model Code,

virtually all recent legislative revisions and proposals follow it in setting up general standards of culpability.[4]

2. *Purpose and Knowledge.* In defining the kinds of culpability, the Code draws a narrow distinction between acting purposely and knowingly, one of the elements of ambiguity in legal usage of the term "intent."[5] Knowledge that the requisite external circumstances exist is a common element in both conceptions. But action is not purposive with respect to the nature or result of the actor's conduct unless it was his conscious object to perform an action of that nature or to cause such a result. It is meaningful to think of the actor's attitude as different if he is simply aware that his conduct is of the required nature or that the prohibited result is practically certain to follow from his conduct.[6]

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[4] *See* Ala. § 13A-2-2; Ariz. § 13-105(5); Ark. § 41-203; Colo. § 18-1-501 (& Cum. Supp. 1976); Conn. § 53a-3; Del. tit. 11, § 231; Haw. § 702-206; Ill. ch. 38, §§ 4-3 to -7; Ind. § 35-41-2-2; Ky. § 501.020; Me. tit. 17-A, § 10; Mo. § 562.016; Mont. §§ 94-2-103(1), -2-101(27), (31) & (52); N.H. § 626:2(II); N.J. § 2C:2-2(b); N.Y. § 15.05; N.D. § 12.1-02-02; Ohio § 2901.22; Ore. § 161.085; Pa. tit. 18, § 302(b); S.D. § 22-1-2(1) (Supp. 1978); Tex. § 6.03; Utah § 76-2-103; Wash. § 9A.08.010(1); U.S. (p) S. 1437 § 302 (Jan. 1978); Brown Comm'n Final Report § 302(1); Alas. (p) § 11.81.900(a) (H.B. 661, Jan. 1978); D.C. (1977 p) § 22-105; Md. (p) § 15.05; Mass. (p) ch. 263, § 16; Mich. (p) S.B. 82 § 305; S.C. (p) § 10.3; Tenn. (p) § 405; Vt. (p) § 1.2.1(2); W. Va. (p) § 61-2-2.

Some codes do not define the culpable mental states. *See* Fla. tit. 44; N.M. ch. 40A. Va. tit. 18.2. The remaining codes define various mental states, but in substantially differing ways. *See* Iowa § 702.16; Kan. §§ 21-3201, -3202; Ga. §§ 26-603 to -606; [illegible] §§ 14.10 to .12; Minn. § 609.02(subd. 9); Neb. § 23-109(19); P.R. tit. 33, §§ 3061-3063; Wis. § 939.23; Cal. (p) S.B. 27 § 2002; Okla. (1975 p) § 1-201.

For a discussion of the adaptation of the Model Code criteria by state revisions, see Lawson, *Kentucky Penal Code: The Culpable Mental States and Related Matters*, 61 Ky.L.J. 657 (1972–73); Copes, *The Mens Rea Provisions of the Proposed Ohio Criminal Code—The Continuing Uncertainty*, 33 Ohio St.L.J. 354 (1972); Comment, *The Proposed Tennessee Criminal Code—General Interpretative Provisions and Culpability*, 41 Tenn.L.Rev. 131 (1973).

[5] *See, e.g.*, Cook, *Act, Intention and Motive in the Criminal Law*, 26 Yale L.J. 645 (1917); Perkins, *A Rationale of Mens Rea*, 52 Harv.L.Rev. 905, 910–11 (1939).

[6] As pointed out in the preliminary study of the subject for the Brown Commission, the distinction is "between a man who wills that a particular act or result take place and another who is merely willing that it should take place." I Brown Comm'n Working Papers 124.

One should contrast to this approach the suggestion of Glanville Williams that "[i]ntention is a state of mind consisting of knowledge of any requisite circumstances plus desire that any requisite result shall follow from one's conduct, or else of foresight that the result will certainly follow." G. Williams, The Mental Element in Crime 20 (1965). The Minnesota and Wisconsin provisions contain substantially the same concept in the following language taken from the Minnesota code:

> "Intentionally" means that the actor either has a purpose to do the thing or cause the result specified or believes that his act, if successful, will cause that result. . .

It is true, of course, that this distinction is inconsequential for most purposes of liability; acting knowingly is ordinarily sufficient. But there are areas where the discrimination is required and is made under traditional law, which uses the awkward concept of "specific intent." This is true in treason, for example, insofar as a purpose to aid the enemy is an ingredient of the offense,[7] and in attempts, complicity and conspiracy, where a true purpose to effect the criminal result is requisite for liability.[8] Although in most instances either knowledge or purpose should suffice for criminal liability, articulating the distinction puts to the test the issue whether an actual purpose is required and enhances clarity in drafting.

The Model Code's approach to purpose and knowledge is in fundamental disagreement with the position of the House of Lords in *Director of Public Prosecutions v. Smith*.[9] That case effectively equated "intent to inflict grievous bodily harm" with what the defendant as a reasonable man must be taken to have contemplated, thus erecting an objective instead of a subjective inquiry to determine what the defendant "intended." In the Code's

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"With intent to" or "with intent that" means that the actor either has a purpose to do the thing or cause the result specified or believes that his act, if successful, will cause that result.

Minn. § 609.02(subd. 9)(3) & (4); Wis. § 939.23(3) & (4). *See also* Okla. (1975 p) § 1–201(B).

These definitions blur the distinction sought to be made in the Model Code between "purpose" and "knowledge," and perpetuate an aspect of the ambiguity to which reference was made above.

For general discussions of the intention issue, see P. Brett, *supra* note 3, at 89–94; A. Denning, *supra* note 3; G. Williams, Criminal Law: The General Part 38–44 (2d ed. 1961); Cross, *Specific Intent*, 1961 Crim.L.Rev. 510; Wechsler, *supra* note 3, at 28–29; Codification of the Criminal Law, General Principles: The Mental Element in Crime (G.B. Law Comm'n Working Paper No. 31) (1970).

[7] *See* Haupt v. United States, 330 U.S. 631, 641 (1947).

[8] *See* Sections 2.06, 5.01, 5.03. With respect to accomplice liability a major disagreement on this precise issue developed within the Institute before a position was finally taken, a disagreement that is reflected in the cases as well. *See* Comment 6(c) to Section 2.06.

[9] [1961] A.C. 290. The position adopted in that case is similar to that taken by Holmes:

> If it had been necessary the jury properly might have been instructed that it is possible to commit murder without any actual intent to kill or to do grievous bodily harm, and that, reduced to its lowest terms, malice in murder means knowledge of such circumstances that according to common experience there is a plain and strong likelihood that death will follow the contemplated act, coupled perhaps with an implied negation of any excuse or justification.

Commonwealth v. Chance, 174 Mass. 245, 252, 54 N.E. 551, 554 (1899). *See also* Commonwealth v. Pierce, 138 Mass. 165, 178 (1884); O. Holmes, The Common Law 53–56 (1881).

formulation, both "purposely" and "knowingly," as well as "recklessly," are meant to ask what, in fact, the defendant's mental attitude was. It was believed to be unjust to measure liability for serious criminal offenses on the basis of what the defendant should have believed or what most people would have intended.[10]

Most recent legislative revisions and proposals have adopted, though with varying terminology, the Model Code's distinction between purpose and knowledge.[11] They, like the Code, have

[10] The *Smith* case has been rejected in England by specific legislation on the point. *See* The Criminal Justice Act, 1967, § 8. *See also* G.B. Law Comm'n Imputed Criminal Intent (Director of Public Prosecutions v. Smith) (1967), *reprinted in* 1 Law Comm'n Reports 219–35 (1966), for a discussion of the reasons for the proposal that was eventually enacted. For additional discussion of this controversial decision, see Collings, *Negligent Murder—Some Stateside Footnotes to Director of Public Prosecutions v. Smith*, 49 Calif.L.Rev. 254 (1961); Ross & Williams, *The Law Commission: Imputed Criminal Intent*, 30 Mod.L.Rev. 431 (1967). In 1974 the House of Lords ruled that one could be guilty of murder if aware that his acts, performed without lawful excuse, created a serious risk of grievous bodily harm. Hyam v. D.P.P., [1975] A.C. 55. That same year the Court of Appeal took a restrictive view of the appropriateness of psychiatric testimony to establish the mental state of a defendant who claimed provocation. Regina v. Turner, [1975] 1 Q.B. 834.

[11] *See* Ala. § 13A–2–2(1) & (2); Ariz. § 13–105(5)(a) & (b); Ark. § 41–203(1) & (2); Colo. § 18–1–501(5) & (6) (& Cum. Supp. 1976); Conn. § 53a–3(11) & (12); Del. tit. 11, § 231(4) & (b); Haw. § 702–206(1) & (2); Ill. ch. 38, §§ 4–4, –5; Ind. § 35–41–2–2(a) & (b); Ky. § 501.020(1) & (2); Me. tit. 17–A, § 10(1) & (2); Mo. § 562.016(2) & (3); Mont. §§ 94–2–103(1), –2–101(27), (52); N.H. § 626:2(II)(a) & (b); N.J. § 2C:2–2(b)(1) & (2); N.Y. § 15.05(1) & (2); N.D. § 12.1–02–02(1)(a) & (b); Ohio § 2901.22(A) & (B); Ore. § 161.085(7) & (8); Pa. tit. 18, § 302(b)(1) & (2); S.D. § 22–1–2(1)(a), (b) & (c) (Supp. 1978); Tex. § 6.03(a) & (b); Utah § 76–2–103(1) & (2); Wash. § 9A.08.010(1)(a) & (b); U.S. (p) S. 1437 § 302(a) & (b) (Jan. 1978); Brown Comm'n Final Report § 302(1)(a) & (b); Alas. (p) § 11.81.900(a)(1) & (2) (H.B. 661, Jan. 1978); D.C. (1977 p) § 22–105(b)(1) & (2); Md. (p) § 15.05(1) & (2); Mass. (p) ch. 263, § 16(b) & (c); Mich. (p) S.B. 82 § 305(a) & (b); S.C. (p) § 10.3; Tenn. (p) § 405(a) & (b); Vt. (p) § 1.2.1(2)(A) & (B); W. Va. (p) § 61–2–2(1) & (2).

The main respect in which these enactments and proposals differ from the Model Code is in the use of the term "intentionally" where the Code uses "purposely." Only the enactments in Arkansas, Missouri, Montana, New Hampshire, New Jersey and Ohio use the term "purposely." Those codes that use "intentionally," however, define it to mean the conscious objective of the actor. This difference is thus one of terminology alone.

The case for using the term "intentionally" is its familiarity in legal usage, although, as has been observed, present usage is ambiguous. The case against it is that the retention of the term may well perpetuate the present ambiguity. It was for this reason, in any event, that "purpose" was selected as the better term. If the words "intentionally" or "with intent" are to be retained for use in defining criminal offenses, it is desirable that they be defined in accord with the Code's concept of purpose. The Model Code so provides in Section 1.13(12). Recent cases interpreting these terms include State v. Chatterson, 259 N.W.2d 766 (Iowa 1977) ("intentionally"); People v. Shanklin, 59 A.D.2d 588, 397 N.Y.S.2d 242 (1977) ("intentionally"); State v. Blanton, 31 Ore.App. 327, 570 P.2d 411 (1977) ("knowingly"); State v. Cook, 557 S.W.2d 434 (Mo. 1977) ("intentionally"); People v. Bembroy, 4 Ill.App.3d 522, 281 N.E.2d 389 (1972) ("intentionally"); People v. Tegins, 90 Misc.2d 498, 395 N.Y.S.2d 907 (1977) ("intentionally"); People v. Segal, 78 Misc.2d 944, 358 N.Y.S.2d 866 (1974) ("knowingly"). *See also* Gegan, *A Case of Depraved Mind Murder*, 49 St. John's L.Rev. 417, 444–48 (1974).

made these levels of culpability depend on the actual state of mind of the actor rather than on what a reasonable man in the circumstances would have contemplated.[12]

3. *Recklessness.* An important discrimination is drawn between acting either purposely or knowingly and acting recklessly. As the Code uses the term, recklessness involves conscious risk creation. It resembles acting knowingly in that a state of awareness is involved, but the awareness is of risk, that is of a probability less than substantial certainty; the matter is contingent from the actor's point of view.[13] Whether the risk relates to the

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In United States v. United States Gypsum Co., 438 U.S. 422 (1978), the Supreme Court concluded that intent was a vital element of a criminal antitrust prosecution and that knowledge as defined by the Model Code was a sufficient predicate for the finding of intent in that context.

[12] The Washington code is an exception. It provides:

A person knows or acts knowingly or with knowledge when:

(i) he is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or

(ii) he has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense.

Wash. § 9A.08.010(1)(b).

The Michigan proposal introduces the following reference to objective criteria:

(a) A person acts "intentionally" with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause that result or to engage in that conduct. In finding that a person acted intentionally with respect to a result the finding of fact may rely upon proof that such result was the natural and probable consequence of the person's act.

(b) a person acts "knowingly" with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of that nature or that the circumstance exists. In finding that a person acted knowingly with respect to conduct or to circumstances, the finder of fact may rely upon proof that under the circumstances a reasonable person would have known of such conduct or circumstances.

Mich. (p) S.B. 82 §§ 302(a) & (b). Under the latter definitions, the objective criteria, whether the "result was the natural and probable consequence of the person's act," and whether "a reasonable person would have known of such conduct or circumstances," may be used only to draw inferences about an actor's purpose or knowledge. Even without such explicit language, it will generally be true that the actual mental state of the actor in most cases will be inferred from the circumstances as they objectively appear to the jury, but the critical point is that this language should not be taken as an invitation to dispense with the need for making the inference, as the *Smith* case did, *see* note 9 *supra*, and the Washington code appears to do.

[13] With respect to result elements, one cannot of course "know" infallibly that a certain result will follow from engaging in conduct, and thus to some extent "knowledge," when applied to result elements, includes a contingency factor as well. This is expressed definitionally in terms of whether the actor is "practically certain" that the result will follow. (For a different formulation of this idea in terms of "firm belief, unaccompanied by substantial doubt," *see* N.D. § 12.1-02-02(1)(b).) Even in regard to attendant circumstances "knowledge" will often be less than absolute certainty. This point does not, however, weaken the utility of employing these terms in this manner. It is still

nature of the actor's conduct, or to the existence of the requisite attendant circumstances, or to the result that may ensue, is immaterial; the concept is the same, and is thus defined to apply to any material element.

The risk of which the actor is aware must of course be substantial in order for the recklessness judgment to be made. The risk must also be unjustifiable. Even substantial risks, it is clear, may be created without recklessness when the actor is seeking to serve a proper purpose, as when a surgeon performs an operation that he knows is very likely to be fatal but reasonably thinks to be necessary because the patient has no other, safer chance.[14] Some principle must, therefore, be articulated to indicate the nature of the final judgment to be made after everything has been weighed. Describing the risk as "substantial" and "unjustifiable" is useful but not sufficient, for these are terms of degree, and the acceptability of a risk in a given case depends on a great many variables. Some standard is needed for determining *how* substantial and *how* unjustifiable the risk must be in order to warrant a finding of culpability. There is no way to state this value judgment that does not beg the question in the last analysis; the point is that the jury must evaluate the actor's conduct and determine whether it should be condemned. The Code proposes, therefore, that this difficulty be accepted frankly, and that the jury be asked to measure the substantiality and unjustifiability of the risk by asking whether its disregard, given the actor's perceptions, involved a gross deviation from the standard of conduct that a law-abiding person in the actor's situation would observe.[15]

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meaningful to draw a line between practical certainty and awareness of substantial risk, a line that, for example, has assumed considerable significance in the Code's grading provisions on criminal homicides. *See* Sections 210.2 and 210.3.

[14] On the other hand, less substantial risks might suffice for liability if there is no pretense of any justification for running the risk. It is, of course, impossible to prescribe in advance the precise balance in adjudging culpability between factors relating to the degree of the risk and factors going to its nature. Subsection (2)(c), however, focuses the questions to be asked about a given situation in terms that will allow the jury sensibly to debate the right issues; this is as far as legislation feasibly can go, but it should go this far.

[15] The original draft of the standard, as published in Tentative Draft No. 4, asked whether disregard of the risk "involved culpability of a high degree." An alternative formulation was offered as well, in substantially the language now contained in the definition. The alternative was selected because of the difficulty inherent in defining culpability in terms of culpability, though in some respects the accomplishment is hardly more than verbal; it does not beg the crucial question any less. The present formulation is, however, a better way to put the issue to a jury, especially since some of the conduct to which the section applies will not involve great moral culpability, as in the violation of a minor regulatory measure.

Ultimately, then, the jury is asked to perform two distinct functions. First, it is to examine the risk and the factors that are relevant to how substantial it was and to the justifications for taking it. In each instance, the question is asked from the point of view of the actor's perceptions, i.e., to what extent he was aware of risk, of factors relating to its substantiality and of factors relating to its unjustifiability. Second, the jury is to make the culpability judgment in terms of whether the defendant's conscious disregard of the risk justifies condemnation. Considering the nature and purpose of his conduct and the circumstances known to him, the question is whether the defendant's disregard of the risk involved a gross deviation from the standards of conduct that a law-abiding person would have observed in the actor's situation.

This approach is thought to be a substantial improvement over previous attempts to be precise about the concept of recklessness. The history of prior common law judicial references to the subject is typified by essentially epithetical attempts to describe "a degree of negligence which far transcends [civil] negligence," "the recklessly careless use of a loaded, deadly pistol," "reckless negligence," "reckless carelessness," and the like.[16] No statutory definition of recklessness could be found that existed prior to the initial Code formulation in 1955, though at that time the proposed Wisconsin code contained a partial definition limited to cases where the risk created was of death or great bodily harm.[17]

Most recent undertakings to revise criminal codes have substantially accepted the Model Code's formulation of recklessness.[18] Some of these versions vary from the Model Code in

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[16] *See, e.g.*, Commonwealth v. Welansky, 316 Mass. 383, 55 N.E.2d 902 (1944); Commonwealth v. Malone, 354 Pa. 180, 47 A.2d 445 (1946). *See generally* J. Hall, *supra* note 3, at 125–27.

[17] *See* Wis. Leg. Council, Judiciary Committee Report on the Criminal Code (Bill No. 100, A.) (Feb. 1953) § 339.24: "Reckless conduct consists of an act which creates a situation of unreasonable risk and high probability of death or great bodily harm to another and which demonstrates a conscious disregard for the safety of another." Also, the draft defined "high degree of negligence" as "an act which the actor should realize creates a situation of unreasonable risk and high probability of death or great bodily harm to another. It is conduct which demonstrates ordinary negligence magnified to a higher degree." *Id.* § 339.25. As enacted, the statute provides:

> Reckless conduct consists of an act which creates a situation of unreasonable risk and high probability of death or great bodily harm to another and which demonstrates a conscious disregard for the safety of another and a willingness to take known chances of perpetrating an injury. . . .

Wis. § 940.06(2). The Wisconsin code also defines a "high degree of negligence" in the same context as "conduct which demonstrates ordinary negligence to a high degree, consisting of an act which the person should realize creates a situation of unreasonable risk and high probability of death or great bodily harm to another." *Id.* § 940.08(2).

[18] *See* Ala. § 13A-2-2(3); Ariz. § 13-105(5)(c); Ark. § 41-203(3); Colo. § 18-1-501(8); Conn. § 53a-3(13); Del. tit. 11, § 231(c); Haw. § 702-206(3); Ill. ch. 38,

admitting the possibility of recklessness only as to attendant circumstances and results, not as to conduct.[19] The rationale for this approach is that while a person may recklessly take risks concerning present external facts or possible consequences of his behavior, it does not make sense to speak of recklessness concerning the behavior itself.[20] Although this position is not likely to make much practical difference, it is nonetheless ill-advised. If recklessness about circumstances and results is sufficient for liability but knowledge or purpose is required for conduct, the outcome of a case might turn on whether a particular aspect of the crime is characterized as conduct or as an attendant circum-

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§ 4-6; Ind. § 35-41-2-2(c); Ky. § 501.020(3) ("wantonly"; "recklessly" defined as is "negligently" in the Model Code); Me. tit. 17-A, § 10(3); Mo. § 562.016(4); N.H. § 626:2(II)(c); N.J. § 2C:2-2(b)(3); N.Y. § 15.05(3); N.D. § 12.1-02-02(1)(c); Ohio § 2901.22(C); Ore. § 161.085(9); Pa. tit. 18, § 302(b)(3); S.D. § 22-1-2(1)(d) (Supp. 1978); Tex. § 6.03(c); Utah § 76-2-103(3); Wash. § 9A.08.010(1)(c); U.S. (p) S. 1427 § 302(c) (Jan. 1978); Brown Comm'n Final Report § 302(1)(c); Alas. (p) § 11.81.900(a)(3) (H.B. 661, Jan. 1978); D.C. (1977 p) § 22-105(b)(3); Md. (p) § 15.05(3); Mass. (p) ch. 263, § 16(d); Mich. (p) S.B. 82 § 305(c); S.C. (p) § 10.3; Tenn. (p) § 405(c); Vt. (p) § 1.2.1(2)(c); W. Va. (p) § 61-2-2(3).

The revised statute in Montana and the proposal in Oklahoma present serious departures from the concept of recklessness as formulated here. The Oklahoma proposal lumps recklessness and negligence together under the heading of "wanton conduct"; *see* Okla. (1975 p) § 1-201(C). The Montana statute does the same under the heading of "negligently"; *see* Mont. § 94-2-101(31).

Recent cases discussing the term "recklessness" as it is defined in the recent revisions include People v. Haney, 30 N.Y.2d 328, 284 N.E.2d 564, 333 N.Y.S.2d 403 (1972); People v. Stanfield, 36 N.Y.2d 467, 330 N.E.2d 75, 369 N.Y.S.2d 118 (1975); People v. Strong, 37 N.Y.2d 568, 338 N.E.2d 602, 376 N.Y.S.2d 87 (1975); People v. Cruciani, 36 N.Y.2d 304, 327 N.E.2d 803, 367 N.Y.S.2d 758 (1975); People v. Bauman, 34 Ill.App.3d 582, 340 N.E.2d 178 (1975); People v. Mitchell, 9 Ill.App.3d 1015, 293 N.E.2d 683 (1973); People v. Bembroy, 4 Ill.App.3d 522, 281 N.E.2d 389 (1972). *See also* Agata, *Criminal Law*, 26 Syracuse L.Rev. 35, 45-48 (1975).

[19] For example, Conn. § 53a-3(13) states that

> a person acts "recklessly" with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists.

U.S. (p) S. 1437 § 302(c) (Jan. 1978) likewise provides:

> A person's state of mind is reckless with respect to:
>
> (1) an existing circumstance if he is aware of a risk that the circumstance exists but disregards the risk; (2) a result of his conduct if he is aware of a risk that the result will occur but disregards the risk; . . . .

See also Ky.; Mo.; Mont.; N.Y.; Wash.; Mass. (p); Mich. (p); S.C. (p), *supra*, note 18.

[20] *See* Sen. Judiciary Comm. Report § 301(4) at 54 n.13 (S. 1, 1975):

> The reasons for the difference in application result from the definitions of the state of mind elements. A reckless or negligent state of mind, both of which involve risk situations, can only apply to circumstances surrounding conduct or to the result of the conduct because it is the circumstances or result that poses the risk.

stance or result. The distinction between conduct and attendant circumstance or result is not always a bright one,[21] so the attempt to draw a line involves difficult and unnecessary problems of drafting or interpretation. The effort will undoubtedly be to define aspects as to which recklessness is possible as something other than conduct. The consequence would then be determinations identical to those reached under the Model Code, at the cost of unnecessary definitional dilemmas, and sometimes artificial constraints on the concept of conduct, made to yield sensible conclusions as a matter of penal policy.[22]

4. *Negligence.* The fourth kind of culpability is negligence. It is distinguished from purposeful, knowing or reckless action in that it does not involve a state of awareness. A person acts negligently under this subsection when he inadvertently creates a substantial and unjustifiable risk of which he ought to be aware. He is liable if given the nature and degree of the risk, his failure to perceive it is, considering the nature and purpose of the actor's

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[21] Consider, for example, U.S. (p) S. 1437 § 1701(a) (Jan. 1978). "A person is guilty of an offense if, by fire or explosion, he (1) damages a public facility; or (2) damages substantially a building or a public structure." Suppose a person casually tosses a match into a public forest thinking that it may or may not still be lighted, and the match starts a fire that destroys the forest and public buildings therein. Under this statute, how would the line be drawn to differentiate conduct from attendant circumstances and results?

[22] In terms of the example used in note 21, *supra*, one might initially suppose that using fire is an aspect of the "conduct" covered by the offense. But, as the example illustrates, one can be reckless as to whether he is performing an action with "fire." If the statute is intended to reach persons who are reckless on that score, one must say that the only "conduct" element is throwing the match (which the person intentionally did) and that its being lighted was an attendant circumstance and its catching fire a result.

A Senate Judiciary Committee Report gives some examples as to how offense elements are classified, not all of which are obvious. It says:

> section 1714 provides that a person is guilty of an offense "if, with intent to obtain transportation, he secretes himself aboard . . . a vessel or aircraft that is the property of another and is aboard when it leaves the point of embarkation." The culpability level for the conduct, i.e., secreting oneself aboard a vessel or aircraft, is "knowing"; the culpability level attaching to the existing circumstances that the vessel or aircraft is the property of another and that the actor is aboard at the time of its departure is, by contrast, set at the lower level of "reckless". The phrase "with intent to obtain transportation" does not describe a general state of mind, but rather a specific purpose for which the conduct is done.

Sen. Judiciary Comm. Report 53 (S. 1, 1975) (footnote omitted).

It analyzes a second crime in the following way:

> 18 U.S.C. 111 makes assault on a Federal officer engaged in the performance of his duties a felony. In the past the courts have split on the question whether it is necessary to show that a person charged under this section knew that the person he was assaulting was a Federal officer. . . . Instead, the standard would be reckless because the element, "a Federal officer," is an attendant circumstance.

Id. 59–60.

conduct and the circumstances known to him, a gross deviation from the care that would be exercised by a reasonable person in his situation. As in the case of recklessness, both the substantiality of the risk and the elements of justification in the situation form the relevant standards of judgment. And again it is quite impossible to avoid tautological articulation of the final question. The tribunal must evaluate the actor's failure of perception and determine whether, under all the circumstances, it was serious enough to be condemned. The jury must find fault, and must find that it was substantial and unjustified; that is the heart of what can be said in legislative terms.

As with recklessness, the jury is asked to perform two distinct functions. First, it is to examine the risk and the factors that are relevant to its substantiality and justifiability. In the case of negligence, these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. Second, the jury is to make the culpability judgment, this time in terms of whether the failure of the defendant to perceive the risk justifies condemnation. Considering the nature and purpose of his conduct and the circumstances known to him, the question is whether the defendant's failure to perceive a risk involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.[23]

Formulation of the standard in these terms is believed to be a substantial improvement over the traditional approach to defining negligence for purposes of criminal liability. A number of codes have traditionally included a definition of negligence drawn from the New York Penal Law as it stood before the modern revision.[24] Rarely, if ever, however, has such a definition served in itself to measure liability, since the rule of liability ordinarily imports the

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[23] For discussion of the distinction between recklessness and negligence, see Fitzgerald, *Crime, Sin and Negligence*, 79 Law Q.Rev. 351 (1963); Fitzgerald & Williams, *Carelessness, Indifference and Recklessness: Two Replies*, 25 Mod.L.Rev. 49 (1962); Turpin, *Mens Rea in Manslaughter*, 1962 Camb. L.J. 200; White, *Carelessness and Recklessness—A Rejoinder*, 25 Mod.L.Rev. 437 (1962); White, *Carelessness, Indifference and Recklessness*, 24 Mod.L.Rev. 592 (1961).

[24] Before the 1965 revision, § 3 of the New York Penal Law read as follows: "Each of the terms 'negligent,' 'negligence,' 'neglect,' and 'negligently' imports a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns." *See also* Ariz. Rev. Stat. Ann. § 1-215(20) (1978); Cal. § 7(2); Idaho § 18-101(2); Nev. § 193.010(14); Okla. tit. 21, § 93; Utah Code Ann. § 76-1-3(2) (1953). Arizona, North Dakota and Utah have followed New York's lead, *see* N.Y. § 15.05(4), in revising their provisions. *See* Ariz. § 13-105(5)(d); N.D. § 12.1-02-02(1)(d); Utah § 76-2-103(4). *See also* Cal. (p) S.B. 27 § 2002(d).

crucial additional requirement that negligence be "criminal" or "culpable." Thus, under such statutes, as at common law, the concept of criminal negligence has been left to judicial definition, and the definitions vary greatly in their terms. As Jerome Hall has put it, the judicial "opinions run in terms of 'wanton and wilful negligence,' 'gross negligence,' and more illuminating yet, 'that degree of negligence that is more than the negligence required to impose tort liability.' The apex of this infelicity is 'wilful, wanton negligence,' which suggests a triple contradiction—'negligence' implying inadvertence; 'wilful,' intention; and 'wanton,' recklessness."[25] Much of this confusion is dispelled by a clear-cut distinction between recklessness and negligence in terms of the actor's awareness of the risk involved. Clarity is also promoted by formulating the inquiry in terms of the specific factors to which attention is directed in the Model Code.

A further point in the Code's concept of negligence merits attention. The standard for ultimate judgment invites consideration of the "care that a reasonable person would observe in the actor's situation." There is an inevitable ambiguity in "situation." If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all its objectivity.[26] The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts.[27]

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[25] J. Hall, *supra* note 3, at 124 (footnote omitted).

[26] *See, e.g.*, G. Williams, Criminal Law: The General Part 100–03 (2d ed. 1961); Hall, *Interrelations of Criminal Law and Torts: II*, 43 Colum.L.Rev. 966, 979 (1943); Michael & Wechsler, *A Rationale of the Law of Homicide II*, 37 Colum.L.Rev. 1261, 1281–82 (1937); Note, 70 Law Q.Rev. 442 (1954); Regina v. Ward [1956] 1 Q.B. 351 (C.C.A.); Bedder v. Dir. of Pub. Prosecutions [1954] 2 All E.R. 801 (H.L.). *But cf.* MPC Section 210.3(1)(b) (mitigation for extreme mental or emotional disturbance). *Compare* Keedy, *Ignorance and Mistake in the Criminal Law*, 22 Harv.L.Rev. 75, 85 (1908); Pieski, *Subnormal Mentality as a Defense in the Criminal Law*, 15 Vand.L.Rev. 769 (1962).

For an argument that the standard of liability should be made more thoroughly subjective by including any specific personal characteristics of the defendant relevant to whether he had failed to take care that could reasonably be expected of him as an individual, see Fletcher, *The Theory of Criminal Negligence: A Comparative Analysis*, 119 U.Pa.L.Rev. 401 (1971).

[27] There is a similar problem with recklessness. Though recklessness requires defendant's conscious disregard of risk, the determination whether he shall be held liable for disregarding a risk turns on whether the disregard involves a gross deviation from the standard of conduct of a law-abiding person "in the actor's situation." Section 2.02(2)(c) thus requires the same discriminations demanded by the standard of negligence.

No one has doubted that purpose, knowledge, and recklessness are properly the basis for criminal liability, but some critics have opposed any penal consequences for negligent behavior. Since the actor is inadvertent by hypothesis, it has been argued that the "threat of punishment for negligence must pass him by, because he does not realise that it is addressed to him."[28] So too, it has been urged that education or corrective treatment, not punishment, is the proper social method for dealing with persons with inadequate awareness, since what is implied is not a moral defect.[29] This analysis, however, oversimplifies the issue. 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.[30] In any event legislators act on these assumptions in a host of situations, and it would be dogmatic to assert that they are wholly wrong. Accordingly, negligence, as here defined,[31] should not be wholly rejected as a ground of culpability that may suffice for purposes of penal law,[32] though it should properly not generally be deemed

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[28] G. Williams, *supra* note 26, at 123. *See also* Danforth, Jr., *supra* note 3, at 169.

[29] *See* Hall, *Negligent Behavior Should Be Excluded from Penal Liability*, 63 Colum.L.Rev. 632 (1963). *See also* J. Hall, *supra* note 3, at 133–41. *But see* Brady, *Punishment for Negligence: A Reply to Professor Hall*, 22 Buffalo L.Rev. 107 (1972).

[30] *See* Wechsler, *supra* note 6, at 30–31. *See generally* H.L.A. Hart, *supra* note 3, at 136–57; Fine & Cohen, *Is Criminal Negligence a Defensible Basis for Penal Liability?*, 16 Buffalo L.Rev. 749 (1967); Fisher, *Criminal Liability for Negligent Conduct in the United States*, in Law in the United States of America in Social and Technological Revolution (J. Hazard & W. Wagner eds. 1974); Hall, *The Scientific and Humane Study of Criminal Law*, 42 B.U.L.Rev. 267 (1962); O'Hearn, *Criminal Negligence: An Analysis in Depth*, 7 Crim.L.Q. 27 & 407 (1964–65); H. Hart, *The Aims of the Criminal Law*, 23 Law & Contemp. Prob. 401 (1958).

[31] It will of course be noticed that the requirements established are considerably more rigorous than simple negligence as usually treated in the law of torts. *See* Wechsler, *Foreword, Symposium on the Model Penal Code*, 63 Colum.L.Rev. 589, 592 (1963).

[32] There are two other reasons why a concept of negligence should be developed for the penal law. First, there are a number of individual elements in crimes that can appropriately be measured in terms of negligence, even though other elements in the same offense carry a higher culpability standard. *See, e.g.*, MPC Sections 1.13(16), 223.1(3)(c), 223.9, 230.1(1)(d). There is also a case to be made that strict liability can and should be resisted by the adoption of negligence as the standard of culpability for the critical element of crimes for which a legislature might otherwise be disposed to use strict liability. *See* C. Howard, Strict Responsibility (1963).

sufficient in the definition of specific crimes[33] and it should often be differentiated from conduct involving higher culpability for the purposes of sentence. The content of the concept should accordingly be treated at this stage.

Most recent legislative revisions and proposals have adopted definitions of negligence similar to that of the Model Code.[34]

5. *Offense Silent as to Culpability.* Subsection (3) provides that unless the kind of culpability sufficient to establish a material element of an offense has been prescribed by law, it is established if a person acted purposely, knowingly or recklessly with respect thereto. This accepts as the basic norm what usually is regarded as the common law position.[35] More importantly, it represents the most convenient norm for drafting purposes. When purpose or knowledge is required, it is conventional to be explicit. And since negligence is an exceptional basis of liability, it should be excluded as a basis unless explicitly prescribed.

Some recent revisions and proposals have substantially similar provisions.[36]

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[33] *Cf.* G. Williams, *supra* note 26, at 124.

[34] *See* Ala. § 13A-2-2(4); Ariz. § 13-105(5)(d); Ark. § 41-203(4); Colo. § 18-1-501(3) (using the term "criminal negligence"); Conn. § 53a-3(14) ("criminal negligence"); Del. tit. 11, § 231(d) ("criminal negligence"); Haw. § 702-206(4); Ill. ch. 38, § 4-7; Ky. § 501.020(3) ("recklessly"; "wantonly" defined as is "recklessly" in the MPC); Me. tit. 17-A, § 10(4) ("criminal negligence"); Mo. § 562.016(5); Mont. § 94-2-101(31) (using the term "negligence" to describe both "recklessness" and "negligence" as defined in the MPC); N.H. § 626:2(II)(d); N.J. § 2C:2-2(b)(4); N.Y. § 15.05(4); N.D. § 12.1-02-02(1)(d); Ohio § 2901.22(D); Ore. § 161.085(10) ("criminal negligence"); Pa. tit. 18, § 302(b)(4); Tex. § 6.03(d) ("criminal negligence"); Utah § 76-2-103(4) ("criminal negligence"); Wash. § 9A.08.010(1)(d) ("criminal negligence"); U.S. (p) S. 1437 § 302(d) (Jan. 1978); Brown Comm'n Final Report § 302(1)(d); Alas. (p) § 11.81.900(a)(4) (H.B. 661, Jan. 1978); D.C. (1977 p) § 22-105(b)(4); Md. (p) § 15.05(4) ("criminal negligence"); Mass. (p) ch. 263, § 16(e) ("criminal negligence"); Mich. (p) S.B. 82 § 305(d); S.C. (p) § 10.3 ("criminal negligence"); Tenn. (p) § 405(d); Vt. (p) § 1.2.1(2)(D); W. Va. (p) § 61-2-2(4) ("criminal negligence").

As with recklessness, *see* note 19 *supra*, a number of these provisions do not seem to admit of the possibility of negligence with respect to conduct elements of an offense.

Recent cases interpreting the term "negligence" as it is defined in the recent revisions include People v. Haney, 30 N.Y.2d 328, 284 N.E.2d 564, 333 N.Y.S.2d 403 (1972); People v. Henson, 33 N.Y.2d 63, 304 N.E.2d 358, 349 N.Y.S.2d 657 (1973); People v. Stanfield, 36 N.Y.2d 467, 330 N.E.2d 75, 369 N.Y.S.2d 118 (1974); People v. Strong, 37 N.Y.2d 568, 338 N.E.2d 602, 376 N.Y.S.2d 87 (1974); People v. Cruciani, 36 N.Y.2d 304, 327 N.E.2d 803, 367 N.Y.S.2d 758 (1975); State v. Swanson, 307 Minn. 412, 240 N.W.2d 822 (1976); People v. Mitchell, 9 Ill.App.3d 1015, 293 N.E.2d 683 (1973).

[35] *See* G. Williams, *supra* note 26, at 64-65; Turner, *The Mental Element in Crimes at Common Law*, 6 Camb.L.J. 31 (1936). *See also* note 3 *supra*.

[36] *See* Ark. § 41-204(2); Del. tit. 11, § 251(b); Haw. § 702-204; Ill. ch. 38, § 4-3(b); Ky. §§ 501.030(2), .040; Mo. § 562.021(2); N.D. § 12.1-02-02(1)(e), (2); Ohio §§ 2901.21(B), .22(E); Pa. tit. 18, § 302(c); Tex. § 6.02(c); Utah § 76-2-102; U.S. (p) S. 1437 § 303(b) (Jan. 1978); Brown Comm'n Final Report § 302(2); Alas. (p)

6. *Ambiguous Culpability Requirements.* Subsection (4) seeks to assist in the resolution of a common ambiguity in penal legislation, the statement of a particular culpability requirement in the definition of an offense in such a way that it is unclear whether the requirement applies to all the elements of the offense or only to the element that it immediately introduces. The draftsmen of the Wisconsin revision posed the problem in these terms: "When, for example, a statute says that it is unlawful to 'wilfully, maliciously, or wantonly destroy, remove, throw down or injure any . . . [property] . . . upon the land of another,' do the words denoting the requirement of intent apply only to the doing of the damage or do they also modify the phrase 'upon the land of another,' thus requiring knowledge or belief that the property is located upon land which belongs to another?" The Model Penal Code agrees with their view that these "problems can and should be taken care of in the definition of criminal intent."[37]

The Code proceeds in the view that if a particular kind of culpability has been articulated at all by the legislature as sufficient with respect to any element of the offense, the assumption is that it was meant to apply to all material elements. Hence this construction is required, unless a "contrary purpose plainly appears." When a distinction is intended, as it often is, proper drafting ought to make it clear.

Two examples may help to clarify the intended scope of the provision and to illustrate its relationship with Subsection 3. False imprisonment is defined by Section 212.3 of the Model Code to include one who "knowingly restrains another unlawfully so as to interfere substantially with his liberty." Plainly, the word "knowingly" is intended to modify the restraint, so that the actor must, in order to be convicted under this section, know that he is restraining his victim. The question whether "knowingly" also

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§ 11.81.310(b) (H.B. 661, Jan. 1978); D.C. (1977 p) § 22-105(c); Tenn. (p) § 404(c); Vt. (p) § 1.2.1(3).

A number of jurisdictions, following New York's lead, provide that when the definition of an offense is silent as to the requisite culpability, any of the four culpable mental states will suffice, thereby including negligence. *See* Ala. § 13A-2-4(b); Colo. § 18-1-503(2); Me. tit. 17-A, § 11(5); Mont. § 94-2-103(1) ("recklessly" is not a mental state defined in this statute; it is, however, included within the statute's definition of "negligently"); N.J. § 2C:2-2(c)(3); N.Y. §§ 15.00(6), .15(2); Ore. § 161.115(2). *See also* Md. (p) § 15.15(2); Mass. (p) ch. 263, §§ 16(a), 17; Mich. (p) S.B. 82 §§ 301(f), 315(2); S.C. (p) § 10.2; W. Va. (p) § 61-2-4(b).

[37] *The Problem of Mental State in Crime*, p. 4 Mimeographed Memorandum for Wisconsin Legislative Council, cited in MPC T.D. 4 at 129 (1955). *See also* Remington & Helstad, *The Mental Element in Crime—A Legislative Problem*, 1952 Wis.L.Rev. 644, 666.

qualifies the unlawful character of the restraint is not clearly answered by the definition of the offense, but is answered in the affirmative by the subsection under discussion.

To be contrasted with this illustration is the case of burglary, as defined in Section 221.1. The offense includes one who "enters a building . . . with purpose to commit a crime therein . . . ." The grading provisions make burglary a felony of the second degree if the offense is perpetrated "in the dwelling of another at night." Since an actor must have a "purpose" to commit a crime within a building to be guilty of burglary when he enters the building, the definition of the offense might be thought ambiguous as to what culpability level applies to elements like "dwelling house" and "night." Must the actor know that he is entering a dwelling house in order to be convicted of a second degree felony, or is some lesser culpability level sufficient?

Section 2.02(3) should control elements of this character, and therefore recklessness should suffice in the absence of special provision to the contrary. Subsection (4) does not produce a contrary result, since it is designed to apply, as noted above, only to offenses where a particular culpability requirement is stated in such a way as to make it unclear whether the requirement applies to all of the material elements of an offense or only to the material element it introduces. In the burglary illustration, the phrase "with purpose to commit a crime therein" plainly does not make purpose the required level of culpability with respect to all material elements of the offense.

Most of the recently enacted and proposed revisions are in substantial agreement with the Model Code's formulation in this subsection.[38]

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[38] *See* Ala. § 13A-2-4(a); Ariz. § 13-202(A); Ark. § 41-204(1); Colo. § 18-1-503(4); Conn. § 53a-5; Del. tit. 11, § 252; Haw. § 702-207; Ill. ch. 38, § 4-3(b); Ind. § 35-41-2-2(d); Ky. § 501.030(2); Me. tit. 17-A, § 11; Mo. § 562.021(1); Mont. § 94-2-103(2); N.H. § 626:2(I); N.J. § 2C:2-2(c); N.Y. § 15.15(1); N.D. § 12.1-02-02(3); Ore. § 161.115(1); Pa. tit. 18, § 302(d); Utah § 76-2-101(1); U.S. (p) S. 1437 § 303 (Jan. 1978); Brown Comm'n Final Report § 302(3); Alas. (p) § 11.81.310(a) (H.B. 661, Jan. 1978); Md. (p) § 15.15(1); Mass. (p) ch. 263, § 17; Mich. (p) S.B. 82 § 315; S.C. (p) § 10.2; Tenn. (p) § 406; W. Va. (p) § 61-2-4(a).

The language of the New York Penal Law, which the Colorado and Connecticut codes and the Michigan proposal, cited above, follow, indicates with even more explicitness than the Model Code that a standard of culpability applicable to one element will be assumed to be applicable to the others in the absence of a clear contrary intent:

> When the commission of an offense defined in this chapter, or some element of an offense, requires a particular culpable mental state, such mental state is ordinarily designated in the statute defining the offense by use of the terms "intentionally," "knowingly," "recklessly" or "criminal negligence," or by use of terms, such as "with intent to defraud" and "knowing it to be false," describing a specific kind of intent or knowledge. When one and only one of such terms appears in a statute defining an

7. *Substitutes for Prescribed Culpability Levels.* Subsection (5) establishes that when negligence suffices for liability, *a fortiori* purpose, knowledge or recklessness are sufficient; that purpose and knowledge similarly are sufficient for recklessness; and that purpose is sufficient for knowledge. Thus it is only necessary to articulate the minimal basis of liability in drafting specific offenses for the more serious bases to be implied. Many recent revisions and proposals contain similar provisions.[39]

8. *Conditional Purposes.* Subsection (6) provides that a requirement of purpose is satisfied when purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense. Thus, it is no less a burglary if the defendant's purpose was to steal only if no one was at home or if he found the object he sought. The condition does not negative the evil that the law defining burglary is designed to control, irrespective whether the condition is fulfilled or fails. But it would not be an assault with the intent to rape, if the defendant's purpose was to accomplish the sexual relation only if the mature victim consented; the condition negatives the evil with which the law has been framed to deal. If his purpose was to overcome her will *if* she resisted, he would of course be guilty of the crime. This is believed to be a statement and rationalization of the present law. Some recent revisions contain similar language.[40]

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offense, it is presumed to apply to every element of the offense unless an intent to limit its application clearly appears.

N.Y. § 15.15(1).

The Ohio and Texas statutes and Vermont proposal do not explicitly deal with the issue of the application of the mental element required by the substantive offense to all of the material elements thereof. The Practice Commentary to Tex. § 6.02 notes that "Section 6.06 answered this question, when the term describing the culpable mental state did not syntactically modify the conduct, circumstances surrounding the conduct, or result of the conduct in the definition of the offense, by providing that the culpable mental state applied to each of these types of elements of the offense definition. Its deletion will be missed because the syntax of several sections in this code leaves ambiguous the relationship between the required culpable mental state and various offense definition elements . . . ."

[39] *See* Ala. § 13A-2-4(c); Ariz. § 13-202(C); Ark. § 41-204(3); Colo. § 18-1-503(3); Del. tit. 11, § 253; Haw. § 702-206; Me. tit. 17-A, § 11(3); Mo. § 562.021(3); Mont. § 94-2-110; N.H. § 626:2(III); N.J. § 2C:2-2(c)(2); N.D. § 12.1-02-02(4); Ohio § 2901.22(E); Ore. § 161.115(3); Pa. tit. 18, § 302(e); S.D. § 22-1-2(1)(f) (Supp. 1978); Tex. § 6.02(e); Utah § 76-2-104; Wash. § 9A.08.010(2); U.S. (p) S. 1437 § 303(c) (Jan. 1978); Brown Comm'n Final Report § 302(4); Alas. (p) § 11.81.310(c) (H.B. 661, Jan. 1978); D.C. (1977 p) § 22-105(d); Md. (p) § 15.15(3); Mass. (p) ch. 263, § 18(b); Mich. (p) S.B. 82 § 315(3); S.C. (p) § 10.4; Vt. (p) § 1.2.2.

[40] *See* Del. tit. 11, § 254; Haw. § 702-209; Pa. tit. 18, § 302(f). *See also* G. Williams, *supra* note 26, at 52-53.

9. *Knowledge Satisifed by High Probability.* Subsection (7) deals with the situation that British commentators have denominated "wilful blindness" or "connivance," the case of the actor who is aware of the probable existence of a material fact but does not determine whether it exists or does not exist.[41] Whether such cases should be viewed as instances of acting recklessly or knowingly presents a subtle but important question.

The Code proposes that the case be viewed as one of acting knowingly when what is involved is a matter of existing fact, but not when what is involved is the result of the defendant's conduct, necessarily a matter of the future at the time of acting. The position reflects what was believed to be the normal policy of criminal enactments that rest liability on acting "knowingly." The inference of "knowledge" of an existing fact is usually drawn from proof of notice of high probability[42] of its existence, unless the defendant establishes an honest, contrary belief. Subsection (7) solidifies this usual result and clarifies the terms in which the issue is submitted to the jury.

Some recently revised and proposed codes have included similar language.[43]

10. *Wilfully.* One of the most common terms in statutory crimes to designate the culpability requirement is "wilfully." Subsection (8) provides that if a person has acted knowingly, that is sufficient to satisfy a requirement of wilfulness. In this respect it follows many judicial decisions[44] as well as legislation in a number of states.[45]

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[41] *See id.* at 157–59; Danforth, Jr., *supra* note 3, at 161; Edwards, *The Criminal Degrees of Knowledge*, 17 Mod.L.Rev. 294, 298 (1954).

[42] The original draft of this language, published in Tentative Draft No. 4, required only that there be a "substantial probability" of the fact in existence. This was changed to "high" probability in the view that "substantial" did not imply a sufficient level of probability and weakened the distinction between knowledge and recklessness as modes of culpability. *Compare* the definition of knowledge with regard to result elements and the discussion of "practically certain" in note 13 *supra*.

[43] *See* Del. tit. 11, § 255; Ill. ch. 38, § 4–5(a) (uses the term "substantial" probability); Mont. § 94–2–101(27); N.J. § 2C:2–2(b)(2); Alas. (p) § 11.81.900(a)(2) (H.B. 661, Jan. 1978); S.C. (p) § 10.3; W. Va. (p) § 61–2–4(c). *See also* United States v. Benjamin, 328 F.2d 854, 862 (2d Cir. 1964). *Compare* Ind. § 35–41–2–2(b) ("A person engages in conduct 'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so."). Ohio has a more expansive definition of "knowingly" embracing any awareness that something is "probable." Ohio § 2901.22(B).

[44] *See, e.g.*, Browder v. United States, 312 U.S. 335 (1941); Hewitt v. United States, 377 F.2d 921 (5th Cir. 1967); United States v. Carter, 311 F.2d 934 (6th Cir.), *cert. denied*, 373 U.S. 915 (1963); Zebouni v. United States, 226 F.2d 826 (5th Cir. 1955); State v. Parish, 79 Idaho 75, 310 P.2d 1082 (1957) (dictum); People v. Parr, 130 Ill.App.2d 212, 264 N.E.2d 850 (1970).

[45] The California provision is typical:

It is recognized, however, that in special situations courts have construed a requirement of wilfulness to import some additional requirement of motive or of purpose or to lay the groundwork for a special defense based upon the actor's state of mind.[46] To accommodate situations of this kind, which rest upon judicial perception of the implications of the legislative purpose in relation to the particular conduct involved, the subsection does not apply if "a purpose to impose further requirements appears." The perception of such a purpose normally derives, of course, from judicial appraisal of the consequences of the enactment if its scope is not limited by construction.

The term "wilfully" was not used in the drafting of offenses prescribed by the Code, but it was believed, nonetheless, that a general provision of this sort was useful.[47] In many jurisdictions there may be offenses defined outside the criminal code, particularly in the regulatory area, that use this word, and the temptation to use such a familiar term may be yielded to as new of-

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The word "willfully," when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.

Cal. § 7(1). Utah's similar provision has been repealed, as has Arizona's and North Dakota's; Oklahoma's proposed revision does not include the provision. *See* Utah Code Ann. § 76-1-3(1) (1953) (current version at Utah § 76-2-103); Ariz. Rev. Stat. Ann. § 1-215(32) (1974) (current version at Ariz. § 13-105); N.D. Cent. Code § 12-01-04(1) (1960) (current version at N.D. § 12.1-02-02(1)(e)); Okla. tit. 21, § 92; *but see* Okla. (1975 p) § 1-201(B).

[46] *See, e.g.*, Screws v. United States, 325 U.S. 91 (1945); United States v. Murdock, 290 U.S. 389 (1933). *But cf.* Ellis v. United States, 206 U.S. 246, 257 (1907). *See also* Edwards v. United States, 321 F.2d 324 (5th Cir. 1963), *cert. denied*, 379 U.S. 1000 (1965); United States v. Palermo, 259 F.2d 872 (3d Cir. 1958). For a summary of federal cases on the construction of "wilfulness," see Brown Comm'n Study Draft 148-51.

[47] The following exchange between the Reporter and Judge Learned Hand should be recorded in this connection:

JUDGE HAND: Do you use . . . [wilfully] throughout? How often do you use it? It's a very dreadful word.

MR. WECHSLER: We will never use it in the Code, but we are superimposing this on offenses outside the Code. It was for that purpose that I thought that this was useful. I would never use it.

JUDGE HAND: Maybe it is useful. It's an awful word! It is one of the most troublesome words in a statute that I know. If I were to have the index purged, "wilful" would lead all the rest in spite of its being at the end of the alphabet.

MR. WECHSLER: I agree with you Judge Hand, and I promise you unequivocally that the word will never be used in the definition of any offense in the Code. But because it is such a dreadful word and so common in the regulatory statutes, it seemed to me useful to superimpose some norm of meaning on it. . . .

ALI Proceedings 160 (1955).

fenses are added to the code or elsewhere. Because the term may be so employed it is wise to define it here.

Some recent revisions have substantially adopted the Code's treatment of wilfulness.[48]

11. *Culpability as to Illegality of Conduct.* Subsection (9) states the conventional position that knowledge of the existence, meaning or application of the law determining the elements of an offense is not an element of that offense, except in the unusual situations where the law defining the offense or the Code so provides.[49]

It should be noted that the general principle that ignorance or mistake of law is no excuse is greatly overstated; it has no application, for example, when the circumstances made material by the definition of the offense include a legal element. Thus it is immaterial in theft, when claim of right is adduced in defense, that the claim involves a legal judgment as to the right of property. Claim of right is a defense because the property must belong to someone else for the theft to occur and the defendant must have culpable awareness of that fact. Insofar as this point is involved, there is no need to state a special principle; the legal element involved is simply an aspect of the attendant circumstances, with respect to which knowledge, recklessness or negligence, as the case may be, is required for culpability by Subsections (1) and (3).[50] The law involved is not the law defining the offense; it is some other legal rule that characterizes the attendant circumstances that are material to the offense.

The proper arena for the principle that ignorance or mistake of law does not afford an excuse is thus with respect to the particular law that sets forth the definition of the crime in question. It is knowledge of *that* law that is normally not a part of the crime, and it is ignorance or mistake as to *that* law that is denied defensive significance by this subsection of the Code and by the traditional common law approach to the issue.

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[48] Haw. § 702–210; Ill. ch. 38, § 4–5(b); Me. tit. 17–A, § 11(1); N.H. § 626:2(IV); Pa. tit. 18, § 302(g); Wash. § 9A.08.010(4). *See also* Okla. (1975 p) § 1–201(B). The North Dakota enactment, the Brown Commission proposal and the proposal in Massachusetts include the concept of recklessness in their use of the term "wilfully." *See* N.D. § 12.1–02–02(1)(e); Brown Comm'n Final Report § 302(1)(e); Mass. (p) ch. 263, § 16(f). Utah equates "willfully" solely with intention. *See* Utah § 76–2–103(1).

[49] *See* G. Williams, *supra* note 26, at 287–93; J. Hall, *supra* note 16, at 376–401; H. Hart, *supra* note 30, at 413; Mueller, *On Common Law Mens Rea*, 42 Minn.L.Rev. 1043, 1049 (1958).

[50] This result is also assured by the provision in Section 2.04(1), which states that a mistake of fact or *law* that negatives a required level of culpability will be a defense.

It needs to be recognized, however, that there may be special cases where knowledge of the law defining the offense should be part of the culpability requirement for its commission, i.e., where a belief that one's conduct is not a violation of the law or, at least, such a belief based on reasonable grounds, ought to engender a defense. Such a result might be brought about directly by the definition of the crime, e.g., by explicitly requiring awareness of a regulation, violation of which is denominated as an offense.[51] It also may be brought about by a general provision in the Code indicating circumstances in which mistakes about the law defining an offense will constitute a defense.[52] In either case, the result is exceptional and arises only when the governing law "so provides."

Many recent revisions and proposals have provisions similar to Subsection (9) in their definitions of culpability.[53]

12. *Lowest Culpability Determines Grade of Offense.* Subsection (10) is addressed to the case where the grade or degree of an offense is made to turn on whether it was committed purposely, knowingly, recklessly or negligently, a common basis of discrimination for sentencing purposes. The position taken is that when distinctions of this kind are made, the grade or degree of a conviction ought to be the lowest for which the determinative kind of culpability is established with respect to *any* material element of the offense.[54] The theory is, of course, that when the

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[51] *See, e.g.*, Brown Comm'n Final Report § 1006, which provides:

(1) . . . "Penal regulation" means any requirement of a statute, regulation, rule, or order which is enforcible by criminal sanctions, forfeiture or civil penalty.

(2) . . . (b) Willful Violations. A person who willfully violates a penal regulation is guilty of a Class B misdemeanor. Willfulness as to both the conduct and the existence of the penal regulation is required.

"Willful" is defined to include intention (purpose), knowledge and recklessness. *Id.* § 302(1)(c).

[52] *See* Section 2.04(3). Comparable provisions in recent revisions and proposals are discussed in the Comment to that section.

[53] *See* Ark. § 41-204(4); Ill. ch. 38, § 4-3(c); Minn. § 609.02(subd. 9)(5); Mo. § 562.021(4); Mont. § 94-2-103(3); N.H. § 626:2(V); N.J. § 2C:2-2(d); N.D. § 12.1-02-02(5); Ore. § 161.115(4); Pa. tit. 18, § 302(h); S.D. § 22-1-2(1)(c) (Supp. 1978); Wis. § 939.23(5); Brown Comm'n Final Report § 302(5); Alas. (p) § 11.81.820(a) (H.B. 661, Jan. 1978); D.C. (1977p) § 22-105(a); Okla. (1975p) § 1-102(A); Vt. (p) § 1.2.2(3). *See also* Gieb v. Jones, 282 F.2d 554, 556 (9th Cir. 1960).

Such a provision, of course, is a corollary of the special exceptions noted in note 52 *supra*; frequently it is assumed rather than explicitly stated in the basic culpability sections of criminal codes.

[54] This general provision would, of course, give way if a legislature explicitly deviated from its principles in the definition of a particular crime. If it decided that a person should be treated as guilty of the most serious level of a graded offense if he acts purposefully as to elements *A*, *B* and *C*, even if he is only negligent as to element *D*,

kinds of culpability involved vary with respect to different material elements, it is the lowest common denominator that indicates the quality of the defendant's conduct.

The best illustration is afforded by the case of homicide, where a killing done purposefully or knowingly is normally treated as an offense of a higher degree than negligent homicide.[55] Even though the actor meant to kill, he may have acted only negligently with respect to another material element of the offense, e.g., he may have deemed the homicide to be necessary in self-defense or necessary to prevent a felony or to effect arrest,[56] without sufficient ground for such belief. For purposes of sentence, the position of the Code is that such a homicide ought to be viewed as reckless or as negligent, as the case may be, since recklessness or negligence is all that is established with respect to justifying elements as integral to the offense as the killing itself.[57] A person who believes that justifying facts exist, but has been reckless or negligent in so concluding, presents, from the point of view of sentence, the same type of problem as a person who acts recklessly or negligently with respect to the creation of a risk of death. Some pre-Code statutes recognized this point explicitly by treating such homicides as manslaughter.[58] Subsection (10) gives general application to the point that is involved.

Although Subsection (10) applies in terms only to crimes for which the grade of an offense depends on the level of culpability, and thus does not apply to ungraded offenses or to offenses graded on a different basis, such as burglary (*see* Section 222.1), nevertheless, the underlying principle of this subsection is one the Institute considered to be valid more generally. Barring exceptional reasons, a person's culpability should be determined by the lowest level of culpability he exhibits with respect to a material element. The offenses for which the Model Code accepts a departure from this general approach are comparatively few.[59]

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then the fact that the person is negligent as to element *D* would not, of course, lead to his being treated as leniently as an actor who is negligent as to *A*, *B*, or *C*.

[55] *See, e.g.*, Sections 210.2 and 210.4.

[56] As previously noted in Comment 1, *supra*, defenses such as those illustrated are "material elements" of the crime.

[57] In Section 3.09(2) the Code specifically so provides in relation to these defenses. Comparable provisions are cited in Comment 2 to that section.

[58] *See, e.g.*, Kan. Gen. Stat. § 21-412 (1949) (current version at Kan. §§ 21-3403, -3404); Wis. Stat. § 340.15 (1951) (current version at Wis. § 940.05).

[59] *See, e.g.*, Sections 213.1 and 222.1.

Some recent revisions contain language similar to that of Subsection (10) in their culpability provisions.[60]

Section 2.03. Causal Relationship Between Conduct and Result; Divergence Between Result Designed or Contemplated and Actual Result or Between Probable and Actual Result.*

(1) Conduct is the cause of a result when:

(a) it is an antecedent but for which the result in question would not have occurred; and

(b) the relationship between the conduct and result satisfies any additional causal requirements imposed by the Code or by the law defining the offense.

(2) When purposely or knowingly causing a particular result is an element of an offense, the element is not established if the actual result is not within the purpose or the contemplation of the actor unless:

(a) the actual result differs from that designed or contemplated, as the case may be, only in the respect that a different person or different property is injured or affected or that the injury or harm designed or contemplated would have been more serious or more extensive than that caused; or

(b) the actual result involves the same kind of injury or harm as that designed or contemplated and is not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offense.

(3) When recklessly or negligently causing a particular result is an element of an offense, the element is not established if the actual

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[60] *See* Haw. § 702-211; N.J. § 2C:2-2(e); N.D. § 12.1-02-02(3)(c) & (d); Wash. § 9A.08.010(3). In Proposed Changes in the Criminal Law of Pennsylvania (Pa. B. Ass'n, Jan. 1971), § 302(i), the equivalent of MPC Section 2.02(10), was deleted from the Senate Bill upon the Reporter's recommendation that it was redundant in view of § 302(d) (the equivalent of MPC Section 2.02(4)), which provided that the "[p]rescribed culpability requirement applies to all material elements." The Reporter's conclusion appears mistaken because § 302(d) contains a flexibility for exceptions that was not left for the crimes to be covered by § 302(i).

* *History.* This section was presented to the Institute in Tentative Draft No. 4 and considered at the May 1955 meeting. *See* ALI Proceedings 162–64 (1955). Subsection (4) was subsequently added in response to criticism of the draft's reliance upon but-for cause alone in cases of strict liability. *See* H.L.A. Hart & A.M. Honoré, Causation in the Law 361 (1959); G. Mueller, *Causing Criminal Harm*, in Essays in Criminal Science 169, 185 (1960). It was presented again to the Institute with minor revisions in the Proposed Official Draft and approved at the May 1962 meeting. *See* ALI Proceedings 72–78, 135–41, 226–27 (1962). For original detailed commentary, *see* T.D. 4 at 132 (1955).