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# Mens Rea and the Colorado Criminal Code

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# *MENS REA* AND THE COLORADO CRIMINAL CODE

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When the Colorado Legislature undertook in the 1960s to revise the state's criminal code, it was able to take advantage of the work done by the American Law Institute from 1953 to 1962 on the Model Penal Code.[1] The new Colorado Criminal Code[2] much resembles the MPC in organization and in many of its detailed provisions. Nevertheless, its authors were not content merely to adopt the MPC wholesale; they consulted other codes and proposed codes and pieced together provisions from those diverse sources.[3] The result was the Colorado Criminal Code, which went into effect in 1972.

It is unfortunate for later scholars that little legislative history of the Colorado revision is available. Questions about why various provisions were chosen cannot, for the most part, be answered. At most, there is brief commentary explaining which of the various sources inspired each Colorado provision.[4] Nothing is said concerning application or interpretation. Consequently, courts and commentators must rely unusually heavily on the text when seeking solutions to various problems in the application of the Colorado criminal statutes. Such reliance is particularly appropriate in a criminal code, which ought to be explicit and precise to satisfy the constitutional requirement that persons be given adequate notice about what con-

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1. MODEL PENAL CODE. [Hereinafter MPC]. The ALI went through thirteen successive drafts before culminating in the MPC. Although the MPC is not the law in any jurisdiction, every criminal code revision accomplished in the 1960s and 1970s is indebted to the work of the MPC's authors.

2. COLO. REV. STAT. §§ 18-1-101 to 18-15-108 (repl. vol. 1978 & Supp. 1980). [Hereinafter the Code.]

3. Sources for the Code include the MPC, the Wisconsin Penal Code that became effective in 1956, the Illinois Criminal Code of 1962, the New Mexico criminal statutes effective 1963, the Revised New York Penal Law effective 1967, the final draft of the Michigan Revised Criminal Code submitted in 1967 but never enacted into law, the final report of the National Commission on the Reform of Federal Criminal Laws, the final 1970 draft of the Texas State Bar Committee on Revision of the Penal Code (later substantially enacted into law), and the 1969 report of New Hampshire's Commission to Recommend Codification of the Criminal Laws. *See* Comment, "Identification of References to Source Material" in COLO. REV. STAT., p. 252 (Supp. 1971). The latter volume contains the only published Comments to the Code.

4. See note 2 *supra*.

duct is criminal. Nevertheless, because the Colorado provisions are in many places seriously flawed by ambiguity or paradox, they hold the potential to create confusion and injustice. This is especially true of the language that sets forth *mens rea* requirements in the Code. This Article will discuss the ambiguities and inadequacies of the *mens rea* provisions of the Colorado Criminal Code and suggest legislative revisions to remedy them. Other sections of the Code also merit discussion, but the *mens rea* provisions are of particular interest because they are central to important philosophical questions concerning criminal liability[5] and because they illustrate so well the difficulties of drafting coherent criminal legislation.

As a preliminary matter, the reader should be alerted to the Code's general treatment of *mens rea*. Section 1-102[6] of the Code bows to the ancients perception that crimes consist not only of acts, but also of accompanying mental states,[7] by stating a purpose to "define adequately the *act and mental state* which constitute each offense."[8] Although clear enough, this provision might more reasonably have been phrased in the plural — "acts and mental states" — since later provisions illustrate that some offenses may be committed only if the actor has more than one mental state or commits more than one act. For example, section 4-203 defines second degree burglary as *knowingly* breaking, or entering, or remaining in, a building or occupied structure *with intent* to commit therein a crime. The guilty second degree burglar hence must have at least two independent mental states: he must *know* that he is breaking, entering, or

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5. *See generally* Sayre, *Mens Rea*, 45 HARV. L. REV. 974 (1932); Levitt, *The Origin of the Doctrine of Mens Rea*, 17 ILL. L. REV. 117 (1922).

For recent treatments of the *mens rea* provisions of other codifications, *see* Feinberg, *Toward a New Approach to Proving Culpability: Mens Rea and the Proposed Federal Criminal Code*, 18 AM. CRIM. L. REV. 123 (1980); Romero, *New Mexico Mens Rea Doctrines and the Uniform Criminal Jury Instructions*, 8 N. M. L. REV. 127 (1978). Although the Supreme Court has recently warned that an "obsession" with "hair-splitting distinctions" in the *mens rea* area would handicap the administration of justice, United States v. Bailey, 100 S. Ct. 624, 632 (1980), lawyers will continue to press such distinctions so long as legislative ambiguity occasionally makes that activity profitable. Although many of the ambiguities I describe might be eliminated by judicial construction, I believe that a legislative solution is preferable. And any such solution must anticipate the "hair-splitting" arguments that inventive lawyers are trained to propound.

6. All references in the text to a "section" of the Colorado Criminal Code refer to provisions in Title 18 of the Colorado Revised Statutes. Hence, "section 1-102" is a reference to COLO. REV. STAT. § 18-1-102 (repl. vol. 1978).

7. *See* G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 30 (1961) ("suffice it to say that the requirement of a guilty state of mind . . . had been developed by the time of Coke, which is as far back as the modern lawyer needs to go.").

8. COLO. REV. STAT. § 18-1-102(a) (repl. vol. 1978).

remaining, and in addition he must *intend* to commit a crime within.[9] Similarly, first degree burglary has a plural *act* requirement: it is not committed unless the defendant both enters or remains unlawfully, and in the course of the crime "assaults or menaces any person."[10] Such multiple elements are not unusual in the Code and its reader ought to be aware of that possibility.

## STRICT LIABILITY AND ITS "MENTAL STATES"

The Code recognizes a class of offenses for which no mental state need be proved, the "strict liability offenses."[11] But it is simplistic to conclude that mental state is entirely irrelevant to strict liability offenses. The Code provides that "the minimum requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which he is physically capable of performing."[12] The dichotomy between act and mental state begins to break down when we examine the definition of "voluntary act," which is "an act performed consciously as a result of effort or determination."[13] Both "effort" and "determination" seem to describe a state of mind more than a state of body,[14] so it appears that even crimes that purport to contain no "mental" element contain the hidden element requiring that the observable conduct of the defendant be accompanied by the mental state that we call "effort" or "determination."[15]

A second way in which a mental state requirement may creep into the proof of even a "strict liability" offense is through the causation requirement. All strict liability offenses require that the prosecution prove that the defendant caused some result. In order to prove causation the prosecution must show that the defendant's conduct was the proximate cause of the prohibited result, and not merely the "but-for" cause. Consider, for example, section 13-110, which pro-

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9. In fact, the mental state requirement is even more complicated, because the definition of "occupied structure" contains a requirement that the defendant know of its occupation, and the definition of "unlawfully remains" incorporates in the case of places open to the public a requirement of personal communication to the defendant that he has been excluded—another sort of knowledge element.

10. COLO. REV. STAT. §18-4-202(1) (repl. vol. 1978).

11. COLO. REV. STAT. §18-1-502 (repl. vol. 1978).

12. *Id.*

13. COLO. REV. STAT. §18-1-501(9) (repl. vol. 1978).

14. *See* Mueller, *On Common Law Mens Rea*, 42 MINN. L. REV. 1043, 1047-48 (1958) ("Even in ordinary parlance we do not refer to that which is not the result of some sort of mental activity . . . as an act . . . . An act is a psycho-physical event.").

15. MODEL PENAL CODE §2.01 includes a similar mental state requirement for strict liability crimes.

hibits causing or permitting the emission of visible air contaminants from a motor vehicle in a designated pollution control region. A defendant whose normally well-maintained vehicle has been sabotaged to emit pollutants, and who in innocent ignorance of the fact starts his vehicle and drives for a few blocks before noticing the emissions and stopping, most likely could not be convicted of the offense, even though it is one of strict liability. One rationale for this result is that the defendant did not "cause" the emissions. Yet it is clear that the emissions would not have occurred "but for" his conduct. A traditional explanation for why we balk at ascribing the result to him would have been that his conduct was not a "proximate cause" of the emissions.[16] The MPC causation provisions would exonerate the defendant because the pollution was not a "probable" result of his conduct.[17] Each of these explanations illustrates that proof of proximate cause requires a showing that the prohibited result was, or could have been, foreseen by the defendant. This requirement is justified on the grounds that a consequence that a reasonable person in the actor's position would not have foreseen is not a consequence of the actor's conduct at all. In effect, a strict liability conviction requires a showing that the defendant did foresee, or was *negligent* in not foreseeing the consequences of his action. Although it is unconventional to describe negligence as a mental state,[18] the Code does regard a rather exaggerated version of objective negligence as a "culpable mental state."[19] Hence a mild form of one of the "culpable mental states" becomes, *mutatis mutandis,* an element even of strict liability offenses.

The Code, unlike the MPC,[20] nowhere makes explicit the link between foreseeability and causation, and perhaps it need not. A juror's intuitive sense of the meaning of "causing or permitting" probably would lead him to the correct verdict in the case of the unknowing polluter. But the causation requirement, like the voluntary act requirement, should be recognized as a source of at least a minimal requirement of mental "fault" for strict liability offenses.

### VARIETIES OF FACTUAL AND MENTAL ELEMENTS

Other than the strict liability offenses, crimes under the Code may be crimes of "intention" or "specific intent," of "knowledge," of

16. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW 248 (1972).
17. MODEL PENAL CODE § 2.03(4).
18. W. PROSSER, LAW OF TORTS 230-31 (4th ed. 1971).
19. COLO. REV. STAT. §18-1-501(3), (4) (repl. vol. 1978).
20. *See* MODEL PENAL CODE § 2.03.

"recklessness," or of "criminal negligence."[21] The definitions of these various culpable mental states are modeled on, but not identical to, the corresponding MPC definitions.[22] For most offenses, each mental state corresponds to a particular factual element of the offense. Hence for the crime of manslaughter, defined *inter alia* as recklessly causing the death of another person, the mental element of recklessness is aligned with the factual element of death.[23] And, as discussed above,[24] some offenses may have multiple factual elements that correspond to differing mental state elements.

In addition, some offenses may have mental state elements that do not correspond to any factual elements. Second degree burglary, for example, requires an intent to commit a crime within a building or structure, but not that the crime actually be committed.[25] All attempt-like crimes fall into this category.

Before examining the definitions of the various "culpable mental states," it is essential to consider a distinction, drawn by both the MPC and the Code, between three different categories of factual elements of crimes. The first category is a result or consequence, the second an attendant circumstance, and the third a description of the "nature of conduct."[26] The crime of first degree arson, for example, is defined as knowingly setting fire to, burning, causing to be burned, or damaging or destroying by explosives, a building or occupied structure of another without consent.[27] The burning and damage or destruction elements are consequential; there can be no liability based on those elements unless the defendant *causes* the elements to happen. The "building or occupied structure" element is circumstantial; there is no requirement that the defendant cause the element (although he might do so, for example by directing a group of persons to occupy the structure that he proposes to burn). Many elements of crimes may be classified as either circumstantial or consequential, and the classification can be important because the mental state required for a conviction may vary for each category. Some elements, however, are difficult to classify. For example, the element of "firesetting" in the arson statute might be considered consequent-

21. COLO. REV. STAT. §§18-1-502, 501(4) (repl. vol. 1978).
22. MODEL PENAL CODE §§2.02(2)(a), (b), (c), (d).
23. COLO. REV. STAT. §18-3-104 (repl. vol. 1978).
24. See text accompanying notes 8-10 *supra*.
25. COLO. REV. STAT. §18-4-203 (repl. vol. 1978).
26. *See, e.g.*, COLO. REV. STAT. §18-1-501(6) (repl. vol. 1978). *See* MODEL PENAL CODE §2.02.
27. COLO. REV. STAT. § 18-4-102 (repl. vol. 1978).

ial. The MPC and the Code, however, seem to regard this element as one that describes the "nature of conduct." Other such elements include "taking" in the theft offenses, "sexual intercourse" in the sexual offenses, and "forcible seizure and carrying" in the definition of the kidnapping offenses. All of these elements are more naturally viewed as types of behavior than as the results of behavior, although I will later be argue that such elements ought to be treated in the same way as consequential elements.

### INTENTION AND KNOWLEDGE

Of the four "culpable mental states," the first is "intention." Because the history of the substantive criminal law contains many conflicting and overlapping definitions of "intent" and "criminal intent," the MPC draftsmen concluded that their statute should avoid the term "intent" altogether, and they used the description "purpose" for this mental state;[28] but the Colorado draftsmen preferred the more traditional term. The Colorado formulation is: "A person acts 'intentionally' or 'with intent' when his conscious objective is to cause the specific result proscribed by the statute defining the offense. It is immaterial to the issue of specific intent whether or not the result actually occurred."[29] Unlike the Model Penal Code formulation,[30] this definition supplies no definition for "intention" when the element to which it refers is a circumstantial element or one that describes the "nature of conduct." But as regards consequential elements, this definition makes clear that it encompasses only purposive mental states, and excludes the milder forms of orientation toward a goal—such as awareness and indifference—that might have sufficed under the historical definition of "criminal intent."[31] The Colorado statute invokes the often-used term "specific intent" to describe any crime that requires proof of the mental state of "intention,"[32] again ignoring the example of the MPC, which eschews the "specific intent" language because it has historically been used so variously. Crimes requiring any mental state other than "intention" are termed "general intent" crimes.[33]

In defining the second culpable mental state, "knowledge," the Colorado statute does differentiate between knowledge of a conse-

28. MODEL PENAL CODE §2.02, Comments 2, 3, & 5 (Tentative Draft No. 4, 1955).
29. COLO. REV. STAT. §18-1-501(5) (repl. vol. 1978).
30. MODEL PENAL CODE §2.02(2)(a).
31. *See* G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 64, 72 (1961).
32. COLO. REV. STAT. §18-1-501(5) (repl. vol. 1978).
33. COLO. REV. STAT. §18-1-501(6) (repl. vol. 1978).

quence and knowledge of a circumstance or the "nature of conduct." As to consequences, knowledge exists when an actor is aware that his conduct is "practically certain" to cause a result. As to circumstances or the "nature of conduct," a person acts with knowledge when he is "aware that such a circumstance exists" or "aware that his conduct is of such nature."[34] The language of this "knowledge" provision is taken from a nearly identical provision in the MPC.[35]

These two definitional sections tend to create ambiguities and inconsistent results. The first curious aspect of these sections is the decision to follow the lead of the MPC in differentiating between consequences and circumstances when defining knowledge, but not when defining intention. The MPC would hold that a person acts "purposely" (or, in Colorado parlance, "intentionally") with respect to a circumstance if he is aware of the circumstance or if he *believes* or *hopes* that it exists.[36] That is, under the MPC, intention toward a circumstance is the equivalent of knowledge of it, augmented by the possible alternatives of belief or hope when knowledge is not present.

Neither the MPC nor the Colorado treatment seems satisfactory; the Colorado statute, by omitting to define intention as it may apply to circumstances, leaves the resolution of some plausible hypothetical cases in doubt. To return to a familiar example, consider second-degree burglary. The elements are knowingly breaking, entering, or remaining unlawfully in a building or occupied structure with *intent* to commit *therein* a crime.[37] Is a defendant guilty of burglary when he breaks into a house to assault a person whom he knows is within, if he is indifferent to whether the assault takes place indoors or out? He *knows* that the assault will take place "therein," because he knows that his victim is within, but it is not his conscious objective to commit an indoor, as opposed to an outdoor, assault. Hence it cannot be said that he has a "conscious purpose" related to the circumstantial element of the statute. Yet the statute requires proof of "intent" respecting the element of place as well as the element of "commission of a crime" according to principles of construction that are articulated elsewhere in the Code.[38] We must accept "awareness" or "knowledge" as equivalent to "intention" as it relates to

34. *Id.*

35. *Compare* MODEL PENAL CODE § 2.02(2)(b).

36. MODEL PENAL CODE §2.02(2)(a).

37. COLO. REV. STAT. §18-4-203 (repl. vol. 1978).

38. COLO. REV. STAT. §18-1-503(4) (repl. vol. 1978). This canon of construction is discussed more fully in the text accompanying notes 67-72 *infra*.

circumstances to convict this defendant,[39] but the Code does not explicitly permit us to make this equation.

We could resolve this hypothetical in favor of the prosecution under the MPC definition of "purpose," but its formulation has another difficulty associated with it. By defining "purpose" with respect to circumstances as including awareness, belief, or hope, but defining "knowledge" of circumstances as awareness, the MPC creates an anomaly. Under the MPC, if two statutes were identical in specifying the elements of an offense, except that one statute required proof of "purpose" toward a circumstantial element and the other required "knowledge," a person who did not know of the circumstance but hoped or believed that it existed would be logically guilty of the offense of purpose but not of the offense of knowledge. This result contravenes the principle expressed in both the Code and the MPC that purpose should be regarded as a more serious mental state than knowledge and hence that proof of purpose should always suffice to prove knowledge as well.[40] So long as purpose can be proved (by proving hope or belief) in a way that does not necessarily imply knowledge, knowledge must be regarded as the more narrow and hence the more serious mental state under the MPC. Nowhere in the Comments to the MPC is this anomaly acknowledged or explained.

A second puzzle is why under the Colorado formulation knowledge can be "practical certainty" (or, by implication, something less than absolute certainty) as regards consequences but must be

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39. LaFave and Scott, in their authoritative treatise, report that although the matter has received "less attention" than other aspects of defining criminal intention, "it would appear than an intention to engage in certain conduct or to do so under certain attendant circumstances may likewise be said to exist on the basis of what one knows." Accordingly, they conclude that "assuming for the moment that burglary is viewed as requiring that the burglar intend to break and enter some building and also that he intend to do so into a dwelling house, the requirement of intention as to circumstances is satisfied if he knows the building in question to be a dwelling." W. LAFAVE & A. SCOTT, CRIMINAL LAW 197 (1971).

As a general matter, legislators would not ordinarily distinguish between an individual's knowledge of circumstantial element and his purpose or desire that it exist; and to the extent this is true, perhaps knowledge of circumstances may be equated to purpose as a principle of construction. Yet it seems preferable for the statutes to eliminate the need for this gloss. And it is not impossible to imagine cases in which one could distinguish, perhaps even for purposes of culpability, between one who desires a circumstance and one who only knows of it. Assuming that assaulting a police officer were a crime, we might want to punish one who assaults a police officer for some reason arising out of his status as a police officer more severely than one who assaults his neighbor, whom he knows to be a police officer in a dispute over a noisy dog. Similarly, we might regard the statutory rapist who purposely seeks out young girls as more reprehensible than one who seeks any willing sexual partner and is indifferent to his knowledge that she is below the age of consent.

40. COLO. REV. STAT. §18-1-503 (repl. vol. 1978); MODEL PENAL CODE §2.02(5).

"awareness" (excluding any state of doubt) as regards circumstances. This definitional peculiarity could lead to results that are hard to rationalize. Consider the following examples: Defendant A is almost but not quite sure that Victim A is still in the building that Defendant A is closing, but he locks the building anyway, thus imprisoning Victim A within. Defendant B is almost but not quite sure that Victim B, whom he knows to still be in the building, has not consented to be locked in, but he locks up anyway and imprisons B inside. The false imprisonment statute provides: "Any person who knowingly confines or detains another without the other's consent and without proper legal authority commits false imprisonment."[41] Assuming that the knowledge requirement modifies both the "confinement" and the "without consent" elements, as rules of construction would dictate,[42] Defendant A is guilty but Defendant B is not. Defendant A had knowledge that his conduct would cause the consequence of confinement or detention of another because he was "practically certain" that Victim A would be trapped. Defendant B, on the other hand, was "practically" certain that Victim B had not consented to be confined, but practical certainty may not qualify as knowledge of a circumstance. If "awareness" requires that the defendant be *absolutely* certain, it could be argued that Defendant B's uncertainty, however slight, about whether Victim B has consented is incompatible with "awareness" that the circumstance of nonconsent exists. If this argument prevails, Defendant B, whose behavior is fully as reprehensible as that of Defendant A, cannot be convicted.

The MPC, which defines "knowledge" in exactly the same way as the Code, nevertheless avoids the difficulty described above by providing separately that "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."[43] This provision would permit the conviction of Defendant B in the above example. In its absence, the Colorado treatment of the "knowledge" requirement is problematic.

The example given illustrates another problem with the Code, the difficulty of distinguishing consequences from conduct. One might object to the example above by arguing that both defendants are not guilty. The analysis of Defendant A's guilt might be rebutted

41. COLO. REV. STAT. §18-3-303 (repl. vol. 1978).
42. See note 38 *supra*.
43. MODEL PENAL CODE §2.02(7).

by claiming that the element "confines or detains another" is not a result or consequential element at all, but a *type* of conduct — "confining-or-detaining conduct," it could be called. If it can be so characterized, then the portion of the "knowledge" definition that is relevant is "if the element involves the nature of his conduct the actor acts with knowledge if he is aware that his conduct is of such nature," and Defendant A's uncertainty about whether his victim is in the building would preclude a finding that he *was* aware that his conduct was of that type. This argument seems good enough to raise worrisome questions about how one distinguishes between elements that describe results or consequences and those that describe the "nature of conduct."[44] Homicide statutes are classic examples of prohibitions that contain a consequential element: death. But it is entirely plausible to regard a prohibition against second-degree murder — the knowing killing of another[45] — as containing only a single factual element: conduct in the "nature" of killing. This characterization would compel the acquittal in Colorado of a killer who was almost but not quite certain that his conduct would cause the death of his victim, despite the provision that practical certainty suffices for knowledge as to consequences. Such a result is so unlikely that one must reject the proposition that whenever a statutory element can plausibly be characterized as a description of the "nature of conduct" it should be so treated. Yet a rule that tells us when elements should be regarded as consequences and when they should be treated as descriptions of conduct is not articulated anywhere in the Code, nor in the body of or commentary to the MPC, which proposes the same distinction.[46] In the absence of any such rule, I propose that the problem should be mooted by treating the two — if they are two — varieties of elements identically, allowing "practical certainty" to suffice as knowledge for either a consequential element or an element that appears to describe a sort of behavior. Moreover, Colorado should enact some version of the MPC language that equates practical certainty to knowledge for purposes of circumstances as well, to eliminate the unequal and confusing results that otherwise may ensue.[47]

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44. For a discussion of a similar problem that arises under the proposed revisions to the federal criminal code, see Feinberg, *supra* note 5, at 141.

45. COLO. REV. STAT. § 18-3-103(1) (repl. vol. 1978).

46. *See* MODEL PENAL CODE §2.02(2)(b).

47. See Appendix (proposed amended section 1-501(6)). Of course, the term "aware" in the Code could be *construed* to mean "practically certain", but this amendment offers a legislative solution.

## RECKLESSNESS AND NEGLIGENCE

It is sometimes asserted that imposing liability for recklessness exposes a discontinuity in the hierarchy of culpable mental states, inasmuch as the reckless actor's conduct only creates a risk, and is not directed either purposefully or indifferently to a certain goal.[48] Yet, as we have seen the mental state of "knowledge" as defined by the MPC drafters may be satisfied with respect to a consequential element if the actor is "practically certain" that his conduct will cause the result.[49] Recklessness, as the MPC defines it, represents only a quantitatively different mental state.[50] It is the attitude of one who is not almost certain that, but is aware of a high risk that, his conduct will cause the forbidden result; or, in MPC language, one who "consciously disregards a substantial and unjustifiable risk that the material element . . . will result from his conduct."[51]

Negligence as a basis for the imposition of criminal liability, on the other hand, is qualitatively different from the other three "culpable mental states." Criminal negligence is defined in Colorado as the mental condition of one who "fails to perceive a substantial and unjustifiable risk that [a] result will occur or that [a] circumstance exists."[52] So defined, negligence is not a subjective mental state at all; rather it is the absence of the mental state that a more reflective or cautious person would have had. But mere "civil" negligence is not sufficient for criminal liability under the Colorado definition, which is taken from the MPC. The negligence must occur through a "*gross* deviation from the standard of care that a reasonable person would exercise."[53] Hence criminal negligence, though akin to civil negligence in its objective nature, is far more culpable than its civil cousin.

Because it is measured objectively and does not describe any mental "event" in the mind of the defendant (unlike intention, knowledge, or recklessness), criminal negligence as a basis for liabil-

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48. *See, e.g.*, G. FLETCHER, RETHINKING CRIMINAL LAW 442 (1978). ("The basic cleavage in the states of mind used in criminal legislation is between those that focus on the actor's goal (willfulness, intention, purposefulness) and those that focus on the risk the actor creates in acting (recklessness and negligence).")

49. MODEL PENAL CODE §2.02(2)(b).

50. *See* G. WILLIAMS, *supra* note 31, at 56. ("Recklessness as a form of *mens rea* is some enlargement upon the requirement of intention, but not a considerable one.")

51. MODEL PENAL CODE §2.02(2)(c).

52. COLO. REV. STAT. §18-1-501(3) (repl. vol. 1978).

53. *Id. Compare* MODEL PENAL CODE §2.02(2)(d).

ity is controversial.[54] Nevertheless, the decision to retain it as a basis for liability for at least some crimes was made by the authors of the MPC and by several jurisdictions that revised their penal laws in the 1960s.[55] The Colorado experience with criminal negligence highlights an important principle of legislative drafting which must be considered if significant changes in the Code's *mens rea* provisions are attempted. The Code took negligence as a basis of liability one step further than other jurisdictions in an apparent blunder that eventually led to the judicial nullification of an important homicide statute. The blunder was the inclusion of negligence-like language in the original definitions of both "knowledge" and "recklessness."

The original definition of *recklessness* in the Colorado revision of 1971 provided that

> a person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware or reasonably should be aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such a nature and degree that disregard thereof constitutes a willful and wanton deviation from the standard of conduct that a reasonable person would observe in the situation . . . . "Willful and wanton" . . . means conduct purposefully committed which the person knew or reasonably should have known was dangerous to another's person or property, and which he performed without regard to the consequences or the rights and safety of another's person or property.[56]

This definition, a mishmash of fragments of the MPC concepts of recklessness ("conscious disregard"), purpose ("conduct purposefully committed"), and negligence ("or reasonably should have known"), must have been hopelessly confusing to the jurors who were instructed in it. The definition of 'knowingly" also permitted an objective construction; it was that "a person acts knowingly . . . when he is aware, *or reasonably should be aware,* that his conduct is of that nature or that the circumstance exists."[57] These misbegotten definitions were finally amended in 1977 after the Colorado Supreme

54. *See generally* G. WILLIAMS, *supra* note 31, at 122-24.

55. *E.g.*, CONN. GEN. STAT. ANN. §53A-3(14) (1969); ILL. REV. STAT. Ch. 38, §§ 4-6, 4-7 (1962); N.Y. PENAL LAW §15.05 (1965).

56. COLO. REV. STAT. §40-1-601(8) (Supp. 1971).

57. COLO. REV. STAT. §40-1-601(7) (Supp. 1971).

Court declared unconstitutional the manslaughter statute, which punished reckless killing, on the ground that the definition of recklessness made the offense indistinguishable from the less serious crime of criminally negligent homicide.[58] The amended definition of recklessness conforms substantially to the MPC formulation and treats recklessness as a subjective, rather than an objective, mental state, thus eliminating any confusion between it and criminal negligence.[59] The present formulation hence is satisfactory, with one exception. The definitions of both "recklessness" and "criminal negligence" refer to "results" and "circumstances," but make no mention of "conduct" elements. They need slight amendment to make them refer to all three categories of factual elements. In addition, the word "consequences" should be substituted for "results" to achieve consistency with the intention and knowledge sections.[60]

## RULES OF CONSTRUCTION

### *A. The "necessary mental state" canon*

Having established the definitions of the principal culpable mental states, the Colorado Criminal Code then provides several conventions or rules of construction to aid in the analysis of its substantive prohibitions. The first convention is that

> although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.[61]

This provision is breathtaking in its casualness after the mathemati-

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58. People v. Calvaresi, 188 Colo. 277, 534 P.2d 316 (1975).

59. The present provision reads: "A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that a result will occur or that a circumstance exists." COLO. REV. STAT. §18-1-501(8) (repl. vol. 1978).

60. See Appendix (Proposed amended sections 1-501(8) and 1-501(3)).

61. COLO. REV. STAT. §18-1-503(2) (repl. vol. 1978). The Comment discloses that this section is adopted from N.Y. PENAL LAW §15.05 and a provision of the Michigan proposal that was never enacted into law. The proposed federal criminal code revision contains a more precise canon of construction. It provides that if no mental state is designated by a particular substantive provision, the mental state required shall be "knowing" as to elements describing "conduct" and "reckless" as to circumstantial or consequential elements. *See* S. 1722, 96th Cong., 1st Sess., §303(b) (1979). This proposal is not without its difficulties, see note 44, but is more precise than the Colorado provision. The MODEL PENAL CODE prescribes a presumptive minimum requirement of "recklessness" as to all three sorts of elements in the absence of a different specification. MODEL PENAL CODE §2.02(3) (Official Draft 1972).

cal precision of the previous definitional sections. Having just understood that the various offenses would be specified as offenses requiring intention, knowledge, recklessness, criminal negligence, or strict liability, the reader now learns that he may have to guess which mental state or states are required by some enactments. Since most of the substantive criminal laws are specific about the mental state that they require, this provision normally need not be invoked, and its existence does aid in the resolution of some analytical problems. Verbs such as "pretend" (in a section prohibiting impersonating a peace officer)[62] carry with them an intrinsic requirement of "intention" or at least "knowledge;" an unintentional pretense is not imaginable. Other provisions, however, raise questions more difficult to resolve. Consider, for example, the provision concerning "Concealing death": its elements are "concealing the death of another person and thereby preventing a determination of the cause or circumstances of death."[63] The statute specifies no mental state. Does the gravedigger who buries a body as to which, unknown to him, the death certificate has been forged by the killer, commit this offense? We would like to hold that he does not, yet we cannot exculpate him unless we can interpret the statute to require some mental state. But the interpretive convention does not help much here, for the proscribed conduct — concealment — does not "necessarily involve" any culpable mental state. One can easily imagine unintentional, unknowing, nonreckless, even nonnegligent concealment. It seems likely that the Code's authors believed that this convention would aid in the defense of those like the unknowing gravedigger, but the provision does not literally prevent the reading of the "concealing death" statute as a strict liability enactment.

A more puzzling question is the treatment of possession offenses under this canon of construction. The definition of "voluntary act," a minimum requirement for a violation of any statute, provides that possession "includes possession of property if the actor was aware of his physical possession or control thereof for a sufficient period to have been able to terminate it."[64] Hence possession requires at a minimum that the actor know that he is in physical control of *something*. But consider this problem: Defendant, a convicted burglar on probation, is asked if he would be willing to keep a suitcase for a friend. Defendant agrees and takes the suitcase home, not knowing

62. COLO. REV. STAT. §18-8-112 (repl. vol. 1978).
63. COLO. REV. STAT. §18-8-109 (repl. vol. 1978).
64. COLO. REV. STAT. §18-1-501 (repl. vol. 1978).

that there is a firearm in it. Is Defendant guilty of violating section 12-108, which prohibits "any person previously convicted of burglary" from possessing (no mental state specified) a firearm? It may be argued that he is not, because he was not aware that a firearm was under his control (and hence not aware for long enough to terminate his possession). But a strict reading of the Code indicates that the "awareness" requirement is that he need only be aware of his control over *something,* but not of the exact nature of that which he controls. This reading is suggested by the observation that other possession statutes specify that they can be violated only by *knowing* possession;[65] there can be no difference between mere possession and knowing possession unless the former dispenses with the requirement that the actor be aware of the nature of the possessed item. Hence our unwitting ex-burglar must be convicted unless he can successfully argue pursuant to the "necessary mental state" rule that the idea of possession necessarily involves knowledge of the nature of the item possessed. But the specification of some offenses as offenses of *knowing* possession indicates that the authors of those provisions did not consider a knowledge requirement to be implicit in the notion of possession. In fact, Colorado cases decided under the narcotics laws, which are not part of the Criminal Code, do hold that the bare term "possession" requires knowledge of the character of the item possessed.[66] This confusing state of affairs could have been resolved by a precise specification of what, if anything, must be within the knowledge of an actor before he can be charged with "possession" of an item.[67] Reliance on a blunder-buss provision like the "necessary mental state" convention can only create uncertainty.

### *B. The canon of "universal application"*

Another convention of construction enunciated in the Code is the rule that "when a statute defining an offense prescribes as an element thereof a specified culpable mental state, that mental state is deemed to apply to every element of the offense unless an intent to limit its application clearly appears."[68] This provision is possibly even less helpful than the "necessary mental state" rule. Its general thrust is clear enough: a designated mental state should be required

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65. COLO. REV. STAT. §§18-12-102, -105 (repl. vol. 1978).

66. People v. Quick, 190 Colo. 171, 544 P.2d 629 (1976); People v. Larsen, 180 Colo. 140, 503 P.2d 343 (1972).

67. See Appendix (proposed amended section 1-503(2) and alternative proposed amended section 1-503(2)).

68. COLO. REV. STAT. §18-1-503(4) (repl. vol. 1978).

with respect to every element, not merely the element that appears closest to it in the grammatical structure of the statute. Hence the language of the second-degree kidnapping statute, which provides that a person who "knowingly, forcibly, or otherwise seizes and carries any person from one place to another, without his consent and without lawful justification, commits second-degree kidnapping,"[69] should be read to require proof that a defendant knew that he was seizing or carrying a person, and further knew that his conduct was not justified and not consented to by the victim. This reading entails the acquittal of any defendant who believed that his conduct was legally justified or that his victim consented to be seized or carried, even if he was mistaken in his belief.

The boundaries of the canon are limited by the proviso "unless an intent to limit its application clearly appears." These boundaries are very difficult to chart. Perhaps the most ambiguous provisions of the Code in this respect are those concerning unlawful sexual behavior. For example, a provision concerning first degree sexual assault says, "Any actor who knowingly inflicts sexual penetration on a victim commits a sexual assault in the first degree if . . . the victim is physically helpless and the actor knows the victim is physically helpless and the victim has not consented."[70] Consider the possible guilt, under this statute, of one who has intercourse with a person whom he knows to be physically helpless (perhaps because of intoxication or unconsciousness) but whom he also believes to have consented to intercourse. One is first tempted to argue that since the adverb "knowingly" appears early in the definition, it must apply to all elements of the offense, including the final element of nonconsent, and hence that such an actor is not guilty. But a closer look at the structure of the prohibition reveals that its authors thought it necessary to require separately that "the victim is physically helpless and that "the actor knows that the victim is physically helpless." These separate provisions should not have been necessary unless the original adverb "knowingly" was intended to modify solely the element of "sexual penetration" (*i.e.*, the actor must have known that he was engaged in sexual penetration); otherwise, it would be repetitive to specify as a separate element the actor's knowledge of the victim's helplessness. This choice of words arguably reveals with respect to the original modifier "knowingly" that "an intent to limit its application clearly appears." Therefore the defendant who mistakenly be-

69. COLO. REV. STAT. §18-3-302 (repl. vol. 1978).
70. COLO. REV. STAT. §18-3-402 (repl. vol. 1978).

lieves that his victim consented would be convicted. The defendant, however, has a further argument: he can urge that the phrase "the actor knows the victim is physically helpless and the victim has not consented" implies the existence of the actor's knowledge of both helplessness and nonconsent. But on that reading, the earlier phrase "the victim is physically helpless," which expressly requires the existence of helplessness, would become superfluous. The language is a hopeless muddle, and the rule of universal application is too vague to resolve the ambiguities.

Adding to the enigmas of the unlawful sexual conduct provisions is their treatment of the *mens rea* necessary with respect to the age elements of their "statutory rape"-like sections. For example, an actor commits second-degree sexual assault if he "knowingly inflicts sexual penetration or sexual intrusion on a victim" and "the victim is less than fifteen years of age and the actor is at least four years older than the victim."[71] One question is whether the guilty defendant must *know* either (a) that his victim is less than fifteen or (b) that he is at least four years older that she. Put another way, the puzzle is whether the "knowingly" requirement stated at the outset follows the statute all the way through the victim's age and the age differential elements. The Code's authors were apparently aware that question (a) would frequently arise, and so they dealt with it specifically in other provisions, which unfortunately do not resolve it. Section 3-406 provides: "If the criminality of conduct depends upon a child being below the age of fifteen, *it shall be no defense* that the defendant did not know the child's age or that he reasonably believed the child to be fifteen years of age or older." But section 3-411 provides: "When criminality depends upon the child's being below a critical age other than under sixteen, *it is an affirmative defense* for the defendant to prove that he reasonably believed the child to be above the critical age." Each of these sections would seem to apply, and they lead to exactly opposite results.

Beyond this tangle, uncertainty plagues cases such as that of the seventeen-year-old defendant who believed (reasonably or not) that his twelve-year-old sexual partner was fourteen. There is no quarrel that he knew that she was under fifteen, but he did *not* know that he was more than four years older than she. Does his lack of knowledge on that point provide him with a defense? If his defense is that he "did not know the child's age," then section 3-406 offers him no

71. COLO. REV. STAT. §18-3-403 (repl. vol. 1978).

help, but his claim is somewhat different: that he did not know the *difference* between their ages. The principle of universal application offers no obvious solution.

Although canons of construction can be useful if properly formulated, they are hazardous. Legislators, knowing that the canons are available to fill in the chinks left by their ambiguous choices of language, may take less care in writing substantive prohibitions. This seems to have happened in the Colorado Criminal Code. The Code would be approved if each substantive prohibition were unambiguous about the *mens rea* required for each element of the prohibition.[72]

## IGNORANCE AND MISTAKE

The Colorado provisions concerning ignorance and mistake are taken, according to the Comments of the drafters, from identical New York provisions. As Glanville Williams remarked, the rule related to mistake "is not a new rule; and the law could be stated equally well without reference to mistake . . . . It is impossible to assert that a crime requiring intention or recklessness can be committed although the accused laboured under a mistake that negatived the requisite intention of recklessness. Such an assertion carries its own refutation."[73] The "rule" to which he referred is embodied in the Code's section 1-504(a); a mistaken belief of fact is a defense if "[i]t negatives the existence of a particular mental state essential to commission of the offense." Hence if first-degree sexual assault requires that the actor *know* that his victim has not consented, then the actor's mistaken belief that consent has been given will exonerate him; if no such knowledge is required, because the element of nonconsent is a strict liability element, then the actor's mistake is irrelevant to his guilt. This part of the statute is unobjectionable, if unnecessary, as are the accompanying provisions holding that a mistake of fact will absolve a defendant if the statute defining the offense specifically makes such a mistake an excuse, or if the mistake would support a defense of justification.[74]

The more problematic mistake provisions concern the significance of an actor's mistaken belief that his conduct "does not, as a matter of law, constitute an offense." Such mistakes will not relieve the actor of liability, according to the Code, unless the actor's con-

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72. See Appendix (proposed amended section 1-503(4)).

73. G. WILLIAMS, CRIMINAL LAW 137 (1953), *quoted in* MODEL PENAL CODE §2.04, Comment (Tent. Draft No. 4, 1955).

74. COLO. REV. STAT. §18-1-504(1)(b),(c) (repl. vol. 1978).

duct has been condoned or authorized by certain authoritative sources of legal power.[75] As to mistakes about the existence or scope of the legal prohibition that the actor is charged with violating, this rule is conventional and unexceptionable. But it leaves in doubt the guilt of an actor who, because he has made some *other* sort of legal mistake, does not have the mental state required by a substantive prohibition. For example, consider the theft statute, some elements of which are that the actor "knowingly obtains or exercises control over anything of value of another."[76] We know from the canon of universal application[77] that the guilty defendant must know that he is exercising control over something, that the something has value, and that the something belongs to another. What, then, of the actor who knowingly exercises control over something he knows to be valuable, but which he believes, because of a legal error, to belong to himself? He may, for example, be a landlord who mistakenly believes that he has a right to seize a tenant's property for nonpayment of rent. It is possible to characterize the actor as one who has a mistaken belief that his conduct does not, as a matter of law, constitute an offense. And if that characterization is correct, then the statute seems to say that his mistake is no defense, since it was not prompted by any official legal advice or permission.[78] Thus according to the statute he is guilty notwithstanding that he quite plainly did *not* have the mental state required by the statute defining the offense of theft. This result seems at least wrong, if not unconstitutional.[79] Moreover, it may not have been intended by the Legislature or its authors. Nevertheless, it is certainly a defensible reading of the mistake statute. An amendment is needed to make clear that legal mistakes that are inconsistent with the mental state required by a statute defining an offense will exonerate a defendant who makes them. The requirement that the mistake proceed from an official ruling, interpretation, or permission should not apply to such mistakes.

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75. COLO. REV. STAT. §18-1-504(2) (repl. vol. 1978).

76. COLO. REV. STAT. §18-4-401 (repl. vol. 1978).

77. See text accompanying notes 68-69 *supra*.

78. According to Section 1-504(b), a violator of the law will be excused if his mistake of law is based on (a) a statute or ordinance binding on the state; (b) an administrative regulation, order, or grant of permission by a body or official authorized and empowered to make such an order or grant the permission under the laws of Colorado; or (c) an official written interpretation of the statute or law relating to the offense made by a person or agency charged with the responsibility for administering the law, providing that if the interpretation is by judicial decision it must be binding in Colorado. COLO. REV. STAT. §18-1-504(b) (repl. vol. 1978).

79. *Cf.* Patterson v. New York, 432 U.S. 197 (1977).

On the other hand, mistakes about the existence or scope of a criminal prohibition normally should not excuse their maker; this proposition is the most sensible view of the venerable principle that ignorance of the law is no excuse. But it is not because the mistakes are *legal* ones that they are irrelevant; it is because they do not negate the existence of a required element of the offense. It is not usually an element of a criminal offense that the defendant know of the law that creates and defines the offense. Hence his ignorance of its existence or mistake as to its scope is not inconsistent with his having every mental state required by the prohibition. The Code, like the MPC and other codes, did choose to afford a limited defense to those who suffer from this brand of mistake or ignorance by excusing them if their mistake was based on official legal advice or permission—and this represents a sensible policy choice.[80] But there is no justification for imposing the same limitations on the defense of one whose mistake of *law* is incompatible with his satisfaction of all of the elements of an offense. The MPC, which provides that a mistake of fact *or law* is a defense if it negatives the mental state specified for an offense,[81] might be the model for a revision of this Colorado statute.

The ignorance-and-mistake statute contains one other significant flaw. Its subsection (3) provides: "Any defense authorized by this section is an affirmative defense."[82] In Colorado, designation of some factor as an "affirmative defense" requires that the defendant, in order to "raise the issue," present "some credible evidence" on the issue.[83] Once the defendant carries this burden of production, the prosecution must establish guilt as to that issue beyond a reasonable doubt; hence the prosecution has the burden of persuasion on that issue.[84] Yet it seems doubtful that the legislature really intended to

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80. This is not to say that Colorado's provision concerning legal mistakes sanctioned by an official source is problem-free. It is unclear concerning who is a "public servant . . . legally charged or empowered with the responsibility of administering, enforcing, or interpreting a statute, ordinance, regulation, or law" and concerning what is an "official written interpretation." (Could a letter from a policeman suffice as a defense?) Furthermore, it does not appear to require any actual reliance on or knowledge of the permissive interpretation by a lawbreaker; he apparently could enjoy the defense even if he only learned of the interpretation or permission *after* committing the crime.

81. MODEL PENAL CODE §2.04(1).

82. COLO. REV. STAT. §18-1-504(3) (repl. vol. 1978).

83. COLO. REV. STAT. §18-1-407 (repl. vol. 1978).

84. Some other jurisdictions require defendants to carry the burden of persuasion as to affirmative defenses; that is, the jury must convict the defendant if it is not persuaded that the defense has been proven and the other elements of the crime have been established. *See, e.g.*, TEX. PENAL CODE ANN. §2.04 (1974). But as to a mistake, of fact *or* law, that is inconsistent with the defendant's satisfaction of a necessary mental element of the offense with which he is

place the burden of production on defendants as to all of the mental elements of all offenses in the Code; and that is the practical effect of 1-504(3).[85] A more likely hypothesis is that only those mistakes of law that do *not* negate a required mental element (and hence that excuse only if made pursuant to official advice or permission) were meant to be designated as "affirmative defenses." It is perfectly sensible to require a defendant, who makes the claim that he has been misled or deceived by an official source about the statute he is claimed to have violated, to present some credible evidence in support of that claim before requiring the prosecution to disprove the claim beyond a reasonable doubt. The statute should, then, be amended to designate only such limited "mistake" defenses as "affirmative defenses;" as other other mistake defenses the prosecution should have the burdens of both production and persuasion.[86]

## *Mens Rea* AND ACCOUNTABILITY

The Colorado Criminal Code uses the term "accountability" to describe the notion that the conduct of one person may be the basis for the criminal liability of another person. There are several situations in which an individual not the actor may be held accountable for an actor's behavior. One situation is when he is "made accountable . . . by the statute defining the offense or by specific provision of [the] code."[87] This provision is tautological, but unobjectionable.

A second variety of accountability attributes the behavior of another to an individual who "acts with culpable mental state sufficient for the commission of the offense in question and . . . causes an innocent person to engage in such behavior."[88] An "innocent person" is defined as one who is

> not guilty of the offense in question, despite his behavior, because of duress, legal incapacity or exemption, or unaware-

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charged, it would be unconstitutional to require him to carry the burden of persuasion. This is so because the Supreme Court has ruled that the Constitution requires the prosecution to prove every material element of a criminal offense beyond a reasonable doubt. Mullaney v. Wilbur, 421 U.S. 684 (1975); *contra* Patterson v. N.Y., 432 U.S. 197 (1977). Since Colorado would not impose the burden of persuasion on such a defendant, but only the burden of producing "some credible evidence" on the issue, there most likely is no constitutional violation. *See* Sandstrom v. Montana 442 U.S. 510, (1979); Barnes v. U.S., 412 U.S. 837 n. 11 (1973).

85. In effect, every simple denial of the requisite mental state involves a claim of mistake. The defendant pleads that he did not know his conduct would produce a certain result, for example.

86. See Appendix (proposed amended section 1-504).

87. COLO. REV. STAT. §18-1-602(1)(a) (repl. vol. 1978).

88. COLO. REV. STAT. §18-1-602(1)(b) (repl. vol. 1978).

> ness of the criminal nature of the conduct in question or of the defendant's criminal purpose, or any other factor precluding the mental state sufficient for the commission of the offense in question.[89]

This formulation covers situations such as the one in the well-known case of *United States v. Bryan*.[90] In that case, the evidence suggested that Bryan had persuaded his codefendant Echols, who was acquitted because he might have been an innocent dupe, to take several hundred cases of stolen liquor from a pier; Bryan appealed his conviction, contending that he could not be convicted on a theory of aiding and abetting if the principal, Echols, was innocent of any crime. Although the court of appeals affirmed Bryan's conviction, it had to resort to some dubious logic to do so. The Colorado statute would lead directly to the same result.

On the other hand, the Colorado formulation can be criticized because its definition of "innocent person" fails to distinguish between actors who are innocent because they have a special relationship to the victim and those who are innocent because they enjoy some other defense. This failure might lead to the conviction of some persons who should not be treated as criminals. For example, suppose that A is a friend of B, whose wife, C, has refused lately to have intercourse with B. A advises B to force C to have sex with him, which advice B accepts. The quoted provisions might be used to argue that A is guilty of first degree sexual assault. B is of course not guilty, because he falls within the marital exception to the sexual assault statute.[91] But this merely amounts to a finding that B is an "innocent person," because he is "not guilty of the offense . . . despite his behavior, because of . . . legal incapacity or exemption."[92] Since A is not exonerated by B's innocence, he may be convicted as one who "acts with the mental state sufficient for the commission of the offense" and "causes an innocent person to engage in . . . behavior."[93] This result seems absurd, and was probably not contemplated when the statute was written. Nevertheless, the statutory language does not clearly preclude A's conviction.

In this case, the actual actor is not guilty of the offense, not because he lacks a necessary mental state or the volition to act other

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89. COLO. REV. STAT. §18-1-602(2) (repl. vol. 1978).
90. 483 F.2d 88 (3rd Cir. 1973).
91. COLO. REV. STAT. §18-3-409; 18-3-402(1),(2) (repl. vol. 1978).
92. See note 89 *supra*.
93. See note 88 *supra*.

than as he does, but because he stands *factually* in a special relation to his "victim." Persons who cause or encourage such actors to behave in ways that would be criminal but for this special relation should not be regarded as criminals; that is, the existence of the special factual relationship should exonerate the instigator as well as the actual actor. A slight amedment to the statutory language should be sufficient to achieve this clarification.[94]

The third variety of accountability established by the Code is "complicity." The complicity provision states: "A person is legally accountable as a principal for the behavior of another constituting a criminal offense if, with the intent to promote or facilitate the commission of the offense, he aids, abets, or advises the other person in planning or committing the offense."[95] Seemingly straightforward, this language conceals some complications. The notion of "intention to promote or facilitate the commission of an offense" is an unsatisfactory one. What of the liability, for example, of a person who knowingly or recklessly aids another in some conduct that constitutes an offense of recklessness? As an example of knowing complicity, suppose that A lends B a gun which B then uses to commit robbery, which is defined as knowingly taking anything of value from the person or presence of another by the use of force, threats, or intimidation.[96] Can A be guilty as an accomplice if he knew that B intended to use the gun to rob? Or consider an example of reckless complicity: A person commits fourth degree arson if he knowingly or recklessly starts or maintains a fire that places a building or occupied structure in danger of damage.[97] Suppose that D asks C to lend him a match, and C knows that D is a pyromaniac; D then uses the match to start a fire that endangers a building. D is certainly guilty of fourth degree arson, but is C? C acted recklessly, so he entertained the mental state necessary to the commission of the offense as did A in the earlier example. But it cannot be said that either A or C acted "with intent to promote or facilitate the commission of the offense." Hence, A and C would not be guilty as accomplices in Colorado.

The resolution of this question under the MPC's more elaborate formulation is uncertain. The American Law Institute rejected a suggestion, incorporated into several early drafts of the MPC, that one could become an accomplice by "knowingly, substantially" facil-

94. See Appendix (proposed amended section 1-602).
95. COLO. REV. STAT. §18-1-603 (repl. vol. 1978).
96. COLO. REV. STAT. §18-4-301 (repl. vol. 1978).
97. COLO. REV. STAT. §18-4-105 (repl. vol. 1978).

itating the commission of an offense.[98] This rejection seems to evidence their sentiment that only a *purpose* to see a crime committed should qualify an aider or abettor as an accomplice. Yet the MPC complicity provision goes on to provide,

> When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense, if he acts with the kind of culpability, if any, with respect to that result, that is sufficient for the commission of the offense.[99]

This language seemingly leads to the conviction of the reckless aider and abettor for the crimes of recklessness, and the knowing aider and abettor for the crimes of knowledge, that he has facilitated.

It may be that the authors of the Colorado Code meant to exclude criminal liability for aiders, abettors, and advisors except for those who act with purpose toward every element of the facilitated offense; if so the language they chose seems to accomplish this goal. On the other hand, Colorado cases prior to the new Criminal Code establish the principle that a *knowing* aider or facilitator may be liable as an accomplice, even apparently for crimes of intention or purpose.[100] More importantly, it is arbitrary, to return to the example of fourth degree arson, to punish the reckless principal but exonerate the reckless aider. This arbitrariness is even more apparent when one considers that a slight change in the wording of the arson statute, from "starts or maintains a fire," to "causes a fire to be started or maintained," would lead to the result that the supplier of the match is guilty—not as an accomplice, but as a principal actor. Yet writing an acceptable complicity statute is no easy task. The varieties of aiding and abetting that can be imagined are innumerable; some intuitively seem to deserve punishment and others do not.

In jurisdictions that rely on common-law complicity doctrines, there are few cases concerning knowing or reckless complicity; the few that do exist principally address the liability of knowing suppliers of good and services necessary or helpful for the commission of an offense. The well-known California case *People v. Lauria*[101] treats

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98. *See* MODEL PENAL CODE §2.04(3)(b) (Tent. Draft No. 1, 1953); *compare* MODEL PENAL CODE §2.06(3) (Tent. Draft No. 4, 1955). The status comment to the Fourth Draft indicates that the Institute disapproved of the "knowing facilitation" formulation and voted to delete it. *See* MODEL PENAL CODE §2.06(3) (Official Draft 1962).

99. MODEL PENAL CODE §2.06(4) (Official Draft 1962).

100. *See* People v. Lamirato, 180 Colo. 250, 504 P.2d 661 (1972); Griffin v. People, 44 Colo. 533, 9 P. 321 (1908).

101. 251 Cal. App. 2d 471, 59 Cal. Rptr. 628 (1967). *See* discussion in W. LAFAVE &

the issue of the knowing supplier by suggesting factors that might permit his conviction as a coconspirator to the crime; those same factors might bear on the appropriateness of accomplice liability for such a supplier. The factors identified by the *Lauria* court include (a) whether the goods or services were supplied at a "grossly inflated price;" (b) whether no legitimate use for the goods and services exists; (c) whether the volume of the enterprise's business with the supplier is "grossly disproportionate to any legitimate demand;" and (d) whether the crime that the supplier knows he is facilitating is a serious one.[102] The *Lauria* court's formula would permit conviction of the supplier when any one of the factors is present, and may be criticized as unduly rigid concerning the relevant factors. I would suggest a more flexible rule, which would give a jury discretion to convict a knowing aider or abettor as an accomplice when conviction is commensurate with the blameworthiness of his behavior. The *Lauria* factors might be suggested to the jury as factors that can be taken into account in making this determination.[103]

But the possibility of accomplice liability for a knowing aider should not be limited to merchants. Gratuitous suppliers of goods, services, information, or encouragement might be candidates for accomplice liability in certain cases. Such cases will not often arise because, if the commercial motive is absent, one is unlikely knowingly to give aid to a criminal enterprise without some intention or purpose that the crime be executed. But examples can be imagined: providing a ride to a friend who is known to be on his way to rob a store; leanding an apartment to a friend who says that he wants to use it to seduce a fourteen-year-old.

We would not want to punish *all* such aid, whether commercial or gratuitous. A factor not mentioned in *Lauria* that seems relevant is the importance of the aid rendered to the success of the criminal enterprise. We are more reluctant to treat the governess or janitor in the Mafia compound as an accomplice, even if he knows of the crimes of his employer, than we are the getaway driver or the firearm merchant. In any event, probably no mathematical specification of the factors that should lead to liability is possible; the common sense of the jury, perhaps guided by some mention of illustrative factors, must sort out the accomplices from the innocent. Although this proposal results in a large amount of jury discretion, many other is-

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A. SCOTT, CRIMINAL LAW 467 (1972).

102. 251 Cal. App. 2d at 478-80, 59 Cal. Rptr. at 632-34.

103. See Appendix (proposed amended section 1-603).

sues — such as causation — are determined by the jury in a highly individualistic way. It is better to leave the resolution of issues that require application of complex social norms to jurors' discretion than to force it into ill-fitting molds.[104]

The reckless aider and abettor presents a similar problem. The reckless aider or supplier of a criminal enterprise is blameworthy, but not as blameworthy as a principal actor who acts with intention or knowledge. In the fourth-degree arson example, the reckless supplier of the match is as blameworthy as his reckless principal; but if the principal acted intentionally or knowingly, and destroyed a building, we should be reluctant to convict the reckless match-lender as his accomplice in first-degree arson. I suggest that one who gives aid or advice to another, reckless toward the possibility that his aid or advice will contribute to the other's commission of a crime, should be equally guilty as an accomplice only if the crime committed is a crime of recklessness and if accomplice liability is appropriate in his case, taking the various factors into account. Hence one who lends his car to a drunkard, reckless about the possibility that the drunk will kill someone, may be the drunkard's accomplice in manslaughter. On the other hand, one who lends his car to a killer, callously disregarding the strong likelihood that the killer will use it to commit a murder, should not be regarded as the killer's accomplice in murder. He should not, however, be entirely innocent of criminal liability. The result that makes the most sense is to convict him of the crime of recklessness that corresponds to his principal's crime of intention or knowledge, if there is one.[105] Hence the reckless car-lender may be guilty of manslaughter whether his principal acts intentionally, knowingly, or recklessly; it is appropriate for his liability to be the same in each case, since in each case he adverted to the risk that his conduct would contribute to a death and chose to act in disregard of the risk. In considering his liability, the jury should have the same

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104. A limitation on the liability of knowing accomplices is that they should not be punished for crimes of intention, such as first-degree murder of the intent-to-kill variety. But a knowing aider or abettor of a first-degree murderer may be guilty, under the formulation of the Appendix, of *second*-degree murder or knowing killing.

105. Of course the car-lender may be guilty of involuntary manslaughter as a principal without reference to the law of complicity, if his conduct is closely enough connected to the ensuing death to satisfy the causation requirement. This possibility of principal liability that bypasses the accomplice issue will exist whenever the sort of conduct that need be engaged in is not specified by the statute, as in the case of manslaughter. But accomplice liability remains an important question because some statutes *do* require that particular sorts of conduct occur—for example, burglary, sexual offenses, and arson. Liability as a principal is not a possibility for one who aids and abets but does not personally commit that sort of conduct.

discretion it exercises concerning knowing accomplices.[106]

This analysis works as well for circumstantial as for consequential elements. Hence if recklessness toward the existence of a circumstance is sufficient for the liability of a principal to an offense, it should usually be sufficient to convict an aider, abettor, or supplier of the same offense as the principal. For example, one who takes or entices a child from the custody of his parents, "knowing he has no privilege to do so or heedless in that regard," commits the crime of violation of custody.[107] One who encourages another to take a child, reckless toward the prospect that the other has no privilege to do so, ought to be guilty of the same crime. But if the offense requires knowledge or intention toward a surrounding circumstance, the reckless aider or abettor should not be guilty of that offense. For example, if A encourages or aids B to take property that belongs to another, and B knows that the property is another's but A is only reckless in that regard, B is guilty of theft but A should not be. If there were an offense of taking property of another with recklessness toward that circumstance, then A could be guilty of it; but no such offense exists in Colorado.

This discussion of *mens rea* and accomplice liability has so far ignored a problem that sometimes arises: the *mens rea* needed for accomplice liability for crimes that are strict liability offenses as to some circumstantial element. For example, section 7-407 defines the crime of Patronizing a Prostituted Child, *inter alia,* as engaging "in an act which is prostitution of a child or by a child."[108] There is no requirement that the customer know that the prostitute he patronizes is a child (defined as a person under eighteen years of age). Consider the case in which A gives B the money to pay C, who is a child prostitute; assume that A's purpose is to enable B to have sex with C, but that both A and B are unaware that C is a child. B, if he does patronize C, is plainly guilty of patronizing a prostituted child, but is A guilty as his accomplice?

Under the current formulation, A's unawareness of C's age makes it impossible that he "intended to promote or facilitate" the offense of patronizing a prostituted child. Hence A cannot be guilty as an accomplice. But if, under a revised complicity statute, knowing or reckless aiding, abetting, or advising can constitute complicity under certain circumstances, there is a theory on which A can be

106. See Appendix (proposed amended section 1-603).
107. COLO. REV. STAT. §18-3-304 (repl. vol. 1978).
108. COLO. REV. STAT. §18-7-407 (repl. vol. 1978).

liable. If A is reckless about the possibility that C is a child, then he can be guilty as an accomplice to a crime for which recklessness or some lesser mental state is sufficient as to the element of age. Hence, since age is a strict liability element for this particular offense, A can be guilty. This is a sensible result, since A would appear to be as blameworthy as B in the case described.

In summary, a revision to the complicity statute is called for, under which a knowing or reckless aider or abettor may be guilty as a principal if the jury finds that such liability is commensurate with his blameworthiness, and if he has the mental state necessary to the commission of the substantive offense. The revision should further provide that if he does not have every necessary mental state, the aider or abettor may be guilty of the crime of knowledge or recklessness that corresponds to the crime of intention or knowledge committed by the principal.[109]

### *Mens Rea* AND RESPONSIBILITY

The Colorado Criminal Code recognizes several sorts of disabilities that may render a person not guilty of a crime: insufficient age, insanity, "impaired mental condition," and intoxication. The provisions concerning insufficient age are clear: children under the age of ten are not criminally responsible for their conduct, and children between ten and eighteen should be treated according to the provisions of the Children's Code.[110] Equally conventional is the insanity provision. Persons who establish their insanity at the time the offense was commited are not criminally responsible, but they must raise the issue of their sanity by special plea.[111]

The sections concerning "impaired mental condition" and "intoxication" are more troublesome. The former provides: "Evidence of an impaired mental condition though not legal insanity may be offered in a proper case as bearing upon the capacity of the accused to form the specific intent if such an intent is an element of the offense charged."[112] Hence a person charged with first degree murder, of which an "intent to cause the death of a person" is an element, may

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109. See Appendix (proposed amended section 1-603).

110. COLO. REV. STAT. §18-1-801 (repl. vol. 1978).

111. COLO. REV. STAT. §18-1-802 (repl. vol. 1978). This is not to say that the Colorado insanity provisions have no unique or controversial aspects. Indeed, Colorado's bifurcated-trial insanity proceedings, in which the issue of sanity is tried before the issue of factual guilt or innocence, give rise to many serious legal issues, but it is beyond the scope of this essay to consider them.

112. COLO. REV. STAT. §18-1-803 (repl. vol. 1978).

introduce evidence of mental impairment to show that he had no such intent when he acted. But, by negative implication, such evidence would be inadmissible, except to the extent it supported a plea of insanity, if the same person were charged with second degree murder (knowingly causing the death of a person) or manslaughter (recklessly causing the death of a person) because those offenses are crimes of "general intent" rather than "specific intent."[113]

A similar, but somewhat more complicated, rule governs evidence concerning the intoxication of a person who engages in criminal conduct. Generally, intoxication is relevant to criminal liability in only two situations: first, when it was not "self-induced" and is offered to show that the actor lacked capacity to conform his conduct to the requirements of law, in which case it is a defense;[114] second, when it "is relevant to negative the existence of a specific intent if such intent is an element of the crime charged."[115]

These provisions present a number of practical, logical, and constitutional problems. Initially, it is hard to see precisely how the prohibition against receipt of any evidence of mental impairment or intoxication except concerning specific intent crimes is to operate. Suppose the defendant in a second degree murder case testifies that he did not know that he would kill his victim when he hit him, and the prosecutor on cross-examination asks, "How could you fail to know that he would die when you hit him with a cue stick hard enough to fracture his skill?" The defendant would like to answer that he was intoxicated, but his answer would bring in evidence of intoxication to negative the existence of knowledge, a "general intent," and hence apparently would be prohibited by the statute. Yet it is hard to imagine that the judge would forbid the defendant to answer the question at all. It seems equally unlikely that the prosecutor's question would be forbidden.

Whatever the uncertainties of the rule as to the admissability of the defendant's own testimony concerning intoxication and mental impairment, the rule would plainly prohibit expert psychiatric testimony concerning the defendant's mental impairments in the trial of a general intent crime unless the defendant has pleaded insanity. This limitation is illogical in cases in which the psychiatric testimony is truly relevant to the question of whether the defendant had the necessary mental state. To use a classic example, suppose the defen-

113. See text accompanying notes 32 & 33 *infra*.
114. COLO. REV. STAT. §18-1-804(3) (repl. vol. 1978).
115. COLO. REV. STAT. §18-1-804(1) (repl. vol. 1978).

dant suffers from a delusion that causes him to believe that he is squeezing lemons when in fact he is squeezing the neck of his victim, who dies from strangulation.[116] Under the Colorado statute, if the defendant is charged with first-degree murder, psychiatric testimony concerning his delusion will be admissible, since it bears on the question of whether he had the "specific intent" required by the first degree murder statute, *i.e.*, intent to cause the death of another. But if the same defendant is charged with second-degree murder, which requires only the "general intent" of *knowledge* that death will result from his conduct, the psychiatric testimony will not be permitted (unless the defendant interposes an insanity defense). Yet the defendant's delusion is inconsistent with his knowledge that the victim would die, just as it is inconsistent with an intention to kill.

It may be argued that the prohibition of evidence of mental impairment to disprove knowledge or recklessness is unconstitutional as well as illogical. Certainly due process values are threatened when a criminal statute requires that the prosecution prove a certain element, but forbids a defendant from introducing evidence relevant to the question of whether the element was present. The Colorado Supreme Court has considered this constitutional question as well as questions of statutory interpretation in the settings of both intoxication and impaired mental condition.

In *People v. Cornelison*,[116.5] the first case to discuss the question of the admissibility of evidence of mental impairment due to intoxication to disprove mental state, the Colorado Supreme Court was faced with the task of reconciling apparently contradictory statutory provisions. At the time the case arose, the definition of second-degree murder was causing the death of a person "intentionally, but without premeditation"; hence, second-degree murder was a "specific intent" crime as that term is now used in the Colorado Code.[117] Yet the second-degree murder statute went on to provide: "Diminished responsibility due to lack of mental capacity is not a defense to murder in the second degree." This limitation clashed with the impaired mental condition and intoxication statutes, which provided then, as now, that evidence of such states could be introduced when relevant to the existence of "specific intent." The court attempted to reconcile

116. See MODEL PENAL CODE §4.01, Comment (Tent. Draft No. 4, 1965).

116.5. 192 Colo. 337, 559 P.2d 1102 (1977).

117. At the time of the *Cornelison* decision, no definition of "specific intent" appeared in the Criminal Code; but the *Cornelison* court found that a crime of intention is a specific intent crime. This holding is consistent with the definition of "specific intent" that was later enacted at §18-1-501(5).

the provisions by construing their combined effect to be that evidence of intoxication or impaired mental condition could be introduced to disprove specific intent, but that neither would provide a defense unless the evidence succeeded in disproving such intent. Any other outcome, the court said, would deprive a defendant of his due process right to require proof of every element of the offense beyond a reasonable doubt.[118] Hence without finding the limitation embodied in the second-degree murder statute unconstitutional, the court construed it away into meaninglessness to avoid that result.

The Legislature, apparently displeased with the result, subsequently amended the second-degree murder statute in two respects. The term "knowingly" was substituted for the term "intentionally," transforming second-degree murder into a "general intent" crime; and the second section was expanded to provide that "Diminished responsibility due to a lack of mental capacity or *self-induced intoxication* is not a defense to murder in the second degree."[119] Even without the second section's emphasis, the substitution of a "general intent" mental state made clear that evidence of intoxication or impaired mental condition was inadmissable to disprove the mental state.

With no room left for construction of the statute as it applied to second-degree murder, the Supreme Court next addressed the constitutionality of the statute's limitations on the use of evidence concerning mental condition. In *People v. Campbell,*[120] the defendant challenged a trial court ruling that evidence of impaired mental condition could not be presented in the defense of a charge of second-degree murder. The defendant argued that the statutes on which the ruling was predicated were unconstitutional, and the Supreme Court initially agreed, converting its *Cornelison* dictum into a holding that the restrictions were "tantamount to lessening the burden of proof which the prosecution is constitutionally required to bear."[121] The *Campbell* opinion, however, was withdrawn shortly after it was issued; a new opinion, which declined on procedural grounds to reach the constitutional question, was substituted.[122]

Fourteen months after the first *Campbell* opinion, the Supreme Court again considered the question of the constitutionality of limi-

118. 192 Colo. at 340, 559 P.2d at 1105.

119. COLO. REV. STAT. §18-3-103(1)(a),(2) (repl. vol. 1978).

120. 196 Colo. 390, 589 P.2d 1360 (1978).

121. 7 COLO. LAWYER 2218, 2221 (December 1978).

122. See note 120 *supra.*

tations on use of evidence of both intoxication and diminished capacity in *People v. DelGuidice.*[123] DelGuidice was tried for first-degree murder, and the jury was instructed that second-degree murder was a lesser included offense of which he could be convicted. The judge further instructed the jurors that the evidence of intoxication that they had heard was relevant to the first-degree murder charge but would not be relevant to the defendant's liability for second-degree murder. The defendant made the same argument on appeal as had Campbell before him, claiming that the limitation embodied in the instruction deprived him of due process. A divided Supreme Court rejected DelGuidice's argument with the observation that the rule challenged "is supported by weighty policy choices about the extent of which drunkenness can excuse criminal responsibility."[124]

The Court's decision in *DelGuidice* does not really confront the essential constitutional issue. Certainly there is some policy support for a rule that would have the law express its disapproval of drunkenness by denying the benefits of a certain criminal defense to the voluntarily intoxicated. It is less easy to discern the arguments in favor of a rule that would afford the blameless mentally ill the same treatment. But neither rule is consistent with the due process right of a criminal defendant to present evidence in his own behalf. So long as the knowledge that one is causing a death is an element of second-degree murder, defendants should be permitted to introduce evidence relevant to the question of whether they in fact entertained such knowledge. If the law's aim is to punish the voluntarily intoxicated or the mentally incapacitated by holding them strictly liable for the consequences of their actions, then statutes may be written that directly accomplish that result.

Despite these practical, logical and constitutional problems, two arguments are sometimes advanced for the rule excluding psychiatric testimony except as related to insanity or "specific intent." Such a rule may reflect judicial experience that psychiatric testimony is rarely helpful on the question of whether a defendant has a "general intent."[125] But it is not clear that psychiatric testimony is any less helpful in determing whether a defendant was "aware" of a consequence or cirumstance (or the substantial and unjustifiable risk of

123. 606 P.2d 840 (Colo. 1979).

124. *Id.* at 844.

125. *See, e.g.*, Dix, *Psychological Abnormality as a Factor in Grading Criminal Liability: Diminished Capacity, Diminished Responsibility, and the Like*, 62 J. OF CRIM. L., CRIM., & POLICE SCIENCE 313, 324-27 (1971).

one) than it is in determining whether he had a "conscious purpose" to cause a given result. Moreover, there are cases like the lemon-squeezing example[126] in which psychiatric testimony plainly bears on the existence of knowledge or recklessness. Dissatisfaction with the general state of forensic psychiatry should not justify the exclusion of psychiatric testimony in an arbitrarily selected category of cases. In any event, an alert trial judge can exclude or limit psychiatric testimony that is irrelevant to whether the defendant had the state of mind required by the statute.

A variety of psychiatric testimony that often appears in so-called "diminished responsibility" cases, and that has apparently motivated many courts to limit psychiatric testimony to the issue of insanity, concerns the capacity of the defendant to control his impulses.[127] Such testimony, which may be appropriate in a sanity trial in a jurisdiction that uses the MPC formulation of the insanity defense,[128] strictly speaking has no bearing on whether the defendant has intention, knowledge, or recklessness in his mind. Psychiatrists who persist in equating self-control with subjective awareness or intention have polluted the waters of the diminished responsibility debate and must bear a measure of responsibility for judicial hostility to the use of psychiatric testimony to disprove mental state. Nevertheless, the complete exclusion of psychiatric testimony (or relegation of it to the insanity stage of a trial) is not an appropriate remedy.

The second, and more probable basis for imposing full criminal liability on such persons even when their mental deficiencies prevented them from having a necessary mental state, is the fear that they will pose a danger to the community if they are not confined. The lemon-squeezing example[129] suggests a type of defendant as to whom the fear of danger is not unwarranted. This concern apparently underlies the doctrine announced by one court that proof of diminished responsibility can be introduced only with regard to crimes that have a corresponding lesser included offense of which the defendant may be convicted even if his diminished capacity is ac-

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126. See text accompanying note 116 *supra*.

127. *See, e.g.*, People v. Gorshen, 51 Cal. 2d 716, 336 P.2d 492 (1959). *See generally* Dix, *supra* note 125, at 328-32.

128. *See* MODEL PENAL CODE §4.01(1) (Official Draft 1962). ("A person is not responsible for ciminal conduct if at the time of such conduct he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirement of law.")

129. See text accompanying note 116 *supra*.

cepted.[130] Such a rule insures that the successful diminished-responsibility defendant can be convicted of *something*, and hence imprisoned for the safety of others. The rule followed in most jurisdictions, including Colorado, that a successful insanity defense leads to a period of involuntary confinement in a mental institution[131] serves a similar purpose. But our reluctance to see dangerous mentally disturbed persons set completely at liberty need not lead to the conclusion that such persons ought to be convicted of criminal offenses despite their innocence of those offenses. Colorado has a mental health code that permits the involuntary confinement of persons who are mentally ill and pose a danger to themselves or others,[132] and it is the appropriate legal mechanism for dealing with those whose incapacities cause them to engage in criminal conduct without entertaining criminal *mens rea*.

A different justification is sometimes advanced for the other fragment of the limitation embodied in the Colorado statutes: the rule that prohibits the introduction of evidence of intoxication to disprove recklessness. The argument for the admissibility of such evidence in some cases would be that the defendant's intoxication prevented him from being aware of the risk that his conduct would cause a certain result or be accompanied by a certain circumstance, and hence from "consciously disregarding" that risk. The Colorado rule, however, would bar him from introducing evidence of his intoxication for that purpose (although, as illustrated earlier in a "knowledge" context, the mechanics of the operation of this rule are somewhat obscure.) This particular stricture is found not only in Colorado law but also in the common law[133] and even in the MPC.[134] It is sometimes defended with the argument that becoming intoxicated is a "reckless" action and that the recklessness that accompanied a defendant's original decision to get drunk is a sufficient mental state to convict him of a crime of recklessness.[135] Hence, evi-

130. *See* McCarthy v. State, 372 A.2d 180 (Del. 1977). *Contra* State v. Booth, 284 Ore. 615, 588 P.2d 614 (1978); People v. Wetmore, 149 Cal. Rptr. 265 (1978). This limitation apparently is not observed in Colorado. *See* Schwickrath v. People, 159 Colo. 390, 411 P.2d 961 (1966) (evidence of mental condition to disprove intent should have been admitted in prosecution for felonious escape).

131. *See, e.g.*, COLO. REV. STAT. §16-8-105(4) (repl. vol. 1978).

132. *See* COLO. REV. STAT. 27-10-101 *et. seq.* (Supp. 1979).

133. W. LAFAVE & A. SCOTT, CRIMINAL LAW 346 (1972).

134. MODEL PENAL CODE §2.08(2) (Official Draft 1962).

135. See MODEL PENAL CODE §2.08, Comment (Tent. Draft No. 9, 1959). ("[W]e believe it fair to postulate a general equivalence between the risks created by the conduct of the drunken actor and the risks created by his conduct in becoming drunk.")

dence of his intoxication becomes self-defeating for the defendant, as it would only contribute to a finding that he was indeed reckless; accordingly, such evidence may be excluded without prejudice to the rights of the defendant. The flaw in this argument is its use of the term "recklessness" in two different ways. It may be "reckless" to become intoxicated in the sense that one who does usually is aware that intoxication creates a risk of untoward occurences; but this is different from saying that a person who becomes intoxicated necessarily consciously adverts to the risk that this particular occasion of overimbibing will lead to the death of a person or whatever factual element the recklessness offense calls for.

The impulse to hold drunks strictly responsible for the harm that they cause is understandable; and it may be served by the creation of a statute that makes the voluntary intoxication of the actor an aggravating circumstance that enhances the penalties for the corresponding crimes of recklessness, or even one that makes intoxicated persons responsible for the consequences of their acts without any corresponding mental state requirement. Such statutes, although perhaps too harsh to win general approval, would at least not bar a defendant from disproving a mental element of the offense. The rule as it is presently stated is misleading because it suggests that there is a mental state requirement, but it bars the criminal defendant from presenting relevant evidence tending to show that he did not entertain that mental state.

Since negligence is an objective rather than a subjective mental state, and since the intoxication of a defendant cannot possibly help him establish that his conduct was the conduct of a reasonable person, evidence of intoxication or impaired mental condition can be excluded as logically irrelevant when a crime of negligence is charged. But the Code should be amended to permit the use of any evidence concerning the defendant's intoxication, mental deficiency, or any other condition when the evidence bears on whether the defendant subjectively entertained the mental state necessary for the commission of an offense.[136]

### *Mens Rea* AND THE INCHOATE OFFENSES

The Colorado Criminal Code provides that attempt, conspiracy, and solicitation are inchoate offenses; generally they are punishable as offenses of one degree lower than the substantive offenses to which

136. See Appendix (proposed amended sections 1-803, 1-804, & 3-103(2)).

they correspond.[137] It is characteristic of inchoate crimes that conduct is comparatively less important and mental state comparatively more important in establishing their elements than in the case of substantive offenses. Hence it is particularly important that the mental state necessary to the proof of an inchoate offense be set forth precisely by the defining statute. Unfortunately, this precision is not evident in the Code's formulation of these offenses.

*1. Attempt*

The attempt statute reads: "A person commits criminal attempt if, acting with the kind of culpability otherwise required for the commission of the offense, he engages in conduct constituting a substantial step toward the commission of the offense."[138] Taken by itself, this language would suggest that the only mental state necessary to the commission of an attempt is the same mental state or states that are elements of the substantive crime to which the attempt corresponds. But the statute continues: "A substantial step is any conduct, whether act, omission, or possession, which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense."[139] Hence the necessity for proving, beyond the mental state required for the completed offense, a certain *purpose* or intention is imported into the definition via a gloss on the term "substantial step." This is an odd way to specify a necessary mental state; more importantly, however, the meaning of the phrase "purpose to complete the commission of the offense" is doubtful. For example, consider the offense of attempting to rob the elderly or handicapped. The substantive offense is apparently one of strict liability toward the circumstance that the victim is elderly or handicapped.[140] Hence a defendant may be guilty without knowledge of the age or handicap of his victim. But suppose a defendant is unsuccessful in consummating the robbery of a particular aged or handicapped person, because of the intervention of a policeman. Since he has not completed the offense, he cannot be convicted of the substantive crime. The troublesome question is whether he had the mental state to be guilty even of attempt.

The problem is similar to the problem of the guilt of one charged as an accomplice to a crime that is one of strict liability

137. COLO. REV. STAT. §18-2-101(4) (repl. vol. 1978).
138. COLO. REV. STAT. §18-2-101(1) (repl. vol. 1978).
139. *Id.*
140. COLO. REV. STAT. §18-4-304 (Supp. 1979).

with respect to a circumstance.[141] One argument runs that even though a principal who completes the crime can be guilty without regard to his ignorance of a material circumstance, the attempter, like the accomplice, cannot be guilty without knowledge. Just as their result follows in the case of the accomplice because he must be found to have had an "intention to promote or facilitate the offense," it obtains in the case of the attempter because he must have entertained a "purpose to complete the commission of the offense." It would be somewhat strained to say in the case of the unknowing would-be robber of an elderly or handicapped person that he had a purpose to commit an offense when his lack of knowledge prevented him from knowing that his planned conduct would constitute that offense.

Yet the requirement that a defendant, to be guilty of attempt, have knowledge as to every circumstantial element of a crime, even if no such knowledge would be necessary to the commission of the substantive offense, is apparently at odds with the Colorado law of attempt as it existed before the revision of the Code. The previous statute provided:

> A person is guilty of an attempt to commit a crime if, acting with the state of mind otherwise required for the commission of the crime, he . . . [,] when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result, without further conduct on his . . . part. . . .[142]

This earlier language is identical to the language chosen by the authors of the MPC for a portion of their attempt section.[143] And although the language of the statute is opaque, it plainly was intended by the authors of the MPC to produce the result that conviction for attempt requires no greater mental state regarding circumstances than does conviction of the corresponding substantive offense.[144] These considerations might encourage an interpretation of the new attempt section in harmony with the old, to require knowledge of

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141. See text accompanying note 108 *supra*.

142. *See* Inchoate Crimes Act, ch. 111, §1, 1963 Colo. Sess. Laws 318 (revised 1971).

143. *See* MODEL PENAL CODE §5.01(1)(b) (Official Draft 1962).

144. *See* MODEL PENAL CODE §5.01, Comment (Tent. Draft No. 10, 1960). ("This section adopts the view that the actor must have for his purpose to engage in the criminal conduct or accomplish the criminal purpose which is an element of the substantive crime but that his purpose need not encompass all the surrounding circumstances included in the formal definition of the substantive offense.")

circumstances only when the substantive statute requires it.[145] Such an argument would urge that the phrase "purpose to complete the commission of the offense" means only a purpose to engage in the conduct and cause the results necessary to the commission of the offense.[146] A statutory revision ought to make clear which interpretation is correct and use language that admits of no doubt on the subject.[147]

A further complication is the Code's treatment of the issue of impossibility as a defense to charges of attempt. The statute reads: "Factual or legal impossibility of committing the offense is not a defense if the offense could have been committed had the attendant circumstances been as the actor believed them to be . . . ."[148] This language, like the rest of the attempt section, is drawn from the proposal of the United States Commission for the Revision of the Federal Criminal Laws, which draws in turn from the MPC.[149] It is unambiguous in its purpose to abolish claims of impossibility as a legal defense in some situations, but does not speak (except negatively) to other sorts of impossibility defenses.

The sort of impossibility that definitely is not a defense under the statute is the sort in which the defendant believes that a certain circumstance exists when in fact it does not. This sort of impossibility is really the obverse of a mistake of fact: rather than the defendant being unaware of a circumstance that exists, the defendant believes that a circumstance exists when in fact it does not. An example is provided by the person who believes that he is receiving stolen goods when the goods are not in fact stolen, but are provided by the police in an effort to trap the defendant into revealing his criminal propensities.[150] Such a defendant ought to be accountable for an attempt, as he has revealed unequivocally his intention to dis-

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145. This argument is lent some credibility by the complete absence of any hint in the comments to the revised Colorado Code that its authors believed that they were changing the law of attempt.

146. The authors of the MPC indicated in their comment to the conspiracy provision of the MPC that it is "strongly arguable" that that section's requirement of "purpose to promote or facilitate" the commission of an offense can be met even when the actor does not know of the existence of a circumstantial element, so long as such knowledge is not required for the commission of the substantive offense. MODEL PENAL CODE §5.03, Comment (Tent. Draft. No. 10, 1960). The argument in the text is quite similar.

147. See Appendix (proposed amended section 2-101(1)).

148. COLO. REV. STAT. §18-2-101(1) (repl. vol. 1978).

149. *See* COLO. REV. STAT. §40-2-101, Comment (Supp. 1971); MODEL PENAL CODE §5.01(1)(a) (Official Draft 1962).

150. *See, e.g.*, People v. Jaffe, 185 N.Y. 497, 78 N.E. 169 (1906).

regard the law and taken affirmative steps to complete a crime; and the statute quite satisfactorily disposes of any claim he might make that the "impossibility" of committing an offense under the actual circumstances prevents his conviction for attempt.

What the statute as written does *not* accomplish is the preclusion of another sort of impossibility defense. Suppose, to borrow another classic example, a pickpocket reaches into a man's breast pocket with the intention of picking it, only to find that it is empty.[151] Charged with attempted theft, he might seek to take advantage of the defense of impossibility, arguing that since the pocket was empty it was impossible for him to pick it. Courts and scholars unanimously agree that a plea of impossibility should be unavailing in such a case.[152] Yet the Colorado formulation does not precisely preclude such an impossibility defense; it bars the defense only when "the offense could have been committed had the attendant circumstances been as the actor believed them to be." But the pickpocket's case is not one in which he was mistaken about the existence of an *attendant circumstance,* at least not as that term is used in the rest of the Code; the presence of a wallet in the victim's pocket is not a circumstantial element of the offense of theft. It is a different sort of feature of the attempted crime than the fact that certain goods are stolen, or that a person is below a certain age, each of which is a material element of the relevant crime. To be certain that the unsuccessful pickpocket cannot plead impossibility, the statute ought to eschew the term "attendant circumstances" in favor of a more general term conveying the notion that a mistake of fact concerning the features surrounding the attempted commission of a crime shall not ordinarily give rise to a defense of impossibility.[153]

### 2. *Conspiracy*

Although it is not solely a matter of vagueness about mental state, one significant ambiguity in the Colorado Code's conspiracy statute deserves mention: the matter of whether the statute is "unilateral" or "bilateral" in nature. At common law, conspiracy was a "bilateral" offense, meaning that there was no conspiracy if there

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151. *See, e.g.,* People v. Feigleman, 33 Cal. App. 2d 100, 91 P.2d 156 (1939).

152. *See* MODEL PENAL CODE §5.01, Comment n.24 & cases cited therein (Tent. Draft No. 10, 1960).

153. See Appendix (proposed amended section 2-101(1)). Another peculiarity of the Colorado treatment of the inchoate crimes is that it makes the mitigating defense of "inherent impossibility" available in conspiracy but not attempt prosecutions. *See* COLO. REV. STAT. §18-2-206(3) (repl. vol. 1978); *compare* MODEL PENAL CODE §5.05(2) (Official Draft 1962).

was no subjective agreement between at least two parties who shared a particular criminal objective.[154] The MPC purports to recognize "unilateral" conspiracies, in which one person alone can be guilty of conspiracy if he *believes* that he has entered into an agreement with another to commit or plan a crime.[155] The difference is most significant in cases in which one person, bent on a criminal enterprise, approaches another seeking to enlist his cooperation. If the other seems to agree, but secretly withholds agreement (perhaps even resolving to notify the authorities), the initiating person is guilty of conspiracy under a unilateral but not a bilateral theory.[156]

The ambiguity in the Colorado statute arises from a divergence between the language of the statute and the language the courts use in describing the offense of conspiracy in Colorado. The Code's definition of conspiracy is identical to that of the MPC's: one is guilty of conspiracy to commit a crime if "with the intent to promote or facilitate its commission, he agrees with another person or persons that they, or one or more of them, will engage in conduct which constitutes a crime or an attempt to commit a crime, or he agrees to aid the other person or persons in the planning or commission of a crime or of an attempt to commit such a crime."[157] The language chosen by the MPC's authors is not entirely unambiguous in its choice of a unilateral theory of conspiracy; it could be argued that the term "agrees" implies the subjective assent of two or more parties to a common plan or scheme. But the Comments to the MPC section make clear that it was intended to create liability for unilateral conspiracies.[158] With this background, it might be expected that the Colorado provision would necessarily be construed as the unilateral variety as well. But the pronouncements of Colorado courts leave some doubt that they view the statute in that way.

Prior to the revision of the Code, the Colorado conspiracy statute was unequivocally of the bilateral variety; it required that "two or more persons . . . agree, conspire, or cooperate."[159] Cases decided under the statute often used language emphasizing the need for mutuality of commitment in conspiracy cases, as for example the state-

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154. *See* Pettibone v. United States, 148 U.S. 197 (1893).

155. *See* MODEL PENAL CODE §5.03, Comment n. 33 & accompanying text (Tent. Draft No. 10, 1960).

156. *Id.*

157. COLO. REV. STAT. §18-2-101(1) (repl. vol. 1978); MODEL PENAL CODE §5.03(1) (Official Draft 1962).

158. See note 155 *supra.*

159. COLO. REV. STAT. §40-2-201 (Supp. 1971).

ment in a 1962 case: "There must be a combination of two or more persons to constitute a conspiracy; one person cannot conspire with himself."[160] After the revision and its substitution of the MPC-inspired "unilateral" statute, the courts continue to use the same language, often citing the earlier cases as authority.[161] This adherence to the conspiracy doctrine appropriate to the earlier statute suggests that the courts do not believe that the revision accomplished a change to a unilateral regime. If a unilateral statute is desired, the present statute should be amended to clarify its unilateral nature.

Other difficulties with the conspiracy statute arise from the *mens rea* language that it shares with the complicity statute: "with intent to promote or facilitate [the] commission [of an offense]." The principal questions concerning this provision are two. The first is whether knowledge or recklessness that one is promoting or facilitating a criminal offense suffices for conspiratorial liability. The second concerns the extent to which liability for conspiracy may require more or "higher" mental states toward circumstantial elements than liability for the substantive offense that is the object of the conspiracy.

The question of whether knowledge that one is promoting or facilitating an offense should suffice for conviction of conspiracy might as a matter of logic and consistency be resolved in the same way as the question considered earlier concerning whether such knowledge can be the basis of a complicity conviction.[162] Yet, use of the conspiracy statute to punish such knowing agreements probably would rarely be necessary if the suggested revisions to the complicity statutes were accepted. Any person who agrees that he himself will commit an offense necessarily has not only knowledge, but an actual intention or purpose to promote or facilitate the crime. And one who with *knowledge* agrees that *another* will commit a crime necessarily *advises* the other person in planning or committing the offense, ex-

160. Archuleta v. People, 149 Colo. 206, 368 P.2d 422 (1962).

161. *See, e.g.*, People v. Wilkinson, 38 Colo. App. 365, 368, 561 P.2d 347, 350 (1976) ("An agreement with common design between defendant and his co-conspirator to engage in conduct which constitutes a crime or to aid in the planning and commission of a crime must be proven to establish a conspiracy . . . . The circumstances necessary to support a conviction for conspiracy are those which show that the alleged conspirators pursued by their acts the same objective, one performing one part, and the other another part, with a view to completing the acts and attaining the common objective.") (citations omitted); People v. Johnson, 189 Colo. 28, 30, 536 P.2d 44, 45 (1975) ("It is well established that the relationship between co-conspirators is part and parcel of the element of conspiracy, which involves an agreement, combination, or confederation between two or more persons.") (citations omitted.).

162. See text accompanying notes 94-106 *supra*.

posing himself to possible liability as an accomplice under the proposed formulation of accomplice liability.[163] Hence the use of the conspiracy statute to convict such a person is unnecessary. I suggest, therefore, that this language of the conspiracy statute be retained in its present form, with an addendum that emphasizes that "intent" as used in the statute means conscious purpose or desire to see the conspired-upon crime consummated. As one result of this formulation, one who is merely knowing or reckless about the prospect that his assent will promote or facilitate an offense cannot be convicted of conspiring to commit it. If the crime is committed as a result of his promotion or facilitation, however, he may be guilty as an accomplice to a crime of knowledge or recklessness, under the boundaries of accomplice liability that I have proposed.[164]

One objection to the above limits on conspiratorial liability is that they offer no avenue for the conviction of those whose knowing or reckless agreements do not result in the actual completion of a crime. But as to knowing or reckless agreements that do not result in any completed crime, conspiracy liability is an excessive sanction. If the knowing or reckless agreement is a substantial factor in creating a serious risk of harm, other statutes such as that prohibiting reckless endangerment provide the most appropriate punishment.[165]

The second question arises as a result of the United States Supreme Court's decision in *United States v. Feola*.[166] Feola and three confederates had agreed to the forcible robbery of some persons whom they thought to be prospective purchasers of heroin. Unknown to the conspirators, their planned victims were federal narcotics agents; Feola and the others were charged with conspiracy to assault federal officers. The Court held that the substantive offense of assault on a federal official was one that required no proof that the defendant knew or suspected the office of his victim; it was a strict liability offense with respect to that element.[167] Feola argued that nevertheless he could not be convicted of *conspiring* to commit the offense without some proof of his knowledge of the identity of the officers. The Court rejected this argument, holding that under federal conspiracy law no proof of knowledge as to circumstantial elements is necessary as long as the circumstance is a strict liability

163. See Appendix (proposed amended section 2-603).
164. *Id.*
165. *See* COLO. REV. STAT. §18-3-208 (repl. vol. 1978).
166. 420 U.S. 671 (1975).
167. *Id.* at 684.

element of the substantive offense and it is only a *jurisdictional* element.[168]

The application of the *Feola* result to the Colorado conspiracy provisions is not altogether clear. Very few Colorado statutes have circumstantial elements that could appropriately be described as solely "jurisdictional." Moreover, the Code differs from the federal conspiracy statute in its use of the phrase "with intent to promote or facilitate [the] commission [of a crime]."[169] These considerations suggest that knowledge of circumstantial elements should be required for conviction of conspiracy to commit a crime in Colorado even if no such knowledge would be necessary to the commission of the completed offense. But the language is not unequivocal. The MPC's conspiracy statute contains nearly the identical phrase, and yet its authors commented that "we think it strongly arguable that such a purpose may be proved although the actor did not know of the existence of a circumstance which does exist in fact, when knowledge of the circumstance is not required for the substantive offense."[170] Although the MPC writers apparently believed that the resolution of the question was best left open to subsequent judicial developments,[171] I believe that statutory language should clearly and unequivocally resolve the question. Criminal statutes are constitutionally required to be clear in their designation of the elements of crimes, including mental elements. The Colorado Code should be revised to make clear that knowledge of attendant circumstances either is or is not required for conviction of conspiracy to commit offenses of strict liability toward those circumstances.[172]

### 3. *Solicitation*

According to the Code, a person is guilty of solicitation if he "commands, induces, entreats, or otherwise attempts to persuade another person to commit a felony, whether as principal or accomplice, with intent to promote or facilitate the commission of that crime, and under circumstances strongly corroborative of that intent."[173] The law of solicitation supplements the law of conspiracy by providing a sanction for those persons who seek unsuccessfully to conspire with another to commit a felony. In fact, if the Colorado conspiracy

168. *Id.* at 694.
169. *Compare* 18 U.S.C. §371 (1976).
170. See note 146 *supra.*
171. *Id.*
172. See Appendix (proposed amended section 2-201(1)).
173. COLO. REV. STAT. §18-2-301 (1973).

statute is unilateral in nature,[174] it is only those attempted conspiracies that fail immediately and visibly with the approached party's rejection of the proposal that can be punished exclusively by the solicitation section. Because of its similarities to conspiracy, solicitation should require the same mental state as conspiracy. Although the statute as written specifies knowledge or purpose, it would be more satisfactory if it were rewritten so that its mental state provisions corresponded to those suggested for the conspiracy provision.[175]

## CONCLUSION

The revision of the Colorado Criminal Code that became effective in 1972 was long overdue, and it did succeed in clarifying certain areas of criminal liability and remodeling or discarding some outworn portions of the existing criminal statutes. Its authors also are to be commended for attempting an original creation, rather than slavishly following the text of an existing code or model statute. The drawback, however, to their eclectic approach to revision is that it resulted in a code that fits together awkwardly and that leaves unanswered important questions concerning the elements of criminal offenses. This is especially so with regard to its *mens rea* provisions. I have sought to illustrate some of the shortcomings that I perceive in the Code, and in the Appendix to this article I have suggested amendments or revisions that should succeed in eliminating some of the ambiguities and paradoxes that I identify.

174. See Text accompanying notes 154-61 *supra*.
175. See Appendix (proposed amended section 2-301).

## APPENDIX

### Proposed Amendments to The Colorado Criminal Code

*Section 1-102(a)*

EXISTING SECTION: (a) To define offenses, to define adequately the act and mental state which constitute each offense, to place limitations upon the condemnation of conduct as criminal when it is without fault, and to give fair warning to all persons concerning the nature of the conduct prohibited and the penalties authorized upon conviction. . .

PROPOSED AMENDED SECTION: (a) To define offenses, to define adequately the *acts and mental states* which constitute each offense. . .

*Section 1-501(5)*

EXISTING SECTION: (5) "Intentionally" or "with intent." All offenses defined in this code in which the mental culpability requirement is expressed as "intentionally" or "with intent" are declared to be specific intent offenses. A person acts "intentionally" or "with intent" when his conscious objective is to cause the specific result proscribed by the statute defining the offense. It is immaterial to the issue of specific intent whether or not the result actually occurred.

PROPOSED AMENDED SECTION: (5) *A person acts "intentionally" or "with intent" with respect to a consequence of his behavior when his conscious objective is to cause that consequence. A person acts "intentionally" or with intent with respect to the nature of his conduct if his conscious objective is to engage in conduct of that nature. A person acts "intentionally" or "with intent" with respect to a circumstance when he knows that the circumstance exists or when he hopes or believes that it does.*

*Section 1-501(6)*

EXISTING SECTION: (6) "Knowingly" or "willfully." All offenses defined in this code in which the mental culpability requirement is expressed as "knowingly" or "willfully" are declared to be general intent crimes. A person acts "knowingly" or "willfully" with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists. A person acts "knowingly" or "willfully", with respect to a result of his conduct, when he is aware that his conduct is practically certain to cause the result.

PROPOSED AMENDED SECTION: (6) *A person acts "knowingly" with respect to a consequence of his conduct when he is aware that his conduct is practically certain to cause the result or hopes or believes that it will. A person acts "knowingly" with respect to the nature of his conduct when he is practically certain that his conduct is of that nature or hopes or believes that it is. A person acts "knowingly" with respect to a circumstance when he is practically certain that the circumstance exists or when he hopes or believes that it does.*

*Section 1-501(8)*

EXISTING SECTION: (8) "Recklessly." A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that a result will occur or that a circumstance exists.

PROPOSED AMENDED SECTION: (8) A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that *a consequence will occur, that a circumstance exists, or that his conduct is of a certain nature.*

*Section 1-501(3)*

EXISTING SECTION: (3) "Criminal negligence." A person acts with criminal negligence when, through a gross deviation from the standard of care that a reasonable person would exercise, he fails to perceive a substantial and unjustifiable risk that a result will occur or that a circumstance exists.

PROPOSED AMENDED SECTION: (3) A person acts with criminal negligence when, through a gross deviation from the standard of care that a reasonable person would exercise, he fails to perceive a substantial and unjustifiable risk that *a consequence will occur, that a circumstance exists, or that his conduct is of a certain nature.*

*Section 1-503(2)*

EXISTING SECTION: (2) Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.

PROPOSED AMENDED SECTION: (2) *As used in this Code, the term "possess" means "possess with knowledge that one is possessing and with awareness of the character of the thing pos-*

*sessed." The term "conceal" means "conceal with intention to hide or obscure." (Etc: resolve the question for each verb as to which there may be ambiguity).*

ALTERNATIVE PROPOSED AMENDED SECTION: (2) *As used in this Code, the term "possess" means "possess with knowledge that one is possessing," but does not necessarily imply knowledge of the character of the thing possessed. The term "conceal" means "conceal with or without an intention to hide or obscure". (Etc.)*

*Section 1-503(4)*

EXISTING SECTION: (4) When a statute defining an offense prescribes as an element thereof a specified culpable mental state, that mental state is deemed to apply to every element of the offense unless an intent to limit its application clearly appears.

PROPOSED AMENDED SECTION: *[Delete this section entirely, and rewrite each substantive provision to state explicitly which mental state, if any, is required with respect to* each *factual element.]**

*Section 3-402 (1)* [This suggested revision is offered as an example of how substantive prohibitions might be reworded to eliminate any doubt about which mental state must be proved toward each factual element.]

EXISTING PROVISION: (1) Any actor who KNOWINGLY inflicts sexual penetration on a victim commits a sexual assualt in the first degree if:

(a) The actor causes submission of the victim through the actual application of physical force or physical violence: or

(b) The actor causes submission of the victim by threat of imminent death, serious bodily injury, extreme pain, or kidnapping, to be inflicted on anyone, and the victim believes that the actor has the present ability to execute these threats; or

(c) The actor causes submission of the victim by threatening to retaliate in the future against the victim, or any other person, and the victim reasonably believes the actor will execute this threat. As used in this paragraph (c), "to retaliate" includes threats of kidnapping, death, serious bodily injury or extreme pain; or

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* A similar suggestion concerning the proposed new federal criminal code is made in Rothstein, *Special Report—Federal Criminal Code Revision: Some Problems with Culpability Provisions*, 15 CRIM. L. BULL. 157, 160 (1979).

(d) The actor has substantially impaired the victim's power to appraise or control the victim's conduct by employing, without the victim's consent, any drug, intoxicant, or other means for the purpose of causing submission; or

(e) The victim is physically helpless and the actor knows the victim is physically helpless and the victim has not consented.

PROPOSED AMENDED PROVISION: (1) Any actor who knowingly inflicts sexual penetration on a victim commits a sexual assault in the first degree if:

(a) The actor *knowingly* causes submission of the victim through the *knowing* actual application of physical force or physical violence; or

(b) The actor *knowingly* causes submission of the victim by *knowingly* making a threat of imminent death, serious bodily injury, extreme pain, or kidnapping, to be inflicted on anyone, and victim believes that the actor has the ability to execute these threats at present *or in the future;**or

(c) The actor has substantially impaired the victim's power to appraise or control the victim's conduct by employing, *with knowledge that the victim has not consented thereto,* any drug, intoxicant, or other means for the purpose of causing submission; or

(d) *The victim is physically helpless and has not consented, and the actor is aware that this is the case.*

*Section 1-504*

EXISTING SECTION: (1) A person is not relieved of criminal liability for conduct because he engaged in that conduct under a mistaken belief of fact, unless:

(a) It negatives the existence of a particular mental state essential to commission of the offense; or

(b) The statute defining the offense or a statute relating thereto expressly provides that a factual mistake or the mental state resulting therefrom constitutes a defense or exemption; or

(c) The factual mistake or the mental state resulting therefrom is of a kind that supports a defense of justification as defined in sec-

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* Note that in this formulation there is no requirement that the actor *know* that the victim believes that he has the ability to carry out the threats. This seems appropriate. On the other hand, he must know that what he has said is a "threat" rather than a joke. This requirement raises the question of what is a "threat"; I suggest that it is a statement that a reasonable person would perceive as an offer to do harm of one of the specified sorts. This gloss makes the proviso "reasonably," attached in the present version to the victim's belief that the defendant will execute his threat *in futuro,* unnecessary.

tions 18-1-701 to 18-1-707.

(2) A person is not relieved of criminal liability for conduct because he engages in that conduct under a mistaken belief that it does not, as a matter of law, constitute an offense, unless the conduct is permitted by one or more of the following:

(a) A statute or ordinance binding in this state;

(b) An administrative regulation, order, or grant of permission by a body or official authorized and empowered to make such order or grant the permission under the laws of the state of Colorado;

(c) An official written interpretation of the statute or law relating to the offense, made or issued by a public servant, agency, or body legally charged or empowered with the responsibility of administering, enforcing, or interpreting a statute, ordinance, regulation, order, or law. If such interpretation is by judicial decision, it must be binding in the state of Colorado.

(3) Any defense authorized by this section is an affirmative defense.

PROPOSED AMENDED SECTION: (1) A person is not relieved of criminal liability for conduct because he engaged in that conduct under a mistaken belief of fact *or law, except as provided in subsection (2), unless:*

(a) The mistake negatives the existence of a particular mental state essential to commission of the offense; or

(b) The statute defining the offense or a statute relating thereto expressly provides that *the mistake* or the mental state resulting therefrom constitutes a defense or exemption; or

(c) *The mistake* or the mental state resulting therefrom is of a kind that supports a defense of justification as defined in sections 18-1-701 to 18-1-707.

(2) A person is not relieved of criminal liability for conduct because he engaged in that conduct under a mistaken belief *concerning the existence or scope of a criminal prohibition, unless the mistake would exonerate him under subsection (1),* or unless the conduct in which he engages is permitted by one or more of the following:

(a) A statute or ordinance binding in this state;

(b) An administrative regulation, order, or grant of permission by a body or official authorized and empowered to make such order or grant such permission under the laws of the state of Colorado;

(c) An official written interpretation of the statute or law relating to the offense, made or issued by a public servant, agency, or body legally charged or empowered with the responsibility of administering, enforcing, or interpreting a statute, ordinance, regula-

tion, order, or law. If such interpretation is by judicial decision, it must be binding in the state of Colorado.

(3) Any defense authorized solely by section (2) is an affirmative defense.

*Section 1-602*

EXISTING SECTION: (1) A person is legally accountable for the behavior of another person if:

(a) He is made accountable for the conduct of that person by the statute defining the offense or by specific provision of this code; or

(b) He acts with the culpable mental state sufficient for the commission of the offense in question and he causes an innocent person to engage in such behavior.

(2) As used in subsection (1) of this section, "innocent person" includes any person who is not guilty of the offense in question, despite his behavior, because of duress, legal incapacity or exemption, or unawareness of the criminal nature of the conduct in question or of the defendant's criminal purpose, or any other factor precluding the mental state sufficient for the commission of the offense in question.

PROPOSED AMENDED SECTION: (1) A person is legally accountable for the behavior of another person if:

(a) He is made accountable for the conduct of that person by the statute defining the offense or by a specific provision of this code; or

(b) He acts with the mental state sufficient for the commission of the offense in question, and he causes an innocent person to engage in such behavior.

(2) As used in subsection (1) of this section, "innocent person" means *any person whose behavior and its consequences, together with the circumstances surrounding them, satisfy the factual elements of an offense, but who is nevertheless not guilty because he lacks a mental state necessary to the commission of the offense, or has a mental state that entitles him to a defense or justification or exemption, or acts under duress, or is legally insane, or is under ten years of age.*

*Section 1-603*

EXISTING SECTION: A person is legally accountable as principal for the behavior of another constituting a criminal offense if, with the intent to promote or facilitate the commission of the of-

fense, he aids, abets, or advises the other person in planning or committing the offense.

PROPOSED AMENDED SECTION: (1) A person is legally accountable as a principal for the behavior of another constituting a criminal offense if with the intent to promote or facilitate the commission of the offense, he aids, abets, or advises the other person in planning or committing the offense.

(2) *A person may be accountable as a principal for the behavior of another if, with the knowledge that he is thereby promoting or facilitating a criminal offense, he aids, abets, or advises the other person in committing the offense, provided that:*

*(a) either (i) the accomplice entertained every mental state necessary to the commission of the offense as a principle,* or *(ii) if the proof of the substantive offense requires proof of intention, the accomplice may be convicted of an offense of knowledge that is, save in that respect, identical to the offense committed by the principal,* and

(b) *such liability is commensurate with his blameworthiness and his degree of involvement in and responsibility for the offense. In determining whether accomplice liability is so commensurate, the jury may take into account factors including, but not limited to, the following:*

*(i) Whether the person supplied goods or services to the criminal enterprise at a grossly inflated price;*

*(ii) Whether the person supplied goods or services that have no legitimate uses;*

*(iii) Whether the person supplied goods or services to a criminal enterprise at a volume that is grossly disproportionate to any legitimate demand;*

*(iv) Whether the person aided, abetted, or advised the commission of a serious crime involving harm to a person or persons or serious damage to property;*

*(v) Whether the person supplied aid or encouragement that made likely the commission of an offense that otherwise was unlikely to be committed.*

*(3) A person may be accountable as a principal for the behavior of another if he aids, abets, or advises the other person in planning or committing the offense, reckless toward the possibility that he will thereby promote or facilitate the commission of the offense, provided that:*

*(1) either (a) the accomplice entertained every mental state necessary to the commission of the offense as a principal;* or

*(b) If the commission of the substantive offense requires proof of intention or knowledge, the accomplice may be convicted of an offense of recklessness that is, save in that respect, identical to the offense committed by the principal,* and

*(2) such liability is commensurate with his blameworthiness and his degree of involvement in and responsibility for the offense, as determined by the jury taking into account factors including, but not limited to, those described in Section 1-603(b).*

*Sections 1-803 and 1-804*

EXISTING SECTIONS:

1-803. Impaired mental condition. Evidence of an impaired mental condition though not legal insanity may be offered in a proper case as bearing upon the capacity of the accused to form the specific intent if such an intent is an element of the offense charged.

1-804. Intoxication. (1) Intoxication of the accused is not a defense to a criminal charge, except as provided in subsection (3) of this section, but in any prosecution for an offense, evidence of intoxication of the defendant may be offered by the defendant when it is relevant to negative the existence of a specific intent if such intent is an element of the crime charged.

(2) Intoxication does not, in itself, constitute mental disease or defect within the meaning of section 18-1-802.

(3) A person is not criminally responsible for his conduct if, by reason of intoxication that is not self-induced at the time he acts, he lacks capacity to conform his conduct to the requirements of the law.

(4) "Intoxication" as used in this section means a disturbance of mental or physical capacities resulting from the introduction of any substance into the body.

(5) "Self-induced intoxication" means intoxication caused by substances which the defendant knows or ought to know have the tendency to cause intoxication and which he knowingly introduced or allowed to be introduced into his body, unless they were introduced pursuant to medical advice or under circumstances that would afford a defense to a charge of crime.

PROPOSED AMENDED SECTIONS:

1-803. *Evidence of mental impairment or of intoxication may be introduced in any case in which it bears on whether the actor had a mental state necessary to the commission of the offense charged.*

1-804. *A person is not criminally responsible for his conduct if, by reason of intoxication that is not self-induced at the time he acts, he lacks capacity to conform his conduct to the requirements*

*of law. "Self-induced" intoxication is intoxication caused by substances that the defendant knows or ought to know have the tendency to cause intoxication and which he knowingly introduced or allowed to be introduced into his body, unless they were introduced pursuant to medical advice or under circumstances that would afford a defense to a charge of crime.*

*Section 3-101(2)*

EXISTING SECTION: (2) Diminished responsibility due to lack of mental capacity OR SELF-INDUCED INTOXICATION is not a defense to murder in the second degree.

PROPOSED AMENDED SECTION: *[Delete subsection (2) altogether.]*

*Section 2-101(1)*

EXISTING SECTION: (1) A person commits criminal attempt if, acting with the kind of culpability otherwise required for commission of an offense, he engages in conduct constituting a substantial step toward the commission of the offense. A substantial step is any conduct, whether act, omission, or possession, which is strongly corroborative of the firmness of the actor's PURPOSE to complete the commission of the offense. Factual or legal impossibility of committing the offense is not a defense if the offense could have been committed had the attendant circumstances been as the actor believed them to be, nor is it a defense that the crime attempted was actually perpetrated by the accused.

PROPOSED AMENDED SECTION, ALTERNATIVE 1: A person commits criminal attempt if, acting with the kind of culpability otherwise required for the commission of the offense, *and with an intention to complete the commission of the offense,* he engages in conduct constituting a substantial step toward the commission of the offense. A substantial step is any conduct, whether act, omission, or possession, which is strongly corroborative of the firmness of the actor's *intention. Provided, however, that if the completed offense is one of strict liability, negligence, recklessness, or knowledge toward any circumstantial element, then proof of the attempt shall require proof only of the mental state towards the circumstantial element that is required for the commission of the substantive offense.* Factual or legal impossibility of committing the offense is not a defense if the offense could have been committed had the *conditions under which the attempt was made been as the actor believed them to be.*

PROPOSED AMENDED SECTION, ALTERNATIVE 2: A

person commits criminal attempt if, acting with the kind of culpability otherwise required for the commission of the offense, *and with an intention to complete the commission of the offense,* he engages in conduct constituting a substantial step toward the commission of the offense. A substantial step is any conduct, whether act, omission, or possession, which is strongly corroborative of the firmness of the actor's *intention. "Intention to complete the commission of the offense," as used in this section, means an intention to cause the consequences and engage in the kind of conduct prohibited by the statute defining the substantive offense, together with knowledge of all of the circumstantial elements of the substantive offense.* Factual or legal impossibility of committing the offense is not a defense if the offense could have been committed had the *conditions under which the attempt was made been as the actor believed them to be.*

*Section 2-201(1)*

EXISTING SECTION: (1) A person commits conspiracy to commit a crime if, with the intent to promote or facilitate its commission, he agrees with another person or persons that they, or one or more of them, will engage in conduct which constitutes a crime or an attempt to commit a crime, or he agrees to aid the other person or persons in the planning or commission of a crime or of an attempt to commit such crime.

PROPOSED AMENDED SECTION: (1) A person commits conspiracy to commit a crime if, with the intent to promote or facilitate its commission, he

(Alternative A) agrees *or hopes or believes that he agrees with another*
(Alternative B) *and another person each agree*

that they, or one or more of them, will engage in conduct which constitutes a crime or an attempt to commit a crime. *As used in this section, "intent to promote or facilitate the commission" of a crime means*

*(Alternative C) a conscious objective to cause the consequences that are elements of the crime coupled with knowledge that the circumstantial elements of the crime exist.*
*(Alternative D) a conscious objective to cause the consequences that are elements of the crime coupled with whatever mental state regarding circumstances that is required for the commission of the crime.*

*Section 2-301(1)*

EXISTING SECTION: (1) Except as to bona fide acts of persons authorized by law to investigate and detect the commission of offenses by others, a person is guilty of criminal solicitation if he commands, induces, entreats, or otherwise attempts to persuade another person to commit a felony, whether as principal or accomplice, with intent to promote or facilitate the commission of that crime, and under circumstances strongly corroborative of that intent.

PROPOSED AMENDED SECTION: (1) Except as to bona fide acts of persons authorized by law to investigate and detect the commission of offenses by others, a person is guilty of criminal solicitation if he commands, induces, entreats, or otherwise attempts to persuade another person to commit a felony, whether as principal or accomplice, with intent to promote or facilitate the commission of that crime, and under circumstances strongly corroborative of that intent.

*As used in this section "intent to promote or facilitate" the commission of a crime means*

*(Alternative A) a conscious objective to cause the consequences that are elements of the crime coupled with the knowledge that the circumstantial elements of the crime exist.*

*(Alternative B) a conscious objective to cause the consequences that are elements of the crime coupled with whatever mental state regarding circumstances that is required for the commission of the crime.*