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Article

Recklessness and the Model Penal Code*

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I. INTRODUCTION

Society has in recent years become increasingly concerned with the growing problems in the criminal justice system. Reform is desperately needed. Much of the attention has focused on procedural reforms. However, as stated by the National Advisory Commission on Criminal Justice Standards and Goals:

> The criminal justice system of a State may be a model of contemporary efficiency; but if its basic criminal law is the outmoded product of legislative or judicial processes of an earlier generation or century, the protection afforded the average citizen through criminal law processes will be much less than it ought to be. In other words, a primary objective of the criminal justice system is enforcement of the substantive criminal law, which itself must be revised and modernized constantly to conform to society's current needs and expectations.[1]

The mental state or culpability of the accused is one of the most troublesome areas of the substantive criminal law, in large part because so many imprecise and vague terms are used to define the mental state.

Mens rea, the mental element of a crime, is perhaps the most complex and significant factor in determining criminal responsibility.[2] It is the accused's mental state that distinguishes, in most in-

1. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON THE CRIMINAL JUSTICE SYSTEM 173 (1973).

2. "No problem of criminal law is of more fundamental importance or has proved more baffling through the centuries than the determination of the precise mental element or *mens rea* necessary for crime." Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 974 (1932). "We are once again reminded of the complexity of the problem [of mental state in crime], conceptually as difficult as any in the law . . . ." Remington & Helstad, *The Mental Element in Crime—A Legislative Problem*, 1952 WISC. L. REV. 644, 644 (1952). "The definition of the . . . elements

stances, a noncriminal act from a criminal act. For example, killing a pedestrian with an automobile may be noncriminal if the driver is negligent only, manslaughter if the driver is reckless, and murder if the driver acts intentionally. To the passerby the conduct in all three situations might appear identical—it is only the mental state of the driver that determines the nature of his culpability. Usually, criminal liability is imposed for conduct only when society condemns the conduct as blameworthy, and it is the mental state of the accused which determines blameworthiness.

Since the mental element plays such a central role in determining innocence or guilt, one would expect to find the concept of the mental element fairly well developed and defined. Unfortunately the common law remains terribly confused, vague, and inconsistent regarding the mental element of crimes. A primary cause of confusion has been the lack of consistent definitions. Many different terms have been used at common law to describe what was probably the same mental state, and the same term often described different mental states. Sometimes recklessness has been distinguished from gross negligence, at other times the terms have been used interchangeably. Terms such as willfully, corruptly, maliciously, feloniously, wrongfully, unlawfully, wantonly, intentionally, purposely, with criminal negligence, and culpably have defined the mental state.[3] Often these terms have not received any further definition, leaving it to the jury to determine or to disregard their meaning.

In the last twenty years, however, a major transformation of American criminal law has occurred. Before 1960, most states had criminal codes that were little more than statutory versions of the common law and retained many of its imperfections. Each crime was defined in virtual isolation from others and consequently, the meaning of terms would vary from crime to crime, with no attempt at consistent definition[4] or grading of offenses or punishment. During the last two decades almost two-thirds of the states have replaced their old criminal codes, many written in the nineteenth century,

of culpability was one of the hardest drafting problems in the framing of the Code." Wechsler, *The Model Penal Code and the Codification of American Law*, CRIME, CRIMINOLOGY AND PUBLIC POLICY 419, 435 (R. Hood ed. 1974). "The most important aspect of the Code is its affirmation of the centrality of *mens rea* . . . ." Packer, *The Model Penal Code and Beyond*, 63 COLUM. L. REV. 594, 594 (1963).

3. Wechsler, *supra* note 2, at 433. 1 NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 119-20 (1970) [hereinafter cited as WORKING PAPERS]; KARLEN, *Mens Rea: A New Analysis*, 9 TOL. L. REV. 191, 210 (1978).

4. J. STEPHEN, 2A HISTORY OF THE CRIMINAL LAW OF ENGLAND 95 (1883). Karlen, *supra* note 3, at 210.

with new, thoughtfully constructed criminal codes containing uniform grading of crimes, consistent and logical organization, and general provisions defining basic concepts applicable to all crimes.

The American Law Institute's *Model Penal Code* has been the model for these reforms.[5] Perhaps the most significant aspect of the new codifications has been the adoption by most of these states of the *Model Penal Code*'s section on culpability. This section defines four mental states or types of culpability and uses these four consistently throughout the *Code* to define crimes.[6] The four kinds of culpability are purpose, knowledge, recklessness, and negligence. Recklessness is the most complex, most utilized, and probably the most critical of the four kinds of culpability. Recklessness is the most critical because for many crimes it defines the minimum level of culpability, thus making the difference between acquittal and conviction.[7]

Most states adopting new codes have utilized the *Model Penal Code* concept of recklessness. Even some state codes that have not adopted a section comparable to the *Model Penal Code*'s section on kinds of culpability, define recklessness in a form similar to that of the *Code*.[8] Within these codes, recklessness is the most frequently employed minimal level of culpability.[9]

The *Model Penal Code* definition of recklessness also warrants careful attention since it is the most complex of the four kinds of culpability.[10] It alone combines subjective and objective aspects, bringing together components of knowledge and negligence. Recklessness is also used in lieu of extremely ambiguous common law terms such as wanton, malicious, heedless, and wicked.[11]

5. Kadish, *Codifiers of the Criminal Law: Wechsler's Predecessors*, 78 COLUM. L.R. 1098, 1144 (1978); George, *Reform of State Criminal Law and Procedure*, 41 L. & CONTEMP. PROB. 63, 63-64 (1977).

6. Packer, *supra* note 2, at 594-95; Haddad, *The Mental Attitude Requirement in Criminal Law—And Some Exceptions*, 59 J. CRIM. L.C. & P.S. 4, 9 (1968).

7. MODEL PENAL CODE § 2.02(3) (Proposed Official Draft 1962) states: "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." Negligence, according to the Commentary, ought to be viewed as an exceptional basis for liability. MODEL PENAL CODE § 2.02, Comments at 127 (Tent. Draft No. 4, 1955).

8. *E.g.*, NEB. REV. STAT. § 28-109 (19 (R.S. Supp. 1978).

9. Wechsler, *On Culpability and Crime. The Treatment of Mens Rea in the Model Penal Code*, 339 ANNALS 24, 31 (1962); Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1372 (1979); *Cf.* N.Y. PENAL LAW § 15.05, Practice Commentaries at 31 (McKinney 1975).

10. N.Y. PENAL LAW § 15.05, Practice Commentaries at 30 (McKinney 1975). Remington & Helstad, *supra* note 2, at 658.

11. Recklessness has been used in lieu of or has been defined by terms such as wanton,

Because of the widespread use and practical impact of the concept of recklessness, it is important to understand the term as defined by the *Model Penal Code* and the state codes which use the concept. The goal of this article is to examine the *Model Penal Code* concept of recklessness to gain an understanding of its meaning and significance, and to identify and, if possible, to resolve ambiguities. Since the *Model Penal Code* was intended to be a model for state legislation, rather than a uniform code to be adopted verbatim, extensive attention will be given to state variations from the *Model Penal Code* definition. For purposes of analysis, the *Model Penal Code* definition has been broken down into eleven lines. After examining, as background, some basic terminology and common law concepts, these eleven lines of the definition of recklessness will be examined in detail. Most readers will be familiar with basic concepts of criminal liability, and therefore much of the background discussion will be very cursory.[12]

A. Terminology and Basic Concepts

Definition of crimes usually involves two components: physical and mental. Though there are crimes that theoretically[13] dispense

wilful, gross negligence, malice, and indifference. *See* Karlen, *supra* note 3, at 210; G. WILLIAMS, CRIMINAL LAW, THE GENERAL PART 53 n. 2, 65 n. 3, 72 (2d ed. 1961); R. PERKINS, CRIMINAL LAW 768-69 (2d ed. 1969); STATE BAR COMMITTEE ON REVISION OF THE PENAL CODE, TEXAS PENAL CODE, A PROPOSED REVISION, § 6.05, Committee Comment at 41 (malice equated with recklessness), 43 (indifference defined as recklessness) (Final Draft 1970).

12. *See generally* CLARK & MARSHALL, A TREATISE OF THE LAW OF CRIMES (M. Barnes 7th ed. 1967); G. FLETCHER, RETHINKING CRIMINAL LAW (1978); J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW (2d ed. 1960); W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW (1972); R. PERKINS, *supra* note 11; G. WILLIAMS, *supra* note 11.

13. Crimes which theoretically dispense with a requirement of a mental element are termed strict liability crimes. *See generally* W. LAFAVE & A. SCOTT, *supra* note 12, § 31. Though these crimes impose liability without fault, they usually require some mental element nevertheless. Even strict liability crimes require conduct, which under the *Model Penal Code* consists of a voluntary act, an omission where the actor was capable of performing the act, or knowing possession. MODEL PENAL CODE § 2.01 (Proposed Official Draft 1962). As will be discussed in part IV, *infra*, this usually means that there will be some mental state accompanying the conduct. The *Model Penal Code* suggests this when it defines conduct as "an action or omission and its accompanying state of mind . . . ." MODEL PENAL CODE § 1.13(5) (Proposed Official Draft 1962). Some crimes which may be viewed as strict liability, because mistake as to certain elements is no defense, nevertheless require *mens rea* or fault as to other elements, and thus are not truly strict liability as to all elements. For example, in United States v. Freed, 401 U.S. 601 (1971), the Court held that it was permissible to dispense with a requirement of *mens rea* since a regulatory crime was involved, possession of unregistered hand grenades. But as Mr. Justice Brennan pointed out in a concurring opinion, the statute was not really strict liability since knowledge of the possession of the items and knowledge that the items were hand grenades were required. The statute was only strict liability as to the element that the hand grenades were unregistered. *Id.* at 612.

with the mental component, these are viewed as the exception rather than the rule.[14] All crimes require a physical component, to avoid punishing persons for thoughts alone, though with respect to crimes such as solicitation or conspiracy the physical component may consist of nothing more than the physical act of speaking words.[15]

The common law terms for the physical and mental components of criminal liability were, respectively, *actus reus* and *mens rea*. Basically, *actus reus* means guilty act, and *mens rea* means guilty mind.[16] Neither of these terms is accurate. The physical component, or element of the crime, involves more than the act,[17] and the mental component may involve negligence, which is not truly a mental state.[18]

Though preserving basically similar concepts, the *Model Penal Code* has replaced the common law terminology. For the physical component of the crime, the *Model Penal Code* uses the term "element of an offense."[19] Element of an offense includes conduct, attendant circumstances, or the result of conduct.[20] Conduct, in turn, is defined as "an action or omission and its accompanying state of mind, or, where relevant, a series of acts or omissions."[21] This definition of conduct creates some confusion since it mixes together the physical and mental components. Perhaps this is because the concept of voluntary act implicitly includes a mental element comparable to intention or purpose,[22] and the concept of possession expressly

14. MODEL PENAL CODE §§ 2.02(1), 2.02(3), 2.05, Comments at 140 (Tent. Draft No. 4, 1955).

15. W. LAFAVE & A. SCOTT, *supra* note 12, at 178; G. WILLIAMS, *supra* note 11, at 3.

16. W. LAFAVE & A. SCOTT, *supra* note 12, at 7.

17. HOUSE COMM. ON THE JUDICIARY, CRIMINAL CODE REVISION ACT OF 1980, H.R. REP. No. 1396, 96th Cong., 2d Sess. (1980) [hereinafter cited as H.R. REP. No. 1396].

18. Karlen, *supra* note 3, at 212; G. FLETCHER, *supra* note 12, at 442 n.13; W. LAFAVE & A. SCOTT, *supra* note 12, at 192; G. WILLIAMS, THE MENTAL ELEMENT IN CRIME 57 (1965). The question of whether negligence is a mental state or conduct is also one that concerned tort scholars for decades. *See, e.g.*, Terry, *Negligence*, 29 HARV. L. REV. 40 (1915); Edgerton, *Negligence, Inadvertence, and Indifference*, 39 HARV. L. REV. 849 (1926); Seavey, *Negligence—Subjective or Objective?*, 41 HARV. L. REV. 1 (1927).

19. MODEL PENAL CODE § 1.13(9) (Proposed Official Draft 1962).

20. *Id.* § 1.13(9) states,

> "element of an offense" means (i) such conduct or (ii) such attendant circumstances or (iii) such a result of conduct as
>
> (a) is included in the description of the forbidden conduct in the definition of the offense; or
>
> (b) establishes the required kind of culpability; or
>
> (c) negatives an excuse or justification for such conduct; or
>
> (d) negatives a defense under the statute of limitations; or
>
> (e) establishes jurisdiction or venue.

21. *Id.* § 1.13(5).

22. G. WILLIAMS, *supra* note 11, at 12.

includes a requirement of knowledge.[23] For the purposes of this Article, when the physical component, or *actus reus*, of the crime is discussed, this will mean exclusively the physical act or failure to act, the physical existence of circumstances, or specific results of conduct.

The *Model Penal Code* has replaced the mental component, or *mens rea*, with what it labels "kinds of culpability."[24] This label is in fact more accurate than mental state, mental element, or *mens rea*, since it avoids unnecessary semantic debate over whether negligence is a mental state.[25] It should be noted that strict liability crimes require no culpability,[26] and thus for these crimes there is, in theory, no mental component, not even an objective one of negligence.[27]

There are four kinds of culpability utilized by the *Model Penal Code* to replace the myriad common law terms. They are purpose, knowledge, recklessness, and negligence.[28] It was the belief of the drafters of the *Model Penal Code*[29] and many of the new state codes[30] that these four terms were sufficient to express all necessary levels of culpability.[31] Agreement on this point is not universal. Some new codes use fewer kinds of culpability,[32] and some authors

23. MODEL PENAL CODE § 2.01(4) (Proposed Official Draft 1962) states, "Possession is an act . . . if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession." See discussion in part IV, *infra*, as to the implicit mental element in actions and omissions, especially text accompanying notes 129-38, *infra*.

24. MODEL PENAL CODE § 2.02 (Proposed Official Draft 1962).

25. *See* note 18, *supra*.

26. MODEL PENAL CODE §§ 2.02(1), 2.05 (Proposed Official Draft 1962).

27. *But see* note 13, *supra*.

28. MODEL PENAL CODE § 2.02(2) (Proposed Official Draft 1962).

29. "The draft acknowledges four different kinds of culpability . . . . The resulting distinctions are, we think, both necessary and sufficient for the general purposes of penal legislation." MODEL PENAL CODE § 2.02, Comments at 124 (Tent. Draft No. 4, 1955).

30. *See, e.g.*, HAWAII REV. STAT. § 702-206, Commentary (1976); THE PROPOSED CRIMINAL CODE OF THE STATE OF MISSOURI § 7.020, Comment at 76 (1973); 1 WORKING PAPERS, *supra* note 3, at 123.

31. However, even in those codes in which only four kinds are defined, it is possible to create additional kinds of culpability by combining terms. For example, the *Model Penal Code*, in defining indecent exposure, speaks of circumstances in which the actor "knows his conduct is likely to cause affront or alarm." MODEL PENAL CODE § 213.5 (Proposed Official Draft 1962). This is a mixing of knowledge with a risk, and thus a cross of knowledge with recklessness.

32. *E.g.*, KAN. CRIM. CODE § 21-3201 (Vernon 1974) uses just two concepts: willful (includes knowing, intentional, and purposeful) and wanton (includes reckless disregard, gross negligence, culpable negligence, wanton negligence, and recklessness). The staff draft of a proposed code for California uses three kinds of culpability: specific intent, knowledge, and criminal negligence. JOINT LEGISLATIVE COMMITTEE FOR REVISION OF THE PENAL CODE, THE CRIMINAL CODE § 405 (Staff Draft). [hereinafter cited as PROPOSED CALIFORNIA CRIMINAL CODE].

believe that additional terms are necessary.[33] However, the majority of the new codes use these four levels, though with modifications in the definitions.

The four kinds of culpability will be examined in detail to clarify the meaning of recklessness, but it is essential, at the outset, to differentiate subjective from objective kinds of culpability. Subjective and objective are terms with a variety of meanings, but in the context of this article they will be used in the following senses.[34] When objective is used with respect to a kind of culpability, it refers to an abstract legal norm or standard, often that of the hypothetical reasonable person, rather than to the actual thoughts, beliefs, or knowledge of the person accused of the crime. Thus the standard is an external one, looking at what a reasonable person would have known or perceived under the circumstances, rather than attempting to probe into the internal thoughts of the accused. For example, where a defendant is accused of receiving stolen property, having reason to know it was stolen, it is irrelevant that he did not realize from the absurdly low price and mutilated serial numbers that the property was probably stolen. The trier of fact must decide whether a reasonable person would have realized the property was stolen.

When subjective is used with respect to a kind of culpability, it refers to the actual thoughts of the person (or actor)[35] charged with a

33. Edward Barrett, a member of the advisory board to the Joint Legislative Committee considering the Proposed California Criminal Code, stated, "I think it is a major mistake not to provide for recklessness as a culpable mental state separate both from intentional acts and those resulting from criminal negligence." PROPOSED CALIFORNIA CRIMINAL CODE, *supra* note 32, at 195. Other commentators have suggested systems of culpability using more than four mental states. "The newer *mens rea* terms derived from proposed and adopted codes, though often more precise, fail to describe certain relevant mental states, a failure resulting in part from their paucity and narrowness." Karlen, *supra* note 3, at 191. Karlen uses six kinds of culpability, breaking negligence into advertent and inadvertent negligence and breaking recklessness into advertent and inadvertent recklessness. *Id.* at 241-43. Professor Silving also uses more kinds of culpability than the *Model Penal Code*, including such terms as knowledge, awareness, intent, purpose, reckless, de facto recklessness, and negligence. H. SILVING, CONSTITUENT ELEMENTS OF CRIME 206-13 (1967). *See also* Brady, *Recklessness, Negligence, Indifference, and Awareness*, 43 MOD. L. REV. 381, 391-92 (1980).

34. The terms subjective and objective will appear later in this article with different meanings. However, after an explanation of those other meanings, other usages of the terms subjective and objective will be avoided to as great an extent as possible to avoid confusion. The terms subjective and objective will be utilized later with respect to risk or probability, and with respect to kinds of evidence or proof. Professor Perkins also calls the *actus reus* the objective component of a crime and the *mens rea* the subjective component. R. PERKINS, *supra* note 11, at 743. Some writers also speak of recklessness having an objective part and a subjective part. *E.g.*, G. WILLIAMS, *supra* note 11, at 58; H. SILVING, *supra* note 33, at 234.

35. The term actor is commonly used in the *Model Penal Code* to refer to a person engaging in prohibited conduct or charged with the crime. "'[A]ctor' includes, where relevant, a

crime. This is an internal standard in that the trier of fact must attempt to ascertain what were the thoughts of the actor.

Though the difference between objective and subjective can be stated rather clearly, in practice there is potential for confusion. Assume, for example, that a person is charged with receiving stolen property knowing it to be stolen. Absent a direct admission of the accused, how is the trier of fact to determine whether the accused actually knew[36] that the property was stolen? This is usually inferred from circumstantial evidence such as testimony that the accused concealed the property or that he forged receipts. To help them decide what was the mental state of the accused, the jurors may be told that if, under the circumstances, a reasonable person would have known the property was stolen, then they may infer that the accused knew, in fact, that the property was stolen. Such an instruction is subtly different from the objective standard, but so subtle that jurors and judges may be confused. Here the trier of fact is being asked to decide what the defendant actually thought. While it is fair to infer[37] that if a reasonable person would have known, then the accused would have known, the issue is still whether the accused actually knew. The defendant is entitled to be acquitted if the jury entertains a reasonable doubt as to whether the accused actually knew that the property was stolen. It is not sufficient for conviction that a reasonable person would or should have known the property was stolen.[38]

person guilty of an omission." MODEL PENAL CODE § 1.13(6) (Proposed Official Draft 1962). "'[P]erson,' 'he' and 'actor' include any natural person and, where relevant, a corporation or unincorporated association." *Id.* § 1.13(8).

36. The *Model Penal Code* does not require proof of absolute certainty, even where knowledge is the required kind of culpability. Under § 2.02(7), knowledge of a fact is established if the person "is aware of a high probability of its existence, unless he actually believes it does not exist." *Id.* § 2.02(7).

37. Precise use of the term infer is essential as indicated by recent decisions of the United States Supreme Court. Inference, or infer, whenever used in this Article, will mean merely a common sense deduction from evidence. Inference when confused with the concept of presumption has the effect of converting the common sense deduction into a rule of law. A presumption is a rule of law that proof of one fact has the legal effect of establishing another, presumed fact. This can have the effect of unconstitutionally shifting the burden of persuasion to the defendant thereby depriving him of his liberty without due process of law. Sandstrom v. Mont., 442 U.S. 510 (1979). Therefore the subtle difference between instructing the jury that they may *infer* something and that they may *presume* something may make the difference between reversal and affirmance on appeal. Compare *Sandstrom* with State v. Coleman, — Mont. —, 605 P.2d 1000, 1053 (1980). On the importance of using these terms accurately, *see also* County Court v. Allen, 442 U.S. 140 (1979).

38. G. WILLIAMS, *supra* note 11, at 55; J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 121 (2d ed. 1960).

These definitions of subjective and objective suggest that subjective kinds of culpability really do represent mental states of the accused, whereas objective kinds of culpability represent a legal norm rather than a mental state. However, in much of the legal literature and case law the terms mental state, mental element, or mental component are still used to refer to both subjective and objective kinds of culpability. It is only when the crime is one of strict liability that the writer will say that no mental state is required. Therefore, for the purposes of clarity in this article, mental states will be classified as objective or subjective, though the term objective mental state may be objected to as internally contradictory.[39]

One other background matter should be considered to avoid confusion. It is of utmost importance in analyzing the mental component of the crime in general, or recklessness in particular, to recognize that a single crime may require more than one kind of culpability, varying with regard to conduct, the results, and the circumstances. To illustrate this the *Model Penal Code* Commentary uses the crime of rape. The accused must have purposely engaged in the conduct, sexual intercourse. But the crime of rape further requires that the sexual intercourse be with a woman, not the wife of the accused, and without the woman's consent. In many states it will probably suffice that the accused should have known the woman was not his wife or was not consenting.[40] Therefore as to these elements ordinary negligence may suffice.

Extreme confusion in the law has resulted from the failure to recognize that a crime may involve more than one kind of culpability. To characterize a crime as one of recklessness or knowledge or strict liability is likely to be misleading.[41] The drafters of the *Model Penal Code* stress that careful analysis requires examination of the mental component as to each element. They state in the Commentary, "The approach is based upon the view that clear analysis re-

39. See note 18, *supra*, for citations suggesting that it is inaccurate to refer to negligence, an objective kind of culpability, as a mental state.

40. Mistake respecting consent to intercourse must be reasonable (i.e. not negligent, though this may mean ordinary negligence rather than the gross deviation required by the *Model Penal Code* definition). U.S. v. Short, 4 U.S.C.M.A. 437, 16 C.M.R. 11 (1954); W. LAFAVE & A. SCOTT, *supra* note 12, at 353 n.12; Wechsler, *supra* note 9, at 28. Mistake respecting marital status must also be reasonable, and, as to this, negligence may also suffice. *Id.* Mistakes respecting marital status for crimes such as bigamy and adultery are sometimes disallowed even if reasonable, resulting in strict liability as to these elements. W. LAFAVE & A. SCOTT, *supra* note 12, at 358-59.

41. MODEL PENAL CODE § 2.02, Comments at 124 (Tent. Draft No. 4, 1955); W. LAFAVE & A. SCOTT, *supra* note 12, at 193-94; Karlen, *supra* note 3, at 209, 241 G. WILLIAMS, *supra* note 18, at 9.

quires 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."[42] The drafters of the *Model Penal Code* further stress this in the text of the code as follows:

> §2.02(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.[43]

Many state codes also stress the importance of analyzing mental states separately as to each element.[44]

The definitions in the *Model Penal Code* of the kinds of culpability explicitly take into account the need to consider separately the different elements of a crime. For example, the definition of purposely varies depending on whether the element to which it is applied is the nature of the conduct or the result of the conduct on one hand, or the attendant circumstances on the other hand.[45] With regard to acting knowingly, the definition varies depending on whether the element is the nature of the conduct or the circumstances on the one hand, or the results of the conduct.[46] The definitions of recklessly and negligently do not reflect as plainly such differences with regard to the different elements. The definitions of recklessly and negligently are only one paragraph each, rather than being split into separate paragraphs with respect to different elements, as is the case

42. MODEL PENAL CODE § 2.02, Comments at 123 (Tent. Draft No. 4, 1955).

43. MODEL PENAL CODE § 2.02(4) (Proposed Official Draft 1962). Compare the confusion which results when the same kind of culpability is not required for all elements. *See* part IV, and especially notes 148-49, *infra*, and accompanying text.

44. *E.g.*, ARK. STAT. ANN. § 41-203, Commentary at 35 (1977), quoting the *Model Penal Code* Commentary cited in note 42, *supra*; HAWAII REV. STAT. § 702-204, Commentary at 210 (1976); N.J. STAT. ANN. § 2C:2-2, Commentary at 40 (West 1981).

45. Purposely with respect to nature of conduct or results thereof is defined in terms of "conscious object," whereas purposely with respect to attendant circumstances is defined in terms of "is aware . . . or . . . believes or hopes that they exist." MODEL PENAL CODE § 2.02(2)(a) (Proposed Official Draft 1962).

46. A person acts knowingly with respect to nature of conduct or attendant circumstances when "he is aware that his conduct is of that nature or that such circumstances exist. . . . *Id.* § 2.02(b)(i). A person acts knowingly with respect to a result when "he is aware that it is practically certain that his conduct will cause such a result." *Id.* § 2.02(b)(ii). The *Code* also states in § 2.02(7) that knowledge of the existence of a fact is established when "a person is aware of a high probability of its existence, unless he actually believes that it does not exist." *Id.* § 2.02(7).

with purposely and knowingly.[47] But the definitions of both recklessly and negligently do indicate that they apply only to material elements which exist or result. To the extent this would exclude the element of conduct, some difficult analytical problems are raised and will be discussed later.[48] To emphasize that recklessness and negligence may have different meanings depending on the type of element modified, some state codes split up the definition.[49] Thus, throughout this article, careful attention will be paid to which element recklessness is being used to modify.[50]

*B. Common Law Background (Pre-*Model Penal Code*)*

At common law,[51] much of the confusion surrounding the concept of *mens rea* in general, and recklessness specifically, was the result of courts and legislatures using a large variety of terms to establish fault without defining those terms. Due to the lack of definition, different terms such as malicious, wilful, wanton, criminal negligence, culpable negligence, and gross negligence were used interchangeably with recklessness. Also a term such as recklessness or negligence might be given different meanings in different states, or even in the same state, depending on the crime involved. Rather than attempting to undo the confusion of the myriad common law and statutory terms relating to fault, the drafters of the *Model Penal Code* and of many of the new state codes abandoned most of the common law terminology in favor of the four *Model Penal Code* kinds of culpability. Nevertheless, in order to fully appreciate the improvements made by the *Model Penal Code* and to identify remaining problems, it is useful to look at the common law terminology. Additionally, courts in states which have adopted the *Model Penal Code* occasionally use cases predating the new *Code* to explain *Code* terms. To the extent these pre-*Code* cases are not the same as the *Model Penal Code* or the new state codes, substantial confusion

47. *Compare id.* § 2.02(2)(a) & (b) with *id.* § 2.02(2)(c) & (d). The later two subsections, defining recklessly and negligently, have no comparable subdivision.

48. *See* part IV, *infra*.

49. *E.g.*, HAWAII REV. STAT. § 702-206(3)-(4) (1976); ME. REV. STAT. ANN. tit. 17A, §§ 35.3, 35.4 (Pamph. 1981).

50. As will be explained in part IV, *infra*, recklessness should not be used to modify the element of conduct. In most states the definition is modified to use recklessness only in connection with results and circumstances.

51. The term common law is somewhat misleading, since for purposes of this article the reference is more accurately to judge-made law and the early statutory codifications of the criminal law, which were essentially codifications of the common law. *See* Wechsler, *supra* note 2, at 419-20; F. REMINGTON, CASES AND MATERIALS ON CRIMINAL LAW AND ITS PROCEDURES 13 (5th ed. 1969); Kadish, *supra* note 5, at 1137.

can result.[52]

Before so many states modeled their new criminal codes on the *Model Penal Code* there was considerable difficulty in finding clear and universally accepted definitions of most concepts of *mens rea*. Even a term as apparently clear as *know* created considerable confusion. For example, with respect to the crime of receiving stolen property knowing it to be stolen, one would expect, based on common understanding of the term know, that the recipient of the property would have to have known it was stolen. However, in many jurisdictions know was interpreted to include "should have known," or that "a reasonable person would have known that the property was stolen."[53]

Glanville Williams, the English scholar, has commented, "A layman might find it painfully ridiculous that, after a thousand years of legal development, lawyers should still be arguing about the expressions used to denote the basic ideas of our legal system."[54] He also wrote, "English judges tend to eschew general definitions and merely *use* the words denoting legal concepts. Unfortunately, the desire of the judges to achieve particular results in particular cases leads them too often to warp a concept in order to meet the exigency of the moment. . . ."[55]

The confusion of terminology has been especially great when dealing with fault that has not been viewed as intentional, such as when the accused causes an unintended result or where circumstances exist that he does not know or believe to exist.[56] While in

52. *See, e.g.*, People v. Taylor, 31 A.D.2d 852, 297 N.Y.S.2d 192, 194 (1969).

53. Pettus v. State, 200 Miss. 397, 410, 27 So. 2d 536, 540 (1946). Sometimes the legislature expressly makes the objective standard a permissible alternative to the subjective standard, allowing conviction on proof that the accused knew or should have known that the property was stolen, or knew of facts which would lead a reasonable man to know that the property was stolen. In some cases the courts refuse to believe that the legislature really intended to enact an objective standard. In State v. Ware, 27 Ariz. App. 645, 557 P.2d 1077 (1976), the Arizona Court of Appeals held that a statute including the terms "knowing or having reason to believe the property was stolen" required proof of subjective knowledge, not a reasonable man standard. In State v. Shipp, 93 Wash. 2d 510, 610 P.2d 1322 (1980), the Supreme Court of Washington held that a statute, which defined knowledge as when a person "is aware of a fact . . . or . . . he has information which would lead a reasonable man in the same situation to believe that facts exist . . .", had to be read as requiring proof of subjective awareness. However, this statute did allow the jury to draw an inference of subjective awareness from proof that a reasonable man would have had the knowledge. 93 Wash. 2d at 516, 610 P.2d at 1325.

54. G. WILLIAMS, *supra* note 18, at 9.

55. *Id.*

56. For the difference between know and believe, see part VI.A. 2 & 4, *infra*. *See also* R. PERKINS, *supra* note 11, at 654; SENATE COMM. ON THE JUDICIARY, CRIMINAL CODE REFORM

civil law it is common to impose fault for unintentional behavior so long as it is negligent, given the different purposes of criminal law,[57] it is usually agreed that something more than ordinary civil negligence should be required for criminal liability.[58]

The issue of what more than civil negligence should be required for criminal liability has arisen frequently in the context of involuntary manslaughter, which at common law was defined as an act done "without due caution or circumspection."[59] Legislatures, in enacting criminal codes, often adopted this common law language without any defintion of "without due caution or circumspection."[60] It was left to the courts to delineate the difference between the fault required for involuntary manslaughter and civil or tort negligence. One approach taken was to require that the conduct constitute more than an ordinary deviation from the standard of care of a reasonable person. This was often phrased as a requirement of a gross deviation from the standard of care of a reasonable person, or gross negligence.[61] Another approach focused on the actor's awareness that his or her conduct was causing a risk of harm, something not required under the civil tort standard.[62] Use of awareness of the risk in distinguishing criminal from civil liability was justified by the view that engaging in conduct while actually aware of a risk is more evil or criminally culpable than engaging in the same conduct while unaware of the risk. Note that under this approach the deviation from the standard of care need not be a gross deviation in terms of the conduct. The difference is in the subjective mental state of the accused. A third approach is to require both that the conduct constitute a gross deviation from the standard of the reasonable person

ACT OF 1979, S. REP. NO. 553, 96th Cong., 2d Sess. 63 (1980) [hereinafter cited as S. REP. NO. 553].

57. Instead of allocating a loss between a victim and a wrongdoer, as the civil law does, the purpose of the criminal law is to deter, rehabilitate, or deliver retribution on the wrongdoer. *See* J. HALL, *supra* note 38, at 121, 136-37; W. LAFAVE & A. SCOTT, *supra* note 12, at 11-12; MODEL PENAL CODE § 1.02 (Proposed Official Draft 1962).

58. W. LAFAVE & A. SCOTT, *supra* note 12, at 209, 211; Remington & Helstad, *supra* note 2, at 658 n.52; Haddad, *supra* note 6, at 6 n.13.

59. W. LAFAVE & A. SCOTT, *supra* note 12, at 587. Many of the early state codes were based on the *Field Code*, which was based largely on what Field thought the common law said. *See* note 51, *supra*.

60. W. LAFAVE & A. SCOTT, *supra* note 12 at 587.

61. *Id.* at 212-13, 588 n.11; R. PERKINS, *supra* note 11, at 72; Commonwealth v. Pierce, 138 Mass. 165 (1884).

62. W. LAFAVE & A. SCOTT, *supra* note 12, at 213 n.17, 588 n.9; J. HALL, *supra* note 38, at 115; MODEL PENAL CODE § 201.4, Comments at 52 (Tent. Draft No. 9, 1959); Trujillo v. People, 133 Colo. 186, 292 P.2d 980 (1956).

and that there is subjective awareness of the risk by the actor.[63] The *Model Penal Code* requires gross deviation from the standard of conduct of a reasonable person both for negligence and recklessness, and additionally requires for recklessness the subjective awareness of the risk of harm.

The common law interpretations, however, were frequently unclear, both in terms used and definition of those terms.[64] For example, some states required gross negligence for involuntary manslaughter, others required culpable negligence, others criminal negligence, aggravated negligence, or recklessness.[65] Some states defined culpable or gross negligence as requiring a subjective mental element, whereas others treated it as an objective standard.[66] Some of the states requiring more than criminal negligence used the term reckless, but then defined it objectively.[67] And some jurisdictions, while purporting to require a subjective standard, so confused the issue of proof by presumptions that the subjective standard was effectively converted into an objective one.[68]

The *Model Penal Code* definitions of kinds of culpability eliminate much of this common law confusion. First, the variety of terms used for fault in regard to unintentional results or lack of knowledge of circumstances has been reduced to two—recklessness and negligence. The new codes make it unnecessary to try to distinguish recklessness and negligence from wanton, wicked, evil, and other undefined terms.[69] Additionally, the *Model Penal Code* defines reck-

63. W. LAFAVE & A. SCOTT, *supra* note 12, at 213, 576 n.19.

64. *Id.* at 211-12; Karlen, *supra* note 3, at 209, 210; J. HALL, *supra* note 38, at 122-33; *see generally* MODEL PENAL CODE § 201.3, Comments at 50-53 (Tent. Draft No. 9, 1959).

65. People v. Joseph, 11 Misc. 2d 219, 172 N.Y.S. 2d 463, 480 (Kings County Ct. 1958); W. LAFAVE & A. SCOTT, *supra* note 12, at 212; J. HALL, *supra* note 38, at 122-33; R. PERKINS, *supra* note 11, at 755.

66. Remington & Helstad, *supra* note 2, at 660 n.58 (gross negligence is subjective). Stating that it is an objective standard, *see* W. LAFAVE & A. SCOTT, *supra* note 12, at 209 n.4; C. BASSIOUNI, SUBSTANTIVE CRIMINAL LAW 180 (1936); MODEL PENAL CODE § 201.4, Commentary at 51-52 (Tent. Draft No. 9, 1959). *See also* authorities cited in note 61, *supra*. In People v. Eckert, 2 N.Y.2d 126, 138 N.E.2d 794, 157 N.Y.S.2d 551 (1956), the court treated gross negligence as an objective standard.

67. *E.g.*, Commonwealth v. Welansky, 316 Mass. 383, 55 N.E.2d 902 (1944); Lester v. State, 562 P.2d 1163, 1167 (Okla. Crim. 1977). *Compare* RESTATEMENT (SECOND) OF TORTS § 500 (1965) which defines reckless by an objective standard. R. PERKINS, *supra* note 11, at 73 n.45.

68. *See* J. HALL, *supra* note 38, at 120-21; G. WILLIAMS, *supra* note 11, at 55.

69. However, some caution is still required. For example, Kentucky and the Proposed Oklahoma Code, S. 46, 35th Leg., 1st Sess. (1975), use the *Model Penal Code* definition of recklessness but label it wanton and use the *Model Penal Code* definition of negligence but label it recklessness. "Because of the labels selected by the legislature for the third and fourth mental states, the confusion and contradiction of the past . . . could easily become as much a

lessness and negligence so that judicial interpretation, which resulted in so many different interpretations, is no longer necessary. The same definitions apply throughout the code.[70]

The *Model Penal Code* has resolved the question of whether more than ordinary negligence is required for criminal liability. For negligence the *Code* requires a gross deviation from the standard of the reasonable person, but not actual awareness of the risk.

In summary, the *Model Penal Code* has clearly distinguished recklessness from negligence by requiring subjective awareness of the risk for the former. The *Code* also makes it clear that recklessness, like negligence, requires more than an ordinary deviation from the standard of care of a reasonable person. However, many questions regarding recklessness remain. To the extent that the *Code* definition of recklessness includes the concepts of negligence and knowledge, some questions regarding those two types of culpability will also be explored.

C. Model Penal Code *Kinds of Culpability*

The four kinds of culpability used by the *Model Penal Code* are defined in § 2.02(2) as follows:

> (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 circum-

factor in the new doctrine of mens rea as it was in the old." Lawson, *Kentucky Penal Code: The Culpable Mental States and Related Matters*, 61 KY. L.J. 657, 667 (1973). Also, some states retain the term wilfully. *E.g.*, MODEL PENAL CODE § 2.02(8) (Proposed Official Draft 1962) states, "A requirement that an offense be committed wilfully is satisfied if a person acts knowingly with respect to the material elements of an offense, unless a purpose to impose further requirements appears." In some new codes, however, wilfully is defined differently. *E.g.*, KAN. CRIM. CODE § 21-3201(2) (Vernon 1974), "Willful conduct is conduct that is purposeful and intentional and not accidental." N.D. CENT. CODE § 12.1-02-02.1 (1976). "For the purposes of this title, a person engages in conduct . . . '[w]illfully' if he engages in the conduct intentionally, knowingly, or recklessly."

70. However, some confusion may still result with respect to the application of these definitions to offenses found outside the penal code of the state. For example, in Ohio the court held that the definition of reckless found in the criminal code, OHIO REV. CODE ANN. § 2901.22(C) (Page 1980), did not apply to the offense of reckless driving as defined in the vehicle code. State v. Beener, 54 Ohio App. 2d 14, 374 N.E.2d 435 (1977); *Contra*, State v. Klein, 51 Ohio App. 2d 1, 364 N.E.2d 1169 (1977).