

KRS 218A.990

Schedule	Drug Classification	Possession (for personal use)		Transfer (non-profit)		Traffic	
		First offense	Each subsequent offense	First offense	Each subsequent offense	First offense	Each subsequent offense
III	Narcotic or Non-narcotic**	Up to 1 year with DMH or Discharge Up to 1 year jail and/or \$500 max.	Up to 1 year jail and/or \$500 max. (DMH)	Up to 1 year jail and/or \$500 max.	1-5 years and/or \$3,000-\$5,000	1-5 years and/or \$3,000-\$5,000	5-10 years and/or \$5,000-\$10,000
IV-V	Narcotic or Non-narcotic	Up to 1 year with DMH or Discharge Up to 1 year jail and/or \$500 max.	Up to 1 year jail and/or \$500 max. (DMH)	90 days jail or \$500	90 days jail or \$500	Up to 1 year jail and/or \$500 max.	1-5 years and/or \$3,000-\$5,000

\* If a person fails to cooperate in DMH program, he is remanded to sentencing court.

\*\* Statute specifies non-narcotic for Schedule III possession penalties, but is ambiguous concerning penalties for possession of Schedule III narcotic drugs.

Proposed Penal Code

Schedule	Drug Classification	Possession		Transfer (non-profit)		Trafficking**	
		First offense	Each subsequent offense	First offense	Each subsequent offense	First offense	Each subsequent offense
III	Narcotic or Non-narcotic	Class A misdemeanor. Jail up to 1 year. Fine not more than \$500	Class A misdemeanor. Jail up to 1 year. Fine not more than \$500	Class A misdemeanor. Jail up to 1 year. Fine not more than \$500	Class A misdemeanor. Jail up to 1 year. Fine not more than \$500	Class D felony	1-5 years*
IV-V	Narcotic or Non-narcotic	Class A misdemeanor. Jail up to 1 year. Fine not more than \$500	Class A misdemeanor. Jail up to 1 year. Fine not more than \$500	Not a separately defined offense	Not a separately defined offense	Class A misdemeanor. Jail up to 1 year. Fine not more than \$500	Class A misdemeanor. Jail up to 1 year. Fine not more than \$500

\* Sec. 303. If placed on probation or conditional discharge, provision for fine not to exceed \$10,000 or double the gain from commission of the offense, whichever is greater.

\*\* Trafficking includes manufacture, sale, transfer or possession with intent to sell, of any controlled substance.

# Kentucky Penal Code: The Culpable Mental States and Related Matters

By ROBERT G. LAWSON\*

## Introduction

All efforts to improve the criminal law of this commonwealth prior to 1972 were directed toward relatively narrow problems. Legislative changes in the law had been made from time to time, almost always without conscious regard for the manner in which related principles were affected. Defects of considerable importance resulted. The criminal law became substantially disjointed and difficult of administration. Unjust and inequitable treatment of offenders was more prominent than its opposite.<sup>1</sup> In some instances sanctions were clearly inadequate for the type of behavior sought to be controlled.<sup>2</sup> In others they were grossly disproportionate to the social harms used to justify their imposition.<sup>3</sup> Many crimes which had come into being through piecemeal legislation had become obsolete through the passage of time.<sup>4</sup>

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<sup>1</sup> See Lawson, *Criminal Law Revision in Kentucky: Part I—Homicide and Assault*, 58 Ky. L.J. 242 (1970); Lawson, *Criminal Law Revision in Kentucky: Part II—Inchoate Crimes*, 58 Ky. L.J. 695 (1970).

<sup>2</sup> For example, attempt to commit murder under some circumstances carried a maximum penalty of twelve months in jail. See *Gibson v. Commonwealth*, 290 S.W.2d 603 (Ky. 1956). The same limitation on penalty existed for a conviction of conspiracy to commit murder. KY. REV. STAT. § 437.110 (1971) [hereinafter cited as KRS].

<sup>3</sup> See, e.g., KRS § 433.250(2) (stealing a hog having a value of four dollars—five years maximum imprisonment); KRS § 433.250(4) (stealing a fowl having a value of two dollars—five years maximum imprisonment); KRS § 435.170(1) (shooting at another without wounding and without intent to kill—twenty-one years maximum imprisonment).

<sup>4</sup> See, e.g., KRS § 432.090 (discrimination against person in uniform); KRS § 432.560 (bringing pauper into state or county); KRS § 433.330 (maliciously damaging salt works); KRS § 433.510 (grazing livestock on capital grounds); KRS § 433.770 (willfully removing or damaging boundary marker).

Other defects of equal importance resulted from a failure of legislative action. For example, many of the crimes committed most frequently, such as murder, robbery, larceny, and burglary, had never been statutorily defined.<sup>5</sup> The legislature had established sanctions for such crimes but had left for the judiciary the more difficult task of describing the types of conduct proscribed. More significantly, major segments of the criminal law were entirely common law in form. No effort had ever been made to reduce the doctrines of mens rea, justification, responsibility, complicity, etc., to statutory form. Such was the condition of this body of law at the beginning of 1972.

In its most recent session the General Assembly attempted to remedy these defects through the adoption of a comprehensive penal code.<sup>6</sup> With this effort the Legislature did not content itself with a revision of statutes which had been previously enacted. It also codified much of the common law of crimes. The important changes in criminal law brought about by this legislation are literally innumerable. There is one change, however, which stands out. Without question the most significant single accomplishment of the entire Code is the clarification that has been provided the doctrine of mens rea.<sup>7</sup> The confusion which previously existed in this area of the law is not totally describable. Its magnitude may be indicated through a listing of mental states used to define only a small portion of Kentucky's statutory offenses:

A. *Crimes Against Persons:*

- (i) Willful—Murder.<sup>8</sup>
- (ii) Wanton—Involuntary Manslaughter, First Degree.<sup>9</sup>
- (iii) Reckless—Involuntary Manslaughter, Second Degree.<sup>10</sup>
- (iv) Negligence—Homicide by Operation of Automobile.<sup>11</sup>
- (v) Unlawfully—Statutory Rape.<sup>12</sup>
- (vi) Forcibly—Kidnapping.<sup>13</sup>

<sup>5</sup> See, e.g., KRS §§ 433.120, 433.220, 435.010, 435.020.

<sup>6</sup> Ky. Acrs ch. 385 (1972) [chapter 385 is hereinafter cited as KYPC].

<sup>7</sup> KYPC §§ 12-16; PROPOSED KY. REV. STAT. §§ 433B.1-010 to 433B.1-050 [hereinafter cited as [KRS]].

<sup>8</sup> KRS § 435.010.

<sup>9</sup> KRS § 435.022(1).

<sup>10</sup> KRS § 435.022(2).

<sup>11</sup> KRS § 435.025.

<sup>12</sup> KRS § 435.090.

<sup>13</sup> KRS § 435.140.

- (vii) Willfully and maliciously—Shooting and Wounding.<sup>14</sup>
- (viii) Intent—Detaining a Woman Against Her Will.<sup>15</sup>
- (ix) Willfully, knowingly and maliciously—Spreading Slanderous Report.<sup>16</sup>
- (x) Knowingly—Fraudulently Having One Adjudged Insane.<sup>17</sup>

B. *Crimes Against Property:*

- (i) Willfully and maliciously—Arson.<sup>18</sup>
- (ii) Willfully, intentionally, or maliciously—Burning Woods.<sup>19</sup>
- (iii) Unlawfully—Burning Weeds.<sup>20</sup>
- (iv) Feloniously—Stealing from Public Building.<sup>21</sup>
- (v) Willfully and knowingly—Mining Coal of Another.<sup>22</sup>
- (vi) Willfully and fraudulently—Damaging Watercraft.<sup>23</sup>

As one might anticipate, the judiciary has experienced substantial difficulty in its efforts to construe and apply these terms. It is reflected in part in some of the definitions provided by the Court of Appeals: *willfully*, for example, has been defined to mean "intentionally";<sup>24</sup> *feloniously* has been defined as "proceeding from an evil heart or purpose";<sup>25</sup> and, *maliciously* has been defined as "the absence of legal excuse or justification."<sup>26</sup> If used only by lawyers, it might be arguable—though not convincingly—that these definitions are meaningful. Unfortunately their use is not so restricted. This language is carefully inserted in jury instructions in an attempt to convey to jurors distinct ideas about criminal behavior. No one could seriously pretend that the effort meets with much success. When used for this purpose the definitions are scarcely more intelligible than the terms which they define.

Other problems reflected in this list of mental states are more obvious. Some—though used to describe moral culpability—are

<sup>14</sup> KRS § 435.170(1).

<sup>15</sup> KRS § 435.110.

<sup>16</sup> KRS § 435.300.

<sup>17</sup> KRS § 435.310.

<sup>18</sup> KRS § 433.010.

<sup>19</sup> KRS § 433.060.

<sup>20</sup> KRS § 433.070.

<sup>21</sup> KRS § 433.180.

<sup>22</sup> KRS § 433.270.

<sup>23</sup> KRS § 433.320.

<sup>24</sup> Hall v. Commonwealth, 159 S.W. 1155, 1156 (Ky. 1913).

<sup>25</sup> Ewing v. Commonwealth, 111 S.W. 352, 355 (Ky. 1908).

<sup>26</sup> Hall v. Commonwealth, 159 S.W. 1155 (Ky. 1913).

not really states of mind. "Unlawfully" and "feloniously" are examples. These two words are descriptive of blameworthy conduct. And when used alone to describe the culpability of behavior, the judiciary is obliged to add to the statutory definition of the offense an element of mens rea. The redundancy contained in the mental element of some crimes is another obvious difficulty. When the term *willfully* has been defined to mean intentionally, the use of "intentionally, willfully, or maliciously" as alternative mental elements for a single crime creates an insurmountable task of interpretation. If "maliciously" is given its most common construction, this combination of words constitutes a double superfluity. Finally, it should be apparent to almost anyone that there exists in this area a needless proliferation of terms. One of the purposes of the doctrine of mens rea—probably the most significant one—is to provide a structure for classifying offenders in accordance with the degree of wrongfulness of their behavior. This purpose has been almost totally frustrated through the seemingly endless development of new types of mens rea.

In the new Code only four culpable mental states are used to define criminal behavior. The provision which creates and defines these mental states is the major focus of this writing. It would seem advisable at the very outset to set it forth in full:

- (1) "Intentionally"—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.
- (2) "Knowingly"—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.
- (3) "Wantonly"—A person acts wantonly 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 the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts wantonly with respect thereto.

- (4) "Recklessly"—A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.<sup>27</sup>

In discussing the foregoing provision this article has two subparts. In the first an attempt is made to describe in some detail the manner in which these four states of mind are intended to function, with special attention given to the changes made in pre-existing doctrine. The second consists of a discussion of the manner in which the culpable mental states function in relation to some other parts of the new legislation. Special consideration is given to the provision dealing with criminal causation. It is hoped that some assistance will be provided with the interpretation and application of this important part of the new Code when it becomes effective in July of 1974.

## I. CULPABLE STATES OF MIND: THE "OLD" AND THE "NEW"

### A. Introduction

For the first time the criminal law of this state has precise, legislative definitions of the mental states used in defining crimes. By providing these, the Code has unquestionably added clarity to the doctrine of mens rea. In two very specific ways, however, the new legislation does more toward this end. The first involves an elimination of most of the "old" states of mind, a change that can be most appropriately described as a consolidation of ideas. Many of the terms previously used to describe mental states were duplicative. A single attitude of mind might have been identified by two or three different labels. As indicated above, only four are used in the Code ("intentionally", "knowingly", "wantonly" and "recklessly") and each is explicitly described as a meaning. For additional assurance that others do not creep back into the law through judicial interpretation or future legislative action, a provision was enacted to require one of these four mental states

<sup>27</sup> KYPC § 13 [KRS § 433B.1-020].



for every criminal offense.<sup>28</sup> Only one exception is made to this requirement. Offenses which are intended to impose "absolute liability" require no mental state.<sup>29</sup> This feature of the Code should serve to eliminate a major source of prior confusion.

A second source of confusion has been removed as a consequence of definitional design. In its effort to provide more precision than has previously existed (and following the lead of the *Model Penal Code*),<sup>30</sup> the General Assembly recognized in its definitions three general types of offenses. For purposes of discussion they may be labeled as "result", "conduct" and "attendant circumstance" crimes. The first consists of crimes whose sanctions are imposed with a view toward proscribing certain socially harmful results. Homicide and arson are examples. Death is the proscribed result of the former.<sup>31</sup> Burning a building is the proscribed result of the latter.<sup>32</sup> With offenses of this type the proscribed result becomes the point of reference in assessing the mens rea—better still, the mental state—of an offender. The second type consists of offenses which are designed to control undesirable conduct, without regard to whether a socially harmful result accompanies the conduct. An example is reckless driving of an automobile or reckless shooting of a firearm.<sup>33</sup> The third type is more limited than the second, at least in one sense. It consists of offenses which proscribe behavior that occurs only under certain well-delineated circumstances. The offense of knowingly receiving stolen property is perhaps the best example.<sup>34</sup> The circumstances under which an actor's conduct occurs constitute the all-important element of this crime. In every respect the culpable mental states of the Code explicitly reflect in their definitions these basic differences in the nature of criminal offenses. And, as indicated above, those provisions which create offenses of the first type link the culpable mental state to the "result" of an offender's behavior; those creating offenses of the second type relate it to his "conduct"; and those creating the third type relate the mental state to the "attendant circumstances." Once again, ease of under-

<sup>28</sup> KYPC § 14 [KRS § 433B.1-030].

<sup>29</sup> *Id.*

<sup>30</sup> MODEL PENAL CODE § 2.02 (Official Draft 1962).

<sup>31</sup> KYPC §§ 62-65 [KRS §§ 434A.1-020 to 435A.1-050].

<sup>32</sup> KYPC §§ 115-17 [KRS §§ 434B.3-020 to 434B.3-040].

<sup>33</sup> KYPC §§ 71-72 [KRS §§ 434A.2-060 to 434A.1-050].

<sup>34</sup> KYPC § 126 [KRS § 434C.1-090].

standing and application should result from this change in approach.

### B. "Intentionally" and "Knowingly"

As used in the Code, probably the most significant distinction between "intentionally" and "knowingly" is in the attitude necessary to constitute each. Before an offender can be found to have acted "intentionally," it must be determined that he had a proscribed result or conduct as his *conscious objective*. His design or his objective in acting must have been to bring about the result or to engage in the conduct. On the other hand the quality of mind essential to "knowingly" is *awareness*. An offender acts knowingly when he has a mental awareness of the nature of his conduct or of the existence of some attendant circumstance.

There exists a second important difference between these two mental states. It involves the types of offenses for which each may serve as the mental element. More specifically, "knowingly" is defined so that it can never serve as the mental state for a crime having a proscribed result as its essential element. The reason for this restriction has been described as follows:

The only difference between the two that should be noted is that the latter cannot serve as the culpable mental state for an offense having a prohibited result as its essential element. Two examples of this type of offense are homicide (with death as the prohibited result) and assault (with bodily injury as the prohibited result). For offenses of this type the distinction between "intentionally" and "knowingly" is practically non-existent and quite likely to result in confusion. "Knowingly", therefore, is not employed in defining this type of offense, *i.e.*, a "result" offense.<sup>35</sup>

Neither "intentionally" nor "knowingly" has been a significant source of past difficulty. And since the new terms are not very different in description from their pre-existing counterparts, future difficulty is not a very strong possibility. One point of concern, however, deserves brief mention. As stated above, "knowingly" has been defined by the legislature to require mental awareness by an offender. In providing this definition no effort was made

<sup>35</sup> See KENTUCKY LEGISLATIVE RESEARCH COMMISSION, KENTUCKY PENAL CODE § 205, Commentary (Final Draft 1971) [hereinafter cited as LRC].



by the Legislature to deal with the endless variations in degree which can exist with this quality of mind. As a result one problem of some importance was generated. It can best be described through a comparison of three distinct types of mental attitude which are frequently asserted to constitute knowledge: (i) A belief in the existence of a fact or circumstance which is based on personal observation; (ii) a belief in its existence which is based on factors other than personal observation, such as information provided by credible observers; and (iii) a suspicion that a fact or circumstance exists, accompanied by a deliberate avoidance of information which would likely confirm or remove that suspicion.<sup>36</sup>

No difference of opinion has existed in this country with respect to criminal culpability for the first two beliefs. Each has been held uniformly to constitute knowledge. On the other hand, uniformity of opinion has not prevailed regarding criminal liability for the third attitude.<sup>37</sup> In apparent anticipation of this the legislative proposal in which the Penal Code originated contained a provision explicitly imposing liability for this state of mind. It provided that knowledge, of a fact or circumstance essential to a criminal conviction, "is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist."<sup>38</sup>

Had this provision been enacted, an individual suspicious of the existence of a fact or circumstance, if criminal liability was to be avoided, would have been forced to make inquiry in order to confirm or remove the suspicion.<sup>39</sup> The General Assembly, however, did not include this provision in the Code. And it provided no substitute. As a consequence, the Court of Appeals, when faced with this situation, will likely resolve the problem by resorting to pre-existing principles. The case of *Ellison v. Common-*

<sup>36</sup> See R. PERKINS, CRIMINAL LAW 779 (2d ed. 1969).

<sup>37</sup> See, e.g., *Woods v. State*, 73 So. 129 (Ala. App. 1916); *State v. Lintner*, 41 P.2d 1036 (Kan. 1935); *State v. Perkins*, 160 So. 789 (La. 1935); *State v. Drew*, 124 N.W. 1091 (Minn. 1910); *State v. Goldman*, 47 A. 641 (N.J. 1900).

<sup>38</sup> H.B. 197, 1972 Ky. Gen. Ass., Reg. Sess. § 15(3).

<sup>39</sup> The manner in which the provision was intended to function was explained as follows by the drafters:

With this provision, if an individual is aware of a "highly [sic] probability" that a particular fact or circumstance exists and has not satisfied himself of its non-existence, the element of "knowledge" as to that fact or circumstance is sufficiently established for criminality. LRC § 215, Commentary.

*wealth*<sup>40</sup> offers the best indication of the Court's prior position. Although the language of the *Ellison* opinion is somewhat lacking in clarity, it seems certain that the Court rejected the notion that was presented to the legislature in the original code proposal. While recognizing that knowledge, as a culpable mental state, can be established by use of circumstantial evidence, the Court held that anything less than full knowledge of a fact essential to an offense is insufficient to support a conviction.<sup>41</sup> The inevitable conclusion to be drawn from this ruling is that the third attitude of mind described above does not constitute knowledge, as that mental state is now defined.

### C. "Wantonly" and "Recklessly"

#### 1. Introduction

A complete understanding of "wantonly" and "recklessly," as defined in the new legislation, is not possible without some description of the manner in which this part of the Code was altered as it passed through the legislative process. As indicated earlier, the Penal Code originated in the House of Representatives with an introduction of House Bill 197. One section of this bill proposed four mental states for use in defining offenses.<sup>42</sup> Two of the four were "intentionally" and "knowingly," defined in the original bill exactly as defined in the legislation which gained enactment. The other two were labeled as "recklessly" and "criminal negligence."<sup>43</sup> The language used to describe "recklessly" was identical to that finally adopted by the Legislature to define

<sup>40</sup> 227 S.W. 459 (Ky. 1921).

<sup>41</sup> The difference in mental attitude required under pre-existing law and that which would have been required under the provision rejected by the General Assembly is indicated in this statement from the *Ellison* case:

[I]t has always been held that the proof of receiving goods under circumstances that would cause a reasonable man of ordinary observation to believe or to morally know that they were stolen constitutes evidence from which a jury is authorized to infer and to find that the recipient of stolen goods had full knowledge of their character, and hence a conviction of guilty knowledge may be sustained by circumstantial evidence. 227 S.W. at 461.

In other words, under the proposal, awareness of highly suspicious circumstances would have been sufficient for conviction in the absence of an actual belief by an offender contrary to the suspicion. Under the *Ellison* opinion, this type of mental awareness would serve only to support an inference by the decision makers that the offender had the requisite knowledge for conviction.

<sup>42</sup> H.B. 197, 1972 Ky. Gen. Ass., Reg. Sess. § 13(1) and (2).

<sup>43</sup> *Id.* at § 13(3) and (4).



"wantonly," and definition of "criminal negligence" was identical to that finally used for "recklessly."

Following its introduction in the House, the Penal Code was referred to committee. The original bill was substantially revised in committee and presented for vote in the House in the form of a substitute bill.<sup>44</sup> As a part of this revision the section which contained the culpable mental states was amended to provide an entirely different definition of "criminal negligence."<sup>45</sup> The substitute bill was approved by the House of Representatives and passed to the Senate for consideration.

In the Senate the Code was once again substantially changed. The section containing the culpable mental states was amended in three respects: (i) The definition of "criminal negligence" which had been substituted by the House Judiciary Committee was eliminated in favor of the one originally presented in H.B. 197; (ii) the label attached to this state of mind was changed from "criminal negligence" to "recklessly"; and (iii) as necessitated by this second change, the label for the other state of mind was changed from "recklessly" to "wantonly." With the approval of these amendments, the culpability provision took its final form and was ultimately adopted by the General Assembly. This means that the section of the Code which defines the culpable mental states trudged almost full circle in the legislative process. The final product differed from the original proposal only as to the labels used to identify two of the four states of mind.

What motivated the General Assembly to make what appears to be an inconsequential change of labels? A complete answer to this question is not possible and, even if it was, would be of limited value. It is sufficient for purposes of this discussion to emphasize that the Legislature's concern with this part of the Code focused on the fourth culpable mental state, i.e., the one labeled in the beginning as "criminal negligence" and in the end as "recklessly." A more important question that is raised by this sketch of legislative history is whether or not this change of labels is truly inconsequential. The ultimate answer to this question will not be provided until after the Code becomes operational. However, it is possible at this time to make one certain prediction.

<sup>44</sup> H.B. 197 (Comm. Substitute), 1972 Ky. Gen. Ass., Reg. Sess.

<sup>45</sup> *Id.* at § 13(4).

Because of the labels selected by the Legislature for the third and fourth mental states, the confusion and contradiction of the past—at least in part—could easily become as much a factor in the new doctrine of mens rea as it was in the old. If this is to be avoided, extraordinary caution must be exercised in the use and interpretation of the new provision. The discussion which follows is designed to generate such caution and, in addition, to encourage a reconsideration of this part of the Code by the General Assembly when it meets again in 1974.

## 2. *The New Definitions*

The essence of mens rea is a state of mind that is morally blameworthy. In analyzing the new definitions of "wantonly" and "recklessly," the search for moral blameworthiness leads almost immediately to the conclusion that wanton and reckless offenders suffer criminal sanctions because of purposeless behavior. Stated more precisely, such offenders do not consciously seek to bring about socially harmful consequences. They do not act with purpose or design. What then is "guilt," the "culpability," the "wrongfulness" in their conduct? What is it that justifies the infliction of punishment on those who so engage?

All of these questions have the same answer: Wanton and reckless offenders generate through their conduct *intolerable risk* that socially harmful consequences will result. Quite appropriately, therefore, the Code defines these two mental states in terms of risk. Under the new provision neither of the two can suffice as the mental element for a crime unless the conduct in question involves a *substantial risk* that a result or circumstance required for commission of an offense will occur or exists.<sup>46</sup> And before a risk can be called substantial, it must involve extraordinary danger of harm—more than that which is ordinarily involved in common activity. As described by Professor Perkins:

Since some element of risk is involved in many kinds of conduct, socially-acceptable conduct cannot be limited to acts which involve no risk at all. To distinguish risks not socially acceptable from those regarded as fairly incident to our mode of life, the former are spoken of as "unreasonable".<sup>47</sup>

<sup>46</sup> KYPC § 13 [KRS § 433B.1-020].

<sup>47</sup> R. PERKINS, CASES AND MATERIALS ON CRIMINAL LAW AND PROCEDURE 384 (1972).



Though labeled as *substantial*, a risk is not socially unacceptable under the Code—sufficient to constitute wantonness or recklessness—unless it is also *unjustifiable*.<sup>48</sup> As stated by the drafters of the Model Penal Code: “[E]ven substantial risks may be created without (wantonness or) recklessness when the actor seeks to serve a proper purpose, as when a surgeon performs an operation which he knows is very likely to be fatal but reasonably thinks the patient has no other, safer chance.”<sup>49</sup>

In addition to the risk requirement, these two mental states have one other common element. Neither can be shown to exist unless the behavior in question involves a gross deviation from the standard of conduct which a reasonable person could be expected to observe in the same situation.<sup>50</sup> This element is nothing more than a measuring stick, designed to provide a gauge by which fact finders can decide in a particular case whether sanctions are warranted. The reason for this requirement was ably explained in the Model Code:

Some principle must be articulated . . . to indicate what final judgement is demanded after everything is weighed. There is no way to state this value-judgement that does not beg the question in the last analysis; the point is that the jury must evaluate the conduct and determine whether it should be condemned. The draft, therefore, proposes that this difficulty be accepted frankly and the jury asked if the defendant's conduct . . . “involves a gross deviation from proper standards of conduct.”<sup>51</sup>

If this element exists, and if the risk involved is “unreasonable,” an offender's behavior will always constitute either wantonness or recklessness, with the choice between the two to depend upon his quality of mind as related to the risk embodied in his conduct. If he is aware of that risk and consciously disregards it, he acts wantonly; if he fails to perceive the risk, he acts recklessly.<sup>52</sup> Or as stated elsewhere, “[wanton] conduct involves *conscious risk taking*, while [reckless] conduct involves *inadvertent risk creation*.”<sup>53</sup>

<sup>48</sup> KYPC § 13 [KRS § 433B.1-020].

<sup>49</sup> MODEL PENAL CODE § 2.02, Comment 3 (Tent. Draft No. 4, 1955).

<sup>50</sup> KYPC § 13 [KRS § 433B.1-020].

<sup>51</sup> MODEL PENAL CODE § 2.02, Comment 3 (Tent. Draft No. 4, 1955).

<sup>52</sup> KYPC § 13 [KRS § 433B.1-020].

<sup>53</sup> LRC § 205, Commentary.

### 3. *Pre-existing Definitions*

Any substantial effort to relate the new definitions of wantonness and recklessness to previous doctrine ultimately leads to a feeling of hopelessness. Nonetheless such an effort seems nearly essential. In using the new mental states courts are certain to resort to previous pronouncements about wantonness and recklessness. Sources of prior difficulty with these concepts and changes in meaning brought about by the Code must be identified. Perhaps, in this way, the difficulty which seems to be an unavoidable component of this part of mens rea can be managed.

Several factors contributed to the problems which existed under previous doctrine with the mental states used to impose sanctions upon purposeless behavior. Probably the most important of these can be shown by reference to a couple of early statements by the Kentucky Court of Appeals. The first is contained in a case which involved an unintentional homicide.<sup>54</sup> In its opinion the Court declared that “[t]he words ‘gross carelessness’ . . . are practically equivalent to the words ‘reckless and wanton.’”<sup>55</sup> The second statement was made in a later case of the same type: “The words ‘reckless,’ ‘gross,’ and ‘wanton,’ . . . mean utterly careless, having no regard for consequences, or for the safety of others, but without malice.”<sup>56</sup> As indicated by these quotations, during a substantial part of the recent past “wantonly” and “recklessly” were treated as synonymous with each other and also with a third state of mind which was labeled as “gross negligence” or “gross carelessness.” Given usual interpretation each of these terms, when compared with the other two, would seem to signify a difference (at least in degree if not in kind) in criminal culpability, a difference in moral blameworthiness.<sup>57</sup> Why were they treated by the Court of Appeals as one? The answer to this question is to be found in the law of homicide. Like much of the doctrine of mens rea this part was formulated in cases involving homicide crimes.

Until quite recently, there existed in Kentucky only three

<sup>54</sup> Jones v. Commonwealth, 281 S.W. 164 (Ky. 1926).

<sup>55</sup> *Id.* at 167.

<sup>56</sup> Pelfrey v. Commonwealth, 57 S.W.2d 474, 476 (Ky. 1933).

<sup>57</sup> On the scale of moral blameworthiness, wantonness would seem to imply greater culpability than recklessness, and recklessness would similarly imply a greater degree of wrongfulness than gross negligence.

recognized homicide offenses—murder, voluntary manslaughter and involuntary manslaughter.<sup>58</sup> None of the three was divided into degrees. Except in situations not relevant to this discussion, the first two were committed only through intentional killings, *i.e.*, those where the offender actually wanted to cause death. Obviously the third could be committed only through a killing which was “unintentional,” *i.e.*, a conscious objective of causing death was absent from the actor’s state of mind. With the law of homicide in this form, the Court of Appeals was simply not presented with a case which required distinctions among “wantonness,” “recklessness” and “gross negligence.” No doubt the Court could have seized an opportunity to distinguish the three. But it elected not to undertake this difficult task, and chose instead to describe the minimum culpability needed for conviction of involuntary manslaughter and to assume that states of mind having a greater degree of culpability would naturally satisfy the requirement. In this way, and despite the fact that “wantonness” ordinarily signifies a greater degree of blameworthiness than “recklessness” and the latter a greater degree than “gross carelessness,” the three became synonyms.

From that point in time, development of this part of the doctrine of mens rea was almost totally dependent upon changes which were to occur in the law of homicide. Such changes came in due time, partly from the Court and partly from the Legislature, but always piecemeal. The first one involved the crime of voluntary manslaughter. Though the exact time is difficult to ascertain, the Court of Appeals at some point accepted the idea that this offense could be committed through an “unintentional” killing.<sup>59</sup> Thereafter, two separate offenses (voluntary manslaughter and involuntary manslaughter) provided sanctions for deaths occurring not as a conscious objective of the actor. Labeled as negli-

<sup>58</sup> To be perfectly accurate, it should be pointed out that for a great many years Kentucky has had substantially more than three homicide offenses. However, only three of the offenses have had general application, *i.e.*, they can be committed without regard to the circumstances under which death occurs so long as the offender has the required state of mind. All of the others are offenses of limited application, meaning that death has to occur under specifically described circumstances. See, *e.g.*, KRS § 435.030 (homicide occurring in course of criminal syndicalism or sedition); KRS § 435.040 (homicide occurring in course of abortion); KRS § 435.060 (homicide resulting from obstruction of road).

<sup>59</sup> See, *e.g.*, *Lambdin v. Commonwealth*, 241 S.W. 842 (Ky. 1922); *Terrell v. Commonwealth*, 240 S.W. 81 (Ky. 1922); *Davis v. Commonwealth*, 237 S.W. 24 (Ky. 1922).

gent voluntary manslaughter,<sup>60</sup> the new offense was defined to require that an offender act “wantonly,” “recklessly” or with “gross carelessness.”<sup>61</sup> With these same terms then being used to describe the mental element for involuntary manslaughter, the Court of Appeals was forced to re-evaluate its culpability requirements for unintentional homicides. Most of this re-evaluation occurred in two cases.

The first was *Jones v. Commonwealth*,<sup>62</sup> which involved a death resulting from an automobile accident. In presenting this case to a jury, the trial court gave instructions on both voluntary and involuntary manslaughter. The defendant was found guilty and subsequently appealed. His principal argument consisted of an assertion that the trial court had erred in its description of the mental elements of these offenses. For the first time, the Court of Appeals was forced to describe with specificity the difference between negligent voluntary manslaughter and involuntary manslaughter. Substantial clarification of the doctrine of mens rea, as it existed at the time of this decision, resulted from the Court’s effort.

For the express purpose of reducing confusion, the Court of Appeals eliminated one of the mental states previously used to impose liability for an unintentional killing: “[I]n order to avoid tautology and confusion in definitions, we feel it well to omit the words ‘gross carelessness.’”<sup>63</sup> The Court made it clear with this ruling that it did not intend to break apart its package of synonyms. Its earlier position that “gross carelessness” (or “gross negligence”) was not distinguishable from “recklessness” and “wantonness” was restated. The Court then moved to the matter of establishing the mental elements for the two types of homicide. “Wantonness or recklessness” was adopted as the culpable mental state for negligent voluntary manslaughter; “carelessness or negligence” (without the “gross”) was established as the mental element for involuntary manslaughter. Then, as a final step in its restatement of this part of mens rea, the Court added a touch of clarity. It defined the new mental element for involuntary manslaughter

<sup>60</sup> See *Fugate v. Commonwealth*, 445 S.W.2d 675, 683 (Ky. 1960) (dissenting opinion); *Lambert v. Commonwealth*, 377 S.W.2d 76, 79 (Ky. 1964).

<sup>61</sup> See *Davis v. Commonwealth*, 237 S.W. 24, 25 (Ky. 1922).

<sup>62</sup> 281 S.W. 164 (Ky. 1926).

<sup>63</sup> *Id.* at 167.



("carelessness or negligence") in exactly the same language that is used to define negligence in tort law, *i.e.*, in terms of an ordinary deviation from the standard of conduct of a reasonably prudent person under similar circumstances.<sup>64</sup> With this definition, phase one of the re-evaluation of unintentional homicide came to an end.

Without question, the *Jones* case clarified the law of homicide. It also clarified the doctrine of mens rea. At the same time, it created for subsequent resolution the following policy question of major importance: Is "ordinary negligence," as the term is used and defined in tort law, sufficiently blameworthy to justify the imposition of criminal sanctions? Or, stated differently, should an individual be imprisoned or fined for ordinary inadvertent behavior? Long before this issue was squarely faced by the Court of Appeals reluctance to use negligence as a basis for criminal liability surfaced.<sup>65</sup> In fact, even in cases involving the offense of involuntary manslaughter, the tort standard of care was not consistently used.<sup>66</sup> However, not until the decision in *Mayre v. Commonwealth*<sup>67</sup> was the issue finally resolved.

As in the *Jones* case, the deaths involved in *Mayre* resulted from an automobile accident. The defendant's motor vehicle left a highway and traveled into his victim's yard. Proof was introduced to show that he was exceeding the speed limit and traveling at night without headlights. Using an instruction which required a finding of ordinary negligence for guilt a jury convicted the defendant of involuntary manslaughter. The Court of Appeals reversed this decision and, in doing so, changed its position with respect to the use of ordinary negligence:

It is our view that instructions in voluntary manslaughter cases should require a finding of *reckless and wanton conduct*,

<sup>64</sup> In its effort to clarify the two offenses under consideration in *Jones v. Commonwealth*, the Court of Appeals established a complete set of jury instructions for cases involving unintentional homicides. One of these instructions was designed to distinguish "recklessness and wantonness" from "carelessness and negligence":

As used in these instructions, the words "reckless" and "wanton" mean utterly careless, having no regard for consequences or for the safety of others, yet without malice. The words "carelessly" and "negligently" mean the absence of ordinary care, and "ordinary care" means such care as an ordinarily prudent person would exercise for his own protection, under circumstances similar to those described in this case. *Id.*

<sup>65</sup> See, *e.g.*, *Commonwealth v. Temple*, 39 S.W.2d 228 (Ky. 1931).

<sup>66</sup> See *Carnes v. Commonwealth*, 129 S.W.2d 543 (Ky. 1939).

<sup>67</sup> 240 S.W.2d 852 (Ky. 1951).

and instructions in involuntary manslaughter cases should require a finding of *gross negligence* in order to authorize a conviction (emphasis added).<sup>68</sup>

With this decision the Court for the first time recognized a distinction between "gross negligence" or "gross carelessness" on the one hand and "wantonness" and "recklessness" on the other. A modest effort was made to explain the difference. But, in the final analysis, the Court simply declared that there is a sound basis for distinction and that if the terms were correctly defined "the jury [would] have a practical working basis upon which to render an intelligent verdict."<sup>69</sup> Thus ended the second phase of the Court's effort to redefine the law of homicide, and along with it, the doctrine of mens rea.<sup>70</sup>

About ten years after the *Mayre* decision, the General Assembly made its contribution to the confusion that had prevailed with this part of mens rea. In an apparent effort to deal specifically with the offense of negligent voluntary manslaughter, the legislature enacted a statute which created the crime of involuntary manslaughter in the first and second degrees.<sup>71</sup> Wantonness was used as the culpable mental state for the higher degree of this offense and recklessness as the mental state for the lower degree. Thus, two terms which had previously been treated as synonyms were used by the legislature to define two separate and distinct homicide offenses. The Court of Appeals was forced once again to review this part of mens rea. It responded by formulating the following definitions:

<sup>68</sup> *Id.* at 855.

<sup>69</sup> *Id.*

<sup>70</sup> Since the decision in *Mayre v. Commonwealth*, the Court of Appeals has not altered its position that criminal sanctions should not be imposed for negligent conduct. At the same time, however, the Court has recognized the power of the Legislature to create such a crime. In apparent response to the *Mayre* decision, the General Assembly enacted a statute which created the crime of homicide resulting from the negligent operation of a motor vehicle. KRS § 435.025. In affirming a conviction under this statute, the Court of Appeals ruled that the Legislature intended with its enactment to reinstate ordinary negligence as the basis for criminality. *Kelly v. Commonwealth*, 267 S.W.2d 536 (Ky. 1954). Under this statute, any act or omission to act which would suffice for tort liability will suffice for criminal liability. The new Code clearly takes an opposite position. As was stated by the drafters of the new mens rea provision when referring to the lowest culpable mental state: "[A]n element of crime [it] is not satisfied by the same type of inadvertent conduct that suffices for tort liability." LRC § 205, Commentary.

<sup>71</sup> KRS § 435.020.

A wanton act . . . is a wrongful act done on purpose in complete disregard of the rights of others, with conscious knowledge of and complete disregard for the probable consequences.

Reckless conduct . . . is conduct done with indifference to the rights of others, and indifference whether wrong or injury will result from the act done.<sup>72</sup>

With this language the Court distinguished wantonness from recklessness by describing the former as a purposeful act and the latter as an indifferent act. It established finally that these two mental states do in fact connote different degrees of moral blameworthiness. Whether or not any additional clarification to this part of the law was provided by these definitions is questionable. In any event they constitute the last significant judicial statement concerning the doctrine of mens rea prior to the enactment of the new Code.<sup>73</sup>

In final comment on previous doctrine it is tempting to conclude that the most recent judicial definitions of wantonness and recklessness are substantially identical to those provided by the General Assembly. In fact, however, the differences between the old and the new definitions are more significant than the similarities. Only two need be mentioned. *First*: The new provision defines these mental states in terms of a *substantial and unjustifiable risk*. No mention of risk was made in the old definitions. Yet, in every instance where sanctions were imposed for behavior that was described as wanton or reckless, it was because of the risk of harmful consequences contained in that behavior. Sub-

<sup>72</sup> Hemphill v. Commonwealth, 379 S.W.2d 223, 227 (Ky. 1964).

<sup>73</sup> This description of pre-Code doctrine leaves one important question unanswered. Following the separation of "wantonness" and "recklessness" as a consequence of legislative action, what happened to the mental state previously labeled as "gross negligence"? An answer to this question is suggested in the case of Smith v. Commonwealth, 424 S.W.2d 835 (Ky. 1967):

At one time "reckless" was equated with "wanton" as a characteristic of conduct punishable as voluntary manslaughter, and gross negligence (failure to exercise slight care) was the basis for involuntary manslaughter. . . . As a result of the statute, KRS § 435.022, "reckless" has been classified as less offensive than "wanton" . . . Whether the demoted "reckless conduct" is the same as gross negligence is a question we are not required here to decide. We think it enough to say that a jury would not be expected to make much distinction between "failure to exercise slight care," or "having little or slight regard for the safety of others," and "indifference to the rights of others, and indifference whether wrong or injury will result from the act done." *Id.* at 839.

stantial clarity is added to this area of the law by describing the states of mind of such offenders in terms of this risk. *Second*: The old definitions of wantonness and recklessness failed to account for basic differences which exist in the character of criminal offenses. Although these two mental states were used most prominently in the definition of homicide crimes (which are "result" offenses), they were described not in relation to a proscribed *result* but rather in relation to an actor's *conduct*. The new definitions do account for this factor. In addition, they expressly reflect the fact that wantonness and recklessness are used as the mental element for both "result" and "conduct" offenses. Because of these differences in the "old" and the "new" terms, and others which will be indicated in subsequent discussion, the culpable mental states of the Code should be interpreted and applied by the Court of Appeals without substantial reliance on pre-existing law.

#### 4. *The Need for Legislative Reconsideration*

As indicated above, the Code does not become operational until July 1, 1974. Before that date the General Assembly will meet in general session. When the Code was enacted and given a deferred effective date it was obviously contemplated that additional revision of the law would be made in the next legislative session, if necessary.<sup>74</sup> The purpose of this part of the article is to urge the Legislature to amend the provision of the Code containing the culpable mental states by reverting to the original proposal. Only a change in terminology would be required, with "recklessness" substituted for "wantonness" and "criminal negligence" substituted for "recklessness." No change in the content of the definitions would be necessary. There are several reasons for making this change and none for not making it.

*First: It becomes crystal clear upon a most cursory examination that the third and fourth labels used in the Code (wantonly and recklessly) have never had distinct meanings in the criminal law.* Reference to any legal dictionary confirms this conclusion. In the one most frequently used *wanton* is defined as "reckless, heedless, malicious, characterized by extreme recklessness, foolhardi-

<sup>74</sup> See H.R. 160, Ky. J. OF HOUSE OF REP. 3790 (1972).



ness, recklessly disregardful of the rights or safety of others or of consequences."<sup>75</sup> *Recklessness* is defined in that same dictionary as "rashness, heedlessness; wanton conduct."<sup>76</sup> With *reckless* defined as wanton, and *wanton* defined as reckless, it cannot be surprising that our own Court of Appeals for a substantial period of time considered the two to be linguistic equivalents.<sup>77</sup> In fact, at the very moment of adoption of the new Code, wantonness and recklessness were treated as synonyms in the definition of at least one offense.<sup>78</sup> Because of this prior usage there is little chance that difficulty can be avoided with the new definitions. The risk that is involved in using both of these words to describe culpable mental states was foreseen by one of the judges of the Court of Appeals even prior to the enactment of the Code:

As could be readily anticipated by any one familiar with the common law, distinguishing between wanton conduct and reckless conduct has already caused this court some difficulty and no doubt in the future will cause considerably more.<sup>79</sup>

*Second: wantonness, as defined in the new legislation, is employed in a sense that is different from that which it has always had in the criminal law.* When used as the mental element for an offense, wantonness, on the scale of blameworthiness, has been much closer to the mental state known as intention than is contemplated by the Code definition. This closeness has been described as follows:

Wanton misconduct "is something different from negligence however gross—different not merely in degree but in kind, and evincing a different state of mind," so callously heedless of harmful consequences known to be likely to follow that "even though there be no actual intent, there is at least a willingness to inflict injury, a conscious indifference to the perpetration of the wrong". While an intent to do an unlawful act in wanton disregard of the foreseen likelihood of harm may differ little in the scale of moral blameworthiness from actual

<sup>75</sup> BLACK'S LAW DICTIONARY 1753 (4th ed. 1968).

<sup>76</sup> *Id.* at 1435.

<sup>77</sup> Cases cited notes 55-56 *supra*.

<sup>78</sup> *See, e.g., Bentley v. Commonwealth*, 354 S.W.2d 495 (Ky. 1962).

<sup>79</sup> *Fugate v. Commonwealth*, 445 S.W.2d 675, 683 (Ky. 1969) (dissenting opinion).

intent to cause such harm it is not the same state of mind and should not be confused therewith, although it may be permissible to characterize it as "equivalent in spirit to actual intent."<sup>80</sup>

On occasion the Court of Appeals of Kentucky has expressly recognized this usage of the term: "[W]anton misconduct is such as puts the actor in the class with the wilful doer of wrong."<sup>81</sup> If one is to completely understand the relationship of the Code definition of wantonness to the usual definition of the term, the instances in the Code in which unintentional conduct is characterized "as equivalent in spirit" to intentional conduct must be examined. There are only two.

The first is contained in the chapter which defines the offenses of homicide. In these new provisions there exists a crime which is defined simply as the killing of another person *intentionally*.<sup>82</sup> It is entitled murder. There exists another offense which is defined as the killing of another *wantonly*.<sup>83</sup> This offense is called manslaughter. To commit the first an offender must consciously desire to bring about a death; for the second he must be aware of a substantial and unjustifiable risk that death will result from his conduct and he must consciously disregard that risk. There is in addition a third offense. This one is defined as the killing of another *wantonly* and *under circumstances manifesting extreme indifference to human life*.<sup>84</sup> Like the intentional killing, this crime is classified as murder.

In the creation of this third homicide, the obvious purpose of the legislature was to provide sanctions for a death involving slightly less moral culpability than an intentional killing but more than that involved in an "ordinary" wanton killing. The quality of mind contemplated for this homicide was more fully explained by the drafters of the Model Penal Code, which contained an identical offense:<sup>85</sup>

[T]here is a kind of [wanton] homicide that cannot fairly be distinguished . . . from homicides committed [intention-

<sup>80</sup> R. PERKINS, CRIMINAL LAW 783 (1969).

<sup>81</sup> *Mayre v. Commonwealth*, 240 S.W.2d 852, 855 (Ky. 1951).

<sup>82</sup> KYPC § 62(1)(a) [KRS § 434A.1-020(1)(a)].

<sup>83</sup> KYPC § 64 [KRS § 434A.1-040].

<sup>84</sup> KYPC § 62(1)(b) [KRS § 434A.1-020(1)(b)].

<sup>85</sup> MODEL PENAL CODE § 210.2(1)(b) (1962).

ally]. [Wantonness] . . . presupposes an awareness of the creation of substantial homicidal risk, a risk too great to be deemed justifiable by any valid purpose that the actor's conduct serves. Since risk, however, is a matter of degree and the motives for risk creation may be infinite in variation, some formula is needed to identify the case where [wantonness] should be assimilated to [intention]. The conception that the draft employs is that of extreme indifference to the value of human life. The significance of [intention] is that, cases of provocation apart, it demonstrates precisely such indifference. Whether [wantonness] is so extreme that it demonstrates similar indifference is not a question that, in our view, can be further clarified; it must be left directly to the trier of the facts. If [wantonness] exists but is not so extreme, the homicide is manslaughter.<sup>86</sup>

As indicated by this statement, the Legislature in its homicide provisions has treated an unintentional wrong and an intentional wrong as legal equivalents. Wantonness has been characterized in this instance as "equivalent in spirit to actual intent". The only other instance in the entire Code involving this type of use for wantonness is in the chapter which defines the bodily injury offenses.<sup>87</sup>

This is the sole use which the criminal law has previously reserved for the culpable mental state labeled as "wantonness." It is clear that the General Assembly has provided for a much broader use of the term. As a consequence, "wantonness" has no meaningful relationship to its historical predecessor except in the two situations where the Code equates intentional behavior with unintentional behavior. Some difficulty with the new mens rea provision is likely to result from this change in meaning. Experience has demonstrated that a change in words does not always accomplish a change in understanding. Judicial officers, whether acting as judges or as advocates, are human, and "the human mind, except when guided by extraordinary genius, cannot sur-

<sup>86</sup> MODEL PENAL CODE § 201.2, Comment 2 (Tent. Draft No. 9, 1959).

<sup>87</sup> In this chapter, sanctions are provided for bodily injuries which are caused intentionally. KYPC § 66(1)(a); [KRS § 434A.2-010(1)(a)]. Lesser sanctions are provided when such injuries are caused wantonly. KYPC § 67 [KRS § 434A.2-020]. But when an offender acts wantonly and under circumstances which manifest extreme indifference to human life, the Code equates his conduct with that of the intentional offender. KYPC § 66(1)(c); [KRS § 434A.2-010(1)(b)].

mount the established conclusions amid which it has been reared."<sup>88</sup>

*Third: Recklessness, as defined in the Code, is used in an unconventional and unusual manner.* The aspect of this mental state that distinguishes it from wantonness is the requirement that the actor fails to perceive the unjustifiable risk of social harm that is contained in his conduct. In other words, as described by the Legislature, recklessness is inadvertent behavior—a kind of negligence. Though the word recklessly has not always been consistently defined, it has rarely if ever been used to imply inadvertence. This has been most clearly established by Professor Hall:

It is apparent . . . that the relationship of recklessness to intent and especially its common link with negligence are the chief area of the prevalent confusion. The major fallacy results from concentration on one or the other of its essential attributes, usually its objective aspect—thus the common assertions that it is a sort of negligence and also that it is more than negligence, that it is gross negligence, and the like. *Actually recklessness is no more a degree of negligence than is intent. Awareness of increasing the danger separates it completely from the genus of negligence.* As seen above, it would be far more defensible to assert that recklessness is a lesser degree of intent; but that, too, is imprecise.<sup>89</sup>

As indicated by this statement, the Kentucky General Assembly has clearly provided an atypical definition of recklessness. Without the requirement of awareness of danger the new description is inconsistent with the ordinary usage of this concept.

More significantly it is inconsistent with the definition of this mental state as contained in modern codes which have come into existence in recent years. Because of the impact of the Model Penal Code, none of the recently enacted codes,<sup>90</sup> and none of those presently under consideration,<sup>91</sup> has used recklessness as the

<sup>88</sup> W. CHURCHILL, *THE GATHERING STORM* 476 (1948).

<sup>89</sup> J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 232 (1947).

<sup>90</sup> See, e.g., N.Y. PENAL LAW § 15.05 (McKinney 1967); ILL. ANN. STAT. ch. 4, §§ 6-7 (Smith-Hurd 1972).

<sup>91</sup> See, e.g., NAT'L COMM'N ON REFORM OF FED. CRIM. LAWS, PROPOSED FEDERAL CRIMINAL CODE § 302 (1970); GOVERNOR'S COMM. FOR REVISION OF THE CRIMINAL LAW, PROPOSED DEL. CRIMINAL CODE § 100 (1967); OHIO LEG. SERVICE COMM'N, PROPOSED OHIO CRIMINAL CODE § 2901.22 (1971).



culpable mental state for inadvertent conduct. Its current use has been described as follows:

Between the extremes of intentionally and negligence lies recklessness. Recklessness is like the former in that the actor is conscious of a forbidden harm, he realizes that his conduct increases the risk of its occurrence, and he has decided to create that risk. It is thus a form of intentional harm—doing in that it, too, is volitional in a wrong direction. But, as noted, recklessness differs from intention in that the actor does not seek to attain the harm; he has not chosen it, has not decided or resolved that it shall occur. Instead, he believes that the harm will not occur or, in an aggravated form of recklessness, he is indifferent whether it does or does not occur. That he deliberately increased the risk does not alter the essential fact that he did not intend to produce the harm. On the other hand, it will be recalled, recklessness resembles negligence in that both include an unreasonable increase in the risk of harm; both fall below the standard of "due care".<sup>92</sup>

The change of labels suggested in this writing would do more than make the Kentucky law consistent with this statement. It would serve to eliminate a potential source of difficulty. And, more importantly, it would provide uniformity in the law of this jurisdiction and the developing law of other jurisdictions.

*Fourth: The use of criminal negligence as a basis for imposing criminal sanctions has a much stronger theoretical basis than was realized by the Legislature when it rejected the original mens rea provision.* As indicated in an earlier part of this discussion, the General Assembly was motivated to alter the culpable mental states presented in the original legislative proposal by a concern over the use of negligence to impose penal liability. Because of the magnitude of the legislation under consideration, it is highly unlikely that the legislative body, either individually or collectively, gave thoughtful attention to the rationale for this small part of the proposal. The justification for this mental state was excellently presented by the drafters of the Model Code:

Of the four kinds of culpability defined, there is, of course, least to be said for treating negligence as a sufficient basis for imposing criminal liability. Since the actor is inadvertent by

<sup>92</sup> J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 115 (2d. ed. 1960).

hypothesis, it has been argued that the "threat of punishment for negligence must pass him by, because he does not realize that it is addressed to him." . . . 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 . . . We think, however, that this is to over-simplify the issue. Knowledge that conviction and sentence, not to speak of punishment, may follow conduct that inadvertently creates improper risk supplies men 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. Certainly legislators act on this assumption in a host of situations and it seems to us dogmatic to assert that they are wholly wrong. Accordingly, we think that negligence, as here defined, cannot be wholly rejected as a ground of culpability which may suffice for purposes of penal law, though we agree that it should not be generally deemed sufficient in the definition of specific crimes, and that it often will be right to differentiate such conduct for the purpose of sentence.<sup>93</sup>

It is equally improbable that the General Assembly gave adequate consideration to the Code's limited use of this mental state. Except for a minor offense or two,<sup>94</sup> the fourth culpable mental state is used in defining only two Code offenses, the most minor homicide offense<sup>95</sup> and the most minor bodily injury offense.<sup>96</sup> As the Legislature through its interim committee structure reviews this legislation prior to its next general session these two matters (the limited use of negligence and the justification for its use) should be kept foremost in mind.

One final point should be emphasized. Without question the reason behind the rejection of the original mens rea proposal was a concern over the imposition of punishment for inadvertent behavior. In reacting to this concern the Legislature did not properly account for the fact that the battle over criminal sanctions for "ordinary" inadvertent conduct had been waged and

<sup>93</sup> MODEL PENAL CODE § 2.02, Comment 3 (Tent. Draft No. 4, 1955).

<sup>94</sup> See, e.g., KYPC § 112 [KRS § 434B.2-070].

<sup>95</sup> KYPC § 65 [KRS § 434A.1-050].

<sup>96</sup> KYPC § 68 [KRS § 434A.2-030].

whether the variation was so great that the imposition of liability for the result would not blend with fundamental notions of fairness. More often than not the issue was framed in terms of whether the result—nearly always a death—“was the natural and probable consequence of the unlawful act complained of.”<sup>144</sup>

### 3. Causation Under the Code

One of the most prominent objectives of the criminal law is the identification of dangerous individuals. Another of its objectives, equal in importance, is the creation of an equitable system of sanctions. Equal offenders should be entitled under the law to equal treatment. In seeking to accomplish these objectives the law could easily justify identical sanctions for every individual who engages in conduct intending some particular social harm, with no importance attributed to the success or failure of his effort. In other words, no distinction would be made between an offender who attempts an offense and one who commits that same offense. Relating this thought to the law of homicide, this approach would simply recognize that an individual who directs force toward another person with intention to cause his death manifests in his conduct no greater dangerousness with a successful effort than with an unsuccessful one. Notwithstanding the unquestionable validity of this conclusion the criminal law has never been satisfied with identical treatment of successful and unsuccessful offenders. Because of what are conceived to be acceptable notions of justice and fairness, the murderer and the attempted murderer suffer significantly different treatment.

From the very beginning the doctrine of causation has developed as the end product of the law's struggle to reconcile this basic conflict, the thrust and counterthrust of criminal law objectives and notions of fundamental fairness. The drafters of the Model Penal Code described the struggle as follows:

When concepts of “proximate causation” disassociate the actor's conduct and a result of which it was a but-for cause, the reason always inheres in the judgement that the actor's culpability with reference to the result, *i.e.*, his purpose, knowledge, recklessness or negligence, was such that it would

<sup>144</sup> *Commonwealth v. Couch*, 106 S.W. 830, 831 (Ky. 1908).

be unjust to permit the result to influence his liability or the gravity of the offense of which he is convicted.<sup>145</sup>

As indicated by this statement, in every case involving a causation issue the defendant's conduct has been the but-for cause of a proscribed result. The result, however, has occurred in a manner that is different from that which was intended (if the mental state was intention) or threatened (if the mental state was recklessness or criminal negligence). The function of those principles which comprise the doctrine of causation is to provide a means by which the law can choose in this situation whether it will treat the offender as it treats a successful offender or as it treats an unsuccessful one.

After eliminating those parts which are not relevant to the present discussion the means provided for making this choice under the new Code are contained in this provision:

(1) Conduct is the cause of a result when it is an antecedent without which the result in question would not have occurred.

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

• • • •

(b) The actual result involves the same kind of injury or harm as that intended or contemplated and occurs in a manner which the actor knows or should know is rendered substantially more probable by his conduct.

(3) When wantonly or recklessly causing a particular result is an element of an offense, the element is not established if the actual result is not within the risk of which the actor is aware or in the case of recklessness of which he should be aware unless:

• • • •

(b) The actual result involves the same kind of injury or harm as the probable result and occurs in a manner which the actor knows or should know is rendered substantially more probable by his conduct.

(4) The question of whether an actor knew or should have

<sup>145</sup> MODEL PENAL CODE § 2.03, Comment 2 (Tent. Draft No. 4, 1955).



known the result he caused was rendered substantially more probable by his conduct is an issue of fact.<sup>146</sup>

The first subsection of this provision merely codifies the rule that conduct cannot be the legally-recognized cause of a result unless it is first the actual cause of that result. No change in previous doctrine is accomplished by this principle. Revision of this part of the law is left for the other three subsections.

The resolution of causation problems under this provision may best be illustrated by use of a typical causation issue. The circumstances of *Commonwealth v. Kilburn*<sup>147</sup> offer an ideal example. The defendant in this case, during the course of a mutual affray, inflicted an injury upon his antagonist by use of a knife. Ordinarily the injury would not have been fatal. But several weeks later tetanus ensued from the wound and the victim died as a consequence. Though framed in terms of causation the real issue presented by these circumstances is whether to assess liability against the defendant for a bodily injury offense or for a homicide. Under the new Code consideration of this issue must commence with an evaluation of the actor's state of mind; and, with respect to this element, there are several possibilities. The offender may have intended with his conduct to bring about the death of his victim. If so, it is certain that he would not have intended death to occur in the manner in which it occurred. He would have intended that it result directly from his conduct and not in combination with a subsequently acquired disease. On the other hand the offender may have acted with a culpable mental state other than intentionally. For example, absent a conscious desire to cause death, the defendant in *Kilburn* could have been aware that his conduct was accompanied by a great risk of death to his victim. His awareness, however, would have been restricted to death resulting as a direct consequence of his use of the deadly weapon and not in combination with an unexpected disease. In both of these situations—that involving the intentional actor as well as that involving the unintentional one—the Code recognizes that the variation between the intended or probable result and the actual result, though it involves only the manner in which the result occurs, might be such that it ought to have a significant

<sup>146</sup> KYPC § 17 [KRS § 433B.1-060].

<sup>147</sup> 34 S.W.2d 728 (Ky. 1931).

bearing upon an actor's liability. Whether or not the variation is sufficiently great in degree to warrant this effect is the crux of the causation problem. The Code requires that in every instance this issue be framed in terms of whether or not the actual result was foreseen or foreseeable by the actor as a reasonable probability.<sup>148</sup>

In what specific ways does this provision improve upon pre-existing law? In its effort to deal with complex problems of causation the Court of Appeals of Kentucky did not catalogue its issues in terms of concurrent and intervening causes, dependent and independent causes, normal and abnormal responses, etc. Much to its credit the Court took a more direct approach to the problems. As a result, some of the difficulty experienced by other jurisdictions was avoided. Nevertheless a fundamental weakness prevailed. In any given case it was not possible to predict with any degree of certainty the exact manner in which the causation

<sup>148</sup> This standard of measurement originated in the Model Penal Code. In its tentative draft of this document the American Law Institute proposed two provisions as alternative solutions to the causation problem. See MODEL PENAL CODE § 2.03 (Tent. Draft No. 4, 1955). One of the two was the provision adopted by the General Assembly and described above. The other, ultimately adopted as a part of the official draft of the Model Code, was identical except for the final criterion by which causation issues are to be resolved. It required that liability for a proscribed result turn upon whether the actual result of conduct was "too accidental in its occurrence to have a just bearing on the actor's liability or on the gravity of his offense." *Id.* Actually, this formulation of the standard of measurement might have added greater clarity to the law than the one adopted by the General Assembly. As indicated in the text the law's need for a doctrine of causation gravitates from notions of justice and fairness. In view of the infinite variety of circumstances under which causation issues are presented, what better way to resolve the problem than to ask whether the proscribed result was too remote or accidental in its occurrence to influence the offender's criminality? Whatever the relative merits of the alternative provisions might be it is very clear that their creators contemplated that both would function identically and both would function well. They expressed themselves in these words.

Viewed in these terms, it may be said that either the proposed or the alternative formulation should suffice for the exclusion of those situations where the actual result is so remote from the actor's purpose or contemplation that juries can be expected to believe that it should have no bearing on the actor's liability for the graver offense, or, stated differently, on the gravity of the offense of which he is convicted. If, for example, the defendant attempted to shoot his wife and missed, with the result that she retired to her parent's country home and then was killed in falling off a horse, no one would think that the defendant should be held guilty of murder, though he did intend her death and his attempt to kill her was a but-for cause of her encounter with the horse. Both court and jury would regard the actual result as "too accidental in its occurrence to have a just bearing on the actor's liability or on the gravity of his offense." Alternatively, they would regard the actual result as one which did not occur in a manner that the actor knew or should have known was rendered substantially more probable by his conduct when he attempted to shoot his wife to death. MODEL PENAL CODE § 2.03, Comment 4 (Tent. Draft No. 4, 1955).

issue would be framed. This weakness is traceable to a failure of the Court of Appeals to declare clearly, and for its own benefit, the policy behind the doctrine of causation. The Code eradicates this weakness by providing a single standard of measurement for all causation issues. In this way the attention and focus of decision-makers is diverted from such factors as the existence or non-existence of corporal injury, the degree of dangerousness of an injury, the existence of pre-existing conditions, contributing causes, and intervening causes, and directed to a single criterion by which a particular causation problem should be resolved. Finally, and perhaps of more significance than any other factor, the new provision offers "a principle that will permit both courts and juries to begin afresh in facing problems of this kind."<sup>149</sup>

### B. Justification

In the area of justification the doctrine of mens rea has taken on an important new role. It can best be described in relationship to the most understood type of justification—the use of force in self-protection. As the privilege of self-defense has been universally described, its availability is dependent upon a showing (i) that the defendant believed himself in need of protection against an unlawful attack and (ii) that he believed the force used to repel the aggression was not excessive.<sup>150</sup> In the application of this privilege to particular cases the law has consistently refused to recognize a right in the user of physical force to be sole judge of the peril which he confronted and the degree of force needed to avoid that peril. Instead it has required that availability of the privilege be restricted to those defendants whose essential beliefs are based upon reasonable grounds, an obviously objective standard.<sup>151</sup> As a consequence of this requirement, as stated in one opinion, "one's right to resist force with force is dependent upon what a reasonably cautious and prudent man would have done under the conditions then existing."<sup>152</sup>

This notion has been incorporated into the law of justification of this state, as that law exists prior to the effective date of the

<sup>149</sup> MODEL PENAL CODE § 2.03, Comment 4 (Tent. Draft No. 4, 1955).

<sup>150</sup> See W. LAFAVE & A. SCOTT, *supra* note 112, at 391; R. PERKINS, *supra* note 112, at 886.

<sup>151</sup> MODEL PENAL CODE § 3.04, Comment 14 (Tent. Draft No. 8, 1958).

<sup>152</sup> State v. Rummelhoff, 459 P.2d 976, 977 (Wash. App. 1969).

Code. A defendant can avail himself of the privilege of self-defense only by showing that he believed himself to be in imminent danger from another's use of unlawful force, that he believed the force used to repel the aggression no more than necessary for self-protection, and, most significantly, that there were reasonable grounds for each of these beliefs.<sup>153</sup> Reflected in this last requirement is an unwillingness in the law to have an individual's criminal responsibility measured by the moral blameworthiness indicated by his state of mind. In this state, and most others as well, this unwillingness is not restricted in application to the privilege of self-defense. The requirement of reasonableness of belief is a part of the privilege to use force in protection of property,<sup>154</sup> the privilege to use force in law enforcement,<sup>155</sup> and presumably all other privileges which are broadly categorized as justification.

Through this requirement the law has created an undesirable legal result. The privilege of self-defense once again offers the best illustration. If a defendant kills another person without any semblance of excuse or justification he is guilty of the offense of murder. If another defendant kills intentionally while entertaining an unreasonable though honest belief in personal danger, under the law described in the preceding paragraph he too is guilty of murder. The sanctions which may be imposed upon the latter are not distinguishable from those which may be imposed upon the former. Yet the moral blameworthiness of the two offenders is vastly different. In recognition of this difference some jurisdictions have created a special type of privilege, commonly labeled as an "imperfect self-defense."<sup>156</sup> It is available to a defendant who can establish the beliefs necessary to support a defense of self protection but cannot establish reasonable grounds for those beliefs. And, when available, the privilege serves only to reduce the offense from murder to a lower degree of homicide. Except on rare occasion,<sup>157</sup> the Court of Appeals of Kentucky

<sup>153</sup> *E.g.*, Brown v. Commonwealth, 214 S.W.2d 1018 (Ky. 1948); Farley v. Commonwealth, 145 S.W.2d 100 (Ky. 1940); Ferguson v. Commonwealth, 34 S.W.2d 959 (Ky. 1931).

<sup>154</sup> *E.g.*, Carroll v. Commonwealth, 299 S.W. 183 (Ky. 1927).

<sup>155</sup> *E.g.*, Crawford v. Commonwealth, 44 S.W.2d 286 (Ky. 1931).

<sup>156</sup> See W. LAFAVE & A. SCOTT, *supra* note 112, at 583.

<sup>157</sup> The clearest statement of the imperfect self-defense in a Kentucky case was the following:

(Continued on next page)