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# SOME THOUGHTS ON THE CULPABILITY PROVISIONS OF THE PROPOSED FEDERAL CRIMINAL CODE

DAVID ROBINSON, JR.\*

## I. BACKGROUND

Present federal criminal law has developed over the years by ad hoc accretion, not by systematic efforts at codification. The large number of *mens rea*<sup>1</sup> or culpability terms and the fact that they are often employed in undefined, inconsistent, and puzzling ways, is therefore understandable. When the present efforts at comprehensive federal criminal law revision began over a decade ago, eighty different words and phrases denoting culpability were identified in the existing laws.<sup>2</sup> The latest Senate and House bills<sup>3</sup> generally follow the pioneering and innovative proposals of the American Law Institute's Model Penal Code.<sup>4</sup> Both bills propose to reduce the categories of culpability required by individual statutory proscriptions to four: "intentional," "knowing," "reckless," and "negligent," and variations thereof.<sup>5</sup> These terms are defined as follows in S. 1722:

The following definitions apply with respect to an offense set forth in this title:

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<sup>1</sup> "Culpability" is a more accurate term than the more traditional *mens rea* phrase, as no actual wrongful mental state is required for criminal liability in some situations.

<sup>2</sup> See Weinreb, *Comment on Culpability*, in I WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 119-20 (1970) [hereinafter cited as I WORKING PAPERS].

<sup>3</sup> S. 1722 and H.R. 6915, 96th Cong., 2d Sess. (1980) [hereinafter cited as S. 1722 and H.R. 6915].

<sup>4</sup> MODEL PENAL CODE § 2.02 (Official Draft 1962).

<sup>5</sup> S. 1722, *supra* note 3, § 301; H.R. 6915, *supra* note 3, § 301.

(a) INTENTIONAL.—A person's state of mind is intentional with respect to—

- (1) his conduct if it is his conscious objective or desire to engage in the conduct; or
- (2) a result of his conduct if it is his conscious objective or desire to cause the result.

(b) KNOWING.—A person's state of mind is knowing with respect to—

- (1) his conduct if he is aware of the nature of his conduct;
- (2) an existing circumstance if he is aware or believes that the circumstance exists; or
- (3) a result of his conduct if he is aware or believes that his conduct is substantially certain to cause the result.

(c) RECKLESS.—A person's state of mind is reckless with respect to—

- (1) an existing circumstance if he is aware of a substantial risk that the circumstance exists but disregards the risk; or
- (2) a result of his conduct if he is aware of a substantial risk that the result will occur but disregards the risk;

except that awareness of the risk is not required if its absence is due to self-induced intoxication. A substantial risk means a risk that is of such a nature and degree that to disregard it constitutes a gross deviation from the standard of care that a reasonable person would exercise in such a situation.

(d) NEGLIGENCE.—A person's state of mind is negligent with respect to—

- (1) an existing circumstance if he ought to be aware of a substantial risk that the circumstance exists; or
- (2) a result of his conduct if he ought to be aware of a substantial risk that the result will occur.

A substantial risk means a risk that is of such a nature and degree that to fail to perceive it constitutes a gross deviation from the standard of care that a reasonable person would exercise in such a situation.<sup>6</sup>

H.R. 6915 is generally similar.<sup>7</sup>

Both bills require culpability for each element of the offenses described in the criminal code, unless a statute expressly provides otherwise.<sup>8</sup> Legislative silence is thus not to be taken as an indication that strict liability is to be imposed, as it occasionally has in the past.<sup>9</sup>

<sup>6</sup> S. 1722, *supra* note 3, § 302.

<sup>7</sup> H.R. 6915, *supra* note 3, § 301.

<sup>8</sup> S. 1722, *supra* note 3, § 303; H.R. 6915, *supra* note 3, § 303.

<sup>9</sup> *See, e.g.*, United States v. Dotterweich, 320 U.S. 277 (1943); United States v. Balint, 258 U.S. 250 (1922). *But see* United States v. Bailey, 444 U.S. 394 (1980); United States v. United States Gypsum Co., 438 U.S. 422 (1978); Morissette v. United States, 342 U.S. 246 (1952).

## II. SOME PROBLEM AREAS

## A. ACTS AND VOLUNTARY ACTS

S. 1722 defines "act" to mean "a bodily movement or activity," not including "reflex, convulsion, or movement or activity during a state of unconsciousness or sleep."<sup>10</sup> H.R. 6915 contains a similar definition, but adds the requirement that the act be "voluntary."<sup>11</sup> The latter term is undefined. Both definitions of "act" are abridged versions of the Model Penal Code requirement that liability be based on conduct which includes a voluntary act or omission.<sup>12</sup> The Model Penal Code goes on to define "voluntary acts" by indicating what they are not. Included in the list of nonvoluntary acts are reflexes, convulsions, movements during hypnosis, and, as a catchall, "a bodily movement that otherwise is not the product of the effort or determination of the actor, either conscious or habitual."<sup>13</sup> The Model Penal Code formulation is of only theoretical interest. Actions occurring during an epileptic seizure, for example, would not be a likely subject of federal criminal prosecution.

The New York Penal Law states that "'voluntary act' means a bodily movement performed consciously as a result of effort or determination, and includes the possession of property . . . ."<sup>14</sup> This represents an improvement over the Model Penal Code formulation. New York achieves greater precision by stating what "voluntary act" is, not merely a list of things which are excluded. S. 1722 is also more satisfactory on this point, as it does not utilize the adjective "voluntary." The omission of so puzzling and ambiguous a term does not detract from the statute in any practical way. In the words of Justice Black in *Powell v. Texas*<sup>15</sup>:

When we say that appellant's appearance in public is caused not by "his own" volition but rather by some other force, we are clearly thinking of a force that is nevertheless "his" except in some special sense. The accused undoubtedly commits the proscribed act and the only question is whether the act can be attributed to a part of "his" personality that should not be regarded as criminally responsible.

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[T]he question whether an act is "involuntary" is, as I have already indicated, an inherently elusive question, and one which the State may, for good reasons, wish to regard as irrelevant.<sup>16</sup>

<sup>10</sup> S. 1722, *supra* note 3, § 111.

<sup>11</sup> H.R. 6915, *supra* note 3, § 101(5).

<sup>12</sup> MODEL PENAL CODE § 2.01.

<sup>13</sup> *Id.*

<sup>14</sup> N.Y. PENAL LAW § 15.00 (McKinney 1975).

<sup>15</sup> 392 U.S. 514, 540, 544 (1968) (Black, J., concurring). The Court upheld the constitutionality of criminal penalties applied to an alcoholic whose public drunkenness was alleged to be beyond volitional control.

<sup>16</sup> This question is more extensively discussed in Robinson, *Consultant's Report on Criminal Responsibility—Mental Illness: Section 503*, I WORKING PAPERS, *supra* note 2, at 229.

The least justifiable approach of all is that of the House bill, which inserts the requirement of voluntariness without defining it. Thus crimes by drug addicts, depredations by sociopaths, offenses by the culturally deprived, and even routine criminal behavior by ostensibly normal persons, given fairly common deterministic psychiatric assumptions, may produce tangled controversy and erratic patterns of conviction and exculpation.

The United States Court of Appeals for the District of Columbia faced such a question in *United States v. Moore*,<sup>17</sup> holding that drug addiction was not a defense to its possession. The majority expressed a concern that to allow the defense could establish a principle that would apply to other illegal acts, such as robbery and even homicide, whose purpose was to obtain narcotics. There was a strong dissent:

Perhaps the most troublesome question arising out of recognition of the addiction defense I suggest is whether it should be limited only to those acts—such as mere possession for use—which are inherent in the disease itself. It can hardly be doubted that, at least in some instances, an addict may in fact be “compelled” to engage in other types of criminal activity in order to obtain sufficient funds to purchase his necessary supply of narcotics. . . . Nevertheless, I am convinced that Congress has manifested a clear intent to preclude common law extension of the defense beyond those crimes which, like the act of possession, cause direct harm only to the addict himself.<sup>18</sup>

Such a congressional intent might be blurred by the adoption of the “voluntary” language of the House bill. Advocates of the creation of an addiction defense should propose specific statutory language indicating its nature and scope, rather than vague verbal formulas contained in general culpability provisions.<sup>19</sup> Furthermore, if volitional incapacity is to be exculpatory, much can be said for channeling it into an insanity defense and providing concomitant procedures for confinement of dangerous persons acquitted by reason of insanity in noncriminal institutions. This approach would also have the advantage of facilitating fairer litigation of the claim by triggering the advance notice require-

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<sup>17</sup> 486 F.2d 1139 (D.C. Cir. 1973).

<sup>18</sup> *Id.* at 1255-56 (Wright, J., joined by Bazelon, Robinson, and Tamm, JJ., dissenting).

<sup>19</sup> An especially sweeping voluntary act requirement was advocated by Professor Weinreb. See I WORKING PAPERS, *supra* note 2, at 110-13. The Study Draft of the National Commission was consistent with his proposal, although its comment warned of raising “problems in the insanity defense area, among others.” See REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS § 301, Comment (Study Draft 1970). The final report of the commission avoided inviting such difficulties by deleting the requirement that the actor act “voluntarily.” See REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS § 302 (1971) [hereinafter cited as FINAL REPORT]. The comment to the *Final Report* states that the deletion was due to the “limited utility” of the term and the possible evasion of limitations placed on defenses such as intoxication and mental illness through inquiries into voluntariness. *Id.* § 302, Comment.

ment of the Federal Rules of Criminal Procedure.<sup>20</sup>

In summary, either the omission of the "voluntary" act requirement of the Final Report and of S. 1722, or use of the more limited and specific definition of the New York Penal Law, is preferable to the undefined vagaries of the House proposal.

#### B. INTENT AND PURPOSE

The Senate and House bills both substitute the word "intent" for the Model Penal Code's "purpose" to designate the highest level of culpability.<sup>21</sup> The Senate Report indicates that the change is designed to achieve two objectives. First, the word "intent" is more familiar. Second, the word "purpose" may connote a particular purpose, rather than the desired meaning that the conduct be done purposely.<sup>22</sup> While this shift in terminology has been elected in a number of state codes patterned on the Model Penal Code,<sup>23</sup> the choice is questionable at best. The very familiarity of the word "intent" is probably disadvantageous for two reasons. It may be confused with its traditional meanings, which usually include knowledge as well as purpose,<sup>24</sup> although the use of the term is quite varied.<sup>25</sup>

In addition, the confusion invited by the retention of "intent" may have had substantive consequences in the bills themselves. For example, the requisite intent to steal for the crime of larceny may be satisfied not only by the perpetrator having the true purpose that the owner lose the value of the property, but also by the mere knowledge that this will occur. Intent would probably even be met by having knowledge of a substantial risk that this will take place.<sup>26</sup> On the other hand, S. 1722's consolidated theft section<sup>27</sup> specifies that the required culpability element is an "intent . . . to deprive . . . or . . . to appropriate . . . ." The general definition section of the bill<sup>28</sup> refers one to the culpability provision,<sup>29</sup> indicating that purposeful conduct is meant. This view is reinforced by the Senate Report.<sup>30</sup> The "intent to deprive" aspect may not reflect what is meant, for the purpose of the thief is commonly not to deprive the owner, but merely to use the property inconsistently with

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<sup>20</sup> FED. R. CRIM. P. 12.2.

<sup>21</sup> See text accompanying note 6 *supra*.

<sup>22</sup> S. REP. NO. 96-553, 96th Cong., 2d Sess. 62 n.14.

<sup>23</sup> *E.g.*, N.Y. PENAL LAW § 15.05; TEXAS PENAL CODE ANN. tit. 1, § 6.03 (Vernon 1974).

<sup>24</sup> See, *e.g.*, United States v. United States Gypsum Co., 438 U.S. at 444-45.

<sup>25</sup> See United States v. Bailey, 444 U.S. at 403-09.

<sup>26</sup> See W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 639-40 (1972).

<sup>27</sup> S. 1722, *supra* note 3, § 1731.

<sup>28</sup> *Id.* § 111.

<sup>29</sup> *Id.* § 302.

<sup>30</sup> S. REP. NO. 96-553 at 682.

ownership, knowing that the effect is one of deprivation.<sup>31</sup> This objection is addressed by S. 1722 by alternatively allowing theft to be committed with an intent to appropriate. This comes closer to the mark described by purposeful conduct, as the focus is the benefit to the thief rather than the loss to the victim. "Appropriate" is not defined by the bill. The grading subsection<sup>32</sup> indicates that taking without consent of the owner will suffice, apparently irrespective of how temporary the deprivation, a view somewhat supported by the Senate Report.<sup>33</sup> The result, however, is to broaden the traditional general law of larceny, where intent to temporarily appropriate will not ordinarily suffice to constitute the offense.<sup>34</sup> H.R. 6915 is more restrictive in this respect.<sup>35</sup>

### C. CONDUCT, EXISTING CIRCUMSTANCES, AND RESULTS

As noted previously, culpability is defined somewhat differently, depending upon whether the reference is to conduct, existing circumstances, or results.<sup>36</sup> Furthermore, if culpability is not specified for a particular offense, S. 1722 provides that the minimum culpability to be proven also varies with the element category. With respect to conduct it is "knowing," and for existing circumstances and results it is "reckless."<sup>37</sup> H.R. 6915 requires "knowing" for all three, in the absence of a specific provision to the contrary.<sup>38</sup> Neither S. 1722, nor the Model Penal Code, which formulated the scheme, provides a definition of what constitutes the conduct, circumstances, or results.

The well-known case of *United States v. Short*<sup>39</sup> may illustrate the problem. Short, an intoxicated American serviceman, attempted to have sexual relations with a Japanese woman, who apparently failed to communicate her nonconsent due to language difficulties as well as to Short's inebriation. He was charged with assault with intent to commit rape. At trial the court rejected a defense-requested instruction that the accused must have had knowledge of the victim's nonconsent. Short was convicted, and the judgment was affirmed on appeal. The majority reasoned that an exculpatory mistake must be reasonable. A dissent

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<sup>31</sup> The Model Penal Code provision which covers larceny requires a "purpose to deprive" with regard to movable property. MODEL PENAL CODE § 223.2. The effect is awkwardly mitigated by defining "deprive" to include withholding and disposition making it unlikely that the owner will recover it. It would have been more candid to have recognized that what is involved is knowledge or recklessness.

<sup>32</sup> S. 1722, *supra* note 3, § 1731(b).

<sup>33</sup> S. REP. NO. 96-553 at 683.

<sup>34</sup> The federal cases on the question are divided. *See id.* at 682-83.

<sup>35</sup> H.R. 6915, *supra* note 3, § 2531(c)(2).

<sup>36</sup> *See* text accompanying note 6 *supra*.

<sup>37</sup> S. 1722, *supra* note 3, § 303.

<sup>38</sup> H.R. 6915, *supra* note 3, § 302.

<sup>39</sup> 16 C.M.R. 11, *aff'd*, 4 C.M.A. 437 (1954).

urged that, while the view of the majority was correct with respect to the crime of rape, assault with intent to rape required a purpose to rape, *i.e.*, to have sexual relations without consent.

Under S. 1722 the dissent would surely be correct with respect to a crime expressly requiring intent to rape.<sup>40</sup> Supposing the sex act to have been consummated, what of a charge of rape? Both opinions in *Short* agreed that such a charge could not be negated by unreasonable mistake. They thus ruled that with respect to the nonconsent element, rape could be committed negligently. If this appears too modest a culpability requirement for so grave a crime, one may ask whether knowledge of nonconsent is required, or whether recklessness will suffice. The section of S. 1722 defining rape<sup>41</sup> provides that a person is guilty of an offense if he compels another to participate in a sexual act by force or specified intimidation. To satisfy this provision the offender must utilize force or intimidation, and the victim must yield rather than consent to the act. Is the psychological response of the victim "conduct"? If so, the nonconsent must be *known* to the rapist. Or is it an "existing circumstance," as, strictly speaking, it is not the *conduct* of the actor? If it is a circumstance, the minimum culpability is "reckless." Either is arguable, and the bill contains no obvious answer. The Senate Report implies that the victim's response is part of the "conduct"<sup>42</sup> ("the element that the defendant compelled the other person to participate in the sexual act . . . is conduct"). No reason for this assertion is stated. Perhaps this conclusion represents a policy decision with respect to the appropriate culpability for the offense, yet the policies are neither identified nor discussed.<sup>43</sup> Perhaps it is based on formal deduction from the syntax and the absence of the traditional language of nonconsent from the definition of the offense. One writer closely associated with the legislative effort has taken such a view.<sup>44</sup> Feinberg notes that the kidnapping section<sup>45</sup> applies to one who "restrains another person." This, he states, would be purely "conduct," but for another section<sup>46</sup> defining "re-

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<sup>40</sup> On the other hand, if the charge were attempted rape, an intent to take without consent may not be required due to a relaxation of the culpability requirement in the general attempt section. S. 1722, *supra* note 3, § 1001(a).

<sup>41</sup> *Id.* § 1641.

<sup>42</sup> S. REP. NO. 96-553 at 596.

<sup>43</sup> Were the question of the appropriate culpability requirement for the victim's nonconsent separately faced, it would be necessary to justify exculpation from a charge of rape where the victim in fact did not consent and the defendant was aware of and disregarded a substantial risk that the victim had not consented, such disregard being a gross deviation from reasonable conduct in the face of the limited utility of the defendant's conduct.

<sup>44</sup> See Feinberg, *Toward a New Approach to Proving Culpability: Mens Rea and the Proposed Federal Criminal Code*, 18 AM. CRIM. L. REV. 140-41 (1980).

<sup>45</sup> S. 1722, *supra* note 3, § 1621(a)(1).

<sup>46</sup> *Id.* § 1625(a)(2).

straint" to mean restriction without consent. This, argues Feinberg, creates a conflict in the bill that the draftsmen have sought to resolve with legislative history in the Senate Report, which states that the nonconsent is an existing circumstance. The issue is analytically present irrespective of the inclusion of a definition of restraint.

In any event, surely reliance on a committee report to define the culpability elements of federal criminal offenses is of doubtful desirability. While many courts might find a report persuasive, it would not be controlling, and some confusion and inconsistency in result may be anticipated in the decisions. In view of the subtlety of the drafting technique and its lack of clarity with respect to the status of complex verbs, adverbs, direct and indirect objects of verbs, participial phrases, and so forth, some courts may be expected to exercise caution by applying a higher minimum culpability than is desired.

One commentator has perceptively suggested that the conduct elements for each offense should be specified in each substantive section.<sup>47</sup> The added prolixity of the code could be minimized by the use of defined, more general terms, resulting in greater clarity and functional utility. For example, the National Commission on Reform of Federal Criminal Laws defined "willfully" to include intentionally, knowingly, or recklessly.<sup>48</sup> Alternatively, adequately detailed and comprehensive rules of construction should be included in the legislation itself. Errors as to elements of offenses are unlikely to be regarded as harmless ones.

#### D. KNOWLEDGE AND RECKLESSNESS

S. 1722 provides that where culpability is not specified in a particular offense, recklessness as to results and circumstances will suffice, although at least knowledge is required with respect to conduct.<sup>49</sup> H.R. 6915, on the other hand, requires at least knowledge for all three, absent a specific directive to the contrary.<sup>50</sup> While it is, of course, possible to arrive at the same position on a specific offense by using culpability language in that offense, the variant positions of the two bills on the suffi-

<sup>47</sup> Rothstein, *Federal Criminal Code Revision: Some Problems with Culpability Provisions*, 15 CRIM. L. BULL. 157, 160 (1979). The question of what is a "result" of conduct may also not be free from controversy. *E.g.*, S. 1722, *supra* note 3, § 1611, defines maiming in terms of intentionally causing serious bodily injury that is permanent or likely to be permanent. According to the Senate Report, the seriousness of the injury is a result, while its permanence is an "existing" circumstance. S. REP. NO. 96-553 at 547. A commentator on the new Texas Penal Code asserts that the intent to commit a felony or theft in the offense of burglary is a "result," while the sex act in rape is both "conduct" and "result." *See* Searcy, *Pleading and Proving the Culpable Mental States Under the New Texas Penal Code*, 6 AM. J. CRIM. L. 243, 246 (1978).

<sup>48</sup> FINAL REPORT, *supra* note 19, § 302(1)(e).

<sup>49</sup> S. 1722, *supra* note 3, § 303(b).

<sup>50</sup> H.R. 6915, *supra* note 3, § 302(b).

ciency of recklessness represent different policy choices with respect to the minimum level of culpability which should ordinarily suffice.

The Senate view is consistent with that of the common law. As Professor Glanville Williams has observed:

It is a general, though not a universal, principle that recklessness is classed with intention for legal purposes. The thing that usually matters is not desire of consequence but merely foresight of consequence, which is the factor common to intention and recklessness.<sup>51</sup> It is this foresight of consequence that, it is submitted, constitutes *mens rea*. Consequently, every crime requiring *mens rea*, if it does not positively require intention, requires either intention or recklessness.<sup>52</sup>

The S. 1722 provision also is consistent with the recommendation of the Model Penal Code: "*Culpability Required Unless Otherwise Provided*. 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."<sup>53</sup> The Model Penal Code, like the Senate and House bills, defines recklessness in a way constituting substantial culpability ("consciously disregards a substantial and unjustifiable risk . . . a gross deviation from the standard of conduct [of] . . . a law-abiding person. . ."),<sup>54</sup> and it takes the view that negligence, and not recklessness, should be the exceptional basis for penal liability. This view was shared by the National Commission on Reform of Federal Criminal Laws.<sup>55</sup>

In view of the consensus of tradition, authority, and the strong policy which generally favors permitting penal liability to be predicated on the gross sort of recklessness defined by both bills, the contrary decision of H.R. 6915 presumably must bear the burden of persuasion for its aberrational position. Yet the House Report contains no reasoned argument for the committee proposal, merely citing four cases, all of which are inapposite.<sup>56</sup>

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<sup>51</sup> Professor Williams uses "intention" to include knowledge. See G. WILLIAMS, *CRIMINAL LAW—THE GENERAL PART* 38-42 (2d ed. 1961).

<sup>52</sup> *Id.* at 64-65.

<sup>53</sup> MODEL PENAL CODE § 202(3).

<sup>54</sup> *Id.* § 2.02(2)(c).

<sup>55</sup> See FINAL REPORT, *supra* note 19, § 302(2).

<sup>56</sup> H. REP. NO. 96-1396, 96th Cong., 2d Sess. (1980) cited the following cases. *United States v. Bailey*, 444 U.S. 394, expressly reserved judgment on whether recklessness would suffice to establish the offense charged because the question had not been raised in that case. *Id.* at 407. Furthermore, in a citation deleted from a portion of the opinion quoted in the House Report, H. REP. NO. 96-1396 at 35, the *Bailey* court indicated its reliance on the Model Penal Code, not an effort to depart from it. 444 U.S. at 405 (citing MODEL PENAL CODE § 2.02). *Ellis v. United States*, 206 U.S. 246 (1907), dealt with a statute expressly requiring intent. The question of whether, absent specification, recklessness would be sufficient was not addressed. Indeed, Justice Holmes, the author of that opinion, is well known for his advocacy of predicating serious criminal liability on negligence as well as recklessness. See *Commonwealth v. Pierce*, 138 Mass. 165, 52 Am. Rep. 264 (1884). The final two cases,

## E. CULPABILITY ELEMENTS AND SPECIFIC INTENT

In generally addressing conduct, existing circumstances, and results, S. 1722 does not cover all of the important culpability referents of prevailing criminal law, which sometimes requires culpability independently of these factors.<sup>57</sup> A number of common crimes are said to require "specific intent." For example, S. 1722 defines burglary to include nocturnal entry of a dwelling of another with intent to commit a crime.<sup>58</sup> This last element is not the proscribed conduct, which is completed by the entry. It is not, strictly speaking, a result of the entry for it requires additional conduct by the offender, and it may never take place. It is probably not an "existing circumstance," as the context of that phrase indicates that factual circumstances, not the actor's state of mind, are meant.<sup>59</sup> Furthermore, S. 1722 makes knowledge the highest culpability with regard to knowledge of existing circumstances, not intent, on the apparent belief that one cannot intend circumstances.<sup>60</sup> As S. 1722 does not hesitate to include specific intent requirements in specific substantive sections, its absence in the general sections is less than crucial, except that some reference to it might have addressed the question of whether intent in the narrow, purposive definition of § 302 was meant, or whether knowledge would also suffice.<sup>61</sup> H.R. 6915 does generally mention specific intent although it fails to give it a definition.<sup>62</sup>

## III. CONCLUSION

As this article was prepared during the congressional consideration of S. 1722 and H.R. 6915, it was thought that it might be most useful to focus on several problem areas in the legislation. The resulting picture

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United States v. Haldemann, 559 F.2d 31 (D.C. Cir. 1976), and United States v. Byrd, 352 F.2d 570 (2d Cir. 1965), likewise do not purport to address the question here involved. The former was concerned, *inter alia*, with an alleged inconsistency in instructions, and the latter reversed a trial court for entirely omitting any requirement of culpability for the offense charged.

<sup>57</sup> The omission is shared by the MODEL PENAL CODE § 2.02 and by the FINAL REPORT, *supra* note 19, § 302.

<sup>58</sup> S. 1722, *supra* note 3, § 1711.

<sup>59</sup> See also S. REP. NO. 96-553 at 61.

<sup>60</sup> S. 1722, *supra* note 3, § 302. See S. REP. NO. 96-553 at 62 n.13. This is not strictly true. For example, a rapist might intend that his victim not consent. However, it is doubtful if grading of the offense should depend upon a distinction between hope and awareness in such a situation.

<sup>61</sup> Specific intent is also traditionally mentioned in the context of consideration of the significance of intoxication. Intoxication, it is said, may be a defense to crimes of specific and not general intent. See, e.g., Parker v. United States, 359 F.2d 1009 (D.C. Cir. 1966); Allen v. United States, 239 F.2d 172 (6th Cir. 1956). In this context specific intent may be satisfied by either purpose or knowledge, but not by recklessness. Both bills achieve this conventional result. See S. 1722, *supra* note 3, § 302(c); H.R. 6915, *supra* note 3, § 723.

<sup>62</sup> H.R. 6915, *supra* note 3, § 301.

is blurred, however, if recognition is not given to the sophistication, intelligence, and effort reflected in both bills. While S. 1722 is a more carefully considered product than is H.R. 6915, reflecting the former's vastly greater period of gestation, both represent long steps in the effort to increase the clarity and rationality of culpability provisions in federal criminal law.