

# Knowledge and Belief as Criminal Law Mental States

Kevin Cole\*

Given how often they appear in criminal statutes, the mental states of “knowledge” and “belief” are surprisingly undertheorized. Scholars have debated whether knowledge is invariably a more culpable mental state than recklessness.<sup>1</sup> The drafters of the Model Penal Code (“MPC”) agonized over whether knowing facilitation of another’s crime should suffice for accomplice liability before ultimately requiring a true purpose. Scholars have debated whether willful blindness should satisfy a statute’s knowledge requirement. But little attention has focused on when knowledge should be the minimum culpability level required for criminality. The MPC drafters established recklessness as the default mental state when a statute lacks *mens rea* language, signaling its presumptive status as sufficient to establish culpability justifying punishment. But the drafters, without explanation, on many occasions required knowledge to establish criminality in their code.<sup>2</sup> The problem appears in recent federal cases. Interpreting federal statutes, the U.S. Supreme Court has spoken as if knowledge is sometimes required for conviction notwithstanding the absence of *mens rea* language. “Belief” is also central to the MPC. It is used in the definition of “purpose.” It also appears in the Code’s justification defenses, and in most jurisdictions’ justification defenses.<sup>3</sup> But the MPC does not define it.

Thoughtful recent work attempts to identify how jurors interpret “knowledge.”<sup>4</sup> One of these efforts raises interesting questions about what I would like to discuss here—when “knowledge” or “belief” should be required as the minimum mental

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\* Professor of Law, University of San Diego. Thanks to Larry Alexander, Don Dripps, Doug Husak, Paul Robinson, and Ken Simons for helpful comments.

<sup>1</sup> *Ceteris paribus*, I would say that it is. For an argument that, essentially, *ceteris* is not always *paribus*, see LARRY ALEXANDER & KIMBERLY KESSLER FERZAN (WITH STEPHEN J. MORSE), *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* 32–33 (2009) (culpability depends on the gap between risk and justification, so that some knowing invasions of interests are less culpable than reckless riskings of the interests). *Ceteris*, however, is often enough *paribus*, that knowledge plays a useful grading role in a workable criminal code.

<sup>2</sup> *E.g.*, MODEL PENAL CODE § 2.01(4) (1962) [hereinafter MPC] (requiring that a person be “aware” of control to qualify as possession).

<sup>3</sup> *See, e.g.*, JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 212 (8th ed., Carolina Academic Press 2018).

<sup>4</sup> *See, e.g.*, James A. Macleod, *Belief States in Criminal Law*, 68 OKLA. L. REV. 497 (2016).

state to establish criminality. The question should be of interest to those who draft criminal statutes and those who interpret them.

*Decoding Guilty Minds: How Jurors Attribute Knowledge and Guilt* reports on cleverly designed experiments that greatly increase our knowledge of jurors' ability and willingness to follow instructions on the mental state required for conviction in the criminal law.<sup>5</sup> The primary concern is whether jurors are capable of distinguishing the mental states of recklessness and knowledge. As to the circumstances of an offense, the MPC defines "recklessness" as an actor's conscious awareness of a substantial and unjustified risk that the circumstance exists.<sup>6</sup> Knowledge, on the other hand, requires the actor's "awareness" that the circumstance exists; awareness of a "high probability" that the circumstance exists is sufficient.<sup>7</sup> Mental states are usually required regarding offense elements other than circumstances—the nature of the actor's conduct or the results of the actor's conduct. However, *Decoding Guilty Minds* focuses on circumstances, like whether illicit drugs are in the vehicle the accused was driving.

While *Decoding Guilty Minds* is instructive in many respects, the authors regard one of their findings as a "stunning result":

[F]or the typical jury-eligible participant in our experiments, recklessness regarding the existence of the circumstance is *sufficient* for holding the defendant criminally liable in these scenarios. In fact, there is no material difference in the proportion of subjects holding a defendant guilty when the evidence strongly suggests that he "knows" that the circumstance exists as compared to suspecting that it does. In other words, for the typical jury-eligible adult, there is a threshold for culpability and it exists not at knowledge, but at recklessness. This finding is especially intriguing in light of the fact that most criminal statutes (including drug possession, weapons possession, fraud, and identity theft) and even some civil statutes (like patent infringement) require knowledge as a necessary predicate for liability when the material circumstance differentiates lawful from unlawful conduct, as did all of our scenarios. To use the example above, though nearly all drug statutes require knowledge for conviction, for the average jury-eligible American, mere recklessness as to the presence of drugs in the bag is sufficient for conviction.<sup>8</sup>

While the study's result could be viewed as evidence that jurors can't distinguish knowledge from recklessness, other aspects of the study conflict with

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<sup>5</sup> Ginther et al., *Decoding Guilty Minds: How Jurors Attribute Knowledge and Guilt*, 71 VAND. L. REV. 241 (2018).

<sup>6</sup> MPC § 2.02(2)(c) (1985).

<sup>7</sup> MPC § 2.02(7) (1985).

<sup>8</sup> Ginther et al., *supra* note 5, at 270–71.

that conclusion.<sup>9</sup> Accordingly, the authors suggest that average jurors may believe as a normative proposition that recklessness suffices morally for criminal liability—enough so to convict merely reckless actors even when instructed that knowledge was the requisite mental state. The authors discussed an experiment in which jurors characterized an individual’s conduct as reckless before being told that knowledge was required for conviction. Upon being so informed, the jurors switched their characterization. The authors concluded that, “for many subjects, it would seem that the statutory language was serving as an anchor for their mental state attribution, and the attribution was perhaps being informed by their collective intuition that *strong suspicion* is a sufficient basis for a finding of culpability.”<sup>10</sup>

Before concluding that *Decoding Criminal Minds* demonstrates lay agreement with those who think recklessness should nearly always suffice for criminal conviction,<sup>11</sup> we should recognize that jurors might have been manifesting a slightly different view—the view that a *belief* (in the sense of assessing a fact as more likely true than not) is as culpable as knowing that the circumstance exists, or at least close enough to justify punishment under a statute requiring knowledge.

MPC recklessness requires neither belief nor knowledge. For example, in a game of Russian Roulette, players who spin the cylinder of a six-chambered gun and shoot it once—unless possessed of misplaced confidence in their ability to predict the future—would not “believe” that the bullet would be under the firing pin. Nor would the players “know” that the bullet would be under the firing pin; a 16.6 percent chance that a fact exists is not a “high probability.” On the other hand, the player would certainly be reckless regarding that fact. A one-in-six risk is substantial, and the thrill of playing the game is insufficient to justify that risk.

The Code’s treatment of belief recognizes its independent significance as a mental state, though in a muddled way. “Belief” can bear multiple meanings. At the very least, “belief” implies a person’s assessment that a fact is more likely true than not. It might also imply no more than that—what might be called the *likelihood* meaning. Or it might imply a stronger assessment of probability—what might be called the *confidence* meaning. Nowhere does the Code define this frequently used term, but the drafters appear to imply different meanings for the term in different parts of the Code.

For example, the *confidence* meaning is most plausible when “belief” is used as acceptable proof of purpose with respect to attendant circumstances.<sup>12</sup> If the *likelihood* meaning were employed, the provision would render meaningless the Code’s definition of the certainty required to establish “knowledge” of circumstance elements (“high probability”), in light of another provision allowing knowledge to

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<sup>9</sup> See *id.* at 271.

<sup>10</sup> *Id.* at 273 (emphasis added).

<sup>11</sup> See ALEXANDER & FERZAN, *supra* note 1, for an extended elaboration of this view.

<sup>12</sup> MPC § 2.02(2)(a)(ii) (1985).

be established by proof of purpose;<sup>13</sup> “high probability” implies a likelihood greater than 50 percent.<sup>14</sup> Moreover, giving “belief” the *likelihood* meaning in the definition of “purpose” would make the Code’s definition of “recklessness” regarding circumstances matter only when the actor perceives the chances at 50 percent or below (otherwise the actor believes the circumstance to be true).<sup>15</sup> Likewise, in the attempt provision allowing conviction when an actor has “the belief” that an act will cause a result element of an offense,<sup>16</sup> the scope of attempt liability would expand more than the commentary anticipated if “belief” were given the *likelihood* rather than the *confidence* meaning—those who think their conduct more likely than not to cause a death would be guilty of attempted reckless homicide.<sup>17</sup>

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<sup>13</sup> The definitions of “knowledge” require a high degree of certainty regarding a circumstance—that a person be “aware” of a circumstance, MPC § 2.02(2)(b)(i), or be “aware of a high probability of its existence.” MPC § 2.02(7). These estimates are greater than a simple likelihood, but if simple likelihood establishes purpose, it satisfies a knowledge requirement by operation of MPC § 2.02(7).

<sup>14</sup> See Macleod, *supra* note 4, at 508 (“The MPC’s drafters apparently considered ‘high’ probability to denote something significantly above 50%, as evidenced by their distinguishing, in the Commentaries, the MPC’s ‘high probability’ form of knowledge from Ohio’s ‘more expansive’ code, which allows for satisfaction of the knowledge requirement where a result or circumstance is merely ‘probable.’”).

<sup>15</sup> This approach would have the practical effect of altering the requirements to justify certain conduct. When the claim is that behavior is reckless, the definition of the mental state allows arguments about justification. For example, if recklessness is the required mental state for illegally possessing a machine gun, and if a person perceives a 40 percent chance that the weapon he is grabbing to defend himself is a machine gun, he could argue he was not reckless because the risk was justified by his action’s potential to save him from an assault. However, if the actor perceived a 51 percent chance the weapon was a machine gun, he would believe that fact, trumping the recklessness formula. He would then need to defend himself by resort to the choice-of-evils justification, which requires conditions and perhaps meeting a burden of persuasion not applicable if the recklessness definition governs the outcome.

<sup>16</sup> MPC § 5.01(1)(b) (1985).

<sup>17</sup> On the other hand, designating a very low level of credence as “belief” might make sense out of § 2.02(7)’s bizarre caveat that knowledge is not satisfied by awareness of a high probability of a fact’s existence if “the actor actually believes” the fact does not exist. But “belief” solves this puzzle only if consistent with a very low estimation of likelihood, contrary to ordinary usage and a lot like “hope.” The most likely explanation is that this provision is just confused—perhaps an effort to pay lip service to willful blindness while deviating from the traditional standard. Professor Alexander and I take this position in Larry Alexander & Kevin Cole, *Reckless Beliefs* (forthcoming in Palgrave Press anthology on topics in criminal law). See also Kenneth W. Simons, *Should the Model Penal Code’s Mens Rea Provisions Be Amended?*, 1 OHIO ST. J. CRIM. L. 179, 187 (2003). It is, of course, possible for a person to hold inconsistent beliefs, either because the person is irrational or because we consider both occurrent and non-occurrent beliefs. See Michael S. Moore & Heidi M. Hurd, *Punishing the Awkward, the Stupid, the Weak, and the Selfish: The Culpability of Negligence*, 5 CRIM. L. & PHIL. 147, 155 (2011) (“Suspicious that there are drugs in the car, one looks in the secret compartment in the trunk, in the rocker panels, and everywhere else where one thinks drugs could be, and there are no drugs. Yet the deal in the bar makes sense only if there are drugs in the car. One’s psychological state could be one of cognitive dissonance: one both believes that there is a risk that drugs are in the car, and one believes there cannot be any drugs in the car.”); Eric A. Johnson, *Knowledge, Risk, and*

On the other hand, when “belief” appears in the Code’s justification provisions, the *likelihood* meaning is preferable. It would be a harsh criminal law indeed that insisted on convicting a person who thought it more likely than not that he was under deadly attack and avoided it through a simple push.<sup>18</sup> While the Code’s provision denying full justification to those with reckless beliefs is somewhat mysterious,<sup>19</sup> it implies that a person can believe a fact short of the confidence threshold. How can you perceive a substantial and unjustified risk that a fact is false when you believe there is a high probability that it is true? The *likelihood* meaning of “belief” might also better serve the drafters’ goal of eliminating the defense of hybrid legal impossibility, suggesting the counterintuitive idea that the word “belief” has multiple meanings in the same Code section.<sup>20</sup>

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*Wrongdoing: The Model Penal Code’s Forgotten Answer to the Riddle of Objective Probability*, 59 BUFF. L. REV. 507, 539 (2011) (“individuals often hold beliefs that are inconsistent with one another”). Whether this possibility would have concerned the MPC drafters is another matter.

Another possible move is to view beliefs as subjective and probabilities as—at least to some degree—objective. On such a view, a fact could be highly probable from an objective standpoint but, because of incorrect information or incorrect assessment of information, an actor might believe that the fact is not true. *Id.* Johnson’s argument focuses on the definitions of recklessness and negligence in the Code. Regardless of what one thinks of the argument in that context, it is hard to transport to § 2.02(7), which addresses cases in which the actor is “aware” of the high probability.

<sup>18</sup> Of course, if the simple push would not work, and the actor’s only defense was deadly force, one could dispute the benefit of allowing the defense. Forty-nine times out of a hundred, a mistaken attacker might be killed even though there was no real threat to the defender. Still, to the extent self-defense embraces notions of excuse, the average person is likely to err on the side of himself when he estimates that he is more likely than not under attack. And if something resembling “high probability” or “practical certainty,” MPC § 2.02(2)(b)(ii), were required before acting in self-defense, the choice-of-evils would strongly tilt toward evil.

<sup>19</sup> See Alexander & Cole, *supra* note 17.

<sup>20</sup> In § 5.01, the Code rejects hybrid legal impossibility by premising liability on whether conduct would be a crime if the circumstances were as the actor “believes them to be.” Consider an actor who thinks (incorrectly) it is more likely than not that the object of her affection is underage. The Code’s commentary makes clear that, as to attendant circumstances, a defendant would be guilty of attempted statutory rape regardless of defendant’s mental state, if the partner ended up being underage in a jurisdiction that imposed strict liability on the age element of the target offense. To require belief in the confidence sense in the case of inculpatory mistake would preserve the hybrid legal impossibility defense as to cases where the level of credence falls between likelihood and confidence. (Even requiring belief in the likelihood sense preserves the defense in a way that may be problematic, as a byproduct of relying on “belief” to signal an affirmative mental state. A related problem arising in the context of justifications is discussed below.)

Other aspects of the Code’s justification provisions might suggest that the drafter’s intended the *confidence* meaning whenever “belief” is used. For example, section 3.08(5)(a)(ii)(1) permits deadly force by certain actors to prevent a crime when the actor “believes that there is a substantial risk” that someone will suffer serious bodily harm otherwise. Explicitly pairing “belie[f]” with a probability standard would be odd if the “likelihood” meaning were intended. Similar examples include section 3.06(3)(d)(ii)(2) (“believes” less than deadly force would expose “to substantial danger”) and section 3.07(2)(b)(iii) (“believes that the force employed creates no substantial risk of injury to innocent persons”). Provisions like this arguably show that the drafters knew how to talk in terms of

While the above suggests that the *confidence* meaning for belief is intended when the word is used in the definition of “purpose,” a question—invited by the respondents in *Decoding Criminal Minds*—remains. The question isn’t merely whether we should ever require a high probability of a fact as a predicate to a conviction, rather than requiring recklessness. It is whether we should ever reject mere recklessness in favor of requiring *either* a high probability, a belief in the *likelihood* sense, a belief in the *confidence* sense, a hope, or some combination of the above.

In what follows, I offer a few thoughts on how one might approach the puzzles and normative questions surrounding recklessness, belief, hope, and high probability. As will be clear, I do not find each of the suggestions normatively attractive. But one of my goals is to identify factors that might help describe the world as it is. It should come as no surprise that that world might be, in some respects, not in keeping with my tastes.

*First*, we might be aided by a clearer sense of why purpose (in the conative sense, not including “belief” among the ways to prove it) is sometimes required as a mental state. A clearer theory of why we sometimes require “purpose” would be useful if “knowledge” is a junior varsity version of purpose (applied when some of the conditions for requiring purpose are present, perhaps in a less severe form). The tyranny of ordinary usage may frustrate extracting moral wisdom from legal practice. As to an actor’s future conduct, the free-will assumptions underlying criminal law doctrine suggest a limited purpose requirement.<sup>21</sup> We can ask what an actor planned to do, but it jars free-will sensibilities to ask whether the actor risked the actor’s own future conduct, or even knew what that future conduct would be (as plans can change).<sup>22</sup> It is natural to characterize an incomplete plan as an “attempt” on this view. But “attempt” also implies purpose in other settings in which a lower mental state would not offend free-will sensibilities. For example, an actor can know the results that the actor’s planned or completed conduct will have in the world. If requiring a purpose respecting results simply flows from our early choice of the word “attempt,” that fact does not provide normative information.

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probabilities when they wanted to and didn’t want to talk in terms of probabilities when they used “belief” unadorned. As discussed in the text, however, that reading would lead to counterintuitive limitations on the justification defenses—for example, when minor transgressions avoid the risk of major harms.

<sup>21</sup> OLIVER WENDELL HOLMES, *THE COMMON LAW* 67 (1881) (regarding incomplete attempts, “it cannot, in general, be assumed, from the mere doing of what has been done, that [the additional acts to complete the attempt] would have followed if the actor had not been interrupted . . . [T]he only way generally available to show that he would have chosen to do them is by showing that he intended to do them when he did what he did.”).

<sup>22</sup> See R.A. Duff, *Guiding Commitments and Criminal Liability for Attempts*, 6 *CRIM. L. & PHIL.* 411, 418 (2012) (“It is true that, if we extend the law beyond ‘last act’ cases to capture cases in which whether the actual creation of the risk depends on further actions by the agent, we might need to require an intention to commit those further actions”).

Heidi Hurd and Michael Moore have suggested without endorsing another possibility—that the purpose requirement “is arguably appropriate for attempts (where necessarily the harm or evil intended has not happened).” In such cases, since the actor has not caused harm, “the thought is, only serious culpability suffices for liability.”<sup>23</sup>

Perhaps that idea can be extended to some other crimes that also do not require that the actor cause harm and that often include a knowledge requirement—so-called proxy crimes.<sup>24</sup> For example, drug and weapons possession offenses fit this category. The analogy to attempt is imperfect in a jurisdiction that requires a purpose to establish attempt. But knowledge is sometimes sufficient to establish attempt, even under the MPC,<sup>25</sup> and at common law, some jurisdictions regarded the requirement of “specific intent” to be satisfied by a showing of knowledge. The argument from free-will assumptions for requiring a true purpose for incomplete attempts may also have resulted in overly broad uses of the requirement in that area. A page of history can spawn a volume of illogic.

*Second* is an analytically distinct problem raised by proxy crimes, arising even for those (like me)<sup>26</sup> who would reject the idea that more culpability should be required as a retributive matter to punish those who fail to cause harm. Attempt punishes those who (at least) risk harms they perceive. Proxy crimes punish those who risk acts that *others* perceive to risk harms. Even if disposing of batteries in landfills unquestionably harms the environment, people might knowingly discard batteries in the trash utterly unaware of that connection. These people are not culpable even if they cause harm; those who consciously risk harm to the environment are culpable even if harm does not result (because their spouses fish the batteries from the garbage).

Proxy crimes make the mistake-of-law doctrine problematic. They displace the need to inquire whether an actor consciously risked social harm. The actor unaware of the law does not receive notice about the risky aspect of the activity in question.<sup>27</sup> The actor is punished, regardless of the actor’s appreciation of the risk.

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<sup>23</sup> Heidi M. Hurd & Michael S. Moore, *Untying the Gordian Knot of Mens Rea Requirements for Accomplices*, 32 SOC. PHIL. & POL’Y 161, 163, 177–78 (2016). See also *id.* at 178 n.45 (“The concession is only *arguendo*, because there should be crimes of unreasonable risk creation such as reckless endangerment as provided too by the Model Penal Code.”). I too, am skeptical of the normative attractiveness of this position as a retributive matter.

<sup>24</sup> For a helpful recent explication of proxy crimes, noting that “[n]o canonical definition . . . is found in the literature” and canvassing usage, see Douglas Husak, *Drug Proscriptions as Proxy Crimes*, 36 L. & PHIL. 345, 355–56 (2017).

<sup>25</sup> MPC § 5.01(1)(a) (1985) (attendant circumstances); see also MPC § 5.01(1)(b) (belief regarding results).

<sup>26</sup> See Kevin Cole, *The Voodoo We Do: Harm, Impossibility, and the Reductionist Impulse*, 5 J. OF CONTEMP. LEGAL ISSUES 31, 40 (1994).

<sup>27</sup> I discuss the problem at length in Kevin Cole, *Better Sex Through Criminal Law: Proxy Crimes, Covert Negligence, and Other Difficulties of “Affirmative Consent” in the ALI’s Draft Sexual*

Requiring knowledge to convict for a proxy crime is, admittedly, only an imperfect solution to this problem. So long as the knowledge requirement is applied as it usually is—only with respect to the facts<sup>28</sup>—the requirement still permits conviction of the morally innocent. An actor might know perfectly well that the item being discarded is a battery but have no idea about the risk associated with putting batteries into landfills. Knowledge of the fact that a battery is being discarded, however, at least somewhat increases the chance that the actor will reflect on its proper disposal, compared with an actor who might simply be aware of some risk that a battery might be among the items in the kitchen garbage pail when the actor dumps it into the garbage can for collection. To the extent that knowledge was historically viewed as a way to displace negligence liability—discussed below—this protective effect is even more pronounced.

*Third*, it may be that something more than recklessness should be required regarding certain crimes because doing so preserves a desirable zone of liberty.<sup>29</sup> One area in which “purpose” is typically required involves liability for the acts of others. Perhaps in these areas, when the law focuses on one who may not be the moving force behind wrongdoing, recklessness would chill our ability to pursue our own life plans, and relatedly require us to be more intrusive respecting the plans of others.<sup>30</sup>

Crimes like drug trafficking and possession or receipt of stolen goods, in which knowledge of the stolen or contraband material is often required, may share something in common with cases of accomplice liability. Often, if not inevitably, criminality depends on the acts of others. Liability based on recklessness for others’ acts is more chilling of liberty than is liability based on something more. How great is the risk that someone is involving you in a crime? Do you have a justification for proceeding? Obligations to inquire interfere with liberty even when triggered only by a belief in criminal circumstances, but the intrusion occurs less often. Nor is the need as great to elaborate an expanded duress defense to deal with persons put into a difficult position by primary wrongdoers, who may be scary even without issuing a threat.<sup>31</sup>

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*Assault Provisions*, 53 SAN DIEGO L. REV. 507, 546 (2016). Of course, retributivists often balk at proxy crimes even when notice is present.

<sup>28</sup> *But see* *Liparota v. United States*, 471 U.S. 419, 434 (1985).

<sup>29</sup> A related idea is that heightened *mens rea* requirements in areas involving accomplice liability reflect commitments to “an ethic of individualism and self-determination.” Sanford H. Kadish, *Reckless Complicity*, 87 J. CRIM. L. & CRIMINOLOGY 369, 390–94 (1997).

<sup>30</sup> LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, REFLECTIONS ON CRIME AND CULPABILITY 43 (2018) (“These include the potential restraint on Michael’s liberty by not selling him the ammo and the imposition on his privacy by inquiring too much.”).

<sup>31</sup> *Id.* at 40–41 (“Many of the merchant cases potentially embed a number of disparate concerns. When we picture the cab driver’s inquiry into whether his passengers are really going to kill Steve, we recoil at the possibility that he must do this, because we are worried about harm to the cab driver. That is, if we think that by asking the question, the cab driver is going to expose himself to harm, then we



*Fourth*, even if one rejects the above argument and concludes that recklessness suffices to establish moral culpability in a world of perfect information, we do not reside in such a world. Perhaps some crimes are particularly likely to present difficulties in assessing mental state. Cases in which another actor is the primary wrongdoer may be an example—predicting others’ actions is harder than predicting the consequences of shooting a person in the head. In other cases, the *actus reus* of the crime is not strongly corroborative of a culpable mental state. An example may be the MPC’s requirement of knowledge for a conviction of sexual assault based on conduct offensive to the partner.<sup>32</sup> What an actor perceived about a partner’s mental state may be difficult to ascertain after the fact when sexual conduct occurs during mutual intimate activity. On the other hand, the Code did not require knowledge when an actor compelled the partner to submit “by force or by threat of imminent death, serious bodily injury, extreme pain, or kidnapping”<sup>33</sup>—facts that, if proven, tend strongly to suggest a culpable mental state. This justification for a mental state beyond recklessness involves something of a belt-and-suspenders approach.<sup>34</sup> After all, we do require proof beyond a reasonable doubt of mental states.<sup>35</sup> And so again, something short of desire but more than recklessness may strike the proper balance—maybe belief in the likelihood sense.

*Fifth*, belief sometimes plays a different role in the criminal law. While the lack of a mental state is often exculpatory in criminal law, it is sometimes inculpatory. Requiring “belief” shows when an actor must have adverted to a fact to avoid liability. Consider self-defense. When the law requires a belief (or reasonable belief) that the actor is threatened, it specifies an affirmative state of mind necessary for the actor to benefit from the defense.<sup>36</sup> When the law requires recklessness, on the other hand, failure to advert to a fact is exculpatory—recklessness requires conscious awareness of a risk. Formulations of sexual assault

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wonder whether he must incur this risk. Hence, sometimes the intuition at work in merchant cases is a worry that these people will need to self-sacrifice or rescue others.”).

<sup>32</sup> MPC § 213.4 (1985).

<sup>33</sup> MPC § 213.1 (1985).

<sup>34</sup> The drafters articulated such an argument in rejecting the “natural and probable consequences” doctrine in connection with accomplice liability. See MPC § 2.06 comment, n.42, at 312 (1985) (“the culpability level for the accomplice should be higher than that of the principal actor, because there is generally more ambiguity in the overt conduct engaged in by the accomplice, and thus a higher risk of convicting the innocent.”).

<sup>35</sup> Cf. Kadish, *supra* note 29, at 385 (“It may be true that on the whole we can more safely predict natural happenings than human actions. Yet where a jury could conclude beyond a reasonable doubt that in a particular case the risk that defendant’s action would help or encourage another’s crime was substantial and unjustifiable and was known to be so by the defendant, one might reasonably think that liability could be safely imposed.”).

<sup>36</sup> For a skeptical view on whether actors really have this mental state, whether jurors actually require it, and whether the law should require it, see Kenneth W. Simons, *Self-Defense: Reasonable Beliefs or Reasonable Self-Control?*, 11 NEW CRIM. L. REV. 51 (2008).

law that excuse an actor with a reasonable belief in the partner's consent have the same structure. Sometimes, however, using "belief" to require advertence unduly limits a defense, because "belief" at least denotes a fact's likely truth,<sup>37</sup> and facts can justify action on a likelihood short of belief. Consider an actor who estimates a 20% chance that a ruckus in the parking lot involves a person who has come to kill the actor. The actor's estimate is insufficient to count as a belief. But would we really blame the actor for breaking into a locked nearby office to escape detection by a possible assailant?<sup>38</sup>

Finally, the historic use of "knowledge" as a criminal mental state may largely have reflected an earlier era's underdeveloped approach to mental states. "Recklessness," as used in the Code, was not yet an established part of the legal vocabulary. The word was used, but the meanings were legion. During the era of general intent crimes, some signal may have been needed to indicate that, for certain crimes, proof of culpability *regarding particular elements* was essential. Moreover, some signal was needed to indicate that more than criminal negligence should sometimes be required. In this environment, "knowledge" may have simply been the best way to send those signals.

Consider, for example, the statute at issue in the well-known impossibility case, *People v. Jaffe*,<sup>39</sup> which provided that "a person who buys or receives any stolen property knowing the same to have been stolen is guilty of criminally receiving such property." If that statute had merely forbidden "buying or receiving stolen property," conventional mistake-of-fact doctrine might have led courts to conclude that only a reasonable mistake about the property's status would exculpate,<sup>40</sup> and even strict liability on the attendant circumstance would not be statutorily precluded. The rise of willful blindness as a way of establishing knowledge—cases bordering on recklessness—is understandable on this view. With an expanded vocabulary, MPC "recklessness" might have often been chosen instead of "knowledge" as an alternative to negligence or strict liability.

Recent federal *mens rea* decisions offer a fitting conclusion. In a series of cases, the Court has construed federal statutes silent regarding *mens rea* to require knowledge for conviction—at least regarding some facts. In *Elonis v. United*

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<sup>37</sup> Macleod, *supra* note 4, at 507 ("belief that P entails acknowledgment of P's being more likely true than not"); Simons, *supra* note 17, at 187 (you cannot "believe that a fact does not exist, when you know that more likely than not, it does exist").

<sup>38</sup> Belief's double duty—suggesting advertence but also specifying a minimum level of probability—is troubling in a different way in sexual assault cases, since merely believing a partner consents still admits of a degree of doubt consistent with culpability. See Eric A. Johnson, *Beyond Belief: Rethinking the Role of Belief in the Assessment of Culpability*, 3 OHIO ST. J. CRIM. L. 503 (2006).

<sup>39</sup> 185 N.Y. 497, 498 (1906).

<sup>40</sup> See Dressler, *supra* note 3, § 12.03[D].

*States*,<sup>41</sup> the Court cited this line of cases<sup>42</sup> in holding insufficient for conviction a showing of negligence regarding whether a communication would be taken as a threat. The Court declined to say whether recklessness would suffice; Justice Alito insisted that it should, on the grounds that “[s]omeone who acts recklessly with respect to conveying a threat necessarily grasps that he is not engaged in innocent conduct.”<sup>43</sup> If that should be the test—and the majority mentioned it, too<sup>44</sup>—the same could be said of the previous cases in which the Court had implied a knowledge requirement, illustrating the desirability of fleshing out the normative case for—and against—elevated *mens rea* standards like knowledge and belief.

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<sup>41</sup> *Elonis v. United States*, 135 S. Ct. 2001 (2015).

<sup>42</sup> The court cited the following:

When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute “only that *mens rea* which is necessary to separate wrongful conduct from ‘otherwise innocent conduct.’” *Carter v. United States*, 530 U.S. 255, 269 (2000) (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994)). In some cases, a general requirement that a defendant *act* knowingly is itself an adequate safeguard. For example, in *Carter*, we considered whether a conviction under 18 U.S.C. §2113(a), for taking “by force and violence” items of value belonging to or in the care of a bank, requires that a defendant have the intent to steal. 530 U.S., at 261. We held that once the Government proves the defendant forcibly took the money, “the concerns underlying the presumption in favor of scienter are fully satisfied, for a forceful taking—even by a defendant who takes under a good-faith claim of right—falls outside the realm of . . . ‘otherwise innocent’” conduct. *Id.* at 269–70. In other instances, however, requiring only that the defendant act knowingly “would fail to protect the innocent actor.” *Id.* at 269. A statute similar to Section 2113(a) that did not require a forcible taking or the intent to steal “would run the risk of punishing seemingly innocent conduct in the case of a defendant who peaceably takes money believing it to be his.” *Id.* In such a case, the Court explained, the statute “would need to be read to require . . . that the defendant take the money with ‘intent to steal or purloin.’” *Id.*

*See, e.g., id.* at 2010.

<sup>43</sup> *Id.* at 2015 (Alito, J., concurring).

<sup>44</sup> *Id.* at 2010 (opinion of the Court) (“When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute ‘only that *mens rea* which is necessary to separate wrongful conduct from ‘otherwise innocent conduct.’”).