THE MENS REA PROVISIONS OF THE PROPOSED OHIO CRIMINAL CODE—THE CONTINUING UNCERTAINTY

Plus ça change, plus c'est la même chose
—Alphonse Karr (1808-1890)[1]

The Proposed Ohio Criminal Code[2] represents the first systematic attempt in Ohio criminal law to define and delineate the scope of *mens rea*. However, the resulting formulations offer no substantial improvement over current statutes and case law. In writing the proposed code, the drafters generally followed the framework of the Model Penal Code but departed from it in many significant ways. A major feature of both the Model Penal Code and the Proposed Ohio Criminal Code is the creation of a comprehensive statutory scheme designed to "codify the fundamental distinction between criminal misconduct on the one hand, and innocent conduct . . . on the other."[3] As the first step in that endeavor, the Proposed Criminal Code states that conduct can be criminal only if it is made so by legislative enactment.[4] This represents the first express legislative codification of the established judicial doctrine that common law crimes have no legal effect under Ohio law.[5] Though this provision does not change existing law, it is nonetheless valuable in that it removes any possible doubt as to the intent of the legislature. Thus, the first step in a consideration of the criminality of an actor's conduct is to determine whether the legislature has affirmatively prohibited or, in some cases, required such conduct. Although there is some cost in terms of flexibility in meeting new situations, the requirement of statutory crimes does advance two important values: (1) it gives the courts an easily administered test with which to evaluate conduct; and (2) it provides people with notice of the standards which their conduct must meet.

At the heart of the Proposed Criminal Code is a provision setting forth the requirements for imposing criminal liability.[6] This section codifies

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[1] 6 LES GUEPES 304 (*Edition Levy* 1849).

[2] Final Report of the Technical Committee to Study Ohio Criminal Laws and Procedures, PROPOSED OHIO CRIMINAL CODE (1971) [hereinafter cited as PROP. OHIO CRIM. CODE]. The text of the proposed legislation is incorporated in HOUSE BILL NUMBER 511, 109th Ohio General Assembly (1971) [hereinafter cited as H.B. 511].

[3] PROP. OHIO CRIM. CODE § 2901.21, Committee Comments at 38.

[4] *Id.* § 2901.03(A): "No conduct constitutes a criminal offense against the state unless it is defined as an offense in the Revised Code."

[5] In Winn v. Ohio, 10 Ohio 345 (1841), the Supreme Court of Ohio stated that "with us it has always been a maxim, . . . that the whole course of procedure relative to crimes . . . should be the subject of legislative enactment." *Id.* at 347. In Vanvalkenburg v. Ohio, 11 Ohio 405 (1842), the court stated that "[w]ith us there is no such thing as common-law crimes." *Id.* at 406. *See also* Ohio v. Cimpritz, 158 Ohio St. 490, 110 N.E.2d 416 (1953); Eastman v. Ohio, 131 Ohio St. 1, 1 N.E.2d 140 (1936); Municipal Court of Toledo v. State *ex rel.* Platter, 126 Ohio St. 103, 184 N.E. 1 (1933).

[6] PROP. OHIO CRIM. CODE § 2901.21.

the view expressed in the common law maxim: "*actus non facit reum, nisi mens sit rea*"—an act is not culpable (punishable) unless the mind which inspired the act is also guilty.[7] Therefore, before liability may justly be imposed, two elements must coalesce: (1) the "material" element of a guilty or prohibited act (*actus reus*); and (2) the "formal" element of a guilty mind (*mens rea*).[8] In essence, the *actus reus* requirement consists of either a voluntary act[9] (other than a reflexive or convulsive act) where the law prohibits conduct or a voluntary omission where the law imposes a duty to act (but only where the accused is physically capable of acting).[10] The concept of *actus reus* is not particularly troublesome since in most cases it is simply a question of fact whether the prohibited conduct has occurred (or a failure to perform a required act) and whether it is the accused who has engaged in that conduct.[11]

Mens rea, on the other hand, is a much more ephemeral concept and one which has raised many difficult questions. For most crimes, Ohio currently follows the established rule of Anglo-American jurisprudence that a guilty mind which must be both pleaded and proved is an essential element of statutory crimes.[12] While there has been little argument on this point in Ohio decisions, there has been substantial disagreement over the definition of the required *mens rea*. This comment will examine the *mens rea* definitions in the Proposed Ohio Criminal Code and will consider what problems those definitions may represent in their present form. To this end, the definitions will be compared with the parallel provisions in the Model Penal Code on which they were based and the significance of the differences between the formulations will be noted. Additionally, the proposals will be compared with other recent codes, both enacted and proposed, which are also based on the Model Penal Code. The experience of two of the states which have enacted such codes will be noted to determine possible implications in the future of Ohio *mens rea* law.

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[7] 3 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND 107 (1641) [hereinafter cited as COKE].

[8] J. SALMOND, JURISPRUDENCE 380 (9th ed. 1937).

[9] PROP. OHIO CRIM. CODE § 2901.21(A)(1).

[10] Additionally, the proposed statute expressly classes as involuntary acts body movements during "sleep or unconsciousness." *Id.* § 2901.21(C)(2).

[11] *But see* G. WILLIAMS, THE MENTAL ELEMENT IN CRIME, 17-18 (1965); Note, *Hypnotism and the Law*, 14 VAND. L. REV. 1509 (1961).

[12] State v. Cameron, 91 Ohio St. 50, 109 N.E. 584 (1914); Licciardi v. State, 18 Ohio App. 118 (1914); Bissman v. State, 6 Ohio C. Dec. 712 (Ct. App. 1895), *aff'd*, 54 Ohio St. 242, 43 N.E. 164 (1896). *But see* Columbus v. Webster, 170 Ohio St. 327, 164 N.E.2d 734 (1960); State v. Healy (Ct. App.), 95 N.E.2d 244, *rev'd*, 156 Ohio St. 229, 102 N.E.2d 233 (1950).

I. THE DEVELOPMENT OF MENS REA UNDER THE COMMON LAW

To better understand the position of Ohio *mens rea* law, it will be instructive to briefly look at the history of *mens rea* under the common law.[13] American criminal law is at least the step-child, if not the child, of English law. Therefore, the history of development of the doctrine of *mens rea* under the common law is relevant to a consideration of the parallel doctrine under American law. While culpability has always occupied a central place in American criminal jurisprudence, the concept had a rather late development in English law—the first systematic treatment not appearing until the middle of the eighteenth century.[14] However, it would be an oversimplification to suggest, as some have,[15] that prior to this time the common law was unconcerned with culpability.[16] At any rate, it is clear that in its earliest stages Anglo-Saxon law was not concerned with abstract theories of blameworthiness.

Criminal law arose out of the "blood feud" in which families sought personal vengeance for injuries to one of their members.[17] The English kings, sensing the danger to the stability of society which such feuds threatened, sought to convince these families to take their grievances before the courts. The early criminal law concerned itself largely with those offenses which were likely to provoke vengeance, and those were largely deliberate or intentional wrongs.[18] Since even vengeance demands blameworthy victims, it was only natural that the core of a concept of moral guilt existed in early crimes. Statutes from this era indicate that a definite, albeit largely undeveloped, distinction was drawn between intentional and inadvertent harms.[19] However, concepts of justice were not yet sophisticated enough to draw fine distinctions of guilt.[20] Therefore, in all but

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[13] For a general discussion of the history of *mens rea* in Anglo-American law, see J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 77-83 (2d ed. 1947) [hereinafter cited as HALL]; F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW (2d ed. 1899) [hereinafter cited as POLLOCK & MAITLAND]; T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW (4th ed. 1948) [hereinafter cited as PLUCKNETT]; Sayre, *Mens Rea*, 45 HARV. L. REV. 974 (1932) [hereinafter cited as Sayre]).

[14] 1 M. HALE, PLEAS OF THE CROWN 14 (1736).

[15] *See, e.g.*, Remington & Helstad, *The Mental Element in Crime—A Legislative Problem*, 1952 WIS. L. REV. 644.

[16] *See, e.g.*, Winfield, *The Myth of Absolute Liability*, 42 L. Q. REV. 37, 42 (1926).

[17] Sayre, *supra* note 13, at 975.

[18] O. HOLMES, THE COMMON LAW 3 (1881).

[19] *E.g.* 6 Aethelred, c. 52, 1 (ca. 1000): "And if it happens that a man commits a misdeed, involuntarily or unintentionally, . . . he . . . should always be entitled to . . . better terms. . . ." A. ROBERTSON, THE LAWS OF THE KINGS OF ENGLAND FROM EDMUND TO HENRY I 107 (1925). *See also* 2 Canute, c. 68, § 3 (ca. 1027): "[I]f anyone does anything unintentionally, the case is entirely different from that of one who acts deliberately." A. ROBERTSON, THE LAWS OF THE KINGS OF ENGLAND FROM EDMUND TO HENRY I 209 (1925).

[20] Sayre, *supra* note 13, at 976. It should be noted that at this time the distinction between criminal and civil law had not yet developed. Recompense to one who was wronged

the clearest cases of inadvertence, such considerations only acted to mitigate the harsh penalties then provided for crimes.[21]

With the coming of the Normans, English law underwent great changes. One of the outstanding characteristics of Norman society was an attention to detail and systematic methods of administration.[22] Thus, one of the first projects of the Norman kings was to draw together the tangled strains of English law into rough "codes." Included in the first of these codes, the *Leges Henrici Primi*,[23] was the maxim that "whoever commits evil unknowingly must pay for it knowingly."[24] Despite the apparent rigidity of this rule, it should be regarded as the result of deciding cases on an ad hoc basis with no unifying legal theory rather than a codification of strict criminal liability. There were, however, some crimes, such as homicide, which were commonly treated in a fashion approaching strict liability—even if committed by accident or in self-defense.[25] The harsh penalties, though, were later mitigated in such cases by the "king's pardon." After conviction, the inadvertent offender could petition the king for clemency.[26]

By the end of the thirteenth century, the effects of two powerful new influences began to appear in English law. First, there was the rise of the great universities with the concomitant revival of ancient Roman writers and law. Scholars eagerly took up concepts of revival, especially those of *dolus* (wrong) and *culpa* (guilt).[27] Second, the rise of church power also had an effect on criminal law. It was the canon law's emphasis on moral guilt which really gave the impetus for the development of a theory of *mens rea*.[28] The influence of church writers may be clearly seen in the thirteenth century writings of Bracton. For example, Bracton divides homicides into "spiritual" and "corporeal" varieties.[29] The concept of

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consisted of a payment of money which formed the basis for later civil damages and the criminal fine. *Id.* at 976-77.

[21] 2 POLLOCK & MAITLAND, *supra* note 13, at 470. *See also* Hall, *supra* note 13, at 78.

[22] PLUCKNETT, *supra* note 13, at 11.

[23] 1 POLLOCK & MAITLAND, *supra* note 13, at 99-101.

[24] LEGES HENRICI PRIMI, c. 88, § 6 (1100): "[Q]*ui inscienter peccat, scienter emendat.*"

[25] Sayre, *supra* note 13, at 979-80.

[26] *Id.* at 980. *See also* Statute of Gloucester, 6 Edw. I, c. 9 (1278), which provides that in cases of homicide by misadventure, the king should be informed and he could then grant a pardon "if it pleased him." 2 POLLACK & MAITLAND, *supra* note 13, at 481.

[27] *See* Bodenstein, *Phases in the Development of Criminal Mens Rea*, 36 So. AFRICAN L. J. 323, 327-33 (1919).

[28] Remington & Helstad, *supra* note 15, at 648. An example of canonist thinking may be seen in Mark 7:20-23:

> [W]hat comes out of a man is what defiles a man. For from within, out of the heart of man, come evil thoughts, fornication, theft, murder, adultery, coveting, wickedness, deceit, licentiousness, envy, pride, foolishness. All of these evil things come from within, and they defile a man.

[29] 2 POLLOCK & MAITLAND, *supra* note 13, at 477: Bracton drew his theory from Bernard of Pavia, a noted cleric of that time.

"spiritual homicide" reflects the canonist's view that one was guilty of crime if he merely desired the prohibited result without any overt act.[30] Bracton divided corporeal homicide (one actually committed) into those committed (1) by "justice" (as when a condemned felon was justly executed by a judicial officer, (2) by necessity, (3) by misadventure, and (4) by desire (intentional).[31] The absence of a similar treatment of *mens rea* in other contemporary accounts suggests that perhaps Bracton, who was influenced by the canonists, overstated the importance of the mental element in the law of his time.[32]

Although Bracton may have overstated the necessity for a guilty mind in thirteenth century law, his writings marked a major advance in the development of a *mens rea* theory. Bracton was the first English jurist to set forth all the elements needed for a theory of culpability, although he failed to systematically develop those elements or to delineate their role in criminal law. Bracton's concept of *mens rea* amounted to little more than an undifferentiated concept of moral blameworthiness.[33] Later, jurists and commentators refined that nascent idea until the first complete theory of moral culpability appeared in the eighteenth century writings of Hale.[34] Between Bracton and Hale there was a gradual shift from the more primitive concept of a blameworthy actor to the more abstract concept of an actor's specific intent to effect a blameworthy result.[35] The extent to which that shift had progressed by the eighteenth century may be seen in Hale's discussion of homicide by "casualty and misfortune" where he stated the following principle:

> [A]s to criminal proceedings, if the act that is committed be simply casual . . . , regularly that act, which were it done out of a spirit of intention, were punishable with death, is not by the laws of England to undergo that punishment; for it is the will and intention, that regularly is required, as well as the act and even, to make the offense capital.[36]

Although legal commentators from the time of Bracton focused on the mental element in crime, there is in their writings a failure to isolate basic concepts.[37] Besides the guilty mind, there is a second mental ele-

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[30] PLUCKNETT, *supra* note 13, at 289.

[31] 2 H. BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE 340 (Thorne Translation 1968).

[32] Bracton is "an untrustworthy guide to the legal notions of his English contemporaries whenever he ventures beyond a mere description of what, as a matter of fact, was done in courts of law." 1 F. MAITLAND, COLLECTED PAPERS 314 (1911).

[33] Sayre, *supra* note 13, at 988.

[34] *See, e.g.*, 1 HALE, *supra* note 14, at 15: "[W]here there is no will to commit an offense, there can be no . . . just reason to incur the penalty . . . ."

[35] *See* Sayre, *supra* note 13, at 988-94. *See also* COKE, *supra* note 7, at 6: *"Actus non facit reum, nisi mens sit rea."*

[36] 1 HALE, *supra* note 14, at 38.

[37] *See* G. WILLIAMS, CRIMINAL LAW, THE GENERAL PART § 8 (2d ed. 1961). *See also* HALL, *supra* note 13, at 104.

ment in crime—the voluntariness of the act. These writers did not treat volition in great depth when discussing the culpability of an act because the prevailing philosophical thought put great emphasis on the necessity of free will. It was the exercise of free will that gave actions their moral character. Thus, an act was blameworthy because the actor freely chose to do evil rather than good. By ignoring the difference between freely acting and desiring that a prohibited result should occur, part of the *actus reus* element was grafted onto the *mens rea*.

Blackstone, writing in the eighteenth century, set forth a classification of *mens rea* defenses as they existed in his time. Blackstone divided these defenses into three categories. The first of these, comprised of the acts arising from the actor's "defect of understanding,"[38] exculpates in cases of insanity,[39] infancy,[40] and involuntary intoxication.[41] The rationale underlying these defenses is that the actor is under a disability to such an extent that he is unable to exercise his free will, despite the fact that such an actor could very well have desired the prohibited result. The third of Blackstone's categories ("where the action is constrained by some outward force and violence") comprises the defenses equivalent to modern duress, coercion, and necessity.[42] Again, the underlying rationale is that an actor who cannot freely choose to do evil should not be culpable. Only the second of the categories describes a technical *mens rea* defense ("where a man commits an unlawful act by misfortune or chance").[43] These are the defenses corresponding to the modern defenses of accident, mistake of law, and mistake of fact. The defense of mistake, either of law or of fact, covers the situation in which someone acts voluntarily, erroneously believing that his conduct is lawful.[44]

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38 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *21 (1857). [Hereinafter cited as BLACKSTONE].

39 *See* M'Naghten's Case, 10 Clark & Fin. 200, 8 Eng. Rep. 718 (House of Lords 1843).

40 At common law, there was a conclusive presumption that a child under the age of seven could not have a guilty mind. Between the ages of seven and 14, there was a rebuttable presumption of lack of capacity, 1 HALE, *supra* note 14, at 25. Ohio currently follows the common law rule. Under the Proposed Criminal Code, since there is no provision dealing with the defense, the common law rule will presumably continue to be applied in Ohio.

41 At common law, this defense applied only to cases of involuntary intoxication. When the drinker freely chose to become intoxicated, acts committed while under the influence of the intoxicant were felt not to merit the same treatment as acts committed while naturally unconscious or asleep. HALL, *supra* note 13, at 530. *See also*, PROP. OHIO CRIM. CODE § 2901.35 (the defense of intoxication). *But see* PROP. OHIO CRIM. CODE § 2901.35(B) (as amended in SUBSTITUTE HOUSE BILL NUMBER 511) [hereinafter cited as SUB. H.B. 511], which effectively removes the defense in many cases: "Involuntary intoxication is not a defense to any offense of which an element is operation of a motor vehicle . . . or of which an element is carrying or using any firearm or dangerous ordnance . . . ." Voluntary intoxication may, however, serve to negate the existence of a true culpable mental state in some cases. *See, e.g.*, WILLIAMS, *supra* note 37, §§ 182-83.

42 4 BLACKSTONE, *supra* note 38, at *21.

43 *Id.* at *21, *27.

44 The classical formulation on this point is *Levett's case*, discussed in Cook's case, 79

The fact that the common law treated all of these defenses as going to the *mens rea* element of an offense has effected American criminal law. During the colonial period, the settlers brought with them the common law including the criminal law doctrine of *mens rea*. The writings of major English commentators, such as Hale, Blackstone, and Coke, became available to American lawyers during the eighteenth century.[45] In fact, due to the difficulty in communicating with England, these treatises became the major reference works for early American criminal law. The failure to clearly distinguish between basic *mens rea* concepts which had entered English law over the course of five centuries became a part of American law at its inception. Although later theorists have been more analytical,[46] most courts and legislatures continue to reveal a basic confusion.

Ohio *mens rea* law represents a typical case of that confusion. In addition to the difficulties inherent in the concept itself, the situation has been aggravated by the inability or unwillingness of the General Assembly to come to grips with problems concerning *mens rea*. The legislature has continued to write culpability elements into its statutes but has not developed a systematic mode of dealing with them. This failure is evidenced by the bewildering number of terms which have been used to express the mental requirement for offenses.[47] However, the legislature has never defined these terms nor has it ever explained why different terms appear in different statutes. Thus, Ohio courts have been forced to interpret statutes without legislative guidance. This situation has led to uncertainty as to how *mens rea* should be applied by both trial and appellate courts. Therefore, the fact that the drafters have included basic culpability provisions as an integral part of the statutory scheme of the Proposed Criminal Code represents a great potential for improving Ohio *mens rea* law.[48]

Eng. Rep. 1063 (K.B. 1638). In this case, a prosecution for murder, the court acquitted a man who killed his servant's friend whom the defendant erroneously, but reasonably, thought to be a burglar. The court felt that the defendant was guiltless since he had not intended to commit murder. *Id.* at 1064. *See also* 1 HALE, *supra* note 14, at 42, 474.

[45] Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 967 (1925).

[46] *See, e.g.*, G. WILLIAMS, THE MENTAL ELEMENT IN CRIME (1965).

[47] *E.g.*, OHIO REV. CODE ANN. § 2901.01 (Page 1954) (first degree murder) (*purposely*, and either of *deliberate* and *premeditated malice*); *Id.* § 2901.04 (taking the life of a police officer) (*purposely* and *willfully*); *Id.* § 2901.05 (second degree murder) (*purposely* and *maliciously*); *Id.* § 2901.39 (threatening letters) (*knowingly* send a . . . writing *for the purpose* of extorting money . . . or containing *willful* and *malicious* threats . . . or *knowingly* send any paper . . . *intended* to simulate a summons . . . *with intent* to obtain money); *Id.* § 2901.40 (abandonment of destitute, infirm, or aged parent) (*neglect* or *refuse*); *Id.* § 2905.27 (keeping a place for prostitution) (*with knowledge* or *reasonable cause to know* that the purpose); *Id.* § 2917.01 (bribery) (*corruptly* give); *Id.* § 2923.14 (assemblage for teaching criminal syndicalism) (*voluntarily* participate); *Id.* § 2923.30 (false statement affecting the solvency of a bank) (*willfully* and *knowingly*); OHIO REV. CODE ANN. § 2923.56 (Page Supp. 1971) (persons prohibited from obtaining or having firearms) (*knowing* or having *reasonable cause to believe*) (emphasis supplied).

[48] *See* note 6 *supra* and accompanying discussion.

In creating a new criminal code, the legislators have the unique opportunity to sweep away nearly two centuries of legislative inaction and judicial groping. Because there is a great need for clarification, it is unfortunate that the Proposed Ohio Criminal Code culpability provisions have failed to seize that opportunity. While there has been an attempt to define culpability in a more rational fashion, any benefit which might have been achieved has been nullified by imprecise draftsmanship and vague definitions of already unclear terms.[49] Furthermore, the proposals will add new confusion by introducing concepts which have no analogues in current law and which the Proposed Code has not clearly defined.[50] The practical result (absent amendment of the present form) will be to inject greater doubt into the minds of the criminal bench and bar than currently exists. Since culpability is the "keystone" of the Proposed Ohio Criminal Code,[51] it is necessary to examine the culpability provisions separately.

II. THE *Mens Rea* DEFINITIONS OF THE PROPOSED OHIO CRIMINAL CODE

One of the dominant themes in recent American criminal law is the movement to reform the patchwork of criminal statutes with a systematic, integrated codification analogous to the Uniform Commercial Code. One particularly outstanding example of this effort is the American Law Institute's Model Penal Code.[52] The Code, which represents the collaboration of numerous legal scholars and jurists, was developed to provide state legislators with a comprehensive model to aid them in drafting their own revisions. The drafters of the Proposed Ohio Criminal Code have drawn heavily from the Model Penal Code in constructing their proposals for Ohio.[53] One of the chief features of the Model Penal Code is the grounding of liability on a bipartite concept of criminality—a voluntary act coupled with a specific guilty mental state.[54] As noted previously, this framework was adopted for the Proposed Ohio Criminal Code and has been made the basic operative section of its statutory scheme.

The adoption of this scheme represents an improvement for Ohio because it clears up the present conflict in judicial doctrine. In *State v. Huffman*,[55] the Ohio Supreme Court laid down a rigid rule that the requisites for liability must be stated in the statute defining an offense—due to the

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[49] *E.g.*, PROP. OHIO CRIM. CODE § 2901.22(A) states that a person "acts purposely when it is his *specific intention* to cause a certain result . . . ." (emphasis supplied).

[50] *See, e.g.*, PROP. OHIO CRIM. CODE § 2901.22(D) ("negligence").

[51] PROP. OHIO CRIM. CODE § 2901.21, Committee Comments at 38.

[52] MODEL PENAL CODE (Proposed Official Draft, 1962) [hereinafter cited as M.P.C. (P.O.D.)].

[53] *See* PROP. OHIO CRIM. CODE, Committee Comments at viii.

[54] M.P.C. § 2.01(1) (P.O.D.).

[55] 131 Ohio St. 27, 1 N.E.2d 313 (1936).

lack of common law crimes in Ohio law. If, however, the statute is silent regarding the *mens rea* element, then culpability is not made a part of the offense.[56] While the *Huffman* rule has been applied in some later cases,[57] its harshness has caused some other courts to retreat from a full application. For example, in *State v. Weisberg*,[58] the Court of Appeals for Cuyahoga County qualified the rule by holding that although the legislature has the power to criminalize behavior without regard to the mental state of the actor, the mere silence of the statute does not of itself eliminate *mens rea*. This view was expanded by *State v. Euclid Fish Co.*,[59] in which the court agreed with the *Weisberg* holding and added the further limitation that unless the language of the statute clearly indicates a legislative intent to eliminate culpability, it will be concluded that culpability must be proved.[60] The confusion that has been engendered by the conflict in these decisions will be eliminated by the inclusion in the Proposed Ohio Criminal Code of a general rule for determining legislative intent regarding proof of *mens rea*. The Proposed Code codifies the *Euclid* rule by providing that only when a statute "plainly indicates a purpose to impose strict criminal liability" is culpability not an element of an offense.[61] If there is no stated *mens rea* requirement and the statute does not clearly indicate strict liability, then the prosecution must prove *mens rea*.[62]

Culpability is defined under the Proposed Ohio Criminal Code as "purpose, knowledge, recklessness or negligence."[63] Each of these terms is given a statutory meaning which is to be applied whenever one of them is specified in a statute defining an offense. The format follows the Model Penal Code pattern of four hierarchically arranged levels of culpability, the definitions of which are also patterned on those in the Model Penal Code. However, the definitions of culpability in the Proposed Ohio Criminal Code differ in several significant respects from the model on which they are based. The proposed definitions, when compared to the parallel provisions in the Model Penal Code, reduce each level of culpability one degree. For example, "knowledge" under the Proposed Ohio Criminal

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[56] *Id.* at 32, 1 N.E.2d at 315.

[57] *See, e.g.*, State v. Lisbon Sales Book Co., 176 Ohio St. 482, 200 N.E.2d 590 (1964); State v. Healy, 156 Ohio St. 229, 102 N.E.2d 233 (1951); Point Cafe, Inc. v. Board of Liquor Control, 168 N.E.2d 157 (Ct. App. 1960); Hanewald v. Board of Liquor Control, 101 Ohio App. 375, 136 N.E.2d 77 (1955).

[58] 74 Ohio App. 91, 55 N.E.2d 870 (1943).

[59] 198 N.E.2d 776 (Ct. App. 1964).

[60] *Id.* at 778:

> It is true that certain conduct may be defined as criminal which does not include the element of guilty knowledge . . . . But unless it is made clearly to appear that the legislature did not intend to require guilty knowledge in defining a crime, the courts will conclude that guilty knowledge was intended.

[61] PROP. OHIO CRIM. CODE § 2901.22(E).

[62] *Id.* The level required to be proved in such cases is "recklessness."

[63] *Id.* § 2901.21(C)(3).

Code[64] is defined in a way which is closest to Model Penal Code "recklessness."[65] Ohio Code "recklessness"[66] is equivalent to Model Penal Code "negligence."[67] The reason for this reduction is not clear but may represent either carelessness with words or a conscious desire to broaden the area susceptible to criminal sanctions by making it easier to establish the requisite mental element. While it is true that there is nothing sacred about the Model Penal Code definitions, it is nonetheless instructive to see how sharply the proposed formulations differ from those in the Model Penal Code.

A. *Purpose*

Under the Proposed Ohio Criminal Code, the highest degree of culpability is "purpose."[68] Under current Ohio law, the terms "intent," "purpose," and "knowledge" are used commonly to express this level of culpability. One of the problems of the current law is the absence of a legislative statement of the relationship between these terms. As a result, the courts have expressed some confusion in dealing with these terms. This confusion may be traced to primarily two factors: (1) no Ohio statute has ever defined any of these terms; and (2) the terms have been applied interchangeably to crimes of widely disparate degrees of severity.[69] The usual practice of referring to the common law whenever the legislature's intent is not clear has been of only limited help in this area because the common law was also confused about *mens rea*. Ohio courts have made what are essentially intuitive judgments of what level of culpability is needed to establish a particular crime, and those judgments, although expressed in the same words, have varied roughly according to the perceived seriousness of the offense charged. Thus, when the facts showed a particularly offensive type of conduct, the courts struggled to find the requisite intent.[70] However, when the offense was not so shocking, courts have tended to place more emphasis on the presence of a true intent.[71]

In drafting the Model Penal Code, the American Law Institute avoided the use of "intent" due to the vagueness resulting from various judicial

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[64] PROP. OHIO CRIM. CODE § 2901.22(B). *See* note 168 *infra.*

[65] M.P.C. § 2.02(2)(c) (P.O.D.). *See* note 179 *infra.*

[66] PROP. OHIO CRIM. CODE § 2901.22(C). *See* note 187 *infra.*

[67] M.P.C. § 2.02(2)(d) (P.O.D.).

[68] PROP. OHIO CRIM. CODE § 2901.22(A):

> A person acts purposely when it is his specific intention to cause a certain result, or, when the gravamen of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.

[69] *Compare* OHIO REV. CODE ANN. § 2901.01 (Page 1954) (first degree murder), *with* OHIO REV. CODE ANN. § 2909.15 (Page 1954) (taking a bicycle with intent to use it).

[70] *See, e.g.*, State v. Salter, 149 Ohio St. 264, 78 N.E.2d 575 (1948).

[71] *See, e.g.*, State v. Cameron, 91 Ohio St. 50, 109 N.E. 584 (1914).

interpretations.[72] Further, since "purpose" had not been so commonly used in statutes, the Institute thought that fewer problems would be carried over from questionable past interpretations. For this reason, and because it corresponds with commonsense usage, "purpose" could be given a standard meaning for purposes of the Code. Apparently, the drafters of the Proposed Ohio Criminal Code agreed with this position and adopted the same term. Although the Technical Committee had suggested the alternative of adopting for Ohio the Model Penal Code definition of purpose *verbatim*,[73] it later decided to develop a version expressing the essence of the Model Penal Code provision in different words.[74] It is not clear from the legislative history what happened or why, but when the final version was reported to the legislature, a substantial change had been made in the wording of the "purpose" definition.

In the Model Penal Code it is provided that "[a] person acts purposely . . . when . . . it is his *conscious object* to engage in [prohibited] conduct . . . ."[75] In the proposed Ohio definition, the standard was changed from "conscious object" to "specific intent."[76] While it is arguable that the two phrases are synonomous, there is more to be considered. Although starting with the basic purpose to clear up the confusion which currently characterizes Ohio *mens rea* law, the new standard for conduct created to serve that purpose has been defined in terms of the phrase which gave rise to much of the problem in the first instance. In the House of Representatives, many sections of the Proposed Ohio Criminal Code were amended extensively. The only change made in the "purpose" definition, however, was the substitution of "gist" for "gravamen."[77] The House left the "specific intent" language intact. If the language is not changed by the Senate, it will result in no change in the current confused law of intent. Therefore, the courts again will be forced to grapple with the same vague, undefined concept absent substantive legislative guidance.

By following the Model Penal Code format, the Proposed Ohio Criminal Code made a more subtle change in the Ohio *mens rea* law than the

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[72] M.P.C. § 2.02, Comment at 124 (Tent. Draft No. 4, 1955).

[73] The Technical Committee to Study Ohio Criminal Laws and Procedures, Draft no. 8 at 7 (July 12, 1966).

[74] The Technical Committee suggested that while the Model Penal Code requirement of a specific mental state for each material element of an offense should be followed, the language used by the Model Penal Code was confusing. Therefore, it was suggested that "purpose" and "knowledge" be defined in different words but that those words should make it clear that the mental state pertains to each element. *Id.*

[75] M.P.C. § 2.02(2)(a) (P.O.D.).

[76] *See* note 68 *supra.*

[77] PROP. OHIO CRIM. CODE § 2901.22(A) (as amended in SUB. H.B. 511): "A person acts purposely when it is his specific intention to cause a certain result, or, when the *gist* of the offense is a prohibition against conduct of a certain nature . . . it is his specific intention to engage in conduct of that nature." (emphasis supplied). *Compare* PROP. OHIO CRIM. CODE § 2901.22(A).

mere substitution of a new term for the old "intent" standard. Under current Ohio law, the judicial consensus is that the terms "purpose,""intent," and "knowledge" are more or less interchangeable and describe approximately the same level of culpability. Under the Proposed Criminal Code, however, there is a narrow distinction between purpose ("specific intent") on the one hand and knowledge on the other. Under current law, though, there seems to be only a choice between "intent," and the lack of intent. However, although the same word is used, the intent required for murder seems to be conceptually different from the intent required for a lesser crime. Frequently, the existence of a "guilty mind" of any level is referred to in judicial opinions by the general term "scienter."[78] Since Ohio law has only used an intent standard, it has become common for judges to draw a distinction between "general intent" and "specific intent."[79] General intent is a design without a particular object and is usually referred to in the context of lesser crimes.[80] Specific intent, on the other hand, refers to the desire of the actor to accomplish the particular result which did in fact occur. General intent is often regarded as the general propensity to commit a crime, while specific intent relates to a more particular proscribed result. Ohio courts appear to have distinguished general and specific intent, often without explicit acknowledgement that they were doing so. This distinction appears to be the reason that "purpose" under the Proposed Ohio Criminal Code is defined in terms of "specific intent."

When considering the impact of the proposed definition of "purpose," it should be noted that there is only a narrow and somewhat artificial distinction between crimes requiring proof of "purpose" and those for which proof of "knowledge" is sufficient. For most crimes under the Proposed Criminal Code, the fact that an actor knew of the nature of his conduct or the results flowing from such conduct should be enough to establish liability. However, there are some crimes for which American criminal law has traditionaly required a higher degree of culpability than knowledge. These are the crimes in which it has been the practice under current law to talk of "specific intent." Crimes of this nature fall into roughly two categories. First, there is the class of crimes which corresponds to the common law *actus malum in se*—an act which is bad in and of itself.[81] These are the offenses which have been regarded as posing the greatest threat to the established order. They were classed as felonies at common law and carried the harshest penalties. Examples of such crimes from the Proposed Ohio Criminal Code are capital murder[82] (cor-

[78] *See, e.g.*, Birney v. State, 8 Ohio 230, 238 (1837).

[79] *See, e.g.*, State v. Guerrieri, 20 Ohio App. 2d 132, 252 N.E.2d 179 (1969).

[80] *See, e.g.*, State v. Healy, 156 Ohio St. 229, 102 N.E.2d 233 (1951) ("larceny by trick").

[81] These were the crimes that were designated as felonies at common law.

[82] PROP. OHIO CRIM. CODE § 2903.01.

responding to murder in the first degree under current law[83]), rape,[84] and child stealing[85] (kidnapping of a child). The other major class of crimes which require proof of purpose are those which are not inherently destructive of society but represent highly provocative affronts to the prevailing social mores, such as voyeurism,[86] desecration (of a flag, cemetery, etc.),[87] and torture of animals.[88] While the penalties for such offenses are generally less harsh than for crimes that are "bad in and of themselves," conviction for one of them is likely to carry with it significant social opprobrium. Thus, before criminal sanctions may be imposed for any of these offenses, fairness requires proof that the actor had the conscious object of engaging in the conduct or causing the prohibited result.

The hallmark of a purposeful crime is either, in the words of the Model Penal Code, a "conscious object" or, in the words of the Proposed Criminal Code, a "specific intent." The Proposed Criminal Code carries over from current law a distinction between two general classes of purposeful crimes: (1) those in which the result of unspecified conduct is prohibited (for example, "causing the death of another"[89]); and (2) those in which a type of *conduct* itself is prohibited regardless of the results which may flow from it (for example, "tampering with coin machines"[90]). In both cases, there must be proof that the accused had the specific objective of engaging in the prohibited act.

The first judicial recognition that culpability was a requirement of Ohio criminal law appears to be the 1836 decision in *Anderson v. State*.[91] The defendant in that case had been charged with "aiding in passing a forged certificate of deposit." The statute under which he was charged contained no reference to a *mens rea* element. In reversing the conviction, the Ohio Supreme Court stated that intention was a requisite element of the offense even though the statute did not provide for it. There is no express reference in the case to the common law requirement of *mens rea*. Rather, the decision seems to have been based on general concepts of fairness.[92] This case also represents the first time that the court discussed the rela-

[83] OHIO REV. CODE ANN. § 2901.01 (Page 1954).

[84] PROP. OHIO CRIM. CODE § 2907.02.

[85] *Id.* § 2905.04.

[86] *Id.* § 2907.07.

[87] *Id.* § 2923.51.

[88] *Id.* § 2923.31.

[89] *E.g.*, PROP. OHIO CRIM. CODE §§ 2903.01 (capital murder) and 2903.02 (murder).

[90] PROP. OHIO CRIM. CODE § 2911.22.

[91] 7 Ohio 539 (1836).

[92] *Id.* at 544:

> It is the intention that gives character to the action, and makes that criminal which would otherwise be exempt from guilt.
>
> . . . .
>
> The statute does not attach criminality to one, who, in honesty and good faith, becomes instrumental in passing off a forged paper.

tionship of knowledge to intention: "There can be no *intention* without *knowledge*."[93] The rule in *Anderson* was reaffirmed the next year in *Birney v. State*,[94] which involved a prosecution under the fugitive slave laws. The defendant had been convicted of harboring a fugitive slave under a statute which did not require knowledge that the person harbored was a fugitive. In overturning the conviction, Justice Wood, who had also decided *Anderson*, stated: "We know of no case where positive action is held criminal, unless the intention accompanies the act, either expressly, or necessarily inferred from the act itself."[95] Thus, the court drew a distinction between the statutory equivalent of common law felonies which inherently involved intentional acts and the class of crimes such as harboring a fugitive slave which, "independent of positive enactment, involve[d] no moral wrong."[96] In the former situation, intention could be inferred from the doing of the act itself, but in the latter, guilty knowledge was an element which must be pleaded and proved.

Anderson points up the difficulty which has greatly contributed to the confusion which afflicts *men rea* law. Since intention by definition is a subjective concept, absent a confession or admission there is no way to prove directly its existence. The *Birney* court stated that intent could be "inferred" from certain types of acts, an inelegant way of stating the accepted rule that intent is to be determined by looking at all the facts and circumstances surrounding the act. On the other hand, if Justice Wood actually meant that intent could be inferred solely from the fact that the accused had committed the act, he stated too broad a rule and one which has since been rejected.[97]

While many courts have paid lip service to the rule that intent is a required element of crimes, the determinations of what constitutes that intent have taken some bizarre turns. The recent case of *State v. Butler*[98] illustrates the extent to which some courts have gone to find intent. *Butler* involved a prosecution for second degree murder for the death of a motorist who was killed when his car was struck by that of defendant Butler. Butler and a companion, Anderson, at the time of the accident, were engaged in a "drag race." While Butler was trying to pass Anderson's car, Butler's car struck the victim's car and killed the driver. The court of appeals upheld the conviction and found that all elements of the charge had been proven.[99] Second degree murder requires proof of (1) an in-

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[93] *Id.*

[94] 8 Ohio 230 (1837).

[95] *Id.* at 238.

[96] *Id.*

[97] *E.g.*, State v. Huffman, 131 Ohio St. 27, 43, 1 N.E.2d 313, 320 (1936). *But see* State v. Swiger, 5 Ohio St. 2d 151, 157, 214 N.E.2d 417, 423 (1966).

[98] 6 Ohio App. 2d 193, 217 N.E.2d 237 (1966).

[99] *Id.* at 197, 217 N.E.2d at 241.

tent and purpose to kill; and (2) malice.[100] The court reached this result by starting with the basic premise that a man may be held to intend the natural and probable consequences of his voluntary acts. Since the defendants had voluntarily and intentionally engaged in the drag race, their act was "voluntary." Furthermore, since they were "operating their cars with such reckless, willful and intentional violation of traffic laws,"[101] death was a natural and probable consequence of their conduct. Thus, they could be held to have intended the death which ensued. Next, second degree murder requires proof of "malice." Malice is a highly technical word of art in Ohio criminal law and, if it means anything, means that there was no justification or legal excuse for the act.[102] The court said that "[w]here the fact of killing, with intent and purpose to kill, is proved, malice is to be presumed."[103] This case illustrates the danger which accompanies the indiscriminate use of "presumptions" and overly broad definitions of intent. Under such a rationale, almost any act of recklessness could be regarded as intentional.

On appeal, however, the Ohio Supreme Court,[104] rejected the reasoning of the court of appeals and stated that the "purpose to kill" required by the statute

> must be present in the mind of the slayer at the time and place of the killing. Further, the act of killing must be preformed to carry out or execute the intent or purpose to kill. The killing must result from the design, purpose or intent of the slayer . . . .[105]

Thus, the evidence in this case did not prove the element of intent or purpose to kill. While the supreme court struck down the conclusion of the court of appeals, its decision demonstrates one of the chief sources of the confusion which characterizes Ohio *mens rea* law: *Butler* upheld the validity of the rule that a man may be presumed to have intended the natural and probable consequences of his voluntary acts.[106] The ways in which this presumption has been applied have added much of the current uncertainty.

The presumption of intent expressed in *Butler* has long been used in Ohio criminal law.[107] It was developed under the common law in response to the need to prove guilty intent and later became part of Ohio law. It is difficult to prove subjective intent and as this presumption has been applied in Ohio there has been a cost in terms both of the clarity of *mens*

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100 OHIO REV. CODE ANN. § 2901.05 (Page 1954).

101 6 Ohio App. 2d at 197, 217 N.E.2d at 241.

102 Davis v. State, 25 Ohio St. 369 (1874); Allison v. State, 12 Ohio App. 217 (1919).

103 6 Ohio App. 2d at 197, 217 N.E.2d at 241.

104 State v. Butler, 11 Ohio St. 2d 23, 227 N.E.2d 627 (1967).

105 *Id.* at 32, 227 N.E.2d at 635.

106 *Id.* at 34, 227 N.E.2d at 636.

107 *See, e.g.*, Ridenour v. State, 38 Ohio St. 272, 274 (1882).

rea and of the fair administration of criminal law. There are undoubtedly times when a court may correctly presume from a person's acts that he had an evil intent. For example, if *X* without provocation deliberately takes a gun and fires six bullets into *Y*'s head, it is reasonable to conclude that *X* intended to cause *Y*'s death, since most people are aware that such wounds are practically certain to result in death. While a jury with these facts could reasonably conclude that *X* intended to kill *Y*, all situations are not so clear. It then becomes necessary to decide where the presumption should justly be applied.

The presumption that a man intends the natural and probable results of his acts arose in homicide cases involving the use of dangerous weapons.[108] Due to the great likelihood of injury or death associated with such devices, courts in such cases tended to require less evidence to show intent. However, lack of judicial precision in application has extended it beyond the narrow context in which it was developed and into areas in which its bases do not apply. In *Ridenour v. State*,[109] for example, the presumption was applied to a prosecution for shooting with intent to maim. The court upheld the conviction because it felt that the paralysis of the victim's leg was a natural and probable consequence of the defendant's act. The court reasoned that since the accused could have been convicted of *actually* maiming the victim, he could not "be heard . . . to say that he did not *intend* to do the very thing he did."[110] This is an overbroad use of the presumption; the court came very close to saying that intent could be inferred from the proscribed result itself.

Later cases continued to widen the scope of the presumption, even though courts refrained from inferring intent solely from the fact of a prohibited act. In *State v. Sappienza*,[111] which involved a charge of armed robbery, the defendant had alleged that he had no guilty intent and was only present at the robbery because his life had been threatened. Despite corroboration by two co-defendants, the defendant was convicted. In upholding the conviction, the Supreme Court at Ohio stated that "[t]he State did not need to go into the question of intent on the part of the robbers because of the universal rule, as a presumption of fact, that the natural and probable consequences of every act deliberatedly done were intended by the person who did them."[112] The court did not discuss its rationale for extending the presumption to a case of robbery but merely stated that it was applying a "universal rule." The rule in *Sappienza* was further extended in *In re Schrank*[113] to a case of unarmed robbery. The petitioner in

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[108] State v. Butler, 11 Ohio St. 2d 23, 34, 227 N.E.2d 627, 636 (1967).

[109] 38 Ohio St. 272 (1882).

[110] *Id.* at 274.

[111] 84 Ohio St. 63, 95 N.E. 381 (1911).

[112] *Id.* at 70, 95 N.E. at 382.

[113] 79 Ohio App. 286, 68 N.E.2d 808 (1946).

Schrank had been convicted of "aiding and abetting" the robbery of a ballot box and ballots from an election conducted by a union of which he was a member. In refusing a writ of habeas corpus the court relied solely on a quotation from *Sappienza* with no further discussion.[114]

The scope of the presumption has been extended in other ways as well. For example, in *Roth v. State*[115] the defendant had been convicted on circumstantial evidence of aiding and abetting the burning of his own property with the intent to defraud an insurance company. The court, following a Massachusetts case, *Commonwealth v. Asherowski*,[116] held that since only someone in privity with the defendant had the opportunity to set the fire, the jury could reasonably infer that the defendant not only aided and abetted the crime, but also committed it with the intent of defrauding the insurer.[117] Dicta in *Roth* suggested that it was valid to use the presumption from circumstantial evidence even in capital cases.[118] In *State v. Schaffer*,[119] the court extended the presumption beyond the use of deadly weapons. In that case the defendant was convicted of first degree murder in the strangulation death of an elderly woman. The defendant had gone to see the victim for the purpose of borrowing money. When she refused, an argument ensued in which the defendant struck and, after some struggle, strangled her. Applying the presumption, the court found that "an intent to kill with deliberation and premeditation may be found to exist where a young man of strength and vigor uses his hands and muscles to violently strangle an elderly, helpless woman."[120] The court found also that "[u]nder such circumstances, the hands may be found to be the equivalent of a deadly weapon . . . ."[121]

The problem is not so much that the courts in these cases found intent under the particular circumstances. In most of the cases, it is at least arguable that the accused had the requisite intent. Rather, the problem is that by extending the scope of the presumption to include conduct to which the rationale for its creation does not apply, the original policy it was designed to serve has been forgotten. There is a real risk that courts will mechanically apply it without sufficient consideration for the standards needed to assure just determinations of guilty intent. The decision of the court of appeals in *Butler*[122] demonstrates that such a fear is justified. However reprehensible one may find the appellant's conduct, it seems

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[114] *Id.* at 288, 68 N.E.2d at 809.

[115] 44 Ohio App. 420, 186 N.E. 7 (1933).

[116] 196 Mass. 342, 82 N.E. 13 (1907).

[117] 44 Ohio App. at 425, 186 N.E. at 9.

[118] *Id.*

[119] 113 Ohio App. 125, 177 N.E.2d 534 (1960).

[120] *Id.* at 130-31, 177 N.E.2d at 538.

[121] *Id.* at 131, 177 N.E.2d at 538.

[122] 6 Ohio App. 2d 193, 217 N.E.2d 237 (1966). *See* discussion at note 98 *supra.*

an undesirable policy to express that disapproval by twisting the standards for second degree murder to such an extent that they become meaningless. The Supreme Court of Ohio recognized this problem and restated the position that the presumption of intent should be applied only in cases where there was a dangerous instrumentality involved.[123] The court specifically declined to extend further the presumption by classifying a motor vehicle, even when recklessly operated, as a deadly weapon.[124] The court also analyzed the facts of the case to demonstrate its view of the nature of an intent to kill. Starting with the premise that the defendants engaged in the drag race to determine the relative merits of their cars, the court concluded that

> while violating the several traffic laws, a purpose or intent to become involved in an accident cannot be inferred . . . , as an accident involving either or both cars would result in the car involved in the accident losing the race. An intent or purpose to maliciously kill by being involved in an accident is contrary and inconsistent with the motive or purpose to win the race. Regardless of how reprehensible or culpable was their conduct, the reckless, . . . operation of their automobiles does not reach the high standard which the law prescribes for murder in the second degree . . . .[125]

From this reasoning, it is apparent that the *Butler* court took a common sense approach to the question of intent. Perhaps this opinion will help to restore some basic logic to an area which has too often become caught up in abstract judicial doctrines.

Beyond the over-extensive use of the presumption, Ohio courts have also had some difficulty determining the factual question of the natural and probable consequences of a man's acts. *State v. Salter*,[126] a prosecution for first degree murder, illustrates the problems which Ohio courts have had with this question. While not expressly based on the presumption, *Salter* was decided by inferring the intent from the "surrounding facts and circumstances."[127] The defendant was tried under the felony murder rule for the death of an eleven year old girl to whom he had administered a common anaesthetic for the purpose of committing a rape. Due to a rare glandular disorder, the victim was fatally allergic to the anaesthetic.[128] Under the Ohio felony murder rule, the prosecution is required to prove an intent and purpose to kill, just as it must for any prosecution of first degree murder.[129] The court, however, found the requisite intent from the fact that the defendant had administered a known poison, even though

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123 State v. Butler, 11 Ohio St. 2d 23, 34, 227 N.E.2d 627, 636 (1967).

124 *Id.* at 34, 227 N.E.2d at 636.

125 *Id.* at 36, 227 N.E.2d at 637.

126 149 Ohio St. 264, 78 N.E.2d 575 (1948).

127 *Id.* at 268, 78 N.E.2d at 577.

128 *Id.* at 274, 78 N.E.2d at 580 (Hart, J., dissenting).

129 State v. Farmer, 156 Ohio St. 214, 102 N.E.2d 11 (1951); Robbins v. State, 8 Ohio St. 131 (1857).

there was no evidence that he desired her death. The court ignored the fact that the victim was unusually susceptible to chloroform[130] and announced a rule that "where proof establishes beyond reasonable doubt that the accused, in the perpetration of rape, intentionally administered poison knowing it to be such and death resulted therefrom, such accused may be found guilty of murder in the first degree."[131] Although the defendant's act was undoubtedly culpable, there are ways to impose sanctions without so violently twisting the meaning of the murder statute. It certainly goes contrary to the common meaning of the words to say that a death resulting from a rare physical defect was a natural and probable consequence of the defendant's act.

Perhaps *Salter*, although it has never been overruled, is an aberration. Four years later, the same court decided *State v. Farmer*[132] which also was a prosecution under the felony murder rule. In *Farmer*, the defendant struck the victim on the head with a stick during an argument over the purchases of two tires. The court found that since the defendant had attempted to remove the tires without paying for them, the felony murder rule was applicable.[133] However, the court reaffirmed the rule first announced in *Robbins v. State*[134] that even in the case of a felony murder, there must be a true purpose or intent to kill.[135] To determine if the defendant had had an intent to kill, the court applied the presumption but held that the facts did not show that death was a natural and probable consequence of the defendant's act. It is not clear whether this decision affects the validity of *Salter*, since the facts in the two cases were different. The only mention of *Salter* by the *Farmer* court was that the former case had questioned the validity of *Robbins*.[136] However, by reaffirming the *Robbins* requirement of a purposeful killing in felony murder cases, *Farmer* necessarily invalidates the rationale of *Salter*. At any rate, since the standards for determining what is a natural and probable consequence remain undefined, the possibility of erroneous decisions still exists.

State v. Swiger[137] reveals a general problem which has arisen in applying the presumption of intent. The difficulty arises from circumstances showing that, while the result can be said to be a natural and probable one, it is questionable that it was intended by the defendant. In *Swiger*, a prosecution for first degree murder, the defendant severely beat an elderly woman to compel her to disclose the location of her safe. Two weeks

130 This fact is not even mentioned in the opinion of the court. Rather, it is mentioned only in the dissenting opinion. *See* note 128 *supra.*

131 149 Ohio St. at 269, 78 N.E.2d at 578.

132 156 Ohio St. 214, 102 N.E.2d 11 (1952).

133 *Id.* at 216-17, 102 N.E.2d at 13.

134 8 Ohio St. 131 (1857).

135 156 Ohio St. at 221, 102 N.E.2d at 16.

136 *Id.* at 222, 102 N.E.2d at 16.

137 5 Ohio St. 2d 151, 214 N.E.2d 417 (1966).

after the incident, the nearly recovered victim suddenly died of a pulmonary embolism. The court held that since such blood clots frequently occur in people confined to beds, the jury could reasonably find that the defendant's act was the proximate cause of the embolism.[138] The court, by applying the presumption, found that death was a natural and probable consequence of the defendant's act and that the defendant, therefore, possessed the requisite intent to kill.[139] While the result in this case is not clearly erroneous, there is a strong question whether the facts establish any more than a reckless unintentional homicide. Because the defendant wished to discover the location of the victim's safe, her death served no useful purpose to him. To say that this defendant had a purpose to kill is to ignore the logic of the situation. The presumption of intent was not created as a device to allow a court to impose liability whenever it was outraged by a defendant's conduct. Rather, the presumption was developed to aid the court in determining the *true* intent of the actor. Any other use of it is questionable both as a matter of logic and as a matter of substantial justice.

Proof of purpose under the Proposed Ohio Criminal Code will pose problems nearly identical to those which currently exist. The drafters of the Proposed Code have not spoken to these difficulties. Since it was their stated goal to rid Ohio *mens rea* law of its present confusion, such silence is surprising. It is of little ultimate value to replace the current chaos with a tight system that cannot be rationally administered. Neither the proposed definitions nor the committee comments provide any alternative to the current devices of presumptions or inferences from the surrounding circumstances. Furthermore, nothing elsewhere in the Proposed Code provides any significant guidance. Section 2901.04 provides that code sections shall be strictly construed against the state and in favor of the accused.[140] In addition, § 2901.05 states that the accused must be acquitted unless all elements of the crime charged, including the requisite culpability, have been proved beyond a reasonable doubt.[141] While these two rules may be of some help in resolving close cases, they are merely statutory codifications of existing judicial doctrines. Therefore, it is doubtful that they will be of any more than minimal benefit. Since there is nothing in the Proposed Code to the contrary, it must be assumed that current judicial interpretations of "intent" will remain in effect and will be applicable to "purpose" under the new code. If this is so, the Proposed Criminal Code will make no improvement upon existing confusion in this area.

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138 *Id.* at 155, 214 N.E.2d at 422.

139 *Id.* at 157, 214 N.E.2d at 423.

140 PROP. OHIO CRIM. CODE § 2901.04.

141 *Id.* § 2901.05.

It is possible, however, that some of the confusion may be avoided by framing appropriate new jury instructions on the meaning of purpose and the proof of its existence. On this point, it is interesting to note that one of the most serious objections to the Model Penal Code's definition of culpability is that the development of a new terminology will only confuse juries.[142] The chief draftsman of the Model Penal Code, Herbert Wechsler, addressed himself to this criticism and indicated that the Institute recommended that new instructions be framed which embody the concepts contained in the definitions.[143] As the situation presently exists in Ohio, even if new instructions are formulated, it is difficult to see how they would result in improvement. Jury instructions are grounded on judicial doctrines and definitions. Since Proposed Criminal Code "purpose" is defined in terms of "intent," and the current judicial position is that the two are synonymous, unless there is some unforeseen change in the underlying precedents, there seems to be no way to significantly improve current instructions.

An example of the type of instruction presently given to Ohio juries is the Ohio Pattern Jury Instruction—Criminal.[144] "Intent" is defined in these instructions as "a decision of the mind to knowingly do an act with a conscious objective of accomplishing a specific result. Intent and purpose mean the same thing."[145] The instructions further state that the jury should *not* be told to presume that an accused intended the natural and probable consequences of his acts.[146] Rather, the jury is to be instructed to determine the actor's intent from "the manner in which [the action] is done, the [means] . . . used and all the other facts and circumstances in evidence."[147] This instruction is relatively unobjectionable and, in fact, contains two strong features. First, the fact that "intent" is defined in terms of "conscious objective" emphasizes that intent is a subjective element. Second, it is a major improvement that the instructions specifically discourage the use of presumptions of intent. Presumptions are, at best, of dubious validity.[148] This is especially true in an area so subjective as culpability. Since a number of judges were involved in the formulating of these instructions, perhaps the decision against using the presumption reflects a change in judicial thinking. If this is correct, then the future of

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142 Kuh, *A Prosecutor Considers the Model Penal Code*, 63 COLUM. L. REV. 608, 622 (1963).

143 Wechsler, *Forward, Symposium on the Model Penal Code*, 63 COLUM. L. REV. 589, 590 (1963). *See also* Packer, *The Model Penal Code and Beyond*, 63 COLUM. L. REV. 594-96 (1963).

144 4 OHIO JUDICIAL CONFERENCE: OHIO JURY INSTRUCTIONS—CRIMINAL (1970).

145 *Id.* § 409.01.

146 *Id.*

147 *Id.*

148 *See, e.g.*, Bohlen, *The Effect of Rebuttable Presumptions of Law on the Burden of Proof*, 68 U. PA. L. REV. 307 (1920).

Ohio *mens rea* law may be more promising. However, since these instructions do not have the force of law, there is nothing to guarantee that they will be employed universally.

There is a second set of pattern jury instructions which are also presently used in Ohio courts—Ohio Instructions to Juries.[149] In addition to instructing the jury to consider the circumstances surrounding the act to determine the actor's intent, these instructions also state that the jury should "bear in mind" that there is a "legal presumption" that a man intends the natural and probable consequences of his acts.[150] The danger of such an instruction is that the standards are vague and give little guidance to the jury. It should be noted that such an instruction was given to the jury in *State v. Salter*.[151] Since the jurors had so little to aid them, it becomes less surprising that they found the defendant to have purposefully killed. Even if future instructions omit the presumption regarding intent, juries will still be forced to make intuitive judgments with no more to guide them than vague factors such as the "facts and circumstances surrounding the act." Thus, even under the Proposed Code, juries will undoubtedly still base their judgment upon how reprehensible the defendant's conduct appears to be.

Despite its shortcomings, the "purpose" definition of the Proposed Criminal Code may prove to be an improvement over current law. Although the concept may prove awkward in practice, the fact that the subsection exists may itself serve a useful function. By creating four discrete levels of culpability and by specifying the crimes to which they shall apply, the proposal will alert courts to the legislature's intention to create a difference between the culpability necessary to establish, for example, capital murder (purpose)[152] from murder (knowledge).[153] For those few crimes requiring proof of purpose, this factor alone could lead to tighter standards for the quantum of evidence needed. Since "purpose," "knowledge," and perhaps "recklessness" as well are all presently subsumed under the general label of "intent," it is possible that once these concepts are separated the strange interpretations which have arisen under present law will disappear.

Insight into the course of future developments in the Ohio law of *mens rea* may be gained by looking at the experience of jurisdictions which have already enacted codes based on the Model Penal Code. In 1961, the state of Illinois adopted such a criminal code.[154] Since the law of culpability in effect in Illinois prior to the adoption of the new code was

149 3 L. FESS, OHIO INSTRUCTIONS TO JURIES § 86.19 (1953).

150 *Id.*

151 149 Ohio St. 264, 78 N.E.2d 575 (1948).

152 PROP. OHIO CRIM. CODE § 2903.01.

153 *Id.* § 2903.02.

154 ILL. REV. STAT. ch. 38 (1961).

similar in many respects to current Ohio law, the Illinois experience with a codified *mens rea* may give some indication of future Ohio culpability law. Illinois adopted the Model Penal Code format for "purpose." However, the Illinois legislature apparently decided that since "intent" was the most common culpability concept in Illinois statutes, it should be used in place of "purpose."[155] The Illinois code provides that "[a] person . . . acts intentionally . . . to accomplish a result . . . when his *conscious objective* . . . is to accomplish that result . . . ."[156] From this wording, it is clear that the Illinois legislature also focused on the subjective nature of intention. In the comments to this code, the drafters state:

> The use of the word "intent" in the 1961 code is *limited* to conscious objective or purpose to accomplish a desired result, as distinguished from "general intent" which often has been used to describe also a presumption of culpability which follows from injury or awareness that certain voluntary acts will, or probably will, have wrongful or unlawful results.[157]

Two points about this comment should be noted: (1) the requirement of a "conscious objective" to establish intent, and (2) the careful distinction of "intent" from "general intent" as that phrase was used in precode Illinois law. Furthermore, the comments indicate a legislative intent to rigidly exclude any concept of "general intent" (the predisposition to commit a crime as opposed to the desire to bring about a specific prohibited result) from the law of intentional crimes.

Although there is not a large body of case law interpreting the new Illinois code, the cases that do exist reveal a judiciary that is troubled by *mens rea* despite a clear expression of legislative intent. Some Illinois courts have apparently noted the change in the *mens rea* law. For example, in *People v. Ford*,[158] a prosecution for involuntary manslaughter, an intermediate appellate court stated that under the new code the mental state of a reckless man fell short of the culpability envisioned by "intent." But, since involuntary manslaughter did not require proof of intent, proof of the defendant's recklessness was sufficient to justify the conviction. In *People v. Wooff*,[159] the court stated that "intent to commit theft" was limited to a conscious objective to commit that result, but since the defendant had failed to object to an instruction relating to his intent, any possible error had been waived. In *People v. Higgins*,[160] the court stated that to obtain a conviction for an intentional "aggravated battery" the prosecution was required to prove more than just recklessness as that level of culpability falls short of intent. These cases, while recognizing that the stan-

[155] *Id.* § 4-3 (1961), Committee Comments at 166.

[156] *Id.* § 4-4 (1961). (emphasis supplied).

[157] *Id.* § 4-3 (1961), Committee Comments at 167. (emphasis supplied).

[158] 56 Ill. App. 2d 153, 206 N.E.2d 105 (1965).

[159] 120 Ill. App. 2d 225, 256 N.E.2d 881 (1970).

[160] 86 Ill. App. 2d 202, 229 N.E.2d 161 (1967).

dards for intent had been changed, do not deal at any length with those standards. Furthermore, most of the statements in the cases about *mens rea* are dicta at best. On the other hand, there is another line of cases in which the Illinois courts have reached disturbing results. In *People v. Powell*,[161] despite the code comment discouraging presumptions, the court reaffirmed the familiar rule that one is presumed to intend the natural and probable consequences of his voluntary acts. In *People v. Ray*,[162] the defendant had forced entry into a stranger's apartment where he was seen and frightened away. He was charged and convicted of "burglary with intent to commit theft." The court of appeals held that a jury was justified in finding intent to commit theft on these facts and stated that the fortuitous interruption of a criminal act, thwarting the completion thereof, did not vitiate the intent to commit the act.[163] The conclusion to be drawn from these cases is that Illinois courts are content to continue applying old interpretations regardless of the fact that the legislature has created new standards which should require different treatment.

The experience in New York follows the same general pattern as that of Illinois. While any conclusions which could be drawn on the New York experience would be somewhat speculative since the New York code was not enacted until 1967,[164] certain features of New York *mens rea* law seem to be emerging. For example, in *People v. Colozzo*,[165] the court stated that knowledge of the underlying fact which made a defendant's conduct unlawful is usually necessary for conviction. In *People v. Shaughnessy*,[166] the court stated that while the New York legislature could have, under the new code, made an act criminal without regard to *mens rea*, it was still necessary to prove that a defendant's act was voluntary, unless the act was voluntary intoxication. The New York decisions also indicate that the historical presumption of intent is still being applied. In *In re Taylor*,[167] the court adjudged the defendant a juvenile delinquent for striking another child with a stone and causing a head wound. The court determined that the injury was a natural and probable consequence of throwing the stone and presumed that she intended to cause the injury. Since the battery in this case occurred as a result of an argument, it is likely that the defendant was upset and not in complete control of her actions. Therefore, there is some question that her act was truly "voluntary" or that the injury was "purposeful" as that word is commonly understood. As the

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161 61 Ill. App. 2d 238, 209 N.E.2d 345 (1965).

162 252 N.E.2d 772 (Ill. Ct. App. 1969).

163 *Id.* at 773 (headnote 2).

164 N.Y. PENAL LAW (McKinney 1967).

165 54 Misc. 2d 687, 283 N.Y.S.2d 409 (Sup. Ct. 1967).

166 66 Misc. 2d 19; 319 N.Y.S.2d 626 (Dist. Ct. 1971).

167 62 Misc. 2d 529, 309 N.Y.S.2d 368 (Fam. Ct. 1970).

act was more reckless than purposeful, it illustrates the effects of rigidly applying legal rules without adequately considering all the facts in a case.

From these few examples, it is possible to conclude that even under a new *mens rea* standard, Ohio courts will probably continue to apply the presumption of intent to find "purpose." This in itself does not represent a great problem, because the standard is valid in most cases. However, the course of Ohio culpability law illustrates that the courts have misapplied the rule in several cases. If the Ohio courts continue to apply the presumption that a man intends the natural and probable consequences of his acts, it will be necessary for courts to become more discriminating in the way that it is applied. Otherwise, the legislative attempt to clear up Ohio *mens rea* law will be frustrated. The policies which led to the development of the "purpose" standard, that criminal sanctions should be applied only when the accused merits them, are vital and should not be undermined in practice by inexact applications of the presumption of intent.

B. *Knowledge*

Under the Proposed Ohio Criminal Code, the required mental state for most crimes will be "knowledge."[168] As in the case of "purpose," "knowledge" is defined in terms of a subjective standard. Under current Ohio law, "knowledge" is generally used interchangeably with "intent" and "purpose."[169] However, its use in statutes has been somewhat narrower in scope; "knowledge" is used primarily to define crimes of fraud or actual malice. For example, the Ohio Revised Code makes it a crime to "knowingly send . . . a writing . . . containing willful and malicious threats of injury . . . ."[170] Under the Proposed Criminal Code, however, "knowledge" is used to establish liability for a wide range of prohibited conduct and to perform the function currently served by "intent" in defining many crimes. Since the term is to be used so widely, it is especially important that this term be adequately defined. In fact, however, the proposed definition of "knowledge" is one of the weak points in the Proposed Criminal Code *mens rea* provisions.

Under the Proposed Ohio Criminal Code, a person acts knowingly, "when he is consciously aware that his conduct is likely to cause a certain result or is likely to be of a certain nature . . . ."[171] The essential element is a subjective personal awareness on the part of the actor that he is en-

168 PROP. OHIO CRIM. CODE § 2901.22(B):

A person acts knowingly, regardless of his purpose, when he is consciously aware that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person has knowledge of circumstances when he is consciously aware that such circumstances are likely to exist.

169 *See, e.g.*, Anderson v. State, 7 Ohio 539 (1836).

170 OHIO REV. CODE ANN. § 2901.39 (Page 1954).

171 PROP. OHIO CRIM. CODE § 2901.22(B).

gaging in prohibited conduct or that his conduct will lead to prohibited results. While the drafters of the Proposed Criminal Code have focused on the subjective element, they have mishandled that subjectivity. The Model Penal Code, which is followed by the drafters of the Proposed Ohio Code, includes in its types of culpability three levels which are subjective in nature—purpose, knowledge, and recklessness. Thus, it is important that each level be distinguished from the others. The Model Penal Code carefully provides such distinctions, but the Proposed Ohio Criminal Code does not.

For most of the common crimes, the Proposed Criminal Code creates a level of criminality for each of the four levels of defined culpability. This may be illustrated by looking at the homicide crimes. Among the homicide crimes are (1) "capital murder" which requires proof of purpose;[172] (2) "murder"[173] and "voluntary manslaughter"[174] which require proof of knowledge; (3) "involuntary manslaughter"[175] which is established by recklessness; and (4) "negligent homicide" which requires only negligence.[176] Although in all cases the result is the death of another person, there are two major differences between each level of offense. First, the penalties differ widely, ranging from a misdemeanor in the first degree in the case of negligent homicide (maximum imprisonment six months) to the death penalty in the case of capital murder. Which of these penalties will be imposed in a given case is determined largely by the other major difference between the crimes—the degree of culpability. The Proposed Criminal Code provides that any degree of culpability includes all lesser degrees of culpability.[177] Thus, proof of purpose suffices also to establish knowledge, recklessness, and negligence. On the other hand, proof of recklessness is not sufficient to establish knowledge or purpose. If there is no clear method by which a jury can distinguish between these levels, substantial injustice could result. If, for example, the definitions do not adequately distinguish knowing conduct on the one hand from reckless conduct on the other, then an actor whose reckless conduct results in the death of some person could be convicted of a knowing murder, a crime more severe than his culpability would justify. As the proposed definition of knowledge currently stands, such a result could occur. This possibility arises from the fact that Proposed Ohio Criminal Code "knowledge" delineates no more than Model Penal Code recklessness. Under the Model Penal Code, both knowledge and recklessness require proof of the actor's subjective awareness of the nature of his conduct. In the case of knowl-

[172] *Id.* § 2903.01.

[173] *Id.* § 2903.02.

[174] PROP. OHIO CRIM. CODE § 2903.03 (as amended in SUB. H.B. 511).

[175] *Id.* § 2903.04.

[176] *Id.* § 2903.05 (dangerous weapon).

[177] PROP. OHIO CRIM. CODE § 2901.22(E).

edge, the actor must be aware that the prohibited result was "practically certain" to occur,[178] while, in the case of recklessness, the actor need be aware only that there is a "substantial and unjustifiable risk" that the result would occur.[179] Basically, this is the difference between certainty and probability. Under the Proposed Ohio Criminal Code, however, to prove the actor had knowledge, it is only necessary to prove that the actor was aware that the result was "likely" to occur.[180] As the word "likely" is commonly understood, it denotes, at most, that something is probable and cannot be said to rise to the level of "practical certainty." Thus, the terminology of the statute describes something like "substantial risk."

There is another reason why the use of "likely" as the standard for knowing conduct may present difficulties. Under the civil law of torts, "likelihood" is a familiar concept. It is not an unrealistic fear that some courts and juries may confuse the new criminal likelihood with civil likelihood. This would represent a serious problem because a different degree of proof is required for criminal than for tort liability. Under tort law, the plaintiff need prove only that it was more likely than not that the defendant caused the injury. In criminal prosecutions, on the other hand, there must be proof beyond a reasonable doubt that the prohibited conduct occurred, that it was the defendant who did the act, and that he had the requisite degree of culpability.[181] In a criminal case under the Proposed Ohio Criminal Code, the state must prove beyond a reasonable doubt that the accused was aware that his conduct was more likely than not to result in the prohibited harm. The practical effect of this standard could well be that a jury would find instead that it was more likely than not that the accused knew his conduct would cause the prohibited result. Such a knowledge standard would represent a significant dilution of the criminal law proof standard.

When the knowledge definitions of the Proposed Ohio Criminal Code are compared with parallel provisions in three other recent codes, it becomes evident that the Ohio version differs sharply from the thrust of those codes. Echoing the Model Penal Code emphasis on "practical certainty," these other codes also insist on proof that the actor was certain of the nature of his conduct. For example, the Proposed Federal Criminal

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[178] M.P.C. § 2.02(2)(b) (P.O.D.):

> A person acts knowingly with respect to a material element of an offense when:
>
> . . . .
>
> (ii) . . . he is aware that it is *practically certain* that his conduct will cause such a result.

(emphasis supplied)

[179] M.P.C. § 2.02(2)(c) (P.O.D.):

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. . . .

[180] PROP. OHIO CRIM. CODE § 2901.22(B).

[181] *Id.* § 2901.21(A).

Code speaks of actual knowledge or a "firm belief, unaccompanied by substantial doubt" that the prohibited result will occur.[182] The absence of a substantial doubt seems to be a much stronger standard than mere likelihood. Furthermore, the use of "substantial doubt" in formulating the standard fits better with the "reasonable doubt" requirement of the criminal law burden of proof than does the "likelihood" test of the Proposed Ohio Criminal Code. The definition of knowledge in the Illinois Criminal Code of 1961 is even more closely patterned after the Model Penal Code. Under the Illinois code, a person acts knowingly when "he is consciously aware that [a prohibited] result is practically certain to be caused by his conduct."[183] The comments to the Illinois code, by providing that "the awareness involved in knowledge must be carefully distinguished from 'substantial and unjustifiable risk' involved in recklessness,"[184] further emphasize the intent of the legislature as to the degree of certainty involved in knowledge. However, it must be noted that the comments quite reasonably point out that this does not mean that absolute certainty is required but only practical certainty.[185] A more restrictive standard would render knowledge, like purpose, impossible to prove directly and would introduce into the proof of knowledge the absurdities which have developed in the proof of purpose. The solution to this problem adopted by Illinois seems preferable to reducing knowledge to the level of recklessness as the drafters of the Proposed Ohio Criminal Code have done.

The definition of knowledge in the New York Penal Law provides that "[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 nature or that such circumstance exists."[186] It is not clear from the language of the statute what degree of certainty must be proved to establish knowledge. However, from the phrase "conduct *is* of that nature . . . ," it is clear that New York has not reduced knowledge to recklessness. While there may be problems interpreting the exact meaning of this provision, they will certainly be less than those which could arise under the Ohio version which equates knowledge with recklessness.

C. *Recklessness*

The problems which may arise under the Proposed Ohio Criminal Code definitions of purpose and knowledge could be minor compared to those which may arise under the "recklessness" provisions. In addition to the

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182 The National Commission on Reform of Federal Criminal Laws, STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE § 302(1)(b) (1970) [hereinafter cited as PROP. FED. CRIM. CODE].

183 ILL. REV. STAT. ch. 38, § 4-5(b) (1961).

184 ILL. REV. STAT. ch. 38, § 4-3 (1961), Committee Comments at 169.

185 *Id.*

186 N.Y. PENAL LAW § 15.05(2) (McKinney 1967).

considerable problems of proof inherent in a subjective concept, there is also a more basic question of what the legislators intended to convey by their definition. As the definition emerged from the Technical Committee, it provided that "[a] person acts recklessly when he consciously and unjustifiably disregards a substantial risk that his conduct may . . . be of a certain nature."[187] This provision is substantially identical to the Model Penal Code definition of recklessness.[188] The only major difference lies in that the Model Penal Code includes the statement that the risk must be of such a nature that to disregard it "involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation."[189] This language in the Model Penal Code would alert a court to a definite subjective element and to an objective element as well. The fact that the Proposed Ohio Criminal Code lacks similar language is not of itself a serious deficiency since it is arguable that an objective element may be inherent in the concept of a "substantial risk" and the "unjustifiable" disregard of such a risk. However, if this was the intent of the drafters, they could have removed doubt by including language similar to that in the Model Penal Code.

What the drafters did intend becomes less clear on examination of their comments instead of the definition itself. The Technical Committee states that it views recklessness in the sense of "rashness," or "heedless indifference to the consequences."[190] Furthermore, they state that the Committee does not envision a requirement of "wantonness or malice" before recklessness may be found.[191] It is not clear whether the Committee uses the terms "wantonness" or "malice" in their common or their legal senses. However, the tone of the whole comment seems to negate a requirement of subjective awareness of the risk. By stating that "wantonness" is *not* required for liability, the Committee may be adopting a wholly objective standard. If this view becomes the settled definition, then it seems to be

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187 PROP. OHIO CRIM. CODE § 2901.22(C):

A person acts recklessly when he consciously and unjustifiably 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 he consciously and unjustifiably disregards a substantial risk that such circumstances may exist.

188 M.P.C. § 2.02(2)(c) (P.O.D.). *See* note 179 *supra.*

189 M.P.C. § 2.02(2)(c) (P.O.D.):

The risk must be of such a nature and degree that, the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

190 PROP. OHIO CRIM. CODE § 2901.22(D), Committee Comments at 41:

Division (C) is intended to describe recklessness in the sense of rashness, or *heedless indifference to the consequences.* It is not the Technical Committee's object to require that recklessness must have an element of *wantonness or malice,* although it recognizes that under given circumstances recklessness may be wanton or malicious.

(emphasis supplied).

191 *Id.*

another major departure from the Model Penal Code view that a reckless actor, just as the purposeful or knowing actor, has a "guilty mind."

When the recklessness definition passed the House of Representatives, there were some significant amendments to its wording. In place of the Technical Committee's suggestion of "conscious disregard," the House substituted "with heedless indifference to the consequences."[192] On one level this represents nothing more than incorporating the comments into the substance of the statute. On another level, however, this substitution may represent a definite change in the standard. To say that a person is reckless when he "disregards" a risk rather than when he "consciously disregards" a risk is not itself a major change since a person logically must be conscious of a risk before he can "disregard" it. However, the language in the original version is not wholly redundant since it serves the purpose of emphasizing the subjective element of recklessness. The use of the phrase "heedless indifference to the consequences," however, does represent difficulties. Since this phrase is not defined in the Proposed Criminal Code, it will be necessary for the courts to construe it, if they are to give effect to legislative intent. In large part, the fact that courts have had to construe undefined terms of legal art has led to the confusion which currently characterizes Ohio *mens rea* law. If an actor is to be held responsible for disregarding a substantial "risk," it must be the risk that his conduct will lead to a result prohibited by the law. "Result" is fairly to be considered as a synonym for "consequence." Thus, an actor would be held liable if he consciously disregards a risk that his conduct will lead to a certain consequence. Since "heedless" implies a lack of awareness, it is anomalous to say that by disregarding a known risk he has been heedlessly indifferent to the consequences. A phrase like "consciously and unjustifiably" disregarding an unreasonable risk seems to import something approaching premeditation or, in other words, assessing of a risk *before* acting.

There is another and more substantial objection to the proposed definition for recklessness. According to the version passed by the House of Representatives, recklessness liability would be imposed whenever a person disregards a substantial risk that his conduct "may" cause a prohibited result or be of a prohibited nature.[193] Imposing liability whenever conduct "may" cause a result rather than when the conduct "will" cause the result as the Model Penal Code requires, is a significant reduction of the standard. In a jurisdiction applying the Model Penal Code standard, a jury

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[192] PROP. OHIO CRIM. CODE § 2901.22(C) (as amended in SUB. H.B. 511):

> 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.

(emphasis supplied)

[193] *Id.*

would have to be persuaded beyond a reasonable doubt both (1) that an actor actually knew of a substantial risk but acted despite his awareness, and (2) that the risk was of such a nature that the result would be *practically certain* to follow. "May," on the other hand, is not a synonym for "certain." Furthermore, "may" does not even rise to the level of "probable." Rather, the most it describes is "possible." Thus, all the definition provides is that liability may be imposed in any case where it was not absolutely *impossible* for the result to occur. There are two major implications of such a broad standard: (1) the universe of culpably reckless acts has been enormously enlarged, which could result in greatly increasing the chances that a law-abiding citizen will be drawn into the criminal process; and (2) the value of the standard as notice to potential actors of what conduct they must avoid has been reduced since too much behavior falls within the prohibition.

The Proposed Ohio Criminal Code defines "substantial risk" as a "serious chance . . . that a certain result *may* occur . . . ."[194] This definition also provides little guidance in interpreting the legislative intent concerning reckless *mens rea*. Here again, the meaning has been clouded by the use of the indefinite and broadly inclusive term "may." The phrase "serious chance" seems to connote some concept analogous to probability or, perhaps, "high" probability. If the definition for "substantial risk" is substituted in place of the "recklessness" provision, liability could be imposed whenever there is a serious chance that the result would follow. It should be noted that the provision does not prohibit conduct when there is a serious chance that the result *will* follow, but only when there is a serious chance that the occurrence would not be impossible. This suggested formulation is not intended to be an exercise in abstract semantics, or in the ambiguities of the English language, but is intended to point out that there is a vast difference between what is conveyed by the proposition that an event *will* occur and what is conveyed by the proposition that it *may* occur. Since a jury will be forced without special training to deal with this standard, any unnecessary source of confusion should be avoided.

The net result of the recklessness definition is to eliminate the requirement that an actor have actual knowledge that a risk exists. It still remains to consider what is left after the elimination of the subjective element. There are several ways in which the statutory language may be interpreted. Whatever else the standard may be, it does not include purpose or knowledge. On the other hand, the standard does not seem to be aimed at creating absolute or strict liability. Rather, the standard probably creates a negligence standard in one of the several ways that term is used in the law.

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194 PROP. OHIO CRIM. CODE § 2901.01(H):

"Substantial risk" means a serious chance, as contrasted with a slight or significant chance, that a certain result may occur or that certain circumstances *may* exist. (emphasis supplied)

It is possible that the drafters intended to apply a civil tort standard of negligence. Such a standard would impose liability for a failure to meet the duty of "ordinary care." Under tort law, this duty is measured in terms of the hypothetical "reasonable man"—the level of care which would be observed by a reasonable person in the same situation as the actor.[195] The use of "heedless indifference to the consequences" suggests that the Proposed Criminal Code "recklessness" involves more culpable conduct than mere tort negligence. Furthermore, the comments to the Proposed Criminal Code definition of "negligence" indicate that the Technical Committee intended tort negligence to be the standard for criminal negligence.[196] Therefore, Ohio Code recklessness must lie somewhere between Model Penal Code recklessness and Ohio tort negligence.

There are several other interpretive possibilities which involve familiar concepts. One of these is "gross negligence." This concept is sometimes defined as the failure to meet the level of care that even an inattentive person would exercise, or the lack of even slight diligence in determining the existence and severity of a risk of injury.[197] At other times, it has been defined as conduct which evidences an almost complete indifference to the value of human life.[198] It is possible that the Proposed Criminal Code recklessness is aimed at one of these concepts. The Technical Committee illustrates its view of criminal recklessness by the following example:

> [D]oing in excess of 100 mph on a freeway would be reckless, even in dry, clear weather, since at such a high rate of speed there is a substantial risk that the driver, no matter how skilled, can lose and not be able to recover control, or will have insufficient time to react to even the usual emergencies of freeway driving.[199]

This language strongly suggests that the standard to be used is that of the reasonable man. "Heedless indifference to the consequences" may, then, be analogous to tort recklessness, "indifference to human life" or a gross deviation from the care of a reasonable person.

Despite the implication of the example, the most likely interpretation of Proposed Ohio Criminal Code recklessness is that it creates a form of "subjective negligence." This interpretation is suggested by the fact that the definition still talks about "disregarding" a risk. In tort law there has been a continuing debate over the standard which should be used to

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[195] Cleveland, Col. & Cin. R.R. v. Terry, 8 Ohio St. 570 (1858); Brewing Co. v. Bauer, 50 Ohio St. 560, 35 N.E. 55 (1893); Mason v. Moore, 73 Ohio St. 275, 76 N.E. 932 (1906); De Groodt v. Skrbina, 111 Ohio St. 108, 144 N.E. 601 (1924); Denison Coal & Supply Co. v. Bartelheim, 122 Ohio St. 374, 171 N.E. 835 (1930); Pickens v. Diecker, 21 Ohio St. 212 (1871).

[196] PROP. OHIO CRIM. CODE § 2901.22(D), Committee Comments at 42.

[197] Payne v. Vance, 103 Ohio St. 59, 133 N.E. 85 (1921); Gerthung v. Stambaugh-Thompson Co., 1 Ohio App. 176 (1913).

[198] M.P.C. § 210.2 (P.O.D.)

[199] PROP. OHIO CRIM. CODE § 2901.22, Committee Comments at 41.

measure negligent conduct.[200] Although an objective standard is the one usually applied,[201] there is an alternative which has been frequently urged.[202] Under this standard, negligence derives from a state of mind of indifference or inadvertence which has been called "a form of *mens rea*, standing side by side with wrongful intention as a formal ground of responsibility."[203] A negligent person is one who does not know of a risk and who does not care to learn of it before he engages in conduct. If, on the other hand, he gives "anxious consideration to the consequences,"[204] then he is not negligent. Such a standard would turn Proposed Ohio Criminal Code recklessness into an assessment of the actor's character. The rationale of a subjective standard is that criminal liability even for inadvertent harms should correspond as closely as possible with moral culpability. It is undesirable, however, to require actors with personal deficiencies to meet a rigid standard of conduct which is beyond their capabilities. The use of "heedless indifference to the consequences" to define recklessness seems to aim at such a subjective standard. The difference between a subjective negligence standard and the Model Penal Code subjective criminal recklessness standard is that the focus of the subjective negligence standard is on the external conduct of the actor, while the Model Penal Code focuses on the subjective internal mental state of the actor before he acts. Another major difference is that although the subjective tort standard looks to the mind of the actor, his conduct is negligent when *he* fails to exercise due care. This is a lower standard than for Model Penal Code recklessness, which requires a gross deviation from law-abiding behavior.

Objections to a standard which looks at the mental state of the actor have caused most jurisdictions, even in tort law, to reject the subjective standard. Traditionally, it has been felt that it is impossible accurately to weigh the differences between people and the implications of those differences as they relate to conduct. However, this is essentially the same as the problem of proving subjective intent, so it is more accurate to say that it is inconvenient rather than impossible. Another objection to a subjective standard is that all men should have the law applied to them equally.[205] In light of this view, it is appropriate to note that, theoretically, there could be a different result in a case if a subjective standard is applied rather

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200 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 16.1 (1956) [hereinafter cited as HARPER & JAMES].

201 Edgerton, *Negligence, Inadvertence and Indifference, The Relation of Mental States to Negligence*, 39 HARV. L. REV. 849 (1926).

202 *See, e.g.*, SALMOND, *supra* note 8, at 535; F. WHARTON, NEGLIGENCE § 3 (2d ed. 1878); P. WINFIELD, LAW OF TORT 436 (2d ed. 1943).

203 SALMOND, *supra* note 8, at 538.

204 Edgerton, *supra* note 201, at 853, *quoting from* J. SALMOND, TORTS 493 (11th ed. 1953).

205 W. PROSSER, TORTS 150 (4th ed. 1971) [hereinafter cited as PROSSER]: "[The standard] must be, so far as possible, the same for all persons, since the law can have no favorites."

than an objective standard. If there were such a difference, it would be likely to arise in cases involving ignorance, physical defects and poor judgment. Psychological studies have shown that personal factors such as poor eyesight account for more accidental injuries than is usually supposed.[206] In such situations, evidence of the actor's personal characteristics would be admissible on the question of his mental state under a subjective test but inadmissible under an objective test. Before a jury could find liability, it must have been persuaded that the defendant was heedlessly indifferent to the dangers. Thus, if the jury concluded that the actor's characteristics caused the result, there would be no liability. The major weakness of a subjective standard for criminal law is that despite its focus on the condition of the actor, it is still a civil tort standard of negligence. Since recklessness will establish liability for some serious crimes[207] and will be used as the residuary level of culpability whenever a statute fails to mention a *mens rea* requirement,[208] the definition of this standard is very important. When there is such serious potential liability as here, sound public policy demands that a more traditional, criminal recklessness standard be applied. Subjective negligence as a criminal standard does not offer adequate protection to the public. Too many actors whose conduct is only negligent, and who should only be liable civilly, will now be subject to criminal sanctions. For example, if *X* walks through a door rapidly without considering that someone might be on the other side, and as he pushes the door open it strikes *Y* knocking *Y* to the ground where he hits his head and is killed, *X* is technically guilty of involuntary manslaughter (recklessly causing *Y*'s death).[209] There is no question that *X* should be liable to his victim civilly, but the penalty for manslaughter under the new code is a term of imprisonment of two to ten years.[210] It is highly questionable that *X*, although subjectively negligent, would be a "criminal" as that word is commonly understood. Yet that would be the result under the Proposed Ohio Criminal Code definition of recklessness.

D. *Negligence*

The fourth and least culpable level of *mens rea* under the Proposed Criminal Code is "negligence."[211] Criminalization of negligence is es-

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206 *See* authorities collected in HARPER & JAMES, *supra* note 200, § 11.4.

207 *E.g.*, PROP. OHIO CRIM. CODE § 2902.04 (as amended in SUB. H.B. 511) (involuntary manslaughter). *Id.* § 2907.04 (corruption of a minor).

208 PROP. OHIO CRIM. CODE § 2901.21(B).

209 PROP. OHIO CRIM. CODE § 2903.04 (as amended in SUB. H.B. 511).

210 *Id.* § 2929.04(B)(3).

211 *Id.* § 2901.22(D):

> A person acts negligently when he fails to exercise due care to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when he fails to exercise due care to perceive or avoid a risk that such circumstances may exist.

sentially a new concept to Ohio law. It is possible, however, to draw an analogy to acts defined as crimes under present law. For example, homicide by vehicle in the second degree[212] criminalizes the unintentional killing of another by means of a motor vehicle. This crime, however, is limited to situations in which the offender has violated a traffic regulation law.[213] If such a law has not been violated, even a negligent killing would not give rise to criminal penalties. On the other hand, manslaughter in the first degree is a broader crime.[214] Violation of this statute consists of the "unlawful" killing of another without regard to the instrumentality employed. An "unlawful" killing by judicial interpretation is one which results from the violation of a statute and such violation is the proximate cause of the victim's death.[215] Under current Ohio law there is no general provision criminalizing unintentional homicides in the absence of other unlawful conduct. Furthermore, there is no provision under current Ohio law, as there is in some jurisdictions, pertaining to "negligent" assault and battery.[216] Nor is there any statute which corresponds to the criminalization of negligent omissions to act. However, the absence of such a concept has not presented any major difficulties in sanctioning negligent conduct due to the way in which intent is handled in Ohio. Decisions such as *State v. Swiger*,[217] which imposed first degree murder liability where there was no clear intent or purpose to kill, demonstrate that negligence may be elevated to intent whenever the court feels that an offender's act is outrageous enough to be punished. Under decisions like *Swiger*, the absence of a negligence standard means very little.

The Proposed Ohio Criminal Code would impose negligence liability "when [an actor] fails to exercise due care to perceive or avoid a risk that his conduct may cause a certain result . . . ."[218] By defining negligence in this way, the Technical Committee has clearly indicated that an objective rather than a subjective standard should be applied. Since there is no requirement that an actor be aware of the risk (no guilty mind), it is technically incorrect to classify negligence as *mens rea*. However, the convenience deriving from having all the standards for imposing liability in

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212 OHIO REV. CODE ANN. § 4511.18 (Page Supp. 1971).

213 In State v. Kotapisch, 171 Ohio St. 349, 171 N.E.2d 505 (1960), the Ohio Supreme Court stated that a law requiring drivers to have adequate emergency brakes was "a law . . . applying to the . . . regulation of traffic" so that the victim's death resulting from the failure of appellant's brakes was within the purview of the statute. *Id.* at 352, 171 N.E.2d at 507.

214 OHIO REV. CODE ANN. § 2901.06 (Page 1954): "No person shall unlawfully kill another."

215 Johnson v. State, 66 Ohio St. 59, 63 N.E. 607 (1902); State v. O'Mara, 105 Ohio St. 94, 136 N.E. 885 (1922) (municipal ordinance is a "law" within the meaning of the rule).

216 *See* R. MORELAND, A RATIONALE FOR CRIMINAL NEGLIGENCE 102-06 (1944) [hereinafter cited as MORELAND].

217 5 Ohio St. 2d 151, 214 N.E.2d 417 (1966). *See* discussion accompanying note 137, *supra*.

218 PROP. OHIO CRIM. CODE § 2901.22(D).

one section justifies this departure from doctrinal purity. This presupposes that there is sufficient justification for criminalizing negligent conduct at all.[219] Although there have been frequent and reasoned objections to the use of negligence, the consensus of lawmakers is that it is a legitimate standard. Even assuming that there is sufficient justification, a negligence standard creates certain difficulties due to the fact that the term has been used in both civil and criminal law. Therefore, it is important that the Proposed Criminal Code clearly delineate what will constitute *criminal* negligence. There has been a continuing debate in those jurisdictions which have accepted negligence as a basis for criminal liability over whether the same standard which is used to justify the recovery of civil damages should be used to justify the additional imposition of criminal sanctions.[220] The Technical Committee has answered this question in the affirmative for Ohio. Apparently, it feels that the availability of the considerable body of case law on tort negligence and the familiarity of the courts with the concept will significantly simplify the administration of the new criminal law standard.[221] Since negligence is a new concept to Ohio law, there is much to be said in favor of using concepts with which the courts feel secure. However, there are some other considerations which may, in the long run, nullify the advantage so obtained.

At the outset, it must be noted that the definition of "negligence" in the Proposed Ohio Criminal Code represents yet another striking departure from those in other recent codes. Looking first to the Model Penal Code, those differences are readily apparent. The Model Penal Code defines negligence as the failure of an actor to be "aware of a *substantial and unjustifiable* risk that the [prohibited harm] . . . will result from his conduct."[222] The insertion of the phrase "substantial and unjustifiable" to describe the degree of risk involved indicates that a stronger standard than ordinary tort negligence is to be applied.[223] This conclusion is strengthened by the fact that the section includes a requirement that "[t]he risk must be of such a nature and degree that the actor's failure to perceive it, . . . , involves a *gross deviation* from the standard of care that a reasonable person would observe in the actor's situation."[224] Due to the nature of objective tests, it is impossible to completely define the type of risk which is

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219 *See* Hall, *Negligent Behavior Should be Excluded from Penal Liability*, 63 COLUM. L. REV. 632 (1963).

220 M. FOSTER, CROWN LAW 264 (2d ed. 1791), first mentioned that the use of criminal negligence was harsh.

221 PROP. OHIO CRIM. CODE § 2901.22(D), Committee Comments at 42: "Division (D) is designed to define negligence, for purposes of the criminal law, in terms equivalent to ordinary negligence as applied to the law of torts."

222 M.P.C. § 2.02(2)(d) (P.O.D.) (emphasis supplied).

223 *Compare* PROP. OHIO CRIM. CODE § 2901.22(D): "A person acts negligently when he fails to . . . perceive . . . a risk. . . ." *See* note 211 *supra*.

224 M.P.C. § 2.02(2)(d) (P.O.D.) (emphasis supplied).

to be condemned. Any definition is at best a guide to allow a jury or court to decide whether an actor's conduct is, in their opinion, culpable. But the Model Penal Code definition is sufficiently clear to alert a jury that a higher degree of culpability is needed than tort negligence. The Proposed Federal Criminal Code also emphasizes that the degree of negligence that it would criminalize exceeds ordinary negligence. The Federal Code prohibits an "unreasonable disregard of a substantial likelihood of . . . [a] risk [when] such disregard involv[es] a gross deviation from acceptable standards of conduct . . . ."[225] While this version is not as clear as that in the Model Penal Code, there can be little doubt that it makes criminal negligence more than civil negligence.

Two recently enacted state criminal codes also manifest the Model Penal Code requirement of higher culpability than tort negligence. The Illinois Criminal Code imposes criminal sanctions for a failure to be aware of "a substantial and unjustifiable risk . . . that a [prohibited] result will follow" when such a failure constitutes "a substantial deviation from the standard of care which a reasonable person would exercise in [that] situation."[226] The New York Penal Law similarly condemns "a substantial and unjustifiable risk" when the failure to perceive the risk constitutes a "gross deviation" from the conduct of a law-abiding person.[227] Thus, it can be seen that the drafters of the Proposed Ohio Criminal Code have made a sharp and somewhat surprising departure from the pattern of other jurisdictions without the justification of existing law.

The fact that the Ohio definition of negligence is so different from other definitions is not of itself disastrous, unless there is a valid objection to the use of a tort negligence standard for criminal law. In point of fact, there are several objections which can be raised against the tort standard. First, such a standard does not square with the historical development of American criminal law. The overwhelming majority of jurisdictions in the United States which have adopted criminal negligence, have used some variation of "gross negligence" as the standard.[228] This alone is not determinative since there are at least five other states which have applied a tort standard.[229] The principal objection to the tort standard is that it is too harsh.[230] Since the trend in the development of Anglo-American criminal law has been away from harsh treatment of criminal offenders, it seems a regression to introduce a standard which threatens overinclusive criminal-

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225 PROP. FED. CRIM. CODE § 302(1)(d).

226 ILL. REV. STAT. ch. 38, § 4-7 (1961).

227 N.Y. PENAL LAW § 15.05(4) (McKinney 1967).

228 MORELAND, *supra* note 216, at 16-17.

229 *See, e.g.*, Haynes v. State, 88 Tex. Cr. Rep. 42, 224 S.W. 1100 (1920); State v. Gilliam, 66 S.C. 419, 45 S.E. 6 (1903); Herndon v. State, 38 Okla. Cr. 338, 261 P. 378 (1927); Clemens v. State, 176 Wisc. 289, 185 N.W. 209 (1921); State v. Emery, 78 Mo. 77 (1883).

230 *See* FOSTER, *supra* note 220, at 264.

ization. Tort negligence does not involve a great deviation from acceptable behavior, and even the most law-abiding citizen could easily find himself in violation of that standard of care. It is important to remember that the primary policy which the law of torts serves is the compensation of the innocent victims of another's negligence.[231] Therefore, it is not unusual that tort law has found liability for even small lapses from the duty of care.

Another important point is that no particular stigma is attached to a finding of negligence. Rather, tort law seeks only that as between two innocent people, the one who caused the injury should bear the cost of it.[232] However, when the context is shifted to that of the criminal law, the situation changes dramatically. The imposition of criminal sanctions involves a great deal more that the compensation of victims. Essentially, there are two objectives which have traditionally been implemented by the criminal law: (1) retribution for morally blameworthy conduct; and (2) deterrence of socially disruptive behavior.[233] Since tort law does not concern itself in any significant degree with moral blame, it is a fallacy to lift a standard from that law and to try to convert it to one applicable to the criminal law where blame is a basic element.[234] Conviction for a crime involves imprisonment, disruption of one's normal life, and the potential imposition of civil disabilities (for example, disqualification from holding certain jobs). This is true even if the offense is only a misdemeanor.[235] It can hardly compensate an injured victim to imprison the negligent actor, or even to fine him, since the money goes to the state and not to the victim. Rather, the offender and his family are forced to endure the trauma and disgrace that occurs whenever one is drawn into the criminal process.

Admittedly, one of the policies which tort law serves is that of deterrence.[236] However, that function is more important in criminal law. As a deterrent, a tort standard of criminal negligence conflicts with traditional criminal law philosophies. Since negligence by definition does not involve any actual awareness on the part of the actor, it is questionable whether the potential of criminal liability will deter conduct in any significant degree because the actor is not aware that he is engaging in conduct at all and is certainly not aware that such "conduct" might constitute a crime.[237]

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231 PROSSER, *supra* note 205, at 22.

232 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 375-77 (3d ed. 1923). *See also* HOLMES, *supra* note 18, at 85-87.

233 *See, e.g.*, 4 W. BLACKSTONE, *supra* note 38, at *16.

234 Note, 28 MICH. L. REV. 933, 934 (1930):

> The requirement of "gross" negligence rather than ordinary negligence in manslaughter cases seems satisfactory, for criminal punishment does not often deter ordinary negligence, and the deterrence of such negligent acts would seem to be the only reason to support criminal punishment.

235 Baldwin v. New York, 399 U.S. 66 (1970); Duncan v. Louisiana, 391 U.S. 145 (1968).

236 PROSSER, *supra* note 205, at 23.

237 Additionally, there may be some conflict with the criminal law requirement of a

Even accepting the premise that there is conduct which poses so serious a threat to society that it must be penalized regardless of the actor's mental state, a tort negligence standard is not the rational measure of such conduct. If the risk of harm is truly so great, then a failure to perceive that risk would, almost by definition, constitute a gross deviation from the standard of conduct of a law-abiding person. Thus, the more traditional criminal negligence standard would not create any hardship for efficient law enforcement in this area. In the case of very minor social harms, such as littering,[238] which could be established by negligence, the tort standard of care is again inappropriate, if one remembers that the same standard will also be applied to offenses with much larger penalties. If offenses of this type are so minor, then this would seem to be a proper case for absolute criminal liability.

It is important also to note that in most negligent crimes, the actor is already liable to the victim civilly. If, as has been frequently maintained, the imposition of civil damages acts as some deterrent to negligent conduct, it is difficult to see how that function will be enhanced by the additional possibility of criminal sanctions based on either a tort negligence standard or a gross negligence standard. At least, any extra deterrence coming from such penalties does not seem substantial enough to justify the suffering which would be thrust on an offender. Perhaps, the objections to a tort negligence standard may be clarified by a comparison of two hypothetical situations. In the first example, *X* is driving his car at a reasonable speed. His attention is momentarily distracted by a flash of sunlight reflected off a glass window. While his eyes are away from his car's path, a pedestrian steps from between two parked cars. *X*'s car strikes the pedestrian and kills him. For purposes of discussion, it will be stipulated that had he been looking, *X* could have avoided the accident. In the second case, *Y* is driving at an unreasonably high rate of speed around a plainly marked curve. *Z* is also in the car with *Y* and the two are engaged so deeply in animated conversation that *Y* does not see the curve. *Y*'s car enters the opposite lane where his car strikes an oncoming car and kills its driver. As between the two situations, the conduct of *Y* in the second case would strike most commentators as more culpable. It is probable that under any system of negligent homicide, *Y*'s conduct would represent a "gross deviation" from acceptable conduct and would be punished criminally as well as civilly. If criminalization of negligent conduct would have any deterrent value, it would be in cases such as *Y*'s. Yet, under the tort standard of care, the result in *both* cases would be a finding of criminal negli-

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voluntary act. Since a negligent person does not know that he is 'acting," it might be inconsistent to say that he is acting voluntarily.

238 PROP. OHIO CRIM. CODE § 2909.08:

'No person, with respect to ... litter, shall negligently:

(1) Place ... it on the property of another or on public property ....

gence. In the case of X, a criminal conviction seems unduly harsh because even the most law-abiding person could find himself in X's place. Furthermore, a finding of criminal liability would be especially strange since there is a chance that X would not be civilly liable to his victim, It is arguable that the pedestrian who was killed was guilty of contributory negligence and his successor in interest would be barred from collection in many jurisdictions. Under the Proposed Criminal Code, however, there is no exculpatory provision due to the victim's contributory negligence.

It could be argued that there are checks built into the system which would serve to moderate the harshness of a rigid, tort negligence standard. One of these checks is prosecutorial discretion. Thus, in a case where the offender's conduct rises to the level of ordinary negligence, the prosecution might decide that such was not conduct flagrant enough to warrant the imposition of criminal sanctions. Another check on the system would be "jury nullification," which involves situations where juries refuse to convict a defendant unless they feel that he has been grossly negligent. This hesitancy to convict is said to be especially present when there is a potential prison sentence involved. While both of these devices exist and are undoubtedly effective limitations in some cases, a criminal law system should not operate on such bases. First, it is doubtful that these factors would obtain equally in every case. Therefore, the defendant's guilt would not so much depend upon what he did but on the makeup of a jury or the idiosyncrasies of a prosecutor. Second, it is hardly conducive to the development of sound judicial administration to evolve a body of case law which operates by undercutting or perverting the standards of criminal law. The fact that better results may be obtained by the simple device of using a more rational standard to determine culpability makes it imperative that the latter course be followed.

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APPENDIX

Legislative History of the Mens Rea Provisions in the Proposed Ohio Criminal Code

1. PURPOSE

The following is the original draft proposal for the "purpose" provision from the Legislative Service Commission to the Technical Committee dated July 12, 1966:

> (a) a person acts purposely with respect to the nature of the conduct or the result of conduct described by the section defining an offense when it is his conscious object to engage in conduct of that nature or to cause such result.

(b) a person acts purposely with respect to the attendant circumstances of an offense when he is aware of the existence of such circumstances [or believes or hopes that they exist].

The following represents the version of the "purpose" provision that was introduced to the House of Representatives in HOUSE BILL NO. 511:

§ 2901.22(A) A person acts purposely when it is his specific intention to cause a certain result, or, when the gravamen of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.

The following represents the version of the "purpose" provision that were reported out of committee as SUBSTITUTE HOUSE BILL NO. 511:

§ 2901.22(A) A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.

2. KNOWLEDGE

The following is the original draft proposal for the "knowledge" provision from the Legislative Service Commission to the Technical Committee dated July 12, 1966:

(a) A person acts knowingly with respect to the nature of the conduct or attendant circumstances described by the section defining an offense when he is aware of the nature of his conduct and the attendant circumstances [or believes or hopes that they exist].

(b) A person acts knowingly with respect to the result of conduct described by the section defining the offense when he is aware that his conduct is practically certain to [will necessarily—alternative] cause such result.

The following represents the version of the "knowledge" provision that was introduced to the House in HOUSE BILL NO. 511:

§ 2901.22(B) A person acts knowingly, regardless of his purpose, when he is consciously aware that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person has knowledge of circumstances when he is consciously aware that such circumstances are likely to exist.

The following represents the version of the "knowledge" provision that was reported out of committee as SUBSTITUTE HOUSE BILL NO. 511:

§ 2901.22(B) A person acts knowingly, regardless of his purpose, when he is aware that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances are likely to exist.

3. RECKLESSNESS

The following is the original draft proposal for the "recklessness" provision from the Legislative Service Commission to the Technical Committee dated July 12, 1966:

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

The following represents the version of the "reckless" provision that was introduced to the House in HOUSE BILL NO. 511:

> § 2901.22(C) A person acts recklessly when he consciously and unjustifiably 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 he consciously and unjustifiably disregards a substantial risk that such circumstance may exist.

The following represents the version of the "recklessness" provision that was reported out of committee as SUBSTITUTE HOUSE BILL NO. 511:

> § 2901.22(C) A person acts recklessly when with heedless indifference to the consequences, he disregards a substantial risk that his conduct 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 circumstance exists.

4. NEGLIGENCE

The following is the original draft proposal for the "negligence" provision from the Legislative Service Commission to the Technical Committee dated July 12, 1966:

> A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to percieve it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

The following represents the version of the "negligence" provision that was introduced to the House in HOUSE BILL NO. 511:

> § 2901.22(D) A person acts negligently when he fails to exercise due care to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to cir-

cumstances when he fails to exercise due care to perceive or avoid a risk that such circumstances may exist.

The following represents the version of the "negligence" provision that was reported out of committee as SUBSTITUTE HOUSE BILL No. 511:

§ 2901.22 (D) [No Change from HOUSE BILL No. 511].