THE MODEL PENAL CODE, THE COMMON LAW, AND MISTAKES OF FACT: RECKLESSNESS, NEGLIGENCE, OR STRICT LIABILITY?

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I am pleased to be able to join in this celebration of the 25th Anniversary of the Model Penal Code. The Model Code is a remarkable document. It is, not to put too fine a point on it, the most important and influential development in the substantive criminal law in this century. It has been, as Sanford Kadish has said elsewhere, "stunningly successful"[1] in accomplishing the hope of its chief architect, Herbert Wechsler, to "stimulate and facilitate the systematic re-examination"[2] of the criminal law. It has served as the model, and more importantly as the stimulus, for the enactment of legislation in at least thirty-seven states.[3] It is an academic product in the sense that it reflects a thorough rethinking of the fundamental premises of the criminal law and their translation into operative principles. At the same time, it has induced more reform of the criminal law than any single effort in the history of the nation, and indeed,

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I should also acknowledge my deep intellectual debt to two of my colleagues, John Calvin Jeffries, Jr., and Richard J. Bonnie, whose collaboration through two editions of our casebook on Criminal Law is largely responsible for whatever contribution that book has made. I am also grateful to them for their comments on a draft of this article.

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3. This number is a little misleading. Most of the states counted have undertaken comprehensive revision fully within the spirit intended by the drafters of the Model Code. A few, however, have retained such large segments of the common law that they can hardly be said to have followed the Model Code structure.
has led to the only systematic reform in the history of many of the jurisdictions that have used it as a model.

I have been asked to focus my remarks on the impact of the Model Penal Code in law school classrooms and on the role of academics in the acceptance of the Code. I will do so, first, by offering some generalizations on that topic and, second, by adding some substantive comments on an aspect of the Code that has bothered me in my own teaching. My purpose in the second undertaking is threefold: to give an example of how I have used the Model Penal Code in the classroom to engender debate about fundamental principles underlying the substantive criminal law; to point out a situation where the rationale thus far advanced in support of a position taken by the Code seems to me inadequate; and to stimulate discussion at this Conference about an important feature of the Code. My intention is to engage in this second task fully within the spirit of the Model Code itself: to demonstrate how the Code can be used, in Wechsler’s words, to “stimulate and facilitate the systematic re-examination” of the criminal law. It is in this respect, as I will conclude, that academics will play their major role in the acceptance of the Model Penal Code.

I

I doubt that there are very many teachers of the substantive criminal law who do not take the Model Penal Code as their major text, or at least as one of their major texts. I hope I am correct in this speculation because there are a number of good reasons for them to do so.

One of the most important is that the Model Code is written in English. The common law, as I do not need to remind this audience, speaks in a language all its own. Professors Jeffries and Bonnie and I have put the point in the following manner in the discussion of common-law mens rea in our criminal law casebook:

The first lesson to be learned about common-law mens-rea terminology is that the words used often do not mean what one would expect. There is remarkably little correlation between their common usage or dictionary meaning and their legal usage to describe an offender’s state of mind. Before mens-reas terms can be understood in their special legal sense, therefore, one must face the problem of translation. Just as one begins the study of a foreign language by learning the English equivalent of the words to be used, and gradually learns to use the foreign vocabulary without the intermediate step of constant translation, it is useful to treat common-law mens-reas . . . as words that must be translated into ordinary language before one can learn what they mean and how to use them.
The difficulty of the terminology is compounded by the colorful variety of mens-rea terms in common usage. They include "corruptly," "scienter," "wilfully," "maliciously," "fraudulently," "wantonly," "feloniously," "wilful neglect," "recklessly," "negligently," "wanton and wilful," "specific intent," "general intent," and many more. Learning to use these terms would not be too problematic if their meaning and the differences among them were settled. This is not the case, however, even though courts and scholars have been centuries in the effort. To return to the foreign language analogy, there are no accepted meanings into which these terms invariably can be translated. Different courts translate them differently, and usages are frequently inconsistent and confusing. What is required of the student, therefore, is not memorization and assimilation of accepted definitions, but sensitive assessment and analysis, informed by the realization that context is essential to understanding.4

By contrast, the Model Code — particularly in its mens rea structure — is an effort, and a successful one, to describe the basic concepts of the criminal law in ordinary English. Ignoring for present purposes some technical refinements, "purpose" means a "conscious object" to engage in behavior and "knowledge" means an "awareness" of the nature of the actor's behavior. "Recklessness" and "negligence" are defined in understandable terms that describe the judgments that must be made rather than in the epithets of the common law. The result does not depart substantially from the meaning of these terms in ordinary discourse or in a standard dictionary.

The point, then, is twofold. Students are more likely to understand classes conducted in ordinary English. And the Model Penal Code facilitates such teaching by encouraging the use of terminology that closely corresponds to the way ordinary people would describe the concepts involved. The advantages extend to understanding the Model Code itself, to debating the appropriate premises of the criminal law, and to comparing Model Penal Code and common-law solutions to the problems of the criminal law.

This is not to say that the Model Penal Code is easy, or that teaching in the language of the Code requires nothing more than an understanding of English composition and grammar. In fact, students find the Model Code forbiddingly difficult. But herein lies another reason why the Model Penal Code has been so successful in the classroom.

Students hate to read statutes; indeed, most refuse to do so, almost as a matter of pride. And they hate even more to make the effort to understand a

tightly integrated, highly analytical statute that requires careful parsing and thoughtful reasoning rather than the kind of rote learning on which many of them would like to rely. Yet these are things they must learn, and the Model Penal Code is a wonderful vehicle through which to begin the process of exposing them to this central task of lawyering. It is not an overstatement to say that the Model Penal Code is the reason that criminal law remains a first semester, first year course at Virginia. In contrast to the other common-law subjects that are the staple of the beginning of law study, criminal law, at least as we teach it at Virginia, combines the study of public law, common law, and a tightly integrated statute. The intrinsic importance of the subject is overshadowed by the foundations in legal methodology that are taught to the first year student. And the real uniqueness of the criminal law course is that it combines the demanding tasks of learning to piece together the structure that underlies a difficult, imposing, and frustrating legal jigsaw puzzle, of coming to understand that the result of that process expresses substantive conclusions about an important component of our system of legal order, and, finally, of beginning to unpack the debates of policy that confirm the substantive conclusions or suggest different ones.

The last point deserves separate emphasis. Professor Wechsler expressed the hope that the Model Penal Code would "stimulate and facilitate the systematic re-examination" of the criminal law. The fact is that the Model Penal Code defines the terms of debate on virtually every significant issue involved in the definition of crime and the recognition of defenses.

There are, to be sure, important questions about the substantive criminal law that it does not address. One is the constitutional limitations that overlay and constrain issues of crime and punishment. The Model Penal Code cannot, of course, be informative on when or whether the death penalty is cruel and unusual, when a non-capital sanction exceeds the limits of proportionality, whether obscenity laws offend the limits of vagueness and fair notice, whether the Constitution contains substantive limits on the minimum conduct and culpability required for crime definition, and the like. Another unaddressed issue is the relationship of regulatory measures and criminalization in such areas as drug and alcohol use or gambling. Indeed, the issue of criminalization at the fringes of the criminal law is perhaps best addressed by other means.

It is also true that to some extent the Model Code is out of date. Developments in sentencing policy would surely call for some rethinking of
articles 6 and 7, although I, for one, am still convinced that the basic approach of the Model Code to this subject is sound. Perhaps the most significant respect in which the Code has been overtaken by time is in its treatment of the crime of rape and related offenses of sexual aggression.

But these limitations are in an important sense beside the point. The core of the basic course in substantive criminal law traditionally has focused, and is likely to continue to focus, on the material covered in the General Part of the Model Code — specifically, articles 1 through 5 — as elaborated in the definitions of specific offenses. And on these questions, the Code is the best single backdrop against which to consider fundamental questions concerning the structure and content of the criminal law. This is not to say, of course, that it is always right. Many would argue, for example, that its insanity defense, though once the standard around the country, is overly generous; recent reforms in this area suggest an emerging consensus that the control formula should now be abandoned. But what

5. I have in mind not only the emergence of the “just deserts” philosophy after the sentencing provisions of the Model Penal Code were in place, but the dramatic increase in attention to issues of equality and fairness in the sentencing process that has occurred since then. While much of the credit for generating these developments can properly be attributed to initiatives taken by the Model Code, it is hardly surprising that the document whose 25th Anniversary we celebrate at this Conference does not entirely reflect what one would say on these subjects today. For further discussion of some of these questions, see Tonry, Sentencing Guidelines and the Model Penal Code, 19 Rutgers L.J. 823 (1988).

6. The major provisions on sexual offenses were first drafted in 1955, see Model Penal Code §§ 207.4 to 207.6 (Tentative Draft No. 4, 1955), and were published in their final form in 1962. See Model Penal Code art. 213 (Proposed Official Draft 1962). While revisions were made in the interim, their basic structure — and more particularly the exclusive focus of rape on sexual aggression by males against females to whom they are not married and the development of the Model Code approach to issues such as force, consent, prior promiscuity of the victim, prompt complaint, and corroboration of the victim's testimony — were developed long before modern changes in attitudes on such questions reached their present state of development. For an example of the kinds of criticisms of rape law in general, and the Model Penal Code in particular, that should be accommodated in a fresh view of the subject, see Estrich, Rape, 95 Yale L.J. 1087, 1134-47 (1986).

7. The Model Penal Code insanity defense provides: “A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.” Model Penal Code § 4.01(1) (Official Draft 1985). Within three years of the acquittal of John Hinckley for attempting to assassinate President Reagan, Congress and half of the states enacted limitations on the reach of the insanity defense. The major thrust of the federal statute changed federal law from the Model Penal Code formulation to a narrower inquiry:

It is an affirmative defense to a prosecution under any federal statute that, at the time of the commission of the acts constituting the offense, the defendant as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. . . .

18 U.S.C. § 20. While all of the state revisions did not follow the federal pattern, many of
the Model Code does do is provide a sound analytical structure for thinking about the criminal law and a series of plausible solutions that are at the least a well-thought-out standard against which other potential solutions can be considered. When one understands the Model Penal Code — even if one disagrees with its conclusions — one has located the points of debate. Even if one agrees with the new federal approach to the insanity defense, to continue with that example, its contrast to the Model Code isolates with precision the major issues one must resolve in coming to rest on the critical questions.

II

How the Model Penal Code locates points of debate is worthy of illustration. I will give an example below. I do not propose to reach closure on the issues it presents, nor have I deemed it necessary — or feasible under the time constraints under which I agreed to make a presentation at this Conference — to exhaust in the footnotes other sources that have addressed the issues involved. My point is the far more modest one of isolating an issue of importance that has emerged from my own teaching and raising some questions that seem to me to deserve further consideration.

My example concerns the relationship between sections 2.02(3) and 2.04(1) of the Model Code. Section 2.02(3) provides: “When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly, or recklessly with respect thereto.”8 As those who are familiar with the Code know, this provision serves two quite different objectives. First, it is a drafting convention, sometimes overridden in specific offenses, that allows crime definitions to be stated without unnecessary verbiage. The second, and more important, purpose is to affirm the basic policy of the Model Code that “recklessness,” defined to mean risk creation of which the actor is aware, is the appropriate minimum culpability for the generality of criminal offenses.

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This second purpose is further implemented in section 2.04(1), which provides: "Ignorance or mistake as to a matter of fact . . . is a defense if: (a) the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense . . . ." As applied to the elements of offenses for which "recklessness" is the prescribed culpability, this provision states the tautological conclusion that mistakes of fact will constitute a defense when they lead to unawareness of the risks created by conduct.

A

The point I wish to make about these provisions can best be made by first referring to some common-law background. The standard American statement of the relevance of mistakes of fact to criminal liability is that, laying aside for the moment offenses that require a specific intent, a mistake is a defense "[i]f an actor honestly and reasonably, although mistakenly, believed the facts to be other than they were . . . ."\(^9\) The modern lawyer, trained in the analytical approach of the Model Penal Code, would describe this rule as a statement that negligence is the mens rea for the elements to which it is applied and that a mistake can be a defense if it shows that the actor was not negligent about the existence of the relevant element. The negligence referred to in this statement, moreover, is negligence of a fairly low order — that is, the question posed is whether the defendant's behavior was "reasonable," not whether it involved an extraordinary departure from common standards of behavior in the situation.\(^11\)

This result is to be contrasted with the approach of the Model Penal Code in situations to which the common-law rule described above was (and, in many jurisdictions, still is) applied. One effect of section 2.02(3) is that recklessness is the mens rea for most comparable elements of Model

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9. *Id.* § 2.04(1).

10. J. MICHAEL & H. WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION 756 (1940). The same rule was applied to the actus reus elements of specific intent crimes, though not to the specific intent itself.

11. As a matter of terminology, I will refer to this concept as "ordinary negligence" in order to contrast it to negligence as the Model Penal Code defines the term. Specifically, section 2.02(2)(d) of the Code provides:

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.
Penal Code offenses. Model Penal Code recklessness, moreover, involves an actual awareness of a substantial and unjustifiable risk and a judgment that taking it under the known circumstances was "a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." This is, to say the least, very different from the standard of "ordinary" negligence envisaged by the common-law approach to mistakes of fact.

The Model Penal Code standard, in what seems to me an overstatement, is described in the final commentary to the Code as "accept[ing] as the basic norm what usually is regarded as the common law position." There is, to be sure, some support in the literature and the cases for this observation, and it may be a correct statement of the "basic norm" of criminal liability under the common law in other contexts. But the accepted common-law rule for mistakes of fact seems more nearly as I have described it above. Thus, the Model Penal Code has rejected a judgment expressed in a common-law rule that was centuries in its evolution. The question I mean to raise is whether this rejection is justified. My conclusion is that it is at least worth asking whether this is a matter on which any categorical position will best reflect the policies that ought to control the imposition of criminal liability.

Before speculating about this matter, however, I should note a further divergence between the Model Code and the common law on a closely related issue. Although it is not unmistakably clear from the definitions of "element" and "material element" in section 1.13, it is made clear in the commentary that the culpability structure of section 2.02 is meant to apply to grading criteria as well as to the formal elements of Model Penal Code offenses. The general position of the common law is almost certainly to the contrary, holding the actor to strict liability with respect to elements

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12. The full definition contained in section 2.02(2)(c) is:

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


that are relevant only to the grade of an offense. Thus, a more complete statement of the common-law position is that the kinds of mistake of fact defenses under discussion are measured by a standard of ordinary negligence with respect to elements central to criminality and by strict liability if the element affects only the grading of the offense. The standard of culpability is thus even lower than ordinary negligence in some cases where the Model Penal Code insists on recklessness as the minimum criterion of liability.

The common-law situation is complicated by yet one further twist. Its conclusion that strict liability should be applied to grading elements is extended by the application of strict liability to additional elements of some offenses. The principle is captured in the following colorful statement: If "there is a measure of wrong in the act as the defendant understands it, . . . his ignorance of the fact that makes it a greater wrong will not relieve him from the legal penalty." In situations to which this common-law doctrine applies, it is enough that the defendant is culpable as to those elements of the offense that are central to the morality of the action undertaken. Strict liability will be applied to elements that merely make the actor's behavior worse than he or she knew (or should have known) that it was. Again, the general position of the Model Penal Code as to such elements would be that recklessness is the standard by which to measure the appropriate scope of

17. The full statement of the rule in Michael's and Wechsler's well-known criminal law casebook is:

If an actor honestly and reasonably, although mistakenly, believed the facts to be other than they were, and if his conduct would not have been criminal had the facts been as he believed them to be, then his mistake is a defense if he is charged with a crime which requires "mens rea." . . .

J. MICHAEL & H. WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION 756 (1940) (emphasis added). The effect of the italicized phrase is to deny a mistake of fact defense to a person whose mistake related only to the degree of criminality involved in the underlying behavior. This translates into strict liability for grading elements of crimes.


19. I do not wish to become embroiled in controversy about whether the imposition of strict liability for an element of a crime under this theory is offensive because judges will retroactively impose their own standards of morality on an unsuspecting public. To the extent that application of a "lesser moral wrong" theory (as I will call it below) has this effect, I would agree that it is offensive. But the theory can be used as a rationale for the consistent imposition of strict liability for an element of a crime that is announced by the legislature in advance of the behavior involved. Or, as I will illustrate, it can be used by the courts as part of a reasonable and unoffensive statutory interpretation. Cf. Jeffries, Legality, Vagueness, and the Construction of Penal Statutes, 71 VA. L. REV. 189 (1985). In the latter two cases, I believe, as I explain below, that the stakes are different.
criminal liability.

B

The issue I wish to put on the table, then, is whether one should categorically reject these common-law positions as unfortunate relics of a best forgotten history, or whether one could reasonably argue that they should still be considered in the drafting of modern penal statutes. I would begin to unravel this problem by first confronting the debate about whether negligence is ever an appropriate basis for criminal liability. The reasons why it can sometimes be appropriate offer an important insight into the rationale underlying the common-law structure.

While I have no ambition to exhaust the subject in these comments, I must say that I have never understood, at least since reading H.L.A. Hart, how one could say that negligence is different in kind from forms of blame that are more "subjective" in their focus. I say this for three related reasons.

First, although we do not ordinarily tend to think of them in this way, neither the Model Penal Code concepts of "purpose" and "knowledge" nor their common-law counterparts are entirely "subjective" in the sense that they turn criminal liability exclusively on the defendant's actual thoughts and intentions. In each of these more "subjective" forms of culpability, the criminal law assumes that people should know that the prohibited behavior may not be engaged in with impunity and that they are able to refrain from its commission. We assume, for example, a level of socialization and, except for those who fit extreme and narrowly defined exceptions such as the insanity defense, a level of intelligence, rationality, and capacity to act otherwise that simply may not in fact be true of a given offender. This assumption, in effect, holds members of the community to an objective standard of behavior from which they deviate at their peril. In other words, even where the standard is "purpose" or "knowledge" criminalization involves a combination of objective and subjective inquiries. And it goes

21. One tension in the criminal law that exists because of this assumption is the debate about the admissibility of evidence of mental abnormality on questions of mens rea. See, e.g., Bethea v. United States, 365 A.2d 64 (D.C. App. 1976), cert. denied, 433 U.S. 911 (1977). I mean to take no position on this debate here, but would only note that those who argue for the admissibility of such evidence in effect seek to reduce the objectivity of the law in the respect of which I am speaking. I know of no actual formulation of the criminal law, however, that permits a wholly "subjective" approach to matters of socialization, intelligence, rationality, and capacity.
22. Compare O. Holmes, The Common Law 38 (1963 ed.): "If punishment stood on the moral grounds which are proposed for it, the first thing to be considered would be those
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without saying that the concept of recklessness, both as defined by the Model Penal Code and by any common-law conception that requires awareness of risk, is based on both objective and subjective components.

Second, just as other forms of culpability are not entirely "subjective" in their focus, negligence is not an entirely "objective" inquiry. At bottom, negligence involves a judgment that, based on what the actor knew, he or she should have known something else and should therefore have known enough to have understood the obligation to act more carefully. In spite of its concentration on objective components, the baseline for negligence is the context as the actor perceived it. Negligence, therefore, involves a subjective inquiry (what the actor actually knew about the context) and an objective inquiry (the inferences that should have been drawn from what the actor knew).

limitations in the capacity for choosing rightly which arise from abnormal instincts, want of education, lack of intelligence," etc. Yet the criminal law, as he further pointed out, has never been structured to take such factors into account.

See also United States v. Moore, 486 F.2d 1139, 1179-80 (D.C. Cir. 1973), cert. denied, 414 U.S. 980 (1973) (Leventhal, J., concurring):

The legal conception of criminal capacity cannot be limited to those of unusual endowment or even average powers. A few may be recognized as so far from normal as to be entirely beyond the reach of criminal justice, but in general the criminal law is a means of social control that must be potentially capable of reaching the vast bulk of the population. Criminal responsibility is a concept that not only extends to the bulk of those below the median line of responsibility, but specifically extends to those who have a realistic problem of substantial impairment and lack of capacity due, say, to weakness of intellect that establishes susceptibility to suggestion; or to a loss of control of the mind as a result of passion, whether the passion is of an amorous nature or the result of hate, prejudice or vengeance; or to a depravity that blocks out conscience as an influence on conduct.

The criminal law cannot "vary legal norms with the individual's capacity to meet the standards they prescribe, absent a disability that is both gross and verifiable, such as the mental disease or defect that may establish irresponsibility. The most that it is feasible to do with lesser disabilities is to accord them proper weight in sentencing."

The internal quotation in the last paragraph, interestingly, is from the early commentary to the Model Penal Code itself, specifically section 2.09, comment at 6 (Tentative Draft No. 10, 1960).


This is not to say that I agree with either Holmes or Smith in the cases to which they would apply negligence as the criterion for liability. Both are wrong, in my view, for proportionality reasons — that is, they approve of negligence for crimes of such seriousness that higher levels of culpability are warranted. See P. LOW, J. JEFFRIES & R. BONNIE, CRIMINAL LAW: CASES AND MATERIALS 218-19 (2d ed. 1986). The question I mean to address here, by contrast, is whether negligence is ever an appropriate criterion for criminal punishment.
Third, as with most issues of crime definition, the choice among purpose, knowledge, recklessness, and negligence for a given element of a crime involves a compromise between the preventive goals of the criminal law and respect for values of personal autonomy and responsibility. There is, moreover, a positive correlation between an objective inquiry and preventive goals on the one hand and between a subjective inquiry and respect for personal autonomy and responsibility on the other. For crimes that require purpose, there is heavy emphasis on the subjective-personal autonomy component, but there are also objective-preventive judgments about the defendant's responsibility even if there is factual inaccuracy in certain assumptions about his or her socialization, intelligence, rationality, or capacity. As the culpability standard is lowered to knowledge, to recklessness or negligence in the Model Penal Code sense, or to ordinary negligence as in the common-law rules on mistake of fact, the subjective component is decreased and the objective component is increased. But leaving aside strict liability only for the moment, no one is judged purely on a subjective scale and no one is judged purely on an objective scale.

All persons, moreover, are judged against an objective standard in the sense that it is assumed that they know enough about common morality to know that they should refrain from the kinds of behavior that the legislature has identified as criminal. There can be no other explanation, I think, for the general acceptance — in the Model Penal Code and in the common law — of the principle that ignorance or mistake of the criminal law is no excuse. There may, of course, be situations where that ancient maxim should not be applied, or cannot in fairness be applied. But the accepted general rule is that ignorance or mistake as to the criminality of

24. See Model Penal Code § 2.02(9). Section 2.02(9) provides: Neither knowledge nor recklessness nor negligence as to whether conduct constitutes an offense or as to the existence, meaning or application of the law determining the elements of an offense is an element of such offense, unless the definition of the offense or the Code so provides.
26. See, e.g., Model Penal Code § 2.04(3). Section 2.04(3) provides:
(3) A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when:
(a) the statute or other enactment defining the offense is not known to the actor and has not been published or otherwise reasonably made available prior to the conduct alleged; or
(b) he acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in (i) a statute or other enactment; (ii) a judicial decision, opinion or judgment; (iii) an administrative order or grant of permission; or (iv) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense.
behavior should not be recognized as a defense.

One can describe the rule about ignorance or mistake of criminality in either of two ways. One is that the law imposes strict liability as to whether the behavior punished by the law is a crime. The other is that the law holds citizens to an objective standard; that is, the law assumes that people are sufficiently socialized, intelligent, rational, and capable of acting otherwise to know that they are not supposed to engage in behavior that is subject to criminal sanctions. This observation captures a general characteristic of strict liability on which I think it important to focus. Strict liability is conventionally thought of as an absence of culpability, as a refusal by the law to inquire into the actor's fault. It can also be described, however, as holding the defendant to an objective standard as to one or more characteristics of an offense, or as an assumption by the law that other aspects of the defendant's behavior are sufficient to justify the belief that it is fair to hold him or her to account. If a person intentionally kills another without justification, we do not permit the defense that "I didn't know it was wrong to kill people." We take that position in part because we believe that there are other sufficient indices of fault in the defendant's behavior that make it fair to convict him or her of murder. The same could be said, as I will elaborate below, of other instances where we are comfortable with the imposition of strict liability in the criminal law. There is no instance of which I am aware where the criminal law uses strict liability for one element of an offense without any inquiry into fault on other elements.\footnote{I am not here considering, of course, the category of "regulatory" or "public welfare" offenses. These "crimes," which the Model Penal Code would reclassify as noncriminal "violations," see Model Penal Code § 2.05, and would as a general matter exempt from the Code culpability structure, see Model Penal Code § 2.02(1), present problems that are beyond the scope of these comments. Rather, my remarks are limited to traditional invasions of personal security, property rights, the integrity of government, etc., that are typically punished by serious criminal sanctions and that are meant to carry the full stigma of a serious criminal conviction.}

Instead, as I will illustrate, the rare occasions where the criminal law uses strict liability involve cases where — as with purpose, knowledge, recklessness, and negligence — the law could be described as holding the actor to a combination of subjective and objective standards of liability. The objective standards, moreover, are based (or at least ought to be) on the premise that the actor had a fair opportunity to ascertain the situation and hence can fairly be punished.

The important point, therefore, is that the culpability required for a given offense should be considered as a whole. Different standards reasonably can be applied to different elements of an offense without necessarily undermining the fairness of the overall result. All measures of
culpability, moreover, involve a combination of subjective and objective inquiries. It is not a decisive criticism on its face to allege that the culpability required for a given element is not subjective in its primary focus.

There are differences, to be sure, between different forms of culpability. On the one hand, purpose and knowledge share with strict liability the characteristic that the legislature itself makes the “objective” judgment. Persons who commit crimes that require purpose or knowledge are to be punished, period, if they are shown to have met the required level of culpability — even if they act with impaired socialization, intelligence, rationality, or capacity that does not satisfy a recognized excuse.28 Similarly, when strict liability is imposed for an element of an offense, the legislature has decided that sufficient culpability will have been shown by the other characteristics of the offense to justify holding the defendant to an “objective” standard with respect to the element for which liability is strict. For recklessness and negligence, by contrast, it is the jury that is asked to make the objective judgment — in both cases whether the defendant should have desisted from the behavior based on what was known about the context. Recklessness in the Model Penal Code sense is a higher form of culpability because the actor knew more about the situation — that is, knew the risk as well as the context. For negligence, knowledge of the context is enough.

I accept, of course, the culpability rankings of the Model Penal Code. All other things being equal, the more one knows about his or her behavior (and the more one intends it), the greater the culpability. Purposeful behavior is more culpable than knowing, knowing is more culpable than reckless, and reckless is more culpable than negligent. And Model Penal Code negligence is more culpable than ordinary negligence, just as ordinary negligence shows more culpability than strict liability. The point I do not accept, however, is that there is a difference in kind between the way in which these concepts are used that makes it categorically clear where the lines of criminal liability should be drawn. There is nothing about the nature of “blaming” or “responsibility” that makes ordinary negligence different in kind from other forms of culpability. And there is nothing about strict liability that makes its use — where, as should always be the

28. One could describe this result in common-law terminology, if so inclined, by saying that the law “presumes” socialization and capacity in the ordinary citizen. Indeed, the common law reflects such a statement in the “presumption of sanity” often applied to those who do not meet the standards of the insanity defense. Such a description, of course, is but another way of saying that the law is holding the ordinary citizen to an objective standard of care without a specific inquiry into the citizen’s capacity to act otherwise.
case, there are other indices of fault — necessarily and inevitably impermissible in the criminal law.

C

How, then, does one resolve debate about whether ordinary negligence or strict liability can appropriately be used by the criminal law and, more particularly, about whether the common-law standards for measuring mistakes of fact can be regarded as a rational and fair solution to the problems to which they speak? My answer is that it comes down to a judgment about the level or degree of culpability that is justified (or required) by the conflicting objectives of criminal punishment. This issue, in turn, involves a balance of the preventive goals of the criminal law and the respect it should hold for values of personal autonomy and responsibility. How this balance should be struck in the case of the mistake rules under discussion seems to me a matter of legitimate debate. I think it not at all obvious that the general approach of the Model Penal Code is plainly right or that the general approach of the common law is plainly wrong. Nor do I think it obvious that any categorical answer is likely always to strike the proper balance.

One should begin to think further about this problem, I would argue, by locating the points of debate with more precision than is customary. I would answer the question about the appropriate uses of ordinary negligence and strict liability in the criminal law by first inviting separate consideration of conduct elements, result elements, and circumstance elements.29

Conduct elements seem the easiest to dispose of. As a practical matter, the defendant will know the nature of his or her conduct. Problems of mistake, at least problems of mistake that the law chooses to recognize,30

29. I mean here to rely, of course, on what I take to be the Model Penal Code use of these terms. That is, conduct elements are the words in the definition of an offense that describe the defendant's actual behavior — "breaking and entering" in common-law burglary, "taking and carrying away" in common-law larceny. Result elements are those words in the offense that describe the consequences of behavior, such as "death" in murder or "serious injury" in aggravated assault. Circumstance elements refer to the objective context in which the conduct or results occur. Examples are "the dwelling of another at night" in burglary or "the personal property of another" in larceny.

30. One problem that may arise is that the defendant may not know that behavior fits into a legal category that is punished by the criminal law. For example, a defendant may know that he or she is reaching through an open window at night to steal something inside the dwelling of another. But the defendant may not know that breaking the plane of the open window constitutes a "breaking" that satisfies this element of the crime of burglary. This lack of knowledge, of course, is traditionally treated as a mistake of the criminal law that is not accorded defensive significance. See Model Penal Code § 2.02(9).
do not arise because the defendant was unaware of "conduct" elements, in the narrow sense in which I understand the Model Penal Code to be using that term. Everyone agrees, moreover, that ordinary negligence and strict liability would be inappropriate if used as the standard by which to measure the defendant's attitude toward the conduct components of an offense. For purposes of the discussion below, in any event, I have assumed that knowledge is the operational level of culpability that can be shown with respect to these elements as conventionally understood.

Debate about the use of negligence as an appropriate level of culpability in the criminal law primarily occurs, I believe, in situations where the focus is on the result elements of crime. I accept the usual outcome of that debate. I am fully in accord, for example, with the traditional position that ordinary negligence is an insufficient basis for the criminal punishment of unintentional killings. The rationale for this conclusion, it seems clear, is that despite the preventive case that could be made for the use of negligence in this context, conviction of a crime would be unacceptably severe. For reasons of proportionality, therefore, the proposition is generally accepted — and I do not challenge it here — that ordinary negligence is an impermissible standard for the result elements of crime. And it goes without saying that strict liability as to results is for the same reasons to be rejected, or at least rarely to be countenanced.31

We are left, therefore, with circumstance elements as the focus of the current discussion. By and large, I would submit, debate about rules governing mistakes of fact concerns the appropriate mens rea for the circumstance elements of crime. Most mistake of fact cases, if not all of them, involve the nature of the defendant's behavior or its results only to the extent that the circumstances in which the conduct or its results occur are those that are addressed by the criminal law. This is, I think, descriptively accurate of the general run of cases. I will, in any event, confine my remarks below to those cases where the mistake problem arises in the context of circumstance elements.

D

I wish to take it as a given, then, that we are only talking about the

31. Felony murder, of course, is an exceptional situation where the law has recognized strict liability as to a result element of crime. That doctrine has been so hemmed in with restrictions that in most jurisdictions it does not result in the functional imposition of liability without fault. In any event, as the Model Penal Code has demonstrated in section 210.2(1)(b), the law of felony murder could easily be reformulated, as it should be, to require traditional forms of culpability that would do no violence to the values sought to be served by those who favor the common-law rule as it now survives in most states.
mens rea that ought to be applied to the circumstance elements of crimes for which knowledge of conduct will operationally be required and for which result components will generally require at least recklessness in the Model Penal Code sense of that term. Given this assumption, it seems to me that a requirement of ordinary negligence or strict liability as the criterion for mistakes of fact may in many cases be justified by its consistency with two minimum conditions of criminal responsibility upon which I, at the least, would insist.

The first is fair notice. That term is encumbered with many meanings, most of which, I would argue, are obscure to a fault in the context of constitutional litigation about vagueness and the like. Rather than become bogged down in sorting out the appropriate constitutional meaning of the term, I mean to advance here a use of the concept that I would defend as a minimum condition of fairness for any proscription of conduct that will be subject to serious criminal sanctions. Specifically, the context must be such that the actor, through the normal processes of socialization that we can reasonably expect of the average citizen, could be expected to be alerted to the wrongfulness of the behavior. Stated another way, the criminal law cannot fairly be applied unless one's moral signals are likely to be alerted by the context in which the behavior occurs. The inquiry is objective; it is derived from standards that can reasonably be expected of the average citizen. The inquiry is also qualitative and judgmental; it cannot be quantified beyond statement of the standard itself.\textsuperscript{32} It also necessarily involves a question of degree — that is, the moral alert, as it were, must be sufficient to bring home to the actor that a non-trivial breach of societal standards may be involved in contemplated behavior.

My conclusion would be that use of ordinary negligence as the standard for mistakes about circumstance elements of crimes would be fundamentally unfair if the remaining features of the conduct, results, and culpability required for conviction were insufficient to alert an ordinary person to the necessity to pay attention to the circumstances under which the behavior occurred. This is, I think, what Holmes had in mind when he said that "a law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear" and that "[i]t is enough that such circumstances were actually known as would have led a man of common understanding to infer

from them the rest of the group making up the present state of things." As I have noted above, the concept of negligence takes as its base what the defendant actually knew about the situation, and asks whether an ordinary person would have inferred from this knowledge the need for circumspect behavior. Virtually by definition, it seems to me, this standard will satisfy in most cases a requirement that the actor be sufficiently aware of the situation that his or her moral signals should be alerted. This will particularly be so if the defendant knows the nature of his or her behavior and is at least reckless as to any result elements of the crime — as I have suggested above will normally be the case. To say the same thing another way, a defendant who is aware of the conduct elements of a crime, is at least reckless (in the Model Penal Code sense) about the result elements, and is negligent (in the sense of the common-law rule for mistakes of fact) as to the circumstance elements usually will meet the minimal notion of fair notice that I have described above. I would conclude from this that at least one essential component of fairness will be met in most cases by that aspect of the common-law rule on mistakes of fact which focuses upon ordinary negligence.

Can the same be said of the occasions where the common-law mistake rules invoke strict liability? I think so. In the case of grading elements, the defendant will be in exactly the situation just described. The concept of fair notice that I have in mind does not speak to the degree of criminal liability that will be imposed. Rather, it is a protection of the citizen against involvement with the criminal law in the first place. This is not to say, I hasten to add, that no objections can be made to the fairness of holding the defendant strictly accountable as to the degree of his or her criminal liability. I will address these objections below. But this particular principle of fundamental fairness is not offended by strict liability on grading elements — that is, the citizen is not deprived of a fair opportunity to avoid entanglement in the criminal process by a law that holds him or her strictly accountable for the grade of an offense.

The same conclusion could follow, it seems to me, in those crimes where the common law applies the doctrine of "lesser moral wrong." I say "could follow" because it depends on the standard of morality under which the conclusion of strict liability is drawn. The fair notice principle I have in mind is itself, in effect, a composite moral judgment. It involves a judgment that an ordinary person of average sensibilities should be alerted to the need for circumspect behavior. To the extent that there is congruence

33. O. Holmes, supra note 22, at 42 & 46-47.
34. See supra notes 18 & 19 and accompanying text.
between this judgment and the "measure of wrong in the act as the defendant understands it," the principle of fair notice that I have advanced will be satisfied by definition. To the extent that the two judgments diverge, the fair notice principle that I have asserted may be offended and the common-law rule may lead to an unfair result that should be rejected. Again let me say, moreover, that I am not asserting at this point that there are no grounds of fairness on which one could object to the imposition of strict liability under this theory. All I propose to assert is that fair notice in the minimal sense in which I mean it here will not be offended if, in effect, that standard is taken into account in the application of the common-law doctrine of "lesser moral wrong."

A second minimum condition of criminal liability on which I would insist has to do with the amount of behavior the law should require — that is, with the actus reus component of crimes. I will not undertake here to defend the idea that a minimum conduct component of crime definition is an important, and indeed perhaps the most important, practical constraint on the fairness of the substantive criminal law.\textsuperscript{35} My points are the more limited one that the common-law rules on mistake of fact in no way offend this constraint and the perhaps more adventurous one that they can in part be justified by their respect for this limitation. The rules do not offend this constraint because mistake of fact issues arise only after it has been proved that the defendant engaged in the conduct required by the definition of the offense; conduct limitations on the definition of crime, in other words, must be independently satisfied.\textsuperscript{36} And the common-law mistake of fact rules may in part be justified by their consistency with a minimum conduct requirement for three reasons. First, the fact that the defendant engaged in the conduct or caused the results under the actual circumstances required by the law is a powerful protection of the values of personal autonomy and responsibility that the criminal law ought to respect. Second, the requirement of completed conduct and results under the circumstances identified by the law, when coupled with the fair notice limitation I have described


\textsuperscript{36} One elaboration should be noted. In cases where the pattern of crime definition includes a "specific intent" of the sort typically involved in burglary or larceny, the common law applies the "general intent" mistake of fact rule to the actus reus elements of the offense, but raises the standard to an "honest" mistake for the specific intent component. It thus applies its ordinary negligence standard only to events that in fact have occurred.
above, substantially increases the law’s respect for these values. And third, if these minimum conditions of fairness for the operation of the criminal law are satisfied, then it is at least plausible for notions of prevention to be used as the basis for establishing a mens rea of less than Model Penal Code recklessness for the circumstance elements of at least some crimes.

E

The implications of these two minimum conditions for the fair operation of the criminal law could perhaps be sharpened by several illustrations. I will give examples of each of the three aspects of the common-law structure that I have described above.

I

I begin with a case where the common-law structure, as I would apply it, would use ordinary negligence as the standard for liability on a circumstance element. The situation I have in mind concerns the federal false statements offense: “Whoever, in any matter within the jurisdiction of any department or agency of the United States, knowingly and willfully . . . makes any false . . . statements . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both.”37 Based on the text and legislative history of the statute, the Supreme Court rejected the argument in United States v. Yermian38 that the words “knowingly and willfully” applied to the element “in any matter within the jurisdiction of any department or agency of the United States.” It stopped short, however, of deciding whether strict liability should be imposed on this element or whether the prosecutor should be required to show ordinary negligence. The District Court had instructed the jury that it was enough if the defendant “knew or should have known that the information was to be submitted to a government agency.”39 Since there was plenty of evidence of negligence,40 the Court upheld the conviction, finding it “unnecessary . . . to decide whether [the District Court’s] instruction erroneously read a culpability requirement into the jurisdictional phrase.”41

It is often forcefully argued that strict liability is appropriate for the

39. Id. at 67 n.4 (emphasis added).
40. The form that the defendant signed was literally plastered with indications that the information was to be used for security purposes by the Defense Department. A warning that false answers would be subject to prosecution under section 1001 was printed right above the space where the defendant signed his name.
41. 468 U.S. at 75 n.14.
jurisdictional elements of federal offenses. This argument itself is based on a version of the common-law culpability structure, for it is in effect a contention that jurisdictional elements are often not essential to the criminality (or to the morality) of the defendant’s behavior. 42 But Yermian is not such a case. As the majority in Yermian recognized, and as the dissent argued, 43 there is legitimate concern that section 1001 could be a “trap for the unwary” if it applied to any false statement that, unknown to the actor, had some relevance to the function of some federal department or agency. Strict liability on this element, in other words, could have the inappropriate effect of criminalizing a wide range of behavior that involved what the actor believed to be trivial falsehood or socially accepted stretching of the truth.

But does the same concern exist if the defendant is held to a standard of ordinary negligence? Surely not in the context before the Court, where the defendant signed a written form that was generously sprinkled with statements indicating the official nature of the inquiry and that contained an explicit warning that falsehood would be prosecuted under section 1001. Surely a person who knowingly makes false statements in such a setting has been given sufficient opportunity to avoid entanglement with the criminal law. As the Court itself said, “[t]he jury’s finding that federal agency jurisdiction was reasonably foreseeable by the defendant, combined with the requirement that the defendant had actual knowledge of the falsity of those statements, precludes the possibility that criminal penalties were imposed on the basis of innocent conduct.” 44 In a word, the defendant’s behavior, the culpability that was shown as to the falsehood, and the finding that a reasonable person in the defendant’s situation should have known that the inquiry was for an official purpose are sufficient to meet the two minimum conditions of a fair criminal law that I have outlined above. Given this conclusion, it may be appropriate to balance the preventive and personal autonomy concerns by this particular combination of subjective and objective culpability. 45

42. Consider, for example, a crime of murder where the victim is an FBI agent. If strict liability is imposed on the element that would give the federal government a jurisdictional interest, the defendant will still be held to the normal conduct and culpability requirements for murder. I do not find it persuasive that notions of fundamental fairness to the defendant in such a case would require a finding of at least recklessness as to the FBI component of the offense. Federal law contains, of course, many such examples. See, e.g., United States v. Feola, 420 U.S. 671 (1975).
43. Justice Rehnquist dissented, joined by Justices Brennan, Stevens, and O’Connor.
44. 468 U.S. at 75 n.14.
45. It surely would be appropriate, I would argue, if the false statements offense were limited to written replies on a form such as the one Yermian signed.
This is not to say, of course, that a greater risk of conviction based on innocent behavior could not be presented by other situations to which section 1001 might be applied. The four dissenters in the Supreme Court were concerned about just such a possibility. But I do not find it implausible to conclude that the ordinary citizen is sufficiently protected from unfair punishment if a jury is prepared to find that he or she should have known from the context that the occasion was one where deliberate falsehoods could not be casually advanced without additional inquiry. The difference between Model Penal Code recklessness on this point and the ordinary negligence of the common law, to be sure, is a difference in the level of protection that would be afforded to the values of personal autonomy and responsibility. The possibility of criminalizing innocent behavior would therefore be reduced if the Model Penal Code were followed on this element of the false statements offense.

For this reason, one may be inclined to conclude that at least Model Penal Code recklessness should be required for the element of the false statements offense under discussion. The question seems to me a close one, however, and I have deliberately chosen an example where the proper outcome can be debated. For this is precisely my point. The criminal law serves preventive goals as well as goals of personal autonomy and responsibility. I for one do not find it obvious or beyond argument that this is a situation where the preventive goals should not prevail.

2

I will give two illustrations of the operation of the grading aspect of the common-law rules. First, consider the elements "dwelling of another at night" that serve to distinguish the second degree felony from the third degree felony in the Model Penal Code offense of burglary.46 The common law would impose strict liability for these elements. The Model Penal Code requires recklessness.

The rationale for punishing intrusions into the home of another at night more seriously than intrusions on other occasions is the additional threat to personal security posed by nighttime invasions of the home. The preventive objectives of the law in this context are of the highest importance. In this situation, I must confess, I find it completely implausible that a defendant should be acquitted because he or she was not reckless, or not negligent, as to whether the building was a dwelling or whether the hour was sufficiently late. Recall that the remaining elements of the offense are that the actor enter a building or occupied structure without license to

46. Model Penal Code § 221.1.
do so and with the intent to commit a crime. A person who engages in this behavior surely has no claim of lack of fair warning that the criminal law might be interested and no claim of lack of fair opportunity to make further inquiry. If the security of a home is in fact invaded at night, the potential alarm to an occupant (not to speak of harm) seems to me to justify putting on the defendant the risks that the building was a home and that the offense was committed after dark. Given the pervasive subjectivity of the offense in other respects, I am not concerned about an objective standard for these elements.

One answer in this situation is that the defense of non-recklessness or non-negligence will be so implausible that no jury would accept it. I agree that this will probably be the case. But this observation seems to me to cut against providing the possibility of such a defense, not in favor of it. There may be bizarre cases where the application of strict liability in this context will lead to discomfort about the fairness of a criminal conviction. That is always a possibility, and there are, as there should be, ameliorating devices in the legal system to account for such an event. But the vast range of burglary cases, I would submit, do not present occasions for concern about the defendant’s mens rea as to these elements of the offense. And I see no justification for encumbering a criminal trial with jury instructions on such questions in order to preserve a theoretical structure that is likely to have little practical application.

My second example is from the Model Penal Code itself. Section 213.1 defines rape, in part, to include a case where a male has sexual intercourse with a female not his wife where the victim is less than ten years old. Under the definitions in section 213.6(1), strict liability is imposed as to the age of the victim. In a case where age served as a grading element, the common law would also impose strict liability for this component of the offense.

I do not mean to become embroiled in debate about the propriety of laws against statutory rape. I fully accept the point that strict liability has

47. See, e.g., Model Penal Code §§ 2.12 (dismissal of de minimis infractions), 5.05(2) (dismissal or reduction in grade of attempt charges), 6.12 (reduction of convictions to lesser grade) (Official Draft 1985). In addition to such formal devices, prosecutors, courts, and juries have many informal means — among them refusal to charge, plea bargaining, conviction of a lesser charge, and jury nullification — by which an unwarrantedly harsh result can be avoided.
48. Id. § 213.1(1)(d).
49. If the defendant believed the victim to be more than 10 years old but less than 16, he would be guilty of the lesser offense defined in section 213.3 (Corruption of Minors). The 10-year-old provision in the rape statute thus would serve to increase the grade of the offense from a felony of the third degree to (most likely) a felony of the first degree.
often been misused in that context. But I would argue that the use of preventive concerns to trump arguments against the use of strict liability in this particular situation fully respects the two minimum conditions for the operation of the criminal law that I have described above. The defendant must be shown to in fact have engaged in the act of sexual intercourse with a female of less than ten years. The defendant will surely know that he engaged in sexual intercourse with a female not his wife. If the defendant is old enough to be held to adult standards of behavior, I have no trouble myself with the conclusion that a sufficiently protective set of minimum conditions for criminal liability has been met in this situation so as not to make a conviction unfair in some fundamental sense, no matter how firmly the defendant believed that his victim was eleven or twelve. Prevention, in other words, can sometimes be a sufficient justification — as the Model Penal Code itself recognizes — for reducing the mens rea for a grading element to a level less than Model Penal Code recklessness.\footnote{The idea that circumstance elements can fairly be controlled by a different culpability policy than that which controls the conduct and result elements of a crime can be found in other provisions of the Model Penal Code as well. Perhaps the best example is in the crime of attempt. See P. LOW, J. JEFFRIES & R. BONNIE, supra note 23, at 351-52. Another example of the use of strict liability for a circumstance element in the Model Penal Code is the materiality requirement for the crime of perjury. See MODEL PENAL CODE § 241.1. 51. 401 U.S. 601 (1971).}

It is not unfair in this situation to hold the actor to an objective standard of common morality. The behavior — even if the facts were as the defendant believed them to be — is a serious breach of community standards about which the defendant should know enough to justify the imposition of serious criminal punishment. Principles of personal autonomy and responsibility are not offended.

3

In many ways the most interesting aspect of the common-law structure for mistakes of fact is the prong that imposes strict liability in cases of "lesser moral wrong." My guess is that it explains more uses of strict liability in the criminal law than is usually acknowledged.

My example is United States v. Freed.\footnote{The defendants were charged with possession of unregistered hand grenades. It was common ground that the offense required proof that the defendants knowingly possessed hand grenades. Everyone also agreed that it was necessary to show that the hand grenades were not in fact registered. The question was whether the District Court properly dismissed the indictment because it did not allege that the defendants knew the hand grenades were unregistered.} The defendants were charged with possession of unregistered hand grenades. It was common ground that the offense required proof that the defendants knowingly possessed hand grenades. Everyone also agreed that it was necessary to show that the hand grenades were not in fact registered. The question was whether the District Court properly dismissed the indictment because it did not allege that the defendants knew the hand grenades were unregistered.

\footnote{The idea that circumstance elements can fairly be controlled by a different culpability policy than that which controls the conduct and result elements of a crime can be found in other provisions of the Model Penal Code as well. Perhaps the best example is in the crime of attempt. See P. LOW, J. JEFFRIES & R. BONNIE, supra note 23, at 351-52. Another example of the use of strict liability for a circumstance element in the Model Penal Code is the materiality requirement for the crime of perjury. See MODEL PENAL CODE § 241.1. 51. 401 U.S. 601 (1971).}
The Court unanimously reversed. The majority opinion reached this conclusion on the indefensible ground that the crime fell into the category of "public welfare" offenses to which the normal culpability structure of the common law does not apply. It is Justice Brennan's concurrence that is interesting for present purposes. He applied analytical tools derived from the Model Penal Code. He concluded that the government had to prove the actus reus of the offense and a mens rea of knowledge as to possession of the hand grenades. As to the unregistered status of the hand grenades, he noted that while normally all elements of an offense should require some element of mens rea, strict liability was appropriate in this context for two reasons. The first was that this result was supported by prior case law. The second is worth quoting:

[T]he firearms covered by the act are major weapons such as machine guns and sawed off shotguns; deceptive weapons such as flashlight guns and fountain pen guns; and major destructive devices such as bombs, grenades, mines, rockets, and large caliber weapons including mortars, anti-tank guns, and bazookas. Without exception, the likelihood of governmental regulation of the distribution of such weapons is so great that anyone must be presumed to be aware of it. In the context of a . . . registration scheme, I therefore think it reasonable to conclude that Congress dispensed with the requirement of intent in regard to the unregistered status of the weapon, as necessary to effective administration of the statute.

I must say that I think it reasonable too. And what makes it reasonable, as I have been arguing, is the level of notice that is conveyed by the remaining elements of the offense. Strict liability can justly be imposed in this context, in other words, because "there is a measure of wrong in the act as the defendant understands it" — that is, the defendant can properly be held to an objective standard of liability based on completion of the prohibited conduct and the culpability proved as to the morally relevant aspects of the offense. The preventive case for dispensing with mens rea on the registration element is strong. The personal autonomy and responsibility case for requiring recklessness or some greater (or lesser) form of mens rea pales, I think, in comparison. It is not unfair to hold the defendant strictly accountable for the fact that his bazooka or anti-tank gun was not registered.

52. The statute carried a 10-year maximum sentence.
53. Freed, 401 U.S. at 613-16 (Brennan, J., concurring).
54. Id. at 616.
55. See supra note 18 and accompanying text.
I would go further than these examples and suggest that similar conclusions might reasonably be drawn in most other instances in which the common-law rules as to mistake of fact have been applied to circumstance elements. I do not mean to suggest that no counter-examples can be given, or that persuasive arguments cannot be mounted against the conclusions that would be reached by the common law in particular cases. I am open to such arguments, and could more readily be convinced than one might infer from my observations that higher culpability requirements should be provided in some cases to which the common-law rules would apply. Indeed, I invite disagreement with my conclusions about the federal false statements offense, and suspect that many will think that at least Model Penal Code recklessness should be required in that situation. But at the least, it seems to me, the matter is not capable of a categorical assertion that ordinary negligence is never a sufficient level of culpability for use in the context of mistakes of fact, that strict liability is also never appropriate in this situation, or that recklessness in the Model Penal Code sense is always, or even generally, the appropriate standard for the circumstance elements of crime. The criminal law always uses a combination of subjective and objective standards of liability and it is not intuitively clear, at least to me, that the line between them can be categorically drawn for circumstance elements in advance of consideration of the specific contexts likely to be posed by a specific offense.

F

There is one final dimension of the problem that I must take into account. I would assert a third minimum condition that should constrain the imposition of criminal liability: Concepts of prevention must be constrained by limits of proportionality. I mean by this assertion to include both limits on criminalization and limits on the grading of crimes. As noted above, I agree with the conclusion generally reached that ordinary negligence is an inappropriate level of culpability for the criminal punishment of unintentional killings. This is an example of the idea of proportionality as a limit on the criminalization decision. One would also conclude for reasons of proportionality that the offense of negligent homicide defined by the Model Penal Code in section 210.4, while

56. On the other hand, if the offense were confined to written replies on a form such as the one Yermian signed, I would not think it difficult, as I suggest in supra note 45, to obtain agreement that a mens rea of ordinary negligence would be sufficient.
appropriately a crime, would not support imprisonment for life.\textsuperscript{57}

It can, of course, be argued that a similar judgment of proportionality requires a higher level of culpability for some or all crimes than is recognized by the common-law rules as to mistake of fact. I might well agree with this assertion in a given context, but I do not think it clear that less subjective forms of culpability always pose proportionality problems. I can only say in my defense that I have seen no recent argument,\textsuperscript{58} and know only of rare instances in modern criminal law,\textsuperscript{59} to the effect that anything short of extraordinary negligence — something approaching negligence in the Model Penal Code sense of the term — should be used as the basis for measuring the defendant's culpability for the result components of crime. Most would agree that even higher standards of culpability ought to be required for most result elements and for all conduct elements. This is a tradition, as I have said, that I am perfectly comfortable to embrace. I have no trouble with the judgment, expressed both in the common law and in the Model Penal Code, that even extraordinary negligence should rarely be invoked as the primary basis, as it were, for criminal liability. But the common-law rules on mistake of fact do not rely on ordinary negligence or strict liability as the primary basis for criminal liability. Those rules in their normal, and perhaps universal, application are perfectly consistent with the conclusion that more subjective forms of culpability should be required, as I think they operationally are, as the minimum standard for conduct and result elements of virtually all crimes except negligent homicide and felony murder.

My thesis is that it does not inexorably follow that ordinary negligence or strict liability cannot fairly be applied to the circumstance elements of crime. It would be relatively easy to make a preventive case for the common-law rules on mistakes of fact. I have argued that often, if not usually, these rules will not offend two important minimum conditions of

\textsuperscript{57} It is a comparable judgment of proportionality that underlies the important insight, with which I wholeheartedly agree, contained in section 3.09(2) of the Model Penal Code. Mistakes of fact in the context of defenses seem to me to raise an entirely different set of concerns to which I do not intend to speak in this presentation.

\textsuperscript{58} Holmes, of course, argued in The Common Law that ordinary negligence should be the standard for murder. But his position has not been generally accepted, and for good reason. See supra note 23.

\textsuperscript{59} One of them is Smith v. Director of Public Prosecutions, [1960] All E.R. 161, [1961] App. Cas. 290, which upheld a conviction for capital murder on the basis of ordinary negligence. But that case has been uniformly vilified, and was even the object of an overruling statute enacted by the British Parliament. See Criminal Justice Act of 1967 ch. 80, pt. I, § 8. The ground on which objection to the decision has been based, see supra note 23, is precisely the proportionality point that I wish now to assert.

As to felony murder, see supra note 31.
criminal liability. On the issue of proportionality, our system has achieved a consensus over the years that certain uses of negligence and strict liability in the criminal law are inappropriate. But there is no such tradition on mistakes of fact. We have effectively bifurcated mens rea levels in the common law of this country — and required no more than ordinary negligence for some circumstance elements and strict liability for others — virtually without exception until the Model Penal Code was drafted. What I mean to suggest is that it is not obvious to me that the common-law rules will always, or even usually, lead to an unfair result. It seems to me that reasonable people can disagree about whether the common-law mistake of fact rules are so fundamentally disproportionate that the preventive function of the criminal law cannot fairly be served by continuing to follow them in many contexts.

In a word, history has rejected ordinary negligence and strict liability as pervasive measures of culpability in the criminal law, and I do not challenge that conclusion. But history also confirms their use in one context, and I do not think we can reject that use out of hand. At the very least I would conclude that this is an area where contextual judgment may be an appropriate response and that there is no categorical imperative about the general conditions of blameworthiness that requires outright rejection of the common-law rules.

Having said all this, I do not wish to be understood as urging that the common-law rules should be applied to all cases. I have emphasized often enough that I think the matter one for contextual judgment. Curiously, perhaps, were I charged with the responsibility of making policy on this question, I would come out pretty close to the Model Penal Code implementation of its culpability structure in many of the offenses defined in the Model Code itself. Operationally, few cases will turn on fine distinctions between Model Penal Code recklessness and ordinary negligence with respect to circumstance elements, and rarely will strict liability as to circumstance elements make a decisive difference. Most importantly, the Model Penal Code result serves to reinforce the values of personal autonomy underlying the presumption of innocence and the requirement of proof beyond a reasonable doubt. In close cases, therefore, a recklessness standard may well be a desirable proxy for the conclusion that we wish our juries to be very sure before they reject a claim of mistake of fact. It may be, therefore, that in the end we should use the Model Penal Code as our model in answering many of the questions I have raised. After all, the Model Penal Code itself, as I have illustrated, countenances some applications of the common-law structure. But I do not think the general solution contained in sections 2.02(3) and 2.04(1) so clearly correct that it should
unthinkingly be applied to the generality of offenses. It is entirely plausible that one might decide to start from a different set of premises — those close to the ones underlying the common-law approach to mistakes of fact — and move upward in culpability requirements for circumstance elements as considerations associated with particular crimes seem to require.

III

Study of the Model Penal Code has the virtue of not being an entirely academic enterprise. The basic approach of the Code — its terminology and its analytical structure — has made a contribution to the discourse of the criminal law that will dominate legislation and litigation for the foreseeable future. There are many reasons for this. Foremost, of course, is the number of legislatures that have followed the Code approach in revisions of their penal codes. More subtle is the way the approach of the Code is working its way into the common law of the country through judicial decisions. More subtle still is the contribution that will be made as the generation of students educated under the Code takes its place among the leadership of the legislatures, the judiciary, and the bar. What the Model Penal Code has contributed is an entirely new structure to the criminal law that will, in time, replace the old structure of the common law. Its genius is that it draws on common-law traditions and builds on the solutions to many of the difficult problems of the criminal law that have been worked out over the centuries. It is a way of thinking about the criminal law that has the unbeatable combination for law teachers of pedagogical advantage and practical utility. It can and should be used by the academic, as I have sought to illustrate, to raise fundamental problems about the requisites for criminal responsibility. At the same time law teachers can use the Model Code to impart important lessons about lawyering and about the actual content of the criminal law, both in jurisdictions that follow the Code and in jurisdictions that do not. In the end, the role of professional academics in the acceptance of the Model Penal Code will be most importantly felt by the contributions of their students as the lawmakers of the future.