THE PROPOSED TENNESSEE CRIMINAL CODE—GENERAL INTERPRETIVE PROVISIONS AND CULPABILITY

But even with us in England, where our Crown law is with justice supposed to be more nearly advanced to perfection; where crimes are more accurately defined, and penalties less uncertain and arbitrary; where all our accusations are public, and our trials in the face of the world . . . even here we shall occasionally find room to remark some particulars that seem to want revision and amendment. These have chiefly arisen from . . . not repealing such of the old penal laws as are either obsolete or absurd; and from too little care and attention in framing and passing new ones.[1]

I. Introduction

The current Tennessee criminal code is largely a codification of common law offenses. Consequently, many of the ambiguities and difficulties inherent in the common law definitions have been perpetuated under existent law. Moreover, new criminal statutes enacted from time to time bear little logical relationship to one another or to older penal laws, and serious inconsistencies often result.[2] Recognizing these and other inadequacies, the Tennessee General Assembly appointed a commission in 1963 to conduct a study of state criminal practice and procedure and to report recommended changes. As a result of this study, in 1972 the Law Revision Commission published a tentative draft of its

1. 4 W. Blackstone, Commentaries on the Laws of England 3 (1765) (1962 reprint).

2. "The glaring defect in the criminal law of most states is the disorganization of the statutes. The typical picture is one of an amorphous mass of statutes unrelated to each other or to any unifying ideas." J. Hall, Studies in Jurisprudence and Criminal Theory 254 (1958).

"No part of the Tennessee criminal law has produced more confusion, more appellate litigation, and more reversals on technicalities unrelated to the actor's guilt or innocence than the multitude of offenses proscribing criminal acquisition of another's property." Criminal Code § 1902, Comment at 251 (Tent. Draft, 1972). There are more than sixty statutes proscribing the destruction or damage to property in the current criminal code. *Id.* ch. 16, Comment at 221.

In addition to the plethoria of repetitious offenses, certain laws in the current criminal code are of questionable constitutional validity, *e.g.*, Tenn. Code. Ann. 39-5201 (Supp. 1972) (requiring disclosure of the author of all publications); *see* 40 Tenn. L. Rev. 301 (1973).

Proposed Tennessee Criminal Code that would recodify most substantive criminal laws. Based to a large extent on the Model Penal Code and derivative state statutes, the Proposed Code is designed to operate as a logical, comprehensive system of criminal justice. In furtherance of this goal, the Proposed Code contains three recommended changes or additions to current law that are to be uniformly applied throughout the new criminal statutes to promote a more consistent and coherent body of law.

First, incorporated within the Proposed Code are stated theoretical objectives that provide assistance in the overall interpretation of its specific provisions. The second major change is the abolition of uncodified common law crimes. While this latter revision may be somewhat mitigated by the complementary abrogation of the traditional rule that criminal laws are to be strictly construed, it leaves the Proposed Code as the primary source of proscribed conduct. Finally, the Proposed Code enumerates and carefully defines the mental states necessary for a determination of culpability.

This comment will compare these three provisions with the existing law and analyze their practical effect on other Code sections. In addition, suggestions are advanced to clarify those provisions deemed inadequate or ambiguous.

II. General Provisions

A. *Objectives of the Proposed Code*

The general objectives section of the Proposed Tennessee Criminal Code outlines the basic goals and legislative premises of specific criminal provisions.[3] Although largely self-

3. The general objectives of the Proposed Code are:
(1) to proscribe and prevent conduct that unjustifiably and inexcusably causes or threatens harm to individual, property, or public interests for which protection through the criminal law is appropriate;
(2) to give fair warning of what conduct is prohibited, and to guide and limit the exercise of official discretion in law enforcement, by adequately defining the act and culpable mental state that constitute an offense;
(3) to give fair warning of the consequences of violation and to guide and limit the exercise of official discretion in punishment, by grading of offenses;
(4) to prescribe penalties that are proportionate to the seriousness of offenses, but that permit recognition of differences in rehabilitation possibilities among individual offenders;
(5) to safeguard conduct that is without guilt from condemnation as criminal;

explanatory, and perhaps of moral interest only, the objectives of the Code are significant as they express the state's position on two important aspects of criminal law theory.[4]

The first concerns the basic question of what constitutes a "crime." Currently, there appears to be no clear delineation of what is and is not a "crime" in Tennessee. Criminal acts have been defined variously as "all violations of law,"[5] "the doing of certain acts,"[6] or those actions that result in punishment, either by fines, imprisonment or infliction of the death penalty.[7] "Breaches of the peace,"[8] provisions that allow for forfeiture,[9] remedial statutes that allow recovery by the wronged individual instead of the state,[10] and statutes that restrict a citizen in the conduct of trade or profession[11] have also been classified as criminal. This variance in definitions is plausibly due to the fact that all "criminal" laws in this state are not presently found in one title but are interspersed throughout the entire code. Additionally, the lack of definitional consistency of terms and phraseology among those statutes that purport to be criminal may have created further ambiguity.

Although the Proposed Code does not advance a theoretical definition of crime, a primary objective is to identify readily those statutes that are criminal, and, accordingly, only those laws imposing explicit penal sanctions[12] are denominated as such. Once

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(6) to prevent arbitrary or oppressive treatment of persons accused or convicted of offenses.

CRIMINAL CODE § 102 (Tent. Draft, 1972). *See* Kirkwood v. Ellington, 298 F. Supp. 461 (W.D. Tenn. 1969); Roberts v. Clement, 252 F. Supp. 835 (E.D. Tenn. 1966). *See also* MODEL PENAL CODE § 102, Comment at 4 (Tent. Draft No. 2, 1954).

4. "For me the dominant tone of the [Model Penal] Code is one of principled pragmatism. . . .[I]ts provisions reflect an awareness that the discernment of right principles is only the beginning of rational law-making and that the besetting sin of rationality is the temptation to press a principle to the outer limits of its logic. The Code avoids that sin." Packer, *The Model Penal Code and Beyond*, 63 COLUM. L. REV. 594 (1963). *See also* Kuh, *A Prosecutor Considers the Model Penal Code*, 63 COLUM. L. REV. 608 (1963).

5. TENN. CODE. ANN. § 39-103 (1955).

6. Burton v. School Comm'rs, 19 Tenn. 583 (1838).

7. TENN. CODE ANN. § 39-103 (1955).

8. Thompson v. Reichman, 135 Tenn. 653, 188 S.W. 225 (1916).

9. Wells v. McCanless, 184 Tenn. 293, 198 S.W.2d 641 (1947).

10. Kitts v. Kitts, 136 Tenn. 314, 189 S.W. 375 (1916). *See* TENN. CODE ANN. § 39-4001 (1955), which provides, *inter alia*, that half of the fine incurred by a person violating the Sunday laws shall go to the person "who will sue for the same" and the other half for the "use of the county."

11. Estep v. State, 183 Tenn. 325, 192 S.W.2d 706 (1946).

12. The Code proscribes seven categories of punishments and if the sanction does

identified, definitions of the acts and culpable mental states involved in each offense are consistently applied to give "fair warning" of proscribed activity.[13] Thus, while not all criminal laws will be found within the Proposed Code, the general objectives provide a uniform framework for identifying and interpreting other criminal statutes.

The second important aspect of the Code's objectives concerns the purpose of punishment. The four generally accepted reasons for applying penal sanctions to certain conduct are: deterrence, rehabilitation, retribution and incapacitation. There has never been any expressed legislative policy in this state, probably due to a lack of consensus, as to which of these theories should prevail. The Proposed Code, however, does offer some guidance, and, although the comments to the objectives section deny any priority among the theories of punishment, rehabilitation would appear at least a primary goal.[14] Rehabilitation is mentioned in the Code itself and reflects the attitude of the Code's progressive method of sentencing. While not creating any substantive change in the law, courts will thus be aided in their determination of the proper punishment for an individual, at least from a policy standpoint, since the rehabilitation rationale is in concert with the commission's primary intent.

Of more practical significance to the Code's theory of punishment is the objective of uniformity of penalties. Under current Tennessee law, most offenses have a distinct penalty attached to the definition of each offense. In many cases the penalties prescribed are vastly different for conduct that is similar in kind and seriousness. The Proposed Code seeks to eliminate the irrational disparity of punishment this system permits by substituting an overall grading of offenses. It proposes four categories of felonies and three categories of misdemeanors, each having a specified range of punishment.[15] Thus, all crimes are logically graded into

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not fall within one of the categories, it is not penal in nature.

13. CRIMINAL CODE § 102(2) (Tent. Draft, 1972).

14. *Id.* § 102(3), Comment at 2. This position is also adopted by the drafters of the Model Penal Code; MODEL PENAL CODE § 102, Comment at 4 (Tent. Draft No. 2, 1954). *See* Cohen, *Moral Aspects of the Criminal Law*, 49 YALE L.J. 987 (1940); Gray, *Criminology: The Treatment-Punishment Controversy*, 4 WM. & MARY L. REV. 160 (1963); Radzinowicz & Turner, *A Study of Punishment, Introductory Essay*, 21 CAN. BAR REV. 91 (1943); ILL. ANN. STAT. ch. 38, § 1-2 (Smith-Hurd 1972). *See also* People v. Hairston, 46 Ill. 2d 348, 263 N.E.2d 840 (1970).

15. CRIMINAL CODE §§ 803-04 (Tent. Draft, 1972). The felonies are classified accord-

one of the seven categories, resulting in a far more equitable and rational sentencing structure. Although the Code does provide for some judicial latitude within each category,[16] the sanctions for similar offenses appear to be more proportionate.

B. *Effect of Codification of Criminal Laws—Common Law Crimes*

The Proposed Code contains most offenses found in the current criminal code in addition to many judicially recognized common law crimes. Any remaining uncodified common law crimes are abolished by section 103 which provides that "[c]onduct does not constitute an offense unless it is defined as an offense by statute . . ."[17] Thus, old and obscure crimes not specifically proscribed by statute are no longer culpable. This concept is not novel since approximately half of the states have by statute expressly or impliedly abolished uncodified common law crimes.[18] Similarly, such crimes are not recognized in federal courts.[19] However, section 103 abrogates these crimes by implication only as there is no express statement that common law crimes are abolished. Although the intention of the drafters to eliminate all common law offenses seems clear beyond doubt,[20] Tennessee courts have occasionally construed equally unambiguous language as

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ing to the relative seriousness of the offenses. A capital felony requires a mandatory death penalty. *Id.* §§ 846, 1105. A felony of the first degree may be from one year to life imprisonment. A felony of the second degree carries a maximum imprisonment of 12 years and a felony of the third degree is a maximum of 6 years. *Id.* § 831. A class A misdemeanor allows imprisonment for less than one year; class B, 3 months; and class C, not to exceed 10 days. *Id.* § 832.

16. *Id.* § 805.

17. *Id.* § 103. There can be little doubt that this is the desired objective as the comments to section 58 provide. The comments are made part of the code as evidence of legislative intent by section 105. However, the comments do not carry the binding force of law. A more strongly worded statute may therefore be necessary in view of Pickens v. Daugherty, 217 Tenn. 349, 397 S.W.2d 815 (1965) (common law rules are not repealed by implication). *See* Baker v. Dew, 133 Tenn. 126, 179 S.W. 645 (1915); State v. Cooper, 1200 Tenn. 549, 113 S.W. 1048 (1908).

18. Note, *Common Law Crimes in the United States*, 47 COLUM. L. REV. 1332 (1947). *See also* W. LAFAVE & A. SCOTT, CRIMINAL LAW 61 n.20 (1972) [hereinafter cited as LAFAVE]; MODEL PENAL CODE § 105, Comment at 106 (Tent. Draft No. 4, 1955).

19. United States v. Hudson, 11 U.S. 32 (1812). Common law crimes may exist in the District of Columbia; *see* United States v. David, 167 F.2d 228 (D.C. Cir.), *cert. denied*, 334 U.S. 849 (1948).

20. CRIMINAL CODE § 103 (Tent. Draft, 1972).

not altering the common law unless the statute expressly so declares.[21] To avoid this potential difficulty, the Code should provide in so many words that common law crimes are abolished.

Common law offenses arose when, in response to certain abhorrent conduct, the judiciary created criminality by analogizing the conduct to existent crimes.[22] Although most common law crimes had been established by the eighteenth century, courts in England were creating new offenses as late as 1933.[23] While a similar practice existed in Tennessee,[24] there have been no recently "created" crimes. Tennessee, however, still recognizes established English common law offenses and allows prosecution for them if a sufficiently exact indictment is presented.[25] While most of the common law crimes have now been codified in the current criminal code,[26] the offenses of false imprisonment, smug-

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21. *See* note 17 *supra*.

22. Jackson, *Common Law Misdemeanors*, 6 CAMB. L.J. 193, 194 (1937). *See* Commonwealth v. Chapman, 13 Mass. 69, 73-74 (1847).

23. Rex v. Manley, [1933] 1 K.B. 529 (1933).

24. In Bell v. State, 31 Tenn. 28 (1851) the Tennessee Supreme Court made the utterance of obscene words in public an indictable offense despite the fact that no statute, precedent, or adjudication could be found to support the indictment. The court, quoting from Blackstone and Lord Mansfield, used the "enlightened and expansive principles of the common law" to adapt and apply to new cases, for which no precedents were found, "to put a stop . . . to the further workings of depraved human nature in seeking out new inventions to evade the law." *Id.* at 29. This principle was later expanded to cover "any practice tending to disturb the peace and quiet of communities, or corrupt the morals of the people." State v. Graham, 35 Tenn. 79, 82 (1855). *See* Parker v. State, 84 Tenn. 3[illegible] 1 S.W. 202 (1886).

25. *See* Goff v. State, 186 Tenn. 212, 209 S.W.2d 13 (1948); DeBoard v. State, 1[illegible] Tenn. 51, 22 S.W.2d 235 (1929). In 1805, Justice Overton held that the British statutes in force in Tennessee, which form the basis for the common law crimes, are those "passed previously to the fourth year of [James] I, [1607] when the charter of the colony of Virginia was granted, which included what was afterwards called North Carolina." Clingow's Lessee v. Smith, 1 Tenn. 146, 156 (1805). "The Acts of North Carolina . . . preserved the common law, while Session Act 1789 c.3, provided for its continuance" in Tennessee. Smith v. State, 215 Tenn. 314, 317, 385 S.W.2d 748, 750 (1964). Presumably the non-statutory English common law as it existed in 1776 or as late as 1789 (the date of the Tennessee reception statute) can still be used as conclusive precedent of existing common law crimes. *See* Moss v. State, 131 Tenn. 94, 103, 173 S.W. 859, 861 (1914). *See also* Hall, *The Common Law: An Account of its Reception in the United States*, 4 VAND. L. REV. 791 (1951); Pharr, *Modernizing Common Law*, 30 TENN. L. REV. 7 (1962); Pope, *The English Common Law in the United States*, 24 HARV. L. REV. 6 (1910).

26. Common law crime of exercising a common vocation of life on Sunday, Goff v. State, 186 Tenn. 212, 209 S.W.2d 13 (1947); *see* TENN. CODE ANN. § 39-4001 (1955). *See also* Paine, *Sunday, The Sabbath, and the Blue Laws*, 30 TENN. L. REV. 249 (1963). Uttering obscene language in public, Bell v. State 31 Tenn. 42 (1851); *see* TENN. CODE ANN. § 39-1213 (Supp. 1972). Public drunkenness, Willard v. State, 174 Tenn. 642, 1[illegible]

gling, lewdness and lasciviousness, solicitation,[27] and "disturbing an assemblage of persons"[28] have not. Other obscure common law crimes may exist and be punishable under the sole authority of some ancient English case.

It is fair to conclude that under the common law, proscriptions are often unknown or uncertain, and thus there is no fair warning of what conduct is prohibited.[29] Lack of this warning has constitutional significance with respect to statutes[30] and the same principle should apply to common law crimes.[31] On the other hand, there exists a school of thought that contends that the retention of common law offenses "plugs loopholes" left by the legislature.[32] Though Tennessee may adhere to this position,[33] recent commentators have ably and aptly criticized the "loophole" rationale as trivial when compared to the more praiseworthy objective of certainty.[34]

The Proposed Code section that abrogates common law crimes is based in part on a similar provision of the Model Penal Code.[35] The Tennessee version, however, takes no position on the continued power to punish for contempt of court, a power expressly preserved in the Model Penal Code. While it may be

S.W.2d 99 (1939); *see* TENN. CODE ANN. § 39-2531 (Supp. 1972), which defines the offense as a "common law" crime. *See also* Gaines v. State, 75 Tenn. 321 (1881) where a vituperative epithet uttered "in the public street of East Knoxville" was held not to be a common law nuisance.

27. CRIMINAL CODE § 103, Comment at 4 (Tent. Draft, 1972). *See* Gervin v. State, 212 Tenn. 653, 371 S.W.2d 449 (1963).

28. State v. Watkins, 123 Tenn. 502, 130 S.W. 839 (1910); *see* Ford v. State, 210 Tenn. 105, 355 S.W.2d 102 (1962), *cert. denied*, 377 U.S. 994 (1964).

29. LAFAVE at 61. *See also* McBoyle v. United States, 283 U.S. 25 (1931), People v. Brengard, 265 N.Y. 100, 191 N.E. 850 (1934).

Additional problems in a jurisdiction retaining common law crimes are: (1) the extent of punishment; (2) the effect of criminal statute relating to the same subject matter; (3) determining the conduct proscribed by the common law; and (4) the applicability of English criminal statutes. LAFAVE at 63-68.

30. Musser v. Utah, 333 U.S. 95 (1948).

31. MODEL PENAL CODE § 1.05, Comment at 107 (Tent. Draft No. 4, 1955).

32. Commonwealth v. Taylor, 5 Penn. 227 (1812); LAFAVE at 67.

33. Bell v. State, 31 Tenn. 28 (1851).

34. J. HALL, GENERAL PRINCIPALS OF CRIMINAL LAW, 52-54 (1960).

35. MODEL PENAL CODE § 1.05(3) (Tent. Draft No. 4, 1955) provides in part: "This section does not affect the power of a court to punish for contempt. . . ." *See* CONN. GEN. STAT. ANN. § 53a-4 (1972):

> The provisions of this chapter shall not be construed as precluding any court from recognizing other principles of criminal liability or other defenses not inconsistent with such provisions.

assumed that this power is inherent in a court and needs no express affirmation, it is recommended that a saving clause similar to the Model Penal Code provision be inserted in the Proposed Code to preserve the power unquestionably.

C. *Construction of Penal Statutes*

At common law almost all crimes were capital offenses. Due to this potential severity of punishment, criminal laws were construed strictly, and, unless the purported act fell exactly within the letter (as opposed to the spirit) of the law, the defendant was acquitted.[36] Although the death penalty was later lessened for most crimes to fine or imprisonment, the rule of strict construction was maintained partially on the theory that it would promote clearer interpretation and, thus, give "fair warning" of a statute's proscriptions.[37] Generally, however, the rule was retained simply because of traditional usage.

Federal case law initiated the trend away from the doctrine of strict construction. In 1820 the Supreme Court held that ". . . though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature."[38] State statutes, enacted as early as 1838,[39] abrogated the common law rule of strict construction, and, today, at least twenty-one jurisdictions have opted for a liberal interpretation of their criminal laws.[40]

Tennessee case law merely reiterates the rule of strict construction,[41] or, alternatively, states the rule in terms of a construction in favor of the accused.[42] The reasons advanced for retaining the rule in Tennessee, aside from blind adherence to precedent,

36. This practice was instituted during the seventeenth century as a result of a humanitarian movement in England after most of the common law crimes were developed. Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 750 (1935) [hereinafter cited as Hall]. *See also* J. BISHOP, COMMENTARIES ON THE LAW OF STATUTORY CRIMES (1883). For example, a Tennessee statute prohibiting the carrying of any kind of pistol was held not to include within its proscription, a miniature shotgun carried in a holster under defendant's overall. Burks v. State, 162 Tenn. 406, 36 S.W.2d 892 (1931).

37. McBoyle v. United States, 283 U.S. 25 (1931).

38. United States v. Wiltberger, 5 U.S. 76, 95 (1820).

39. Hall at 753.

40. LAFAVE at 72.

41. Crowe v. State, 192 Tenn. 362, 241 S.W.2d 429 (1951); Burks v. State, 162 Tenn. 406, 36 S.W.2d 892 (1931); Payne v. State, 158 Tenn. 209, 12 S.W.2d 528 (1928).

42. Chadwick v. State, 201 Tenn. 57, 296 S.W.2d 857 (1956); Kimsey v. State, 192 Tenn. 421, 241 S.W.2d 514 (1951).

have been the traditional theory based on severity of punishment[43] and, more recently, on providing exact notice of the prohibited act.[44] Under the latter theory it is felt that only the specific activity proscribed by the legislature should be culpable. Occasionally, however, a court will engage in judicial gymnastics to maintain a conviction under an admittedly inapplicable statute, while purportedly maintaining its strict construction approach.[45] Moreover, some recent cases tend to give criminal statutes a broad interpretation based on the intent of the legislature or "the saving grace of common sense."[46]

The Proposed Tennessee Code specifically abrogates Tennessee's existing rule of strict construction and provides instead that criminal laws are to be interpreted liberally, "according to the fair import of their terms, to promote justice and effect the objectives of the Code."[47] This approach appears to be more rational and pragmatically realizes that prohibited conduct may not be susceptible to exact wording covering all desired situations.[48] Liberal construction may, however, foster legislative ineptness in drafting future penal laws and could result in greater reliance on the judicial branch to fit specific conduct within the scope of the enactment. The liberal construction of statutes, however, may replace at least to some extent the function once served by the creation of new common law crimes since some judicial latitude is clearly preserved.

While the adoption of liberal construction may effectively change future interpretation of criminal laws in Tennessee, practice in other states has shown that this result does not necessarily follow.[49] Courts in other states have occasionally returned to the strict construction approach because of the "attitude of mind" of the judiciary,[50] ignorance of a liberalizing statute,[51] or merely as

43. Galbraith v. McFarland, 43 Tenn. 216 (1866).

44. Burks v. State, 162 Tenn. 406, 36 S.W.2d 892 (1931).

45. State v. Cooley, 141 Tenn. 33, 206 S.W.182 (1918) represents an excellent example.

46. Lavvorn v. State, 215 Tenn. 659, 389 S.W.2d 252 (1965); *see* Bell v. United States, 349 U.S. 81 (1955); *see also* Southern Ry. v. Sutton, 179 F. 471 (6th Cir. 1910).

47. CRIMINAL CODE § 105(a) (Tent. Draft, 1972).

48. Hall at 760.

49. *Id.* at 756 lists at least ten states where this has been the case.

50. LAFAVE at 73.

51. Continental Supply Co. v. Abell, 95 Mont. 148, 24 P.2d 133 (1933).

a result of tradition.[52] These examples suggest that Tennessee, with its strong respect for the common law, may, in practice, ignore this section of the Code. Furthermore, this potential attitude may be justified by an apparent inconsistency in the Proposed Code. Tennessee has adhered to the strict construction approach in order to give fair warning or notice of the exact conduct proscribed.[53] The Proposed Code similarly advances the objective that its provisions are drafted in order to give fair warning of prohibited activity,[54] thus adopting the reason for the old strict construction rule, but changing the rule itself. Although the new liberal construction rule is phrased as a specific command that may reflect a change in policy, the Code's objective of fair warning is a guide to overall interpretation and should therefore take precedence in a potential conflict. Thus, the "fair warning" concept may in fact operate as a limitation on the application of the liberal construction provision. Moreover, at some point "fair warning" merges with fourteenth amendment due process considerations, which would act as a further limitation on the liberal construction of a criminal law.

The imposition of criminal sanctions is extremely serious and therefore every reasonable doubt in applicability should be resolved in favor of the accused. The liberal construction provision should be viewed only to allow a court the freedom to construe a statute in a logical fashion and avoid an irrational or overly strict interpretation to which a law may be susceptible.

III. Culpability

Most modern penal statutes are based on the common law concept that, for conduct to be criminal, there must be a guilty or culpable state of mind (mens rea) that concurs with, or activates a proscribed act (actus reus).[55] This concept is also inherent

52. J. Hall, General Principals of Criminal Law 48 (1960) [hereinafter cited as Hall].

53. Burks v. State, 162 Tenn. 406, 36 S.W.2d 839 (1931).

54. Criminal Code § 102(3) (Tent. Draft, 1972).

55. Indeed, to make a complete crime, cognizable by human laws, there must be both a will and an act. For though, in foro conscientiae, a fixed design or will to do an unlawful act is almost as heinous as the commission of it, yet as no temporal tribunal can search the heart, or fathom the intentions of the mind, otherwise than as they are demonstrated by outward actions, it therefore cannot punish for what it cannot know. For which reason in all temporal

in the Proposed Code, as definitions of specific criminal provisions contemplate an act and a stated culpable mental state. Due to the lack of legislative guidance and the varied and confused judicial interpretations that these two elements have received in the past, the Proposed Code defines the terms specifically in order to promote their uniform and consistent application.

The act or actus reus element is defined in the Proposed Criminal Code as a "voluntary . . . bodily movement . . . performed consciously as a result of effort or determination."[56] There are divergent views of what constitutes the "act" of a crime. Some authorities express the broad view that the "act" includes both the circumstances and resultant consequences of the action.[57] The current view, and that expressed in the Code, is limited only to "bodily movement."[58] This more narrow approach seems to be the less complicated definition since it does not involve considerations of causation or resulting harm and describes what is most commonly thought of as a person's act or action.[59] The "voluntary" provision simply provides that actions which are not the

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jurisdictions, an overt act, or some open evidence of an intended crime, is necessary, in order to demonstrate the depravity of the will, before the man is liable to punishment.

4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 21 (1767) (1962 reprint). Blackstone merely enunciated the precept; the required "will and act" have been an inherent part of the common law, albeit unrefined, since the ancient Anglo-Saxon era. The more formal and complex mens rea concept seems to have been formulated first by church writers such as St. Augustine who defined actions as either wrong or right. This Roman influence reached England, after the Norman invasion, through the church and universities. Bracton, an English jurist who was influenced by these canonist ideas, wrote *De Legibus*, around 1250, as an early classification of crimes. Bracton's "blameworthyness" became mens rea; an essential part of criminality. Hale, in his PLEAS OF THE CROWN, published in 1736, began the first systematic treatment of the mental element or "evil intent", which became as much a part of "crimes" as the actus reas. Blackstone's COMMENTARIES represents the final and most advanced classification of common law crimes by their definitions and mental states. Although the law today has developed a more sophisticated attitude, it is interesting to note that many crimes are still defined in terms of moral guilt as opposed to the idea of "intent" or "will". *See* TENN. CODE ANN. § 39-801 (Supp. 1972) (any person who corruptly bribes an executive, legislative, or judicial officer); Fox v. State, 441 S.W.2d 491, 496 (Tenn. Crim. App. 1969) (equates malice with a "wicked, depraved and malignant spirit"). *See also* Hall, at 186; McIlwain, *The Present Status of the Problem of The Bracton Text*, 57 HARV. L. REV. 220, 233 (1943); F. POLLACK & F. MAITLAND, THE HISTORY OF ENGLISH LAW (2nd ed. 1899); Sayre, *Mens Rea*, 45 HARV. L. REV. 974 (1932).

57. J. SALMOND, JURISPRUDENCE 503 (11th ed. 1957).

58. O. HOLMES, THE COMMON LAW (1881). *See generally* HALL at 172.

59. The Code also includes speech within the definition of an act, CRIMINAL CODE § 107(a)(1). (Tent. Draft 1972). *See* HALL at 175 n.30.

product of an individual's conscious desire, like sleepwalking, are not culpable.[60] Although the current criminal code does not contain a definition of actus reus,[61] Tennessee case law recognizes the act in the narrow context developed by the Proposed Code.[62]

Omission to act is also carefully proscribed by the Code where there is a statutory or, in certain limited instances, contractual duty to do an act that the person is physically able to perform.[63] Although current Tennessee law recognizes statutory[64] and contractual responsibilities,[65] the common law duties of affirmative action[66] will no longer give rise to potential criminal liability under the Proposed Code.

Since Tennessee has varied possessory crimes, such as possession of burglarious instruments,[67] the Proposed Code uniformly defines possession as a voluntary act where "the possessor knowingly obtains or receives the thing possessed or is aware of his

60. LAFAVE at 179. *See generally* MODEL PENAL CODE § 2.01, Comment at 121 (Tent. Draft No. 4 1955). Naturally a person who knows he is prone to such activities as sleepwalking may incur criminal liability if he puts himself in a position where his later involuntary activities may cause harm. Illinois adopted a similar definition of "act" requiring that it be done "voluntarily." ILL. ANN. STAT. ch. 38, § 4-1 (Smith-Hurd 1972).

In People v. Jones, 43 Ill. 2d 113, 251 N.E.2d 195 (1969) defendant argued that he could not be prosecuted for deviate sexual assault since his homosexuality was "involuntary," in the sense that he had "no capacity to delay tension or the relief of tension; that he had limited control over impulses." The court held that the defendant was not being punished for *being* a homosexual, rather he was being punished for his acts which the law did not recognize as involuntary since he had limited control of his impulses.

61. *See* TENN. CODE. ANN. § 39-1102 (1955) (requiring an overt act for the crime of conspiracy). *See also* Cline v. State, 204 Tenn. 251, 319 S.W.2d 227 (1958).

62. Duncan v. State, 26 Tenn. 148 (1846).

63. CRIMINAL CODE § 403 (Tent. Draft, 1972) provides:

> A person does not commit an offense if his criminal responsibility is based solely on an omission to perform a voluntary act unless: (1) the law defining the offense imposes criminal responsibility for the omission; or (2) a duty to perform the omitted voluntary act is imposed by statute; or (3) the performance of a voluntary act has been undertaken by the actor and he fails to make a reasonable effort to assure that his withdrawal from action will not cause result[ing harm.]

See Hughes, *Criminal Omissions*, 67 YALE L.J. 590 (1958); Perkins, *Negative Acts in Criminal Law*, 22 IOWA L. REV. 659 (1937).

64. *E.g.*, TENN. CODE ANN. § 39-421 (Supp. 1972) (duty to report tortured horses at a horse show); *id.* § 39-2007 (duty of peace officers to apprehend persons possessing gambling devices); *id.* § 39-3105 (1955) (refusal to aid officers); *id.* § 39-3201 (neglect of duty of public officers); *id.* § 39-4401 (duty of allegiance to state).

65. State v. Bannes, 141 Tenn. 469, 472, 212 S.W. 100, 101 (1919).

66. Robinson v. State, 42 Tenn. 181 (1865).

67. TENN. CODE ANN. § 39-908 (Supp. 1972).

control. . . ."[68] Possession is not technically an act or omission to act since it does not necessarily involve physical movement. What is required, however, is the subjective "knowledge" of possession, something most current possessory offenses do not require.[69] It should be noted that the Proposed Code does not require the accused to "know" the nature of the thing possessed, but merely that he "knows" the item in question is under his control. Thus, "possession" of a narcotic may be culpable although the possessor believes the substance to be powdered milk.[70] The specific possessory statute involved provides whether knowledge of the properties of the thing possessed is required. For example, possession of stolen property requires that the actor know the item in question was stolen in addition to knowing he has the item in his control.[71]

Since the act is an objective, observable fact, the actus reus element of a crime, despite the above distinctions, does not normally present any major difficulty. The only issue is whether the accused did or failed to do the act proscribed. The law, however, requires proof of an additional element before criminal liability attaches—the culpable mental state of the accused when he performed the act. This state of mind has been variously denominated scienter (guilty knowledge) or mens rea (blameworthy or guilty mind). Absent statements by the accused of his mental state, proving a subjective state of mind is inherently difficult. It is even more difficult to legislatively define subjective intention by an objective definition. Accordingly, great care must be exercised in the proper selection of words since often the only distinction between various degrees of an offense will be the accused's mental state. The most obvious example is homicide, which is

68. CRIMINAL CODE § 402 (Tent. Draft, 1972). The wording chosen is a slight variant of a similar section of the Model Penal Code:

> Possession is an act, within the meaning of the section, if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession.

MODEL PENAL CODE § 2.01, Comment at 123 (Tent. Draft No. 4, 1955). The Illinois Code uses the same language, except it adds the word "voluntary" before the word "act." ILL. ANN. STAT. ch. 38, § 4-2 (Smith-Hurd 1972).

69. *E.g.*, TENN. CODE ANN. § 39-908 (1955) (burglary tools); *id.* § 39-5110 (Supp. 1972) (fire bomb material).

70. However, this may negate a required mens rea. *See* LAFAVE at 182; J. SALMOND, JURISPRUDENCE 265-298 (19th ed. 1966); G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 6 (2nd ed. 1961).

71. CRIMINAL CODE § 1903(2) Tent. Draft, 1972).

punishable anywhere from a brief incarceration to the potential imposition of the death penalty, depending solely on the state of mind of the slayer.

Statutory and judicial writers have never been entirely successful in their attempts to deal with the problem of expressing and interpreting the mental states required within the definitions of particular crimes. This has been due, in large measure, to an unwieldy plethora of terminology. In the current Tennessee criminal code, for example, over twenty different terms are used to express the required mental state, such as feloniously,[72] willfully,[73] dangerously,[74] and fraudulently.[75] Moreover, if combinations of terms are considered, the number may exceed a hundred. This quagmire is not unique to Tennessee; the current Federal Criminal Code, for example, lists over sixty different mens rea terms.[76]

The reason for this diversity is that most of the present statutory crimes were derived from their common law counterparts. Common law crimes evolved in response to different social concerns and at different times and, thus, the mens rea terms in the definitions of these crimes were expressed by a variety of words.[77] Homicide, for example, must be accomplished with "malice," burglary requires the act be done "feloniously" and arson necessitates a "malicious intent." The early American penal codes, which codified the common law definitions, preserved the distinctions between the various mens rea elements but failed to accurately define their meanings.[78]

In Tennessee, which is typical of most common law jurisdictions, the task of interpreting the assortment of mens rea terms is left to the courts. The legislature, when enacting a statute, normally neglects to prescribe the parameters of a particular

72. TENN. CODE. ANN. § 39-107 (1955).

73. *Id.* 39-208.

74. *Id.* § 39-511.

75. *Id.* § 39-4219. Additional examples include: *Id.* § 39-402 (wantonly, knowingly and willfully); *id.* § 39-509 (Supp. 1972) (negligently and carelessly or maliciously); *id.* § 39-604 (1955) (malice aforethought); *id.* § 39-801 (corruptly); *id.* § 39-1101 (falsely); *id.* § 1209 (unnecessarily); *id.* § 39-2216 (Supp. 1972) (intentionally); *id.* § 39-4251 (wrongfully); *id.* § 39-4402 (1955) (wittingly).

76. 1 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 120 (July, 1970).

77. Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 994 (1932); Turner, *The Mental Element in Crimes at Common Law*, 6 CAMB. L. J. 31, 39-48 (1936).

78. LAFAVE at 192.

mens rea element, a practice that results in confusing and contradictory interpretations. Consequently, most mens rea terms in this state remain either undefined or, for those terms that have received judicial definition, are inconsistently applied. For example, statutes that contain similar mental states may be interpreted as requiring a specific intent for one offense, yet only a general intent for another.[79] Other offenses, such as forgery, which mention only one type of mens rea, may be judicially expanded to include other types.[80] Another common problem is that the same mens rea word may have two different meanings in separate offenses. Thus, "malice" has been held to mean one thing for mayhem and quite another for murder in the first degree.[81]

The Proposed Tennessee Criminal Code recognizes the source of confusion to be the multitude of terms and lack of uniform legislative definition.[82] In order to achieve a more workable system, the Code adopts only four carefully defined and concise mental states: intentionally, knowingly, recklessly and negligently. These four terms are applied uniformly throughout the Code and are accompanied by special rules of construction.[83] The four mental states modify the various elements of the specific criminal provisions and are hierarchically arranged.[84]

Intentionally represents the most narrow and highest degree of culpability, as crimes committed "intentionally" incur the greatest penal liability. Knowingly, recklessly and negligently, in descending order, represent proportionately lesser degrees of culpability. Conduct that is accomplished recklessly is thus

79. State v. Smith, 119 Tenn. 521, 105 S.W. 68 (1907); Whim v. State, 117 Tenn. 94, 94 S.W. 674 (1906); *see* LAFAVE at 201; R. PERKINS, THE CRIMINAL LAW 744 (2nd ed. 1969) [hereinafter cited as PERKINS].

80. Forgery is defined as "the fradulent making or alteration of any writing to the prejudice of another's rights." TENN. CODE ANN. § 39-1701 (1955). Ratliff v. State, 175 Tenn. 172, 176, 133 S.W.2d 470, 471 (1939), expands the definition to include "knowledge of the falsity of the instrument and the intent to defraud."

81. *See* Terrell v. State, 86 Tenn. 523, 8 S.W. 212 (1888).

82. *See* LAFAVE at 192; Kuh, *A Prosecutor Considers the Model Penal Code*, 63 COLUM. L. REV. 608, 622 (1963); Remington, *The Mental Element in Crime, A Legislative Problem*, 1952 WIS. L. REV. 644 [hereinafter cited as Remington].

83. "The most important aspect of the [Model Penal] Code is its affirmation of the centrality of *mens rea*, an affirmation that is brilliantly supported by its careful articulation of the elements of liability and of the various modes of culpability to which attention must be paid in framing the definitions of the various criminal offenses." Packer, *The Model Penal Code and Beyond*, 63 COLUM. L. REV. 594, 594-595 (1963) (emphasis in original).

84. See MODEL PENAL CODE § 2.05(5) (Tent. Draft. No. 4, 1955).

deemed more reprehensible or "blameworthy" than if done negligently and invokes a greater penalty despite the similarity of the physical act described by the criminal offense.

Each offense defined in the Code is made up of as many as three elements or parts: the conduct, circumstances surrounding conduct, and the result of conduct.[85] These elements describe the various physical acts that constitute the actus reus of the offense. The four mental states are then applied to actuate or modify these elements. The reason for dividing an offense into several elements is that confusion often arises in current statutes that contain one or more mental states. There is often some question about which mental description modifies which elements in the definition of a crime. The Code has alleviated part of the problem by providing for separate elements with the required mental state set forth separately for each element.[86]

The first element, "conduct," concerns the nature of the proscribed act. For example, false imprisonment, as defined in the Code, occurs when an actor "intentionally or knowingly *detains* another or intentionally or knowingly *moves* another . . ."[87] The italicized words represent the nature of defendant's conduct. Thus, "conduct" is the manner in which he acts. The mens rea words preceding these terms describe the standard of mens rea to be applied to the accused's conduct.

Actions may also constitute false imprisonment if the victim is younger than twelve and the "detention or moving is accomplished *without the effective consent of the victim's custodial parent* . . ."[88] The italicized words represent the second element, or "circumstances surrounding conduct," which is a situation created by the actor that bears indirectly on his culpability. Thus, if the actor "knows" he does not have the required consent or is "reckless" about whether he has acquired it or not, his mental state satisfies the requirements of this element. These mental states, although not appearing within the definition of the "circumstances" element, are supplied by the Code's rule of con-

85. CRIMINAL CODE § 107(15)(A) (Tent. Draft, 1972).

86. "If the definition of an offense prescribes a culpable mental state but does not specify the conduct, circumstances surrounding the conduct or result of the conduct to which it applies, the [proscribed] mental state applies to each element of the offense." *Id.* § 406. *See* Remington at 676.

87. CRIMINAL CODE § 1202 (Tent. Draft, 1972) (emphasis added).

88. *Id.* § 1202(b) (emphasis added).

struction that whenever the terms of an offense do "not prescribe a culpable mental state, . . . intent, knowledge or recklessness suffices to establish criminal responsibility."[89]

The penalty for false imprisonment is increased if the actor "recklessly exposes the victim to a *substantial risk of serious bodily injury or death*."[90] Here the italicized words represent the third element, or the "results," of the actor's conduct, and the mental state preceding those words is deemed to modify that result. The result element does not describe how the accused acts upon the victim but rather the status of the victim or the degree of his harm as a result of the accused's actions.

Under the Code's formulation it is a simple procedure to determine exactly what state of mind is necessary to establish culpability. First, the type of element, either conduct, circumstances or result must be ascertained. Secondly, the definition of the mens rea term preceding that element will indicate exactly how the former element is to be modified. If no mens rea element is specified, criminality results if the accused acted intentionally, knowingly or recklessly. Despite the fact that the organization and format may seem novel, the four mental states that modify the three offense elements are defined in a manner that the Code indicates is "familiar to Tennessee practitioners."[91] For the most part, the only differences between current interpretation and that adopted by the Proposed Code is the structure and form, rather than the substance of the mens rea concept.

A. Intention

The Proposed Tennessee Criminal Code chose the word "intentionally" to represent the highest degree of culpability. The Code provides: "A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result."[92] This definition includes both conduct

89. *Id.* § 404(c).
90. *Id.* § 1202(c)(2) (emphasis added).
91. *Id.* § 405, Comment at 44.
92. *Id.* § 405(a). Despite slight variations in terminology, the modern codes of other states which are similarly based on the Model Penal Code, define "intentionally" or "with intent" as a conscious objective, purpose, desire or specific intention.

A person acts purposely with respect to a material element of an offense when:
(1) if the element involves the nature of his conduct or a result thereof, it is his

and the result of conduct, two of the possible elements of an offense. Notably absent is the element of "circumstances surrounding conduct." Properly speaking, a person cannot intend "circumstances" since they are, rather, a function of "knowledge," and the drafters of the Proposed Code quite properly recognize the distinction.

The formulation of "intent" under the Proposed Tennessee Criminal Code appears to be quite different from the common law usage of the term.[93] Under the common law, "intent" has been both refined and extended through the use of various ambiguous terms such as constructive intent, presumed intent, criminal intent, and specific and general intent.[94] Much of the confusion surrounding the mens rea concept has been due to the varied interpretations given these terms.

Probably the greatest difficulty has been caused by the distinction between general and specific intent. The former term is usually construed to mean an "intent to do the deed which constitutes the actus reus of a certain offense" in the sense that all crimes require voluntary, conscious conduct.[95] Specific intent has been variously defined but its most common usage is a "special mental element which is required above and beyond any mental state required with respect to the actus reus of the crime."[96]

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conscious object to engage in conduct of that nature or to cause that result. . . .

MODEL PENAL CODE § 2.02(2)(a) (Tent. Draft No. 4, 1955). *See also* CONN. GEN. STAT. ANN. § 53A-1-3(11) (1972); ILL. ANN. STAT. Ch. 38, § 4-4 (Smith Hurd 1972); N.Y. PENAL LAWS § 15.05 (McKinney 1972); ORE. REV. STAT. § 161.185(7) (1971); Comment, *The Mens Rea Provisions of the Proposed Ohio Criminal Code—The Continuing Uncertainty*, 33 OHIO ST. L.J. 354 (1972) [hereinafter cited as Proposed Ohio Code]; Comment, *Student Symposium On The Proposed California Criminal Code*, 19 U.C.L.A. L. REV. 525 (1972); Symposium, *The Revised Washington Criminal Code*, 48 WASH. L. REV. 1, 156-65 (1972) [hereinafter cited as Symposium.]

93. *See also* MODEL PENAL CODE § 2.02(2)(a)(2) (Tent. Draft No. 4, 1955).

94. *See* HALL at 141-42; LAFAVE at 201; PERKINS at 743; 9 J. WIGMORE, EVIDENCE § 2511a (3rd ed. 1940).

> Intent may be used in at least three distinct legal meanings. It may designate simply the exercise of will power necessary to cause muscular or physical movement. . . .Secondly, it may denote the immediate result desired by the actor. Thirdly, it may signify the ultimate reason for aiming at that immediate objective. At this point, however, intent shades into motive, which is really the ulterior intent on the cause of the intent. Intent, in other words, is the object of the act; motive, in turn, is the object or spring of the intent.

R. PAUL, MOTIVE AND INTENT IN FEDERAL TAX LAW, SELECTED STUDIES IN FEDERAL TAXATION 257-58 (2d Cir. 1938).

95. PERKINS at 744.

96. LAFAVE at 202; *see* PERKINS at 750.

example, the "intent to commit a felony therein" is a specific intent of burglary. Despite its continued viability under current law, the specific—general dichotomy has been criticized by commentators as obsolete, serving no valid function in modern criminal philosophy.[97] The Model Penal Code similarly maintains that there is "no virtue in preserving the concept of 'general intent' [vis-a-vis specific intent] which has been an abiding source of ambiguity and of confusion in the penal laws."[98]

The modern criminal codes, like the proposed Tennessee version, although purporting to abolish general intent and modify the awkward concept of specific intent, may not have properly distinguished the two for purposes of proof. Under prior law, to establish the requisite proof of guilt, courts engaged in the presumption that one intends the natural and probable consequences of his acts.[99] Stated alternatively, the law presumes,[100] once the culpable act has been established, that the act was done consciously and voluntarily.[101] Although some courts speak of the presumption as "conclusive" of general intent, [102] a majority of jurisdictions view the presumption as shifting the burden of coming forward with evidence to the accused by requiring him to introduce rebutting evidence.[103] Failure to come forward with

97. The specific-general intent formulation is a "confusion of procedural concepts with those of substantive penal theory. . . ." HALL at 144.

98. MODEL PENAL CODE § 2.02, Comment at 128 (Tent. Draft No. 4, 1955). *See* O. HOLMES, THE COMMON LAW 53 (1881); HALL at 112.

99. In West v. State, 28 Tenn. 65, 70 (1848), the court reasoned that "as men seldom do unlawful acts with innocent intentions, the law presumes every act, in itself unlawful, to have been criminally intended." *See, e.g.*, Rogers v. State, 196 Tenn. 263, 265 S.W.2d 559 (1954); Walden v. State, 178 Tenn. 71, 156 S.W.2d 385 (1941). *See also* Stallard v. State, 209 Tenn. 13, 348 S.W.2d 489 (1961). In Tennessee a "presumption is a substitute for evidence which, in the absence of direct evidence conflicting, requires as a matter of law that a certain fact conclusion be accepted or proved by the jury." Liming v. State, 220 Tenn. 371, 381, 417 S.W.2d 769, 773 (1967).

100. Justice Holmes stated that a man may be convicted of a very serious crime because his actions resulted in "consequences which he neither intended nor foresaw. To say that he was presumed to have intended them, is merely to adopt another fiction, and disguise the truth." Commonwealth v. Pierce, 138 Mass. 165, 178 (1884). *See* PERKINS at 748; G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 89-93 (2nd ed. 1961).

101. "Many writers do not use the term 'general intent' but they nevertheless distinguish between a specific mental element [and one] which is presumed from the defendant's voluntary conduct." Remington at 651 n.22.

102. *See, e.g.*, Reizenstein v. State, 165 Neb. 865, 881, 87 N.W.2d 560, 569-70 (1958).

103. *See, e.g.*, State v. Robinson, 193 Kan. 480, 485, 394 P.2d 48, 53 (1964); State v. Davis, 214 N.C. 787, 792, 1 S.E.2d 104, 107 (1939); Johnson v. Commonwealth, 188 Va. 848, 853-54, 51 S.E.2d 153, 154 (1949). *See generally* C. MCCORMICK, EVIDENCE § 349, at

such evidence permits, and in some jurisdictions, requires the jury to find the presence of the requisite general intent.

When a crime requires proof of a specific intent, however, courts have generally held these presumptions inapplicable and require a greater production of evidence by the state to support a jury finding of intent.[104] In *Liming v. State*,[105] for example, the Tennessee court adopted the view that specific intent must be proven by independent evidence and cannot be presumed from the commission of the unlawful act itself.[106] Otherwise "a defendant [would be deprived] of his presumption of innocence. . . ."[107] Since the state is not aided by a presumption of intent simply because the unlawful act is proven, courts generally allow a jury to infer specific intent from circumstantial evidence,[108] such as the acts, words, or conduct of the accused.[109] This is a practical approach since "intent can rarely be shown by direct proof. . . ."[110] Unfortunately, language allowing an inference to be based on circumstantial evidence is frequently couched in terms of a presumption, and the burden of going forward with the evidence may be allowed to shift to the accused upon a mere showing of an unlawful act. In this context, the distinction between proving a general intent and a specific intent is blurred. For example, in the recent Tennessee case of *Hall v. State*,[111] in which defendant was indicted for burglary, the sole ground for appeal was that the accused did not have the requisite intent to

829 (2nd ed. 1972) [hereinafter cited as McCormick].

104. In Holland v. United States, 348 U.S. 12 (1954) defendants were convicted of a willful attempt to evade their income taxes. The court adopted the view that "willfullness involves a specific intent which must be proven by independent evidence and which cannot be inferred from the mere understatement of income.'" *Id.* at 139. *See* State v. Higgen, 257 Minn. 46, 52, 99 N.W.2d 902 (1959):

> Like every other essential element of the crime, specific intent must be established beyond reasonable doubt or be reasonably deductible from the evidence. It may not rest on a presumption.

See also State v. Cooper, 113 N.J. 34, 272 A.2d 557 (1971); People v. Neal, 40 Cal. App. 2d 115, 104 P.2d 555 (1940). *But see* Kirkendall v. State, 152 Neb. 691, 42 N.W.2d 374 (1950).

105. 220 Tenn. 371, 417 S.W.2d 769 (1967).

106. *Id.* at 380, 417 S.W.2d at 773.

107. *Id.* at 382, 417 S.W.2d at 774. *See* Marie v. State, 204 Tenn. 197, 319 S.W.2d 86 (1958).

108. Patterson v. State, 475 S.W.2d 201, 203 (Tenn. Crim. App. 1971).

109. *See, e.g.*, Gibbs v. Commonwealth, 273 S.W.2d 583, 584 (Ky. 1954); Dawkins v. Commonwealth, 186 Va. 55, 61, 41 S.E.2d 500, 503 (1947).

110. Hall v. State, 490 S.W.2d 495, 496 (Tenn. 1973).

111. 490 S.W.2d 495 (Tenn. 1973).

steal that burglary requires. The Tennessee Supreme Court held that "in the absence of an acceptable excuse . . . the intent to steal may be inferred from the breaking and entering of a building which contains things of value or from the attempt to do so."[112] Although the court indicated that the jury "may" infer the intent, the requirement of an "acceptable excuse" clearly shifts the burden of going forward with the evidence to the accused to disprove criminal intent by an alibi or justification. This procedure, if couched in terms of a jury instruction, has been held, in at least one jurisdiction,[113] to be violative of due process and the United States Supreme Court has given at least tacit approval to this decision.[114]

An additional problem is the standard of pursuasion which must be met before a jury can infer the requisite intent from the known facts. Until recently it was not clear whether a mere probable inference of the existence of intent was sufficient so long as ultimate guilt was proven "beyond a reasonable doubt."[115] The

112. *Id.* at 496. *But see* United States v. Melton, 14 CRIM. L. REP. 2050 (D.C. Cir. Oct. 17, 1973). The trial court in that case ruled that "mere unlawful entry into another's house supports an inference that the interloper was there to steal." *Id.* Chief Judge Bazelon reversed the conviction and reasoned that "[t]o allow proof of unlawful entry, ipso facto, to support a burglary charge is, in effect, to increase sixty-fold the statutory penalty for unlawful entry." *Id. See also* Barnes v. United States, 412 U.S. 837 (1973), where the defendant was convicted of possessing certain stolen treasury checks, knowing them to be stolen. The trial court instructed the jury that "ordinarily it would be justified in inferring from unexplained possession of recently stolen mail that defendant possessed the mail with knowledge that it was stolen." *Id.* The Court in affirming the conviction, held that the unexplained possession of recently stolen property is "clearly sufficient to enable the jury to find beyond a reasonable doubt, that petitioner knew the checks were stolen. Since the inference thus satisfies the reasonable doubt standard . . . it satisfies due process." *Id* at 845.

The Court indicated that the practical effect of the instruction on the inference would be to shift the burden of going forward with the evidence to the defendant. This is permissible only where the inference satisfies the reasonable doubt standard. Although this common law inference was allowed, the Court did not decide whether more recent or less accepted judge-formulated inferences may "properly be emphasized by means of a jury instruction." *Id.* at 845 n.11.

113. Stump v. Bennett, 398 F.2d 111, 113 (8th Cir. 1968); *see* State v. Commenos, 461 S.W.2d 9 (Mo. 1970); State v. Adams, 81 Wash. 2d 468, 503 P.2d 111 (1972). *But see* Boatwright v. State, 272 So. 2d 137 (Fla. 1973); People v. Laietta, 30 N.Y.2d 68, 281 N.E.2d 157, 330 N.Y.S.2d 351 (1972).

114. Johnson v. Bennett, 393 U.S. 253 (1968). Liming v. State, 220 Tenn. 371, 417 S.W.2d 769 (1967), properly recognizes a similar constitutional limitation on presumptions, but since Hall v. State, 490 S.W.2d 495 (Tenn. 1973), is a subsequent decision, it may indicate a retreat from the *Liming* position. *See* MCCORMICK § 341, at 801.

115. *See* MCCORMICK § 341.

United States Supreme Court held, in *In re Winship*,[116] that the due process clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[117] Since proof of intent is a necessary fact or element, it would appear that, absent other evidence, specific intent can be inferred only when the known facts can be said to establish the inferred intent beyond a "reasonable doubt." Any lesser standard would appear to be unconstitutional.[118]

Although the problems of shifting the burden of going forward with the evidence through the use of presumptions and the reasonable doubt standard are separate issues, they are related:

> Both the right of the defendant to trial by jury and his right to have the prosecution prove each element of the offense beyond a reasonable doubt are constitutionally protected. A rule that shift(s) the burden of producing evidence with regard to an element of the offense so as to require the jury to find against the defendant in the absence of rebutting evidence or that required that the defendant persuade the jury of the nonexistence of such an element would violate both these rights.[119]

While part of the current misunderstanding of presumptions and burdens is attributable to "loose terminology" on the part of courts and legislatures,[120] the confusion could also be attributable to the general-specific intent dichotomy. The Model Penal Code abrogates the distinction[121] and two other jurisdictions have adopted its approach.[122] While the Tennessee version was being

116. 397 U.S. 358 (1970).

117. *Id.* at 364.

118. Although "[a] simple instruction that the jury will acquit if they have a reasonable doubt of the defendant's guilt . . . is ordinarily sufficient . . ." a similar instruction may now be required for each element of crimes consisting of several elements. McCORMICK § 341, at 799. *See* Barnes v. United States, 412 U.S. 837 (1973).

119. McCORMICK § 346 at 831.

120. *Id.* at 829.

121. MODEL PENAL CODE § 2.02, Comment at 128 (Tent Draft No. 4, 1955).

122. The Proposed Washington and Ohio Criminal Codes have been similarly interpreted. "Probably the closest equivalent in Washington law to the new definition [of intent] is the rather imprecise phrase 'specific intent' which seems similar in effect to this new term." REV. WASH. CODE ANN. § 9A.08.020, Comment (1972) reprinted in Symposium at 161 n.59. *See* Proposed Ohio Code at 363-78. Other modern codes apparently skirt the issue. For example, the New York Code summarily dispenses with an extended explanation. "Intentionally . . . and 'knowingly' . . . are familiar concepts, and the revised definitions thereof are largely self-explanatory." N.Y. PENAL LAW § 15.05, Comment at

drafted, it was suggested that the use of the word "intent" as defined by the Proposed Code be "limited to conscious objective or purpose to accomplish a described result, as distinguished from the 'general intent' which often has been used to describe also a presumption of culpability. . . ."[123] For some reason this language, found in the comments to a similar Illinois provision,[124] does not appear in the final draft of the Proposed Code; rather, no position is taken at all. There is no indication why the Proposed Code is silent on the general-specific intent issue but the drafters may have concluded that other sections of the Proposed Code effectively deal with the problem.

It is fair to say that the Proposed Code treats some of the constitutional issues raised by the above discussion. Initially, the Code provides that the actus reus of an offense and the culpable mental states, as well as the negation of various defenses, must each be proved beyond a reasonable doubt.[125] This provision codifies the holding of *In re Winship*.[126] The Proposed Code then deals with the issue of presumptions and defenses by dividing these concepts into four categories, each having its own rules as to the quantum of evidence a party must offer to raise and rebut them, as well as the party on whom rests the initial burden of coming forward with the evidence. The first category deals with those penal provisions which contain "exceptions" to a finding of criminality, and requires the state to prove beyond a reasonable doubt

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22 (McKinney 1967); *see In re* Taylor, 62 Misc. 2d 529, 309 N.Y.S.2d 368 (Fam. Ct. 1970). *See also* Comment, *Insanity, Intoxication, and Diminished Capacity Under the Proposed California Criminal Code*, 19 U.C.L.A. L. REV. 550, 576-84 (1972). *But see* CONN. GEN. STAT. ANN. § 53a-5, Comment at 9 (1972):

> Nor does [the requirement of a mental state] change the rule that intent may be inferred from conduct and that one is presumed to intend the natural and necessary consequences of his act.

ORE. REV. STAT. § 41.360(3) (1971):

> [That] a person intends the ordinary consequences of his voluntary act is a disputable presumption.

123. 1 LAW REVISION COMMISSION, STATE OF TENNESSEE, WORK DOCUMENT: THE LAW OF CRIMES 51 (Dec. 1971).

124. ILL. ANN. STAT. ch. 38, § 4-3, Comment at 256 (Smith-Hurd 1972).

125. CRIMINAL CODE § 201(a) (Tent. Draft 1972):

> No person may be convicted of an offense unless each of the following is proved beyond a reasonable doubt:
>
> (1) the conduct, circumstances surrounding the conduct, or result of his conduct described in the definition of the offense; and
>
> (2) the culpable mental state required; . . .

126. 397 U.S. 358 (1970).

that the accused does not fall within the exception.[127] For example, it is an exception to the offense of giving a gift to a public servant[128] that the public servant is lawfully entitled to receive the gift.[129]

The second category concerns defenses on which the defendant must produce the initial evidence but, once such evidence is introduced, the prosecution has the burden of persuasion to disprove it beyond a reasonable doubt.[130] For example, it is a defense to the offense of giving a gift to a public servant,[131] when under the election laws, the purpose of the gift was for the political campaign of the elective official.[132]

The third category treats affirmative defenses. Once there is evidence to warrant submission of the affirmative defense to the jury, the burden of persuasion by a preponderance of the evidence is on the defendant.[133] For example, it is an affirmative defense for the crime of conspiracy[134] that the actor withdrew from the conspiracy before commission of the object offense and made an effort to prevent its commission.[135] The few affirmative defenses listed in the Proposed Code appear to comport with earlier Supreme Court limitations on the imposition of the burden of persuasion[136] although there may be some question of their validity in view of *In re Winship*.[137]

The fourth category deals expressly with presumptions. If sufficient evidence of facts giving rise to a presumption is introduced, the existence of the presumed fact is left to the jury.[138] Once submitted to a jury the judge charges that "although the presumed fact must, on all the evidence, be proved beyond a reasonable doubt, the law declares that the facts giving rise to the

127. CRIMINAL CODE § 202 (Tent. Draft 1972).
128. *Id.* § 2108.
129. *Id.* § 2110(a).
130. *Id.* § 203.
131. *Id.* § 2108.
132. *Id.* § 2110(b)(2).
133. *Id.* § 204.
134. *Id.* § 902.
135. *Id.* § 904(b).
136. Morissette v. United States, 342 U.S. 246, 263 (1952); *see* Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107 (1962).
137. 397 U.S. 358 (1970). The affirmative defenses are presumably constitutional if they merely alter the burden of persuasion. *See* MCCORMICK at 799.
138. CRIMINAL CODE § 205(1) (Tent. Draft 1972).

presumption are some evidence of the presumed fact."[139] The Proposed Code recognizes the constitutional limitations imposed by cases like *Leary v. United States*[140] and *United States v. Gainey*[141] requiring a rational connection between the fact proved and the ultimate fact to be presumed. The presumption section, however, does not contain a comprehensive list of presumptions. This raises the possibility that "intent" as defined in the Proposed Code might be proven solely through use of the presumption that commission of the criminal act is sufficient in itself to prove the requisite intent. This is an unsatisfactory result, and the Proposed Code should be amended to preclude this possibility. It is submitted that to achieve clarity, the proposed Code incorporate in its comments the suggested explanation of intent found in the comments to the Illinois code.[142]

B. *Knowledge*

Most crimes in the Proposed Code that require an act to be committed "intentionally" also require an element of knowledge on the part of the actor. The term "knowingly" connotes a slightly lower level of culpability and thus allows a broader base of criminal liability. The Code provides:

> A person acts knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is practically certain to cause the result.[143]

In this definition all three elements of an offense are present but each is treated somewhat differently. Knowledge of the "nature of conduct" simply requires the actor to be "aware of the nature" of his conduct. This formulation is similar to the "intent" standard of a conscious objective or desire. Both definitions require a subjective mental state which, taken together, convey the same meaning as "intent" under current usage.[144] As to "circum-

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139. *Id.* § 205(2).
140. 395 U.S. 6 (1969).
141. 380 U.S. 63 (1965).
142. *See* text accompanying note 123 *supra.*
143. CRIMINAL CODE § 405(b) (Tent. Draft, 1972).
144. Erby v. State, 181 Tenn. 647, 653, 184 S.W.2d 14, 16 (1944) ("[k]nowingly,

stances surrounding conduct," a person acts with "knowledge" when he is aware that the circumstances exist. This awareness is similar to the current Tennessee definition which provides that "knowingly" is that "state of mind wherein the person charged was in possession of facts under which he was aware he could not lawfully do the act whereof he was charged. . . ."[145]

The Proposed Code states that a person acts knowingly as to a result of his conduct, when he "is aware that his conduct is practically certain to cause the result."[146] The phrase "practically certain" should be compared to the Model Penal Code distinction that an actor must know his conduct "will necessarily cause" a result.[147] This terminology, however, was rejected by the drafters of the Proposed Code because

> to require absolute certainty [which the M.P.C. implies] would seem to narrow the scope of 'knowledge' unnecessarily, and to leave a gap in the range of culpability; a high degree of probability that a certain result will occur could hardly be distinguished logically from a complete certainty of the result, in fixing the criminal liability, and in many cases proof of complete certainty would be impossible.[148]

Despite critical comments concerning the Model Penal Code's definition of "knowingly,"[149] the modern codes of other jurisdictions have followed its basic pattern. A few states, however, define knowingly in terms of "nature of conduct" and "circumstances surrounding conduct" and exclude the "results of conduct" element.[150] The New York Code, for example, considers the distinction between "knows" and "intends" to be highly tech-

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when applied to an act or thing done, imports[s] knowledge of the act or thing so done. . . .").

145. Smith v. Smith, 119 Tenn. 521, 525, 105 S.W. 68, 69 (1907).

146. CRIMINAL CODE § 405(b) (Tent. Draft, 1972).

147. MODEL PENAL CODE § 2.02(a)(b)(2) (Tent. Draft No. 4, 1955).

148. 1 LAW REVISION COMMISSION, STATE OF TENNESSEE, WORK DOCUMENT: THE LAW OF CRIMES 51 (Dec. 1971).

149. PERKINS at 779. *But see* LAFAVE at 198.

150. CONN. GEN. STAT. ANN. § 53(a)(93)(12) (1972):

> 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 such a nature or that such circumstances exist.

ORE. REV. STAT. § 161.085(8)(1971): ". . .[a] person acts with an awareness that his conduct is of a nature so described or that a circumstance . . . exists."

N.Y. PENAL LAW § 15.02(2) (McKinney 1967): ". . . when he is aware . . . that such circumstances exist."

nical and semantic and does not employ the word "knowingly" in defining result offenses. Thus, in New York, "[m]urder, of the common law variety . . . is committed *intentionally* or not at all."[151] The drafters of the Proposed Tennessee Code admit the distinction is immaterial for many offenses, but offer an example to show why it was retained. Murder, in the Tennessee version, is defined as an intentional or knowing killing of another. Under this definition, "the owner who burns down his apartment building to collect the insurance doesn't desire [intend] the death of his tenants, but he is practically certain [knows] it will occur."[152] This is not to say that similar activity in New York would not be equally culpable. Rather, under New York's definition, the actions are proscribed by giving "intent" a broader interpretation. This also illustrates that, although there are variations between the modern codes, the majority of distinctions are definitional rather than substantive.

C. *Recklessness*

The third level of culpability is recklessness, which, like the two preceeding terms, requires a subjective standard to establish criminal responsibility. Since under current Tennessee law recklessness has often been confused with "negligence," the Proposed Code makes a clear distinction between the two:

> A person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.[153]

151. N.Y. PENAL CODE § 15.05, Comment at 22 (McKinney 1967) (emphasis in original).

152. CRIMINAL CODE § 405, Comment at 45 (Tent. Draft, 1972). Illinois similarly retains the distinction between acting intentionally and knowingly to the results of conduct. ILL. ANN. STAT. ch. 38, § 4-5(b)(Smith-Hurd 1972).

153. CRIMINAL CODE § 405(c) (Tent. Draft, 1972). See the following comparative legislation in the MODEL PENAL CODE § 2.02(a)(c) (Proposed Off. Draft, 1962):

> A person acts recklessly . . . when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from the conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its

Recklessness requires that the actor consciously ignore a risk that he has created. It is not required that he "intends" the dangerous event or "knows" that it is practically certain to occur. Rather the action, to be reckless, must involve a "conscious" indifference as to whether certain circumstances exist or a result will occur.[154] In "negligent" conduct, however, the actor is not actually "conscious" of the created risk. These distinctions can be illustrated by the series of events that must occur before an actor's conduct is deemed reckless. Initially, there must be a risk that a proscribed event will happen. Assume that a driver of a car pulls into the wrong lane in heavy traffic but no approaching vehicles are immediately visible to him. If he remains there long enough a result will probably occur, namely, a collision with an oncoming car. The danger, however, is one of probability rather than certainty since he does not see any cars in the oncoming lane. If he did see other cars, but proceeded anyway, then the result would be intended or there would be a practical certainty of a collision occuring; and his action would not be termed a risk under the Code's formulation. The risk, moreover, must be substantial[155] and unjustifiable. For example, if the driver was trying

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disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

REV. WASH. CRIM. CODE § 9A.08.020(2)(c) (1972), in Comment, *A Hornbook to the Code*, 48 WASH. L. REV. 149, 162 n.69 (1972):

A person is reckless or acts recklessly when he knows of and consciously disregards a substantial and unjustifiable risk (i) that the result described by a statute defining an offense may occur, or (ii) that a circumstance described by a statute defining an offense exists, and when the disregard of such risk constitutes a gross deviation from the standard of conduct that a reasonable person would exercise in that situation.

Proposed Ohio Code at 383 n.192:

A person acts recklessly when with heedless indifference to the consequences he disregards a substantial risk that his conduct may cause a certain result or may be of a certain nature. A person is reckless with respect to circumstances when with heedless indifference to the consequences he disregards a substantial risk that such circumstances may exist.

See also CONN. GEN. STAT. ANN. § 53-a-3(13) (1972); N.Y. PENAL LAW § 15.05(3) (McKinney 1967); ORE. REV. STAT. § 161.085(9) (1971).

154. CRIMINAL CODE § 405(c), Comment at 45 (Tent. Draft, 1972).

155. "Thus it has been suggested that if there were 1000 pistols on a table, all unloaded but one, and if A, knowing this, should pick one at random and fire at B, killing him, A's conduct in creating the risk of death, though the risk is very slight (one tenth of 1%), would be unreasonable, in view of its complete lack of social utility." LAFAVE at 210. The MODEL PENAL CODE § 2.02, Comment at 125 (TENT. DRAFT No. 9 1955) provides

to take his sick child to a hospital, the risk taken might be justifiable under the circumstances. Thus, determining whether the risk taken is substantial or justifiable is nothing more than a value judgment to be made by a jury. The definition also requires that the actor be "aware" of the risk he has created and "consciously" disregard that risk. This is a highly subjective element requiring actual knowledge by the actor that his conduct does create a risk of harm. It is not enough that he should have known of the risk; he must in fact know that he is ignoring it. This distinction is the crux of criminal recklessness.[156]

Once the subjective elements are established, the jury must determine if disregarding the risk constituted a "gross deviation from the standard of care that an ordinary person would exercise. . . ."[157] This objective standard determines, in the final analysis, the actor's culpability. The drafters of the Proposed Code state that although this procedure and the terms used to define reckless conduct are admittedly vague, they are "intended only to focus on the judgmental factors the fact-finder must weigh in deciding whether a person's disregard of . . . a risk was serious enough to merit the condemnation of the criminal law."[158]

Current Tennessee law does not have a similar definition of criminal recklessness. Although the term is certainly recognized, the interpretation it has received makes it indistinguishable from criminal negligence and will therefore be discussed within the context of that term. It is important to note, however, that the Proposed Code, by its separate definition, attempts to divide reckless and negligent conduct into two distinct levels of criminal liability.

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that: "[E]ven substantial risks may be created without 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." *See also* Hurt v. State, 184 Tenn. 608, 201 S.W.2d 988 (1947).

156. LAFAVE at 211; PERKINS at 761; G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART § 26 (2d ed. 1961).

157. CRIMINAL CODE § 405(c) (Tent. Draft, 1972).

158. *Id.*, Comment at 46. The Model Penal Code's definition of recklessness is similarly "designed to avoid the difficulty inherent in defining culpability in terms of culpability, but the [definition] seems hardly more than verbal; it does not really avoid the tautology or beg the question less. It may, however, be a better way to put the issue to a jury. . . ." MODEL PENAL CODE § 2.02, Comment at 125. (Tent. Draft No. 4, 1955).

D. Criminal Negligence

With respect to the lowest level of criminal liability, criminal negligence, the Proposed Code provides:

> A person acts with criminal negligence, or is criminally negligent, with respect to circumstances surrounding his conduct or the result of his conduct when he *ought to be* aware of a substantial and unjustifiable risk that the circumstances exist or the results will occur. The risk must be of such a nature and degree that the *failure* to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.[159]

The italicized words in the above definition represent the slight but important distinction from the more subjective concept of recklessness. The words "ought to be" and "failure to perceive" indicate that negligence is an objective standard.[160] Properly speaking, negligence is not a true mens rea term at all because it is concerned with the absence rather than the presence of a culpable state of mind. The other three mental states all require some subjective awareness on the part of the actor, negligence does not.

The negligent failure to perceive a risk is what creates criminal liability when such lack of awareness constitutes a "gross deviation" from an ordinary standard of care. This is consistent with the Tennessee view that "the kind of negligence required to impose criminal liability must be of a higher degree than is required to establish negligence upon a mere civil issue."[161] Unfortunately, various adjectives have been used to describe the "higher degree" such as "gross," "wanton," "reckless" and "culpable."[162] The danger of using these adjectives to connote negligence is that courts often fail to make a clear distinction

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159. CRIMINAL CODE § 405(d) (Tent. Draft, 1972) (emphasis added). For comparative legislation see CONN. GEN. STAT. ANN. § 53a-3(14) (1972); N.Y. PENAL LAW § 15.05(4) (McKinney 1967); ORE. REV. STAT. § 161.085(10) (1972).

160. *See generally* G. WILLIAMS, CRIMINAL LAW 99 (1953); *Perkins* at 752; Hall, *Negligent Behavior Should be Excluded from Penal Liability*, 63 COLUM L. REV. 632 (1963); Hautamaki, *The Element of Mens Rea in Recklessness and Criminal Negligence*, 2 DUKE BAR J. 55 (1951); Moreland, *A Rationale for Criminal Negligence*, 32 KY. L.J. 1 (1943).

161. Hiller v. State, 164 Tenn. 388, 390, 50 S.W.2d 225, 226 (1932); *see* Trentham v. State, 185 Tenn. 271, 206 S.W.2d 291 (1947); Claybrook v. State, 164 Tenn. 440, 51 S.W.2d 499 (1932); Copeland v. State, 154 Tenn. 7, 285 S.W. 565 (1926).

162. Trentham v. State, 185 Tenn. 271, 206 S.W.2d 291 (1947).

between negligent conduct and reckless conduct. The former term requires that the actor *should have known* of the risk, the latter that he does know.[163]

Tennessee's reckless driving statute, for example, is defined as a "willful or wanton disregard for the safety of persons or property."[164] Jury instructions for this offense contain an explanation of the words "willful or wanton disregard" to define the level of culpability. As an example, one such instruction explains:

> To constitute willful disregard there must be a designed purpose, an intent to do the wrong, while to constitute wanton disregard the party doing the act or failing to act, must be conscious of his conduct, and though having no intent to injure, must be conscious, from his knowledge of surrounding circumstances and existing conditions, that his conduct will naturally or probably result in injury.[165]

This definition of recklessness coincides with the Proposed Code's definition of recklessness. Unfortunately, Tennessee appellate courts have expanded the interpretation to include criminal negligence. The leading case of *Cordell v. State*[166] further defines reckless driving as an actor's creation of a hazard either "consciously [recklessly] or under circumstances which would charge a reasonabl[y] prudent person with appreciation of the fact and the anticipation of consequences injurious or fatal to others."[167] The latter part of the definition thus proscribes negligent conduct since the court would impute "awareness" to the actor. Apparently, no one has challenged the statute on the basis that convictions grounded on criminal negligence may, in fact, provide a broader level of culpability than intended by the legislature.

Aside from reckless driving, criminal negligence has been important in defining involuntary manslaughter, which must result from the performance of an "unlawful act [malum in se],

163. *See* RESTATEMENT OF TORTS § 12 (1934) for the tort distinction between "reason to know" and "should know."

164. TENN. CODE ANN. § 59-858 (1955).

165. W. SMITH, TENNESSEE JURY INSTRUCTIONS: CRIMINAL No. 36-3, at 182 (1965), paraphrasing Smith v. State, 119 Tenn. 521, 105 S.W. 68 (1907) (for willful) and Usary v. State, 172 Tenn. 305, 315, 112 S.W.2d 7, 10 (1938) (for wanton). *See* Barkley v. State, 165 Tenn. 309, 54 S.W.2d 944 (1932).

166. 209 Tenn. 219, 352 S.W.2d 234 (1961).

167. *Id.* at 220, 352 S.W.2d at 234. *See also* Potter v. State, 174 Tenn. 118, 124 S.W.2d 232 (1939).

or a lawful act in an unlawful manner [malum prohibitum]."[168] In both aspects of the definition, a court must find criminal negligence to convict. Courts tend, however, to utilize greater detail in explaining or finding negligence in actions which are malum prohibitum,[169] because the mere violation of a statute "will not sustain a conviction of manslaughter when it appears that the killing was not the natural or probable result of the unlawful acts."[170] The current distinction between malum prohibitum and malum in se appears to be rather artificial and arbitrary. Under the Proposed Code these terms are deemed unnecessary and are abolished, leaving but one uniform definition of negligent homicide.[171]

The Proposed Code will presumably retain the current rule that the contributory negligence of a victim is not a defense in a criminal prosecution for negligent behavior.[172] This rule is derived from the Tennessee tort concept which provides that contributory negligence is not a bar to recovery where the defendant is guilty of gross or wanton negligence.[173]

Although criminal negligence is a basis for penal liability in almost all jurisdictions there has been some recent debate as to whether it should be proscribed by criminal sanctions in addition to any possible civil remedy.[174] Although one of the basic objectives of criminal law is to deter certain behavior,[175] there is some doubt that a statute based on nonconscious behavior will deter people from acting negligently. By definition, the actor is not aware that he is violating any law. However, the mere existence of a crime based on objective fault may cause people to think about the consequences of their actions before they act, and,

168. CRIMINAL CODE § 1103, Comment at 170 (Tent. Draft, 1972); *see* TENN. CODE ANN. § 39-2409 (1955); Roe v. State, 210 Tenn. 282, 358 S.W.2d 308 (1962); Nelson v. State, 65 Tenn. 418 (1873); *see also* Lee v. State, 41 Tenn. 62 (1860).

169. Keller v. State, 155 Tenn. 633, 299 S.W. 803 (1927); Holder v. State, 152 Tenn. 390, 277 S.W. 900 (1925).

170. Hiller v. State, 164 Tenn. 388, 392, 50 S.W.2d 225, 227 (1932).

171. CRIMINAL CODE § 1104 (Tent. Draft, 1972).

172. Fuston v. State, 215 Tenn. 401, 386 S.W.2d 523 (1965); Barr v. Charley, 215 Tenn. 445, 387 S.W.2d 614 (1964); Lauterbach v. State, 132 Tenn. 603, 179 S.W. 130 (1915).

173. Stinson v. Daniel, 220 Tenn. 70, 414 S.W.2d 7 (1967).

174. HALL at 137; LAFAVE at 211. For the British view, see G. WILLIAMS, THE MENTAL ELEMENT IN CRIME 54 (1964).

175. *See* LAFAVE at 22.

therefore, may tend to reduce dangerous conduct.[176] The Model Penal Code similarly takes the position that negligence "cannot be wholly rejected as a ground for culpability . . . though we agree that . . . it often will be right to differentiate such conduct for the purposes of sentence."[177]

The drafters of the Proposed Tennessee Criminal Code, in adopting the Model Penal Code position, have created very few offenses based on negligence because of a "traditional reluctance to brand even grossly negligent conduct as criminal."[178] The principal crimes involving this mental state are: negligent homicide,[179] negligent failure to obtain a firearm permit;[180] or, when dispensing drugs to a minor, negligence in ascertaining the minor's age.[181] Conversely, the Code specifically precludes proscribing negligent destruction of property and allows only a civil recovery.[182]

IV. Conclusion

Like an aging dinosaur, the current substantive criminal system has not evolved with time. Rather, the antiquated criminal provisions have been augmented by additional laws, layered on top of the old, which compound and enhance the confusion. Viewed out of context with other statutes, an individual law may not, perhaps, seem in need of revision. The criminal code, however, seen as a whole, appears to be too cumbersome and is ripe for reform.

The alterations suggested by the Proposed Tennessee Criminal Code represent significant advancements over current law. The individual criminal provisions have been reworded to proscribe similar conduct as under the earlier code, but the terms selected are designed to convey a clearer meaning than Blackstonian verbiage. In addition, uniform rules of construction are

176. *Id.* at 216; *see* G. Williams, Criminal Law 99 (1953), where it is said that the "threat of punishment for negligence must pass him by, for he does not realize that it has been addressed to him." *See also* Hall, *Negligent Behavior Should be Excluded from Penal Liability*, 63 Colum. L. Rev. 632 (1963).

177. Model Penal Code § 2.02, Comment at 127 (Tent. Draft No. 4, 1955).

178. Criminal Code § 404, Comment at 42 (Tent. Draft, 1972).

179. *Id.* § 1104.

180. *Id.* § 2704(a)(3).

181. *Id.* § 2904(c)(2)(A).

182. *Id.* Ch. 16, Comment at 221.

provided to aid in interpretation, and the Code expressed its overall philosophy by certain theoretical objectives.

To effect the objective of fair warning of its terms, the Code abrogates uncodified common law crimes. This provision may have gone too far, however, and inadvertently abolished the contempt power as well. Fair warning should also operate to limit somewhat the application of the rule of liberal construction of penal statutes. Adoption of the liberal construction rule should not operate as too drastic a change since courts have recently tended to adopt a more liberal formulation on their own initiative.

The above general interpretive provisions create subtle changes in the law. The culpability sections, while apparently more extensive in the scope of revision, function principally to delineate the required mental states necessary to establish criminal liability. This area, which has been subject to the most judicial misunderstanding and legislative laxity, represents the primary shortcomings of the current criminal law. The Proposed Code quite properly recognizes the principal cause of the problem to be the multitude and variation of mens rea terminology.

The Proposed Code ameliorates this fragmentation and confusion by adopting only four well defined mens rea terms. On the one hand, this procedure creates a closed system in which the mental state for any particular crime can be immediately ascertained and explained in very precise terms. This is a laudable result, since consistency and uniformity of interpretation seem the inherent goal of the Code. However, by adopting this structured format, the Code has possibly acquired a pitfall that could not exist under the prior "free form" jumble of statutes. Every criminal provision in the Proposed Code rests upon one or more of the four mental states which, in the final analysis, define the scope of criminal liability. The definitions given these four mental states are, therefore, inextricably intertwined with the definitions of the specific offenses. The caveat is obvious: a change in the wording or interpretation of a particular mental state affects every statute that this mental state modifies.[183] In the case of

183. A case in point would be Ohio's Proposed Criminal Code. As originally drafted, the culpability provisions were not unlike those adopted by the Tennessee Law Revision Committee. Unfortunately, the definitions of the four mental states were legislatively altered, with the result being an overcriminalization of culpable conduct. For example, under the Ohio formulation, ordinary tort negligence may be sufficient to establish negli-

"intent" or "knowledge," this could constitute three fourths of the Code. Thus no longer will a court be as free to interpret the mental state of an offense in a vacuum. The mens rea of negligent homicide must be the same, despite the vast distinction in physical act, as the negligent failure to register a firearm.

The terminology that has been selected to define the four mental states is obviously of paramount importance. The drafters have chosen ably their recommended terms from several jurisdictions and the American Law Institute.[184] As to the wording of these definitions, no alteration is suggested or advised. The explanatory comments, however, are less than adequate; it must be made clear that the definitions are inviolate. In addition, the Code should provide greater explanation as to the method of proof of a mental state.

It appears that not all of Tennessee's criminal laws will be found within the Proposed Criminal Code. Certain laws with penal sanctions will still exist in other chapters of the Tennessee Code even after the Proposed Code becomes law. These laws will still manifest the problems associated with their counterparts in the current criminal code. Perhaps at some future date these laws will be altered to conform to those present in the Proposed Criminal Code.[185]

The transition from the current law to the new format adopted by the Proposed Code will not be without some cost. The bench and bar may encounter some difficulty in adjusting to the Code's new "systems" approach. In addition, the inevitable omissions and ambiguities of the Code itself will become evident

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gent homicide, where, before, gross negligence was required. The Ohio example serves to illustrate the far-reaching and unsatisfactory effect that any major alteration of the mental state definitions will have on the entire code. *See* Proposed Ohio Code at 393.

184. The terms used to express mens rea in modern codes, such as the proposed Tennessee version, have been criticized, as nothing more than "linquistic embroidery." Kuh, *A Prosecutor Considers the Model Penal Code*, 63 COLUM. L. REV. 608, (1963).

185. After the enactment of the Proposed Code, the existence of the non-Code criminal laws may present some problems. For example, will the rule of liberal construction apply to the non-Code laws? If it does, a statute may be susceptible to a broader interpretation than intended by the legislature. A greater problem will exist with respect to those statutes which do not contain a stated mens rea. Will the Code's rule of applying the four new mens rea terms be applicable to the non-code laws? Despite the fact that it may create a dual system of criminal laws, it is suggested that the old interpretation remain for the non-Code statutes to avoid confusion. Although the vast majority of criminal laws will be found in the Proposed Code, the Code should delineate its applicability to the remaining criminal provisions.

through practical usage. Despite these initial problems, however, the net result of the Proposed Code should be a fairer and more efficient judicial process which will serve as a model for other jurisdictions to follow.

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