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Mens Rea

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MENS REA

Mens rea, or "guilty mind," marks a central distinguishing feature of criminal law. An injury caused without mens rea might be grounds for civil liability but typically not for criminal. Criminal liability requires not only causing a prohibited harm or evil—the actus reus of an offense—but also a particular state of mind with regard to causing that harm or evil.

For a phrase so central to criminal law, *mens rea* suffers from a surprising degree of confusion in its meaning. One source of confusion arises from the two distinct ways in which the phrase is used, in a broad sense and in a narrow sense. In its broad sense, *mens rea* is synonymous with a person's blameworthiness, or more precisely, those conditions that make a person's violation sufficiently blameworthy to merit the condemnation of criminal conviction. In this broad sense, the phrase includes all criminal law doctrines of blameworthiness—mental requirements of an offense as well as excuse defenses such as insanity, immaturity, and duress, to name a few. This was a frequent usage of *mens rea* at common law. It remains common among nonlegal disciplines such as philosophy and psychology, perhaps because it captures in a single phrase criminal law's focus on personal culpability.

The modern meaning of mens rea, and the one common in legal usage today, is more narrow: mens rea describes the state of mind or inattention that, together with its accompanying conduct, the criminal law defines as an offense. In more technical terms, the mens rea of an offense consists of those elements of the offense definition that describe the required mental state of the defendant at the time of the offense, but does not include excuse defenses or other doctrines outside the offense definition. To help distinguish this more narrow conception from the broader, the Model Penal Code drafters substitute the term *culpability* for *mens rea*. Thus, Model Penal Code section 2.02, governing the Code's offense mental states, is titled "General Requirements of Culpability" and subsection (2), defining the offense mental elements employed by the Code, is titled "Kinds of Culpability." Unfortunately, the term *culpability* has come to suffer some of the same confusion between broad and narrow meanings as the term *mens rea*. While most frequently used in its narrow sense, as interchangeable with *offense mental elements*, *culpability* is sometimes used in a broad sense, as interchangeable with *blameworthiness*. The meaning of

both *mens rea* and *culpability* must often be determined from their context.

The development of mens rea

The law did not always require mens rea for liability. Early Germanic tribes, it is suggested, imposed liability upon the causing of an injury, without regard to culpability. But this was during a period before tort law and criminal law divided. It seems likely that as the distinction between tort and crime appeared—that is, as the function of compensating victims became distinguished from the function of imposing punishment—the requirement of mens rea took on increasing importance.

The phrase *mens rea* appears in the Leges Henrici description of perjury—*reum non facit nisi mens rea*—which was taken from a sermon by St. Augustine concerning that crime. The sermon is also thought to be the source of the similar maxim in Coke's *Third Institutes*, the first major study of English criminal law: *"actus non facit reum nisi mens sit rea"* (the act is not guilty unless the mind is guilty). The Church had much influence on the development of this part of English law for several reasons. First, it preached the importance of spiritual values and mental states to a wide audience. Physical misconduct was significant only because it manifested spiritual failure; it was the inner weakness that was the essence of moral wrong. For example, "Whoever looketh on a woman to lust after her hath committed adultery with her already in his heart" (Matthew 5:27–28). Second, clerics were influential in the administration of government and governmental policy, both because they were among the few who could read and write and because of the Church's own political power. And third, the Church had its own courts, for trying clergy. In these courts new offenses were developed that put the new ideas of the importance of mental state into criminal law form.

While Christian thought on mens rea had a dominant influence over its development in English law, similar concepts are found in nearly all criminal laws, often without a history of Christian influence. The cross-cultural presence of concepts like mens rea provides some evidence that the notion of moral blameworthiness expressed by the broad conception of *mens rea* arises from shared human intuitions of justice and would have developed in English law through some other means, if not through the spread of Christian thought.

Once adopted as a basic principle of criminal law, the legal meaning of mens rea continued to evolve. The early stages of its development are illustrated by the decision in *Regina v. Prince* (13 Cox's Criminal Cases 138 (1875)). The defendant took an underage girl "out of the possession" of her father, reasonably believing she was over the age of consent. That the defendant's conduct was generally immoral was sufficient for Lord Bramwell to find that the defendant had the mens rea necessary for criminal liability. Lord Brett, on the other hand, would require that Prince at least have intended to do something that was criminal, not just immoral.

A somewhat more demanding requirement is expressed in *Regina v. Faulkner* (13 Cox's Criminal Cases 550 (1877)). In the process of stealing rum from the hold of a ship, a sailor named Faulkner accidentally set the ship afire, destroying it. Building upon Lord Brett's conception of a more specific and demanding mens rea, Lords Fitzgerald and Palles concluded that the mens rea requirement meant that Faulkner must have at least intended to do something criminal that might reasonably have been expected to have led to the actual harm for which he was charged. Thus, Faulkner ought not be liable for the offense of burning a ship when he intended only to steal rum from it; stealing in the normal course of things, does not lead one to reasonably foresee that a ship will be destroyed.

This last shift in the notion of mens rea marked not only a dramatic increase in the demand of the requirement, but also a significant qualitative change. No longer did there exist a single mens rea requirement for all offenses—the intention to do something immoral or, later, something criminal. Now each offense had a different mens rea requirement—the mens rea required for the offense of burning a ship was different from the mens rea required for the offense of theft. Liability now required that a person intend to do something that might reasonably be expected to lead to the harm of the particular offense charged. As some have expressed it, there is no longer a mens rea for criminal liability but rather *mentes reae*.

Common Law often grouped offenses according to whether an offense required a *specific intent* or a *general intent*. The categorization had practical significance. For a specific intent offense, a reasonable mistake often was a defense, while for a general intent offense only a reasonable mistake was a defense. Voluntary intoxication could provide a defense to a specific intent

offense but not a general intent offense. The distinction has been largely abandoned, however, because it rested upon no coherent conception, which made it difficult to determine reliably into which category an offense fell. Further, it became apparent that the distinction assumed that each offense had a single kind of mens rea—a general intent or a specific intent—when in fact the law's practical operation showed increasingly that no such generalization could be made. Courts increasingly found that their desired mens rea formulations applied one kind of mens rea to one element of an offense and a different kind to other elements.

The Model Penal Code carried this insight to its logical conclusion. Section 2.02(1) requires the proof of culpability "with respect to each material element of the offense." In what might be termed a shift from *offense analysis* to *element analysis*, the Code expressly allows offense definitions in which a different level of culpability is required as to different elements of the same offense.

This element analysis approach—defining required culpability as to each offense element rather than as to each offense—provided, for the first time, a comprehensive statement of the culpability required for an offense. The early conceptions of mens rea were not simply undemanding, they were hopelessly vague and incomplete. They failed to tell courts enough about the required culpability for an offense to enable them to resolve the cases that commonly arose. For example, a prior case might tell a court that intentionally destroying a person's house was arson. But what results if the person intended the destruction but mistakenly believed she was destroying her own house? The previously announced intention requirement did not speak to what culpable state of mind was required as to the ownership of the building. A prior case might say intentionally killing a viable fetus was a crime. Was the defendant liable even if she reasonably (but mistakenly) believed the fetus was not viable? What culpable state of mind was required as to the viability of the fetus? When the mens rea requirement is unspecified or vague, it is left to the courts to decide ad hoc, and necessarily ex post facto, the precise culpability required for the offense. Element analysis permited legislatures to reclaim from the courts the authority to define the conditions of criminal liability and, for the first time, to provide a comprehensive statement of the culpability required for an offense.

The shift to element analysis, then, was not so much an attempt to change the traditional offense requirements, as it was to make them complete. Common law lawyers and judges were wrong to think that their offense-analysis view of culpability requirements was adequate to describe the required culpability. Their misconception stemmed in part from their conceptualization of an independent "law of mistake," which they saw as supplementing the culpability requirements of an offense definition. Thus, a person might satisfy the requirements of theft by intentionally taking someone else's property, yet have a defense if the law of mistake allowed a defense in the situation, such as when the defendant reasonably believed the property was his. To the common law mind, offense culpability requirements and the "law of mistake" that governed when a mistake provided a defense could be separate and independent doctrines.

The Model Penal Code drafters, in contrast, recognized that a mistake defense and an offense culpability requirement are one and the same. To say that negligence is required as to the victim's age in statutory rape is the same as saying that only a reasonable mistake as to age will provide a mistake defense. To say that recklessness is required as to "another person's property" in theft is the same as saying that only a reasonable or a negligent mistake will provide a mistake defense. This interchangeability between mistake defenses and culpability requirements informs Model Penal Code section 2.04(l)(a), which provides simply that mistake is a defense if it negates an offense culpability requirement. This is sometimes called the *rule of logical relevance* because it makes a person's mistake relevant to the determination of criminal liability only if the mistake is inconsistent with the existence of an offense culpability requirement.

The mens rea–actus reus distinction

Common law doctrine traditionally paired mens rea with actus reus. Liability required both a guilty mind and a bad act. It is unclear, however, whether this most basic organizing distinction is coherent and useful to our understanding of offense requirements.

The actus reus of an offense typically is described as including the conduct constituting the offense, as well as any required circumstances or results of the conduct. The conduct must include a voluntary act. Where a result is an offense element, proof of the actus reus requires proof that

the person's conduct and the result stand in a certain relation, as defined by the doctrine of causation: the conduct must have caused the result. Not every offense is defined in terms of conduct, however. In the absence of an act, liability may be based upon an omission to perform a legal duty of which the person is physically capable, or upon a person's knowing possession of contraband for a period of time sufficient to terminate the possession; these elements are part of the actus reus of the offenses. Thus, the actus reus of an offense commonly is said to include the doctrines of causation, voluntary act, omission, possession, and the conduct, circumstance, and result elements of the offense definition.

Undoubtedly, the actus reus–mens rea distinction is an extension of the obvious difference between a person's conduct, which we can directly observe, and the person's intention, which we cannot. In the simple case—the person shoots another person intending to injure him—both the person's conduct and intention are prerequisites to liability. The concepts of actus reus and mens rea adequately capture these two facts and note the empirical difference between them. It is natural to broaden the mens rea requirement beyond an intention to injure, to include recklessness or negligence as to injuring another person (as when a person target shoots in the woods without paying adequate attention to the possibility of campers in the overshoot zone). Similarly, it is natural to expand the actus reus requirement beyond an affirmative act of shooting another to include cases of injuring another by failing to perform a legal duty (as in failing to feed one's child) and cases of possession of contraband (such as illegal drugs), even though these may occur without an affirmative act.

While such an evolution is understandable, even logical, it does not follow that the resulting distinction is one around which criminal law is properly conceptualized, for the resulting concepts of actus reus and mens rea have limited usefulness.

First, there is no unifying internal characteristic among either the actus reus doctrines or the mens rea doctrines. Aspects of the actus reus requirements are not all "acts" or even all objective in nature. For example, a circumstance element of an offense may be entirely abstract, such as "being married" in bigamy or "without license" in trespass. Indeed, actus reus elements may include purely subjective states of mind, such as the requirement of causing "fear" in robbery or the necessary absence of "consent" in rape. Nor are the mens rea doctrines all state of "mind" requirements, or even subjective in nature. The mens rea element of negligence, for example, is neither subjective nor a state of mind, but rather a failure to meet an objective standard of attentiveness. Mens rea elements seem no more common in form than actus reus elements.

Further, the mens rea requirements and actus reus requirements do not serve functions distinct from one another. Most mens rea elements go to assess whether a violation is blameworthy, but so do many aspects of the actus reus, such as the voluntariness portion of the voluntary act requirement in commission offenses, the physical capacity requirement in omission offenses, and the possession offense requirement that the person have possession for a period sufficient to terminate possession. Similarly, while many aspects of the actus reus define the conduct that is criminal—specifically, the conduct and circumstance elements of the offense definition—some aspects of mens rea, such as the culpability requirements in inchoate offenses, serve the same function of defining the conduct that is prohibited. (That is, the conduct that will constitute an inchoate offense cannot be defined without reference to the offense's mens rea requirement—an intention to commit the completed offense. Conduct that constitutes an attempt is not a violation of the rules of conduct in the absence of the defendant's intention to commit an offense.)

In large part because of these difficulties, modern usage tends to avoid the mens rea–actus reus distinction. The closest substitute is the more modest distinction between "culpability" requirements and "objective" requirements of an offense definition. The former include those elements that require the defendant have a particular state of mind or negligence; the latter refer to all other offense requirements, commonly grouped into conduct, circumstances, and results.

Modern culpability levels

Aside from their insight into the relation between mistake defenses and culpability requirements, the Model Penal Code drafters' greatest contribution in this area is their use of a limited number of defined culpability terms. This aspect of the Code's scheme has been adopted with variations in nearly every American jurisdiction with a modern criminal code, a majority of the states. Even in jurisdictions that still have not enacted a

modern code, the Model Penal Code is of enormous influence. Judges rely upon the Code culpability definitions and its official commentaries in creating the judge-made law that the old codes require by their incomplete statements of offense culpability requirements.

In place of the plethora of common law terms—wantonly, heedlessly, maliciously, and so on—the Code defines four levels of culpability: purposely, knowingly, recklessly, and negligently (from highest to lowest). Ideally, all offenses are defined by designating one of these four levels of culpability as to each objective element. If the objective elements of an offense require that a person take the property of another, the culpability elements might require, for example, that the person *know* that she is taking property and that she is at least *reckless* as to it being someone else's property. In each instance, and for each element of an offense, the legislature may set the culpability level at the minimum they think appropriate either to establish liability or to set off one grade of an offense from another.

When an offense definition requires a particular level of culpability as to a particular element, it means that the required culpability as to that element must exist at the time of the conduct constituting the offense. (Culpability at the time of the result, rather than the offense conduct, is neither necessary nor sufficient. Changing one's mind after setting a bomb does not bar liability for deaths caused by the blast, if the intent to kill existed when the bomb was set.) This *concurrence requirement*, as it is called, reflects the law's interest in judging the culpability of the act rather than the general character of the actor. The required concurrence between act and culpability is implicit in the language of the Model Penal Code's section 2.02(2) culpability definitions.

Modern codes give detailed definitions of each of the four culpability levels. As the Model Penal Code commentary explains:

> The purpose of articulating these distinctions in detail is to advance the clarity of draftsmanship in the delineation of the definitions of specific crimes, to provide a distinct framework against which those definitions may be tested, and to dispel the obscurity with which the culpability requirement is often treated when such concepts as 'general criminal intent,' 'mens rea,' 'presumed intent,' 'malice,' 'wilfulness,' 'scienter' and the like have been employed. What Justice Jackson called 'the variety, disparity and confusion' of judicial definitions of 'the requisite but elusive mental element' in crime should, insofar as possible, be rationalized by a criminal code. (Model Penal Code § 2.02 comment at 230 (1985))

Under the Code's culpability scheme, the objective building blocks of offense definitions are conduct, circumstance, and result elements (although many offenses have no result element). The culpable levels are defined slightly differently but generally analogously with regard to each of these kind of objective elements. For the sake of simplicity, the following discussion focuses on culpability as to causing a result, such as death.

Under the Code, the highest level of culpability is "purpose." A person acts "purposely" with respect to a result if her conscious object is to cause such a result. While the criminal law generally treats a person's motive as irrelevant, the requirement of "purpose" is essentially a requirement that the person have a particular motive for acting, albeit a narrowly defined motive. The requirement does not make motive generally relevant, but only asks whether one specific motive was present, such as the purpose to gain sexual satisfaction required by the offense of indecent exposure. Thus, "flashing" another in order to surprise or annoy would not satisfy the required purpose and would not support liability for the offense.

In contrast to "purpose," which requires the person's conscious object to cause the result, a person acts only "knowingly" if she does not hope for the result but is practically certain that her conduct will cause it. The antiwar activist who sets a bomb to destroy draft board offices may be practically certain that the bomb will kill the night watchman yet may wish that the watchman would go on coffee break and not be killed. The essence of the narrow distinction between purpose and knowledge is the presence of a positive desire to cause the result as opposed to knowledge of its near certainty. In the broader sense, the distinction divides the vague notion of maliciousness or viciousness from the slightly less objectionable callousness.

Most common law courts and modern codes make clear that a person's deliberate blindness to a fact does not protect her from being treated as "knowing" that fact. For example, it is a common case law rule that one who drives across the border in a car with a secret compartment but carefully avoids actually knowing what is hidden in it can be held liable for knowingly transporting marijuana if it can be shown that "his ignorance in this regard was solely and entirely the result of his having made a conscious purpose to disre-

gard the nature of that which was in the vehicle, with a conscious purpose to avoid learning the truth" (*United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976)).

The Model Penal Code resolves this problem of "wilful blindness" of circumstances in a slightly different way. Section 2.02(7) provides: "When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist." Thus, the smuggler is held to "know" of the marijuana if he is aware of a high probability that it is there. (Note that this standard requires something less than the "practically certain" standard that the Code uses when defining "knowingly" as to causing a result.)

In contrast to "knowingly," a person acts "recklessly" if she is aware only of a substantial risk of causing the result. The narrow distinction between knowledge and recklessness lies in the degree of risk—"practically certain" versus "substantial risk"—of which the person is aware. The distinction marks the dividing line between what we tend to scold as careless (recklessness and negligence) and what we condemn as intentional (purposely and knowingly). In a very rough sense, the distinction between purpose and knowing, on the one hand, and reckless and negligent, on the other, also appropriates the common law distinction between specific intent and general intent.

While knowing and reckless culpability focus on the likelihood of causing the result—"practically certain" vs. "substantial risk"—purposeful culpability pays no regard to the likelihood of the result. Even if the chance of killing another is slight, a killing is purposeful if it nonetheless is the person's "conscious object." This characteristic of the purpose requirement reflects an instinct that trying to cause the harm, whatever its likelihood, is more condemnable than acting with the belief that the harm will or might result without desiring it. The practical effect is that reckless conduct can be elevated to purposeful conduct if the person hopes that the risk will come to fruition. This characteristic of purpose also illustrates how specially demanding it is. When determining whether knowing or reckless requirements are met, a jury might logically deduce those culpability levels from other facts. They may conclude that a person "must have known" the certainty or the risk of harm if she knew this fact or that. A purpose requirement, on the other hand, requires the jury to determine a person's object or goal, a somewhat more complex probing of a defendant's psychological state. To uncover a "purpose," a jury may have to dig deeper into the person's psyche, her general desires and motivations. If a jury is conscientious in adhering to the proof-beyond-a-reasonable-doubt standard constitutionally required for offense elements, this may be a difficult conclusion to reach.

In contrast to acting "recklessly," which requires a person consciously to disregard a substantial risk, a person acts only "negligently" if she is unaware of a substantial risk of which she should have been aware. If it never occurs to a person that her conduct creates a prohibited risk, such as causing death, she can at most be held negligent in causing the death. Nor can negligent culpability be elevated to recklessness if the person is only cognizant of a risk of causing lesser injury. Absent a special rule, causing death while being aware of a risk of injury, but not death, will result in liability for negligent homicide, but not reckless homicide.

One might think that "negligence" has something to do with omissions. An omission occurs when one "neglects" to act. The terms seem to share a common root. Older cases sometimes suggest or assume such a connection, but it has long since been agreed that "negligence," when used to refer to a level of culpability, can apply as easily to a commission as to an omission. The crux of negligent culpability is the failure to perceive a risk of which one should be aware while doing either an act or failing to perform a legal duty. It is equally clear that one can have any level of culpability as to an omission, not just negligence. Where a parent fails to obtain needed medical care for a child and as a result the child dies, the parent may have been purposeful, knowing, reckless, negligent, or faultless as to allowing the resulting death. The parent may have failed to get medical care because she desired to cause the child's death; or, she may not have desired to cause the death, but she may have been practically certain that her omission would result in the death; or, she may have been aware only of a substantial risk; or, she may have been unaware of a substantial risk but should have been aware. Generally, the culpability requirements apply to omissions in the same way that they do to commissions.

The distinction between negligence and the three higher levels of culpability is one of the most critical to criminal law. A person who acts purposely, knowingly, recklessly is aware of the

circumstances that make her conduct criminal and therefore is by all accounts both blameworthy and deterrable. A defendant who acts negligently, in contrast, is unaware of the circumstances and therefore, some writers argue, is neither blameworthy nor deterrable. While writers disagree over whether negligence ought to be adequate to support criminal liability, it is agreed that negligence represents a lower level of culpability than, and is qualitatively different from, recklessness. For this reason, recklessness is considered the norm for criminal culpability, while negligence is punished only in exceptional situations, as where a death is caused.

Recklessness and negligence share an important quality that distinguishes them from purpose and knowledge. The latter asks a specific empirical question. Did the person have the required purpose or practical certainty of causing the prohibited result? The culpability requirement of recklessness and negligence, on the other hand, require a normative rather than an empirical determination. The recklessness inquiry admittedly begins by asking whether the defendant had a particular state of mind—awareness of a specific risk—but then shifts to an inquiry into whether the disregard of that known risk was sufficiently blameworthy to support criminal liability. In the language of the Model Penal Code, the disregard of a specific risk is reckless and the failure to perceive a specific risk is negligence only if the disregard or failure to perceive "involves a gross deviation from the standard of care that a reasonable person would observe in the person's situation" (Model Penal Code § 2.02 (2)(c)&(d)). A jury can come to this conclusion only after making a judgment about what the reasonable person (the law's objective standard) would do in the situation, comparing the defendant's conduct to that of the reasonable person's, and then assessing the extent of the difference.

Further, it is generally understood, and intended by the Model Penal Code drafters, that the reasonable person standard to which the defendant is compared when determining recklessness or negligence is a standard properly adjusted to take account of the defendant's "situation." This may include not only the physical conditions but also the facts known to the defendant and even personal characteristics of the defendant. Such individualization of the objective reasonable person standard gives decision-makers some leeway in making what is essentially a general blameworthiness judgment, one that is not possible in judging purpose or knowing. That such a general blameworthiness assessment is permitted in judging recklessness is made all the more significant by the fact that recklessness, recall, is the norm, the most common level of culpability in modern codes. The common law was much less likely to individualize the objective standard of recklessness and negligence, tending instead to ignore differences in education, intelligence, age, background, and the like. In contrast, it is the characteristic of a modern code to attempt to assess what might reasonably have been expected of the particular defendant given the "situation."

Disagreements over the minimum culpability requirement

There is some disagreement over the appropriate minimum level of culpability for criminal liability. Some argue that recklessness should be the minimum, that neither negligence nor strict liability—liability in the absence of proof of negligence—should be tolerated. Others argue that negligence is an appropriate basis but that anything short of negligence is inappropriate. Still others argue that strict liability ought to be permitted in select instances. In practice, while recklessness is the norm in current criminal law, criminal liability for negligence is common in select instances, as is even strict liability on occasion. Why these differences in opinion?

Recall, first, the basic contours of recklessness and negligence. Recklessness requires that the person actually be aware of a substantial risk that the prohibited result will occur or that the required circumstance exists. And the risk must be of a sort that a law-abiding person would not disregard. That is, not every instance of conscious risk-taking is culpable. Every time one drives a car or builds a bridge, one is likely to be aware of risks that such conduct creates. But many risks are well worth the taking, for taking the risk creates a good that outweighs the danger. Other risk-taking is not necessarily beneficial, but neither is it condemnable. The law's definition of recklessness is its attempt to distinguish proper risk-taking, or risk-taking that is not so improper as to be criminal, from risk-taking that is condemnable.

A similar challenge for the law arises in the context of negligence. Negligence, recall, differs from recklessness in that the person is not, but should be, aware of a substantial risk. It is not

negligent to be unaware of every risk, for no person could be so aware. In any case, it would be a waste of time and energy for people to try. In defining negligence, the law attempts to specify those risks to which one ought to pay attention, those risks that are likely enough and serious enough in their consequence to justify attention. In the language of the Model Penal Code, "the risk must be of such a nature and degree that the person'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 person's situation" (Model Penal Code § 2.02 (2)(d)). The "gross deviation" requirement helps distinguish the civil standard of negligence in tort law from that in criminal law: even a failure to meet the objective test will not support criminal liability, since the failure must be a "gross deviation" from the standard.

It is easy to confuse *creating* a risk of harm with *taking* a risk that an offense circumstance exists or that one's conduct will cause a prohibited result. Creating a risk is altering the circumstances of the world in such a way as to create the possibility of a harm that did not previously exist. Risk-taking, in contrast, is a mental process: acting in disregard of a known risk. One can create a risk of fire by leaving the stove on when leaving the house. One takes a risk of a fire starting by leaving the house knowing that the stove might start a fire. It is the latter that is a form of a culpable state of mind; risk-creation typically is an objective element of endangerment offenses. Also, one creates a risk of causing a result, but one cannot create a risk that a circumstance exists. One can create a risk that a fire will start, but one cannot create a risk that one is exceeding the speed limit. One is either exceeding the limit at the present or is not. In other words, while risk-creation, the objective issue, concerns only results, risk-taking, the culpability issue, concerns both results and circumstances.

Nearly all agree that recklessness is an appropriate basis for criminal liability and, for that reason, it is the default culpability level read in by most modern codes when an offense definition is silent as to the required culpability. Negligence, however, is controversial for some. One argument against liability for negligence focuses on what is said to be the law's inability to deter negligent conduct. Where there is awareness of risk, as with recklessness, the threat of punishment may cause a person to avoid the risk. The threat of criminal sanction can make the person pause, perhaps reconsider, before choosing to disregard the risk. In the case of negligence, in contrast, a person cannot be deterred, it is said, because she has no awareness of the facts that make her conduct criminal. It is argued that imposing liability in such a case is a futile and wasteful use of sanctioning resources.

The same argument can be used to challenge the retributivist grounds for punishing negligence. If a person is unaware of the circumstances that make her conduct criminal, how can it be said that she has chosen to do something that is or may be criminal, and on what grounds can her moral blameworthiness be based?

One might respond to the impossible-deterrence argument by noting that it is too narrow, for it focuses only on special deterrence. Punishing the negligent person may well serve general deterrence goals: it may cause others to pay closer attention to possible risks. Indeed, punishing the person who is unaware of the risk she takes might well send a more powerful message than punishing those who consciously take the risk, for such punishment tells the potential offender that inattentiveness will not provide a defense to liability. One also can point to other utilitarian arguments, such as the crime control value of convicting negligent people for incapacitative or rehabilitative purposes. Such liability would bring within the jurisdiction of the correctional system people who are needlessly inattentive, thereby protecting society from them.

A more direct response, however, is to challenge the underlying assumption of the impossible-deterrence argument that inattentiveness in the individual at hand cannot be deterred in the future by punishment for the present lapse. The evidence suggests that people can chose to pay more (or less) attention to their surroundings and the consequences of their conduct. If speeding were punished with the death penalty in all cases, presumably people would pay more attention to their speedometers. Further, if inattentiveness can be deterred, if it is not hopelessly inevitable, then there can be moral blame in the failure to be attentive. If a person can choose how attentive he or she is to a particular kind of risk-taking, the person can be blamed for not being as attentive as the situation demands.

One might argue, however, that while some people can meet the law's objective standard of attentiveness, others cannot. To punish a person who cannot, especially for reasons beyond the person's control, is to impose a form of strict lia-

bility. There can be no blameworthiness in failing to meet a standard that the person is incapable of meeting. Further, to make the utilitarian argument, a person ought not be encouraged to be too attentive. To hold people criminally liable for risk-taking of which they are not aware could create fear of liability that would infect all action, thereby incurring societal costs through a pervasive timidity that hinders possibly beneficial risk-taking activity. The net effect of negligence liability might therefore be an overly deterred society.

But the response to these arguments is found in the restrictions commonly placed upon the imposition of negligence liability in modern codes. As illustrated by the Model Penal Code's definition of negligence quoted above, a person is held negligent only if she fails to be reasonably attentive to risks; the reasonableness of her attentiveness is judged in light of "the circumstances known to her" and in her "situation." That is, she can be held liable only if the jury finds that the situation was such that she reasonably could have been expected to have been aware of the risk. And, even under this individualized objective standard, the defendant's failure to perceive the risk must be a "gross deviation" from what reasonably could have been expected in the situation.

Many of these same arguments are echoed in the debate over strict liability, although the conclusion of the analysis is different. While strict liability is viewed with suspicion and used sparingly, even modern codes commonly use it in two kinds of cases. First, strict liability is common for offenses labeled as only a "violation" or some other term designed to distinguish them from true criminal "offenses." These are instances where the criminal law is performing an essentially regulatory function. The liability imposed for such quasi-criminal offenses typically is limited to civil-like sanctions, such as a fine. Traffic offenses are an example. In a second group of serious offenses, strict liability is provided as to one particular element of the offense. For example, strict liability is sometimes provided as to the age of the victim in statutory rape, especially when the victim is in fact very young. These are the instances of greatest controversy. (Recall that the interchangeability of culpability requirements and mistake defenses means an offense may be made one of strict liability either by explicitly providing that no culpability is required or by providing that a reasonable mistake is no defense.)

It is precisely the above arguments in support of the use of negligence that argue most strongly against the use of strict liability. The test for negligence is set carefully to mark the precise contours of moral blameworthiness that supports criminal conviction (and to provide for the degree of attentiveness that we reasonably expect and want, no more, no less). Of particular note are the individualization of the objective standard by which offenders will be judged and the requirement that the failure of attentiveness be a "gross deviation" from even this individualized objective standard.

Thus, to punish violators in the absence of negligence under this carefully crafted standard is to punish persons without sufficient blameworthiness—they could not have been reasonably expected to have avoided the violation—and to risk demanding a degree of attentiveness that would be more costly to societal interests than can be justified. Indeed, strict liability, by disregarding the circumstances or the person's situation, mental and physical, inflicts punishment even on the person who acts perfectly reasonably even by a purely objective, unindividualized standard, as the common law frequently imposed.

Three sorts of arguments typically are given in support of strict liability: that strict liability is limited in application to situations where the person probably is at least negligent, that the use of strict liability will lead people to be more careful, and that only civil-like penalties are imposed for strict liability, so that no serious injustice is done.

First, it is argued that strict liability typically is limited to instances where a person necessarily is at least negligent, especially where the negligence bar is lowered by the increased seriousness of the offense. It seems unlikely that a person would not be at least negligent as to whether a sexual partner is under the age of ten, for example. Similarly, many states impose strict liability in holding a person liable for murder when an accomplice kills a person in the course of a felony, the so-called felony-murder rule. Many accomplices to a felony will be negligent as to contributing to such a death. They should have been aware that, by engaging in a felony where one of them planned to have a gun, for example, a death might result.

It may be true that some of the people convicted under these strict liability doctrines do in fact satisfy the requirements of negligence, but this will not be true for all persons convicted. Indeed, if we sought only to convict those who in fact were negligent, a negligence requirement

would serve the purpose. Presumably the point of adopting strict liability instead of negligence is to allow liability to be imposed even in the absence of negligence.

In some cases, "under the circumstances known to [the person]," a reasonable person "in the person's situation" might well make a mistake as to a sexual partner being under ten years old. Yet strict liability, as the Model Penal Code provides in this instance, will impose significant liability in the absence of negligence, and therefore in the absence of blameworthiness. Similarly, the felony-murder rule will impose murder liability even if in the situation at hand no one could have guessed that there was any chance that someone would be killed. Unless negligence is explicitly required, liability can be imposed even if a person is clearly nonnegligent as to the offense.

One might argue that we can rely on the discretion of prosecutors to forego prosecution in such cases of nonnegligence, but others would claim that such an expectation is unrealistic and misguided. If we care about the demands of the legality principle, we will have criminal liability depend on written rules, not personal discretion. Further, the "trust discretion" argument essentially concedes that the law itself, when it adopts strict liability, fails to make the distinctions necessary for a just result.

A further defense of this negligence per se argument for strict liability points to the significant burden placed on prosecutors to prove negligence. The difficulties of negligence prosecution create a danger that blameworthy and dangerous people will go free. Moreover, negligence prosecutions may incur costs that strict liability prosecutions avoid.

A possible response to these arguments is to shift the burden of persuasion to the defendant on some culpability issues, instead of dropping the culpability requirement altogether. If a case can be made for the special difficulties of prosecution together with the special need for effective prosecution, then a rebuttable presumption will be employed to help the prosecutor. It will, in any case, be preferable from the defendant's point of view than the irrebuttable presumption of negligence that strict liability provides.

While this approach is used in other countries to limit the use of strict liability, it is forbidden in the United States because of broad constitutional rules that require the state to carry the burden of persuasion on all offense elements. Although the underlying sentiment seems sound, in this instance the Supreme Court's rule—together with the Court's constitutional approval of the use of strict liability—has created an unfortunate and somewhat inconsistent state of affairs.

A second line of argument in support of strict liability is the claim that its use will cause people to be more careful. This may be true; strict liability may make people more careful. What is left unclear is whether strict liability is more effective in this regard than negligence. The negligence standard requires a person to do all that he or she reasonably can be expected to do to be careful. What can the use of strict liability add to this? Strict liability might be able to encourage people to be even more careful than the circumstances reasonably would require. But this seems a questionable goal. As noted above, some risks ought to be taken and it may be harmful to society to have a person unreasonably preoccupied with all potential risks.

One might argue that, in a few instances, the potential harm is sufficiently serious that the law ought to do everything within its power to avoid a violation, and strict liability provides that special "super-punch." But this argument does not explain the current use of strict liability, which is most common in minor offenses and less common in more serious offenses. More importantly, the argument misunderstands the nature of negligence. In judging a person's negligence, the seriousness of the harm is taken into account. One's inattentiveness as to whether one is speeding might be nonnegligent, but the same degree of inattentiveness to a risk of hitting a pedestrian would be negligence. The negligence assessment takes account of both the likelihood of the harm risked and its seriousness, among other things. As the potential harm becomes greater, a person's ability to avoid negligence liability for inattentiveness disappears.

A final argument in support of strict liability focuses on its use primarily in minor offenses with minor penalties. When liability is imposed in the absence of culpability, it is argued, the penalties at stake—typically fines—make the prosecution essentially civil in nature. The argument finds support in modern codes, which commonly limit to some extent the available penalties when strict liability is imposed. As the Model Penal Code provides, "Notwithstanding any other provision of existing law and unless a subsequent statute otherwise provides, when absolute liability is imposed with respect to any material element of an offense defined by a statute other

than the Code and a conviction is based upon such liability, the offense constitutes a violation" (Model Penal Code § 2.05 (2)(a)). And violations are offenses for which imprisonment is not authorized...

There are two difficulties with the minor penalties argument. First, as has been noted, strict liability is not in fact limited to minor offenses. Note, for example, that the Model Penal Code limitation applies only to "an offense defined by a statute other than the [criminal code]," thus allowing the imposition of lengthy imprisonment for offenses defined by the code, such as statutory rape of a person under age ten. Even if the use of strict liability were limited to minor offenses, however, the minor penalties argument is problematic. If strict liability is to be justified on the grounds that only minor, civil penalties such as fines are imposed, one may reasonably ask, Why not use civil liability?

One might counter that criminal procedures are faster and have other enforcement advantages. But if special procedures are needed, the legislature has the authority to alter the procedures for civil actions or create special procedures for a special group of civil violations. In fact, a primary reason the criminal process is preferred in most cases is its potential to impose the stigma associated with criminal liability.

It is true that the stigma of criminal conviction can provide a deterrent threat that civil liability does not. But to impose criminal liability where the violation is morally blameless—where normally only civil liability would be appropriate—is to dilute the moral credibility of the criminal law, which can have serious consequences for the criminal law's crime control power. As the criminal law is used to punish blameless offenders under strict liability, its ability to stigmatize is increasingly weakened and, therefore, so is its ability to deter. Each time the system seeks to stigmatize where condemnation is not deserved, it reduces incrementally its ability to stigmatize even in cases where it is deserved. Any advantage gained from using criminal law to punish blameless violations is purchased at a serious cost. This result is particularly troublesome because social scientists increasingly suggest that the criminal law's moral credibility plays a large part in its ability to gain compliance.

PAUL H. ROBINSON

See also ACTUS REUS; CAUSATION; CIVIL AND CRIMINAL DIVIDE; DETERRENCE; EXCUSE: THEORY; MISTAKE; PUNISHMENT; STRICT LIABILITY; VICARIOUS LIABILITY.

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MENTAL HEALTH EXPERTS

See SCIENTIFIC EVIDENCE.

MENTALLY DISORDERED OFFENDERS

This entry covers the relationship of mental disorder to crime, the overlap between the criminal justice and mental health systems, and the nature and operation of institutions and programs that deal with mentally disordered criminals.

Crime and mental disorder

Crime is neither mental disorder nor necessarily evidence of such disorder. It is a misconception that all criminals are "sick," especially those who commit apparently senseless crimes or particularly serious crimes such as murder or rape. The concepts of crime and of mental disorder should be kept distinct. Crime is a violation of the criminal law, whereas mental disorder refers to behavior that is usually marked by some type of lack of the general capacity for rationality and accompanying distress or dysfunction. Conduct resulting from mental disorder may or may not be criminal and people with mental disorder may or may not be legally responsible for the behavior that mental disorder produces; criminal behavior, by contrast, is often highly rational. Thus, some crime is the product of mental disorder, but to consider all crime as a manifestation of such disorder would tend both to eliminate any sensible boundaries to the concept of mental disorder and to play havoc with generally accepted notions of morality and accountability.

The criminal behavior of people with mental disorders is difficult to estimate with precision because reliable data are hard to obtain. Many mentally disordered persons and many criminal acts never come to the attention of public authorities. Older studies of the issue, although suggestive, suffered from serious methodological flaws. Based on recent community-based studies that examine all criminal behavior, whether or not an offender is arrested and convicted, we can cautiously estimate that, in general, people with major mental disorders, such as schizophrenia or severe depression, are not at greater risk for criminal behavior than people without disorder. Drug use is much more closely correlated with criminal behavior than is mental disorder. People with and without major mental disorders who abuse illegal drugs and alcohol are equally and far more likely to engage in crime than people who do not use drugs, but people with mental disorders are about seven times more likely to abuse drugs and alcohol than people without disorders. Thus, although drug use independently accounts for more crime than does major mental disorder, the prevalence of criminal behavior among people with mental disorder may be greater because they are at much greater risk of drug use. People with less severe mental disorders, such as personality disorders, are at even greater risk for criminal behavior if they use illegal drugs and alcohol than people with major mental disorders or people without disorders.

The non-substance-related mental disorders that seem to have the strongest relation to crime are antisocial personality disorder (APD) and psychopathy, both of which are personality disorders. People with these disorders are generally in touch with reality and therefore are responsible for their behavior. APD is widely recognized as a mental disorder by its inclusion in the fourth edition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV-TR), but its classification as a mental disorder is problematic. The criteria for APD, for example, are largely persistent, serious antisocial behaviors and do not include cognitive or affective psychopathology. These diagnostic criteria virtually guarantee that APD will be found to a great degree among offenders, but such criteria offer little reason per se to consider the condition a disorder. Psychopathy is also frequent among prisoners. Psychopathy is not an officially recognized diagnostic category in DSM-IV, but there are good data to validate the disorder and it is used by many clinicians. The condition is marked