§ 4.1 Culpability Levels

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> HYPOTHETICAL > BABIES AND DITCHES

Geets and Carrie find Anver intolerable. He struts about the club, pompous beyond belief, expecting that he will be elected the next president. They concoct a practical joke to bring him down to earth. A winding road leading down the hill from the club runs by a playground. They plan to buy a baby carriage and two life-like dolls and to place them in the middle of the road near the playground. As Anver comes around the turn, he will be surprised by the carriage. If he pulls his precious Jaguar off the road into the high grass, he may get stuck in the soft ground. If he fails to pull off, he will blast through the carriage and the "babies." Either way, Geets and Carrie will have a tale to tell, either about Anver's humorous slide or his apparent indifference to killing babies. Either one will serve Carrie's purpose.

Geets has a slightly different goal in playing the practical joke: to kill Anver. While he jokes with Carrie about what a buffoon Anver is, the truth is that Anver is likely to be elected the next president, a position that Geets covets for himself. He knows that the tall grass adjacent to the stretch of road by the playground hides a drainage ditch. If Anver swerves to miss the baby carriage and if he is unable to keep his car on the road and if he slides in the direction of the ditch, he may get injured and possibly even killed. Geets sees the chances of successfully killing Anver through this scheme as
something less than 10 percent but he is hoping for the best. Carrie is
unaware that their joke creates any risk of killing Anver.

The next day is perfect for the scheme, overcast with a light rain. Geets
and Carrie put the carriage and dolls in the road just before Anver is
scheduled to leave the club. Without telling Carrie about the ditch,
Geets selects the location that he thinks maximizes the chance that
Anver will slide into it. Anver’s car approaches, swerves before hitting
the carriage, hits the ditch, and sends Anver through the windshield.
When he sees Anver’s serious injuries, Geets has second thoughts about
whether his scheme was such a good idea. He feels bad about Anver’s
injuries and hopes he will survive. Unfortunately, Anver dies two days
later from injuries sustained in the accident.

Are Geets and Carrie liable for homicide? If so, for which homicide
offense? ▼

§ 4.1. History

The requirement of culpability distinguishes the criminal law from other
bodies of law. Without mens rea, the common-law expression, there is little
justification for condemning or punishing an actor. An actor’s conduct
may be harmful; the victim may have a claim in tort; and fairness and utility
both may suggest that the actor rather than the victim should bear the loss
for the injury. But without culpability in the actor, causing the injury may
be seen as lacking sufficient blameworthiness to deserve the condemnation
and reprobation of criminal conviction.¹

The law did not always require culpability of an actor. Early Germanic
tribes, it is suggested, imposed liability upon the causing of an injury,
without regard to culpability.² But this was during a period before tort
law and criminal law were divided. It seems likely that as the distinction
between tort and crime appeared—that is, as the function of compensating
victims became distinguished from the function of imposing
punishment—the requirement of culpability took on increasing impor-
tance.³ Early notions of mens rea requirements are seen in Regina v. Prince.⁴
The defendant had taken an underage girl “out of the possession” of her
father, reasonably believing she was over the age of consent. That the
defendant’s conduct was generally immoral was sufficient for Lord Bram-
well to find that the defendant had the mens rea necessary for the crime.
Lord Brett, on the other hand, would require that Prince at least have

¹ For an eloquent statement of the special place of culpability in criminal law and the reasons
for it, see Sanford H. Kadish, The Decline of Innocence, 26 Cambridge L.J. 273, 273-90
(1968).
² For a history of the development of culpability requirements, see Paul H. Robinson, A Brief
³ For centuries, admittedly, tort law remained tied to notions of fault, generally negligence,
but the nature of the fault required for tort recovery was never set at the level that would
justify condemnation of the actor, as was and is generally required at criminal law. Nor,
admittedly, has criminal law completely forsaken the imposition of liability in the absence of
subjective awareness of wrongdoing. Criminal liability sometimes is still permitted for “gross
negligence” or a “gross deviation” from the standard of care of a reasonable person. See, e.g.,
Model Penal Code § 2.02(2)(d).
⁴ 13 Cox’s Crim. Cases 138 (1875).
From one *mens rea* to multiple categories

Confusion in Common Law categories of "specific intent" and "general intent"

intended to do something (anything) that was criminal, not just immoral. A somewhat more demanding requirement is expressed in *Regina v. Faulkner*. In the process of stealing rum from the hold of a ship, Faulkner accidentally set the ship afire, destroying it. Lords Fitzgerald and Palles conclude that the *mens rea* requirement means that Faulkner must have at least intended to do something criminal that might reasonably have been expected to have led to the actual harm caused and charged. Thus, Faulkner ought not be liable for the offense of burning a ship when he intended only to steal rum from it, and by that conduct could not reasonably have foreseen its destruction.

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

The Common Law focused on two varieties of *mentes reae* in particular: as the law developed, most offenses came to be understood as requiring either *specific intent* or *general intent*. Unfortunately, the meanings of these terms, and the distinction between them, were difficult to pin down. Even more unfortunately, the obscurity and confusion did not diminish, and may even have increased, over time; the terms became more familiar, but their content was no less fuzzy. Perhaps worst of all, this confusion was not merely an intellectual shortcoming but had serious legal consequences, as the Common Law also developed rules and defenses that applied differently to specific-intent versus general-intent crimes.

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5 13 Cox's Crim. Cases 550 (1877).
6 As late as 1957 in England, appellate courts were having to correct trial courts on the point. In *Regina v. Cunningham*, [1957] 2 Q.B. 396 (C.C.A.), the defendant stole a gas meter for money contained within, thereby allowing gas to escape and kill an elderly woman who lived next door. The trial court instructed jurors that the defendant need only be found to have acted maliciously in some general sense; a requirement easily satisfied by his intention to commit theft. The Court of Criminal Appeal reversed the conviction, making clear that the statutory term "malicious" meant that the jury must find that the defendant was malicious; to causing the death of the deceased, that he foresaw that his removal of the gas meter created a risk of her death.
8 For an attempt to define and illustrate these distinctions, see Linehan v. State, 442 So. 2d 244 (Fla. App. 1983).
10 For example, voluntary intoxication could be a defense to a specific intent crime but no general-intent crime. See, e.g., Model Penal Code § 2.08(1) comment 1 at 353 (1985); further discussion, see § 4.4. The rules governing "mistakes" also differed based on whether underlying offense was one of general or specific intent. For further discussion, see § 4.4.
The term “specific intent” sometimes seemed to contemplate that, beyond the (general) intent to perform certain conduct, the actor must have a further purpose or design in mind when doing so: for example, “with intent to kill,” or trespass “with intent to commit a felony” (definition of burglary). At other times “specific intent” seemed to suggest an intent to do a particular thing in a particular way, such as an intent to kill a particular person or steal a particular object, as opposed to “general intent” to act on an unknown or undetermined victim or thing. Sometimes “general intent” seemed to capture an overall capacity for wrongdoing, whereas “specific intent” demanded a particular decision to engage in a wrongful act.

Specific intent and general intent were not the only *mens rea* recognized at Common Law. Instead of, or in addition to, requiring specific or general intent, a number of Common Law offenses required that the relevant conduct must be performed “maliciously,” “fraudulently,” “feloniously,” “wantonly,” and the like. In contrast to the concepts of specific and general intent, which suggest a focus on the actor’s psychology (his goals, perceptions, beliefs, and so on), many of these terms suggest a normative assessment of the actor’s conduct—a focus on so-called *objective fault* (the blameworthiness of the activity *per se*) rather than *subjective fault* (the blameworthiness of the actor).

Even after recognizing more than one category of *mens rea*, the Common Law retained a sense that the required *mens rea* (or *mentes reae*) applied in a general way to the offense as a whole. The Model Penal Code further refines the understanding of how culpability should apply, requiring culpability “with respect to each material element of the offense.”12 In what may be described as a shift from *offense analysis* to *element analysis*,13 the Model Penal Code emphatically rejected the notion of having one overall “umbrella” culpability requirement for an offense (a notion which was poorly understood and inconsistently employed even at Common Law). The Code instead adopted the position that culpability requirements should apply to individual elements of offenses. One consequence of this shift is that under the Code, and other modern criminal codes, the required level of culpability may be different for different elements of the same offense.

This element-analysis approach provides, for the first time, a comprehensive statement of the culpability required for an offense. The early conceptions of *mens rea* were not simply undemanding, they were hopelessly vague and incomplete. They failed to tell courts enough about the required culpability for an offense to enable the courts to resolve the cases that commonly arose. These vague conceptualizations left it for courts to fill in the culpability requirements as the cases arose.14 Element analysis

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12 Model Penal Code § 2.02(1).
14 This occurs most commonly in determining whether an actor’s mistake should provide a defense. For further discussion of this issue, see § 4.4.
permits legislatures to reclaim from the courts the authority to define the conditions of criminal liability and, for the first time, to provide a comprehensive statement of the culpability required for an offense.\footnote{Despite these recent dramatic developments, many American courts have failed to take note of the modern criminal code shift to element analysis. Dulled by generations of offense analysis, courts ignore general code provisions that, together with offense definitions, define every objective and culpability element required for liability. They continue to define unstated culpability requirements according to their own view of the public policy interests. While it does not explain or excuse the slow judicial re-education, the Model Penal Code’s implementation of element analysis is admittedly seriously flawed in many respects. So too are the criminal codes of most states, modeled as they are after the Code. Yet, the virtues of element analysis make it worth salvaging. For discussion of the flaws of the Model Penal Code’s system and proposals for reform, see §§ 4.2.3 and 4.2.4.}

The shift to element analysis did not come from a determination by the Model Penal Code drafters to change the traditional offense requirements. Rather, the drafters believed that element analysis was necessary to describe accurately an offense’s culpability requirements, even requirements that had been recognized during the Common Law period. That is, Common Law lawyers and judges were wrong to think that their offense-analysis view of offense culpability requirements was adequate to describe the culpability that the Common Law required. Their misconception stemmed in part from their conceptualization of an independent “law of mistake,” which they saw as supplementing the culpability requirements of an offense definition. Thus, an actor might satisfy the requirements of theft, yet have a defense if the “law of mistake” allowed a defense in the situation. The Model Penal Code drafters, in contrast, recognized that a mistake defense and a culpability requirement are one and the same: they are simply two ways of describing the same thing. Thus, the Model Code provides that mistake gives a defense if it negates an offense culpability requirement.\footnote{See Model Penal Code § 2.04(1).}\footnote{The current federal criminal law, which has never undergone the modernization via the Model Penal Code that a majority of state codes have, uses 78 different culpability terms. “Present federal criminal law is composed of a bewildering array of terms used to describe the mental element of an offense.” S. Rep. No. 605, 95th Cong., 1st Sess., pt. 1, at 55.} Mistakes negating an offense culpability element are discussed further in § 4.4.

\section*{§ 4.1.2 Culpability Under Modern Criminal Codes}

Aside from their insight into the relation between mistake defenses and culpability requirements, the Code drafters’ greatest contribution in this area is their use of a limited number of carefully defined culpability terms. In place of the plethora of common-law terms—wantonly, heedlessly, maliciously, and so on—\footnote{Some jurisdictions have adopted the Model Penal Code scheme, using the four defined culpability terms described above, but have altered the definition of some offenses to use terms other than the defined terms. New Jersey, for example, adopted a code based upon the Model Penal Code but continued for some time to use terms such as “carelessly,” “heedlessly,” “wanton,” “willful,” “intent,” and “criminal negligence,” without definition.} the Code defines four levels of culpability: purposely, knowingly, recklessly, and negligently.\footnote{The current federal criminal law, which has never undergone the modernization via the Model Penal Code that a majority of state codes have, uses 78 different culpability terms. “Present federal criminal law is composed of a bewildering array of terms used to describe the mental element of an offense.” S. Rep. No. 605, 95th Cong., 1st Sess., pt. 1, at 55.} Ideally, all offenses are defined by designating one of these four levels of culpability as to