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# Some Weak Points in the Model Penal Code

By ROLLIN M. PERKINS\*

THE Model Penal Code, prepared by the American Law Institute, represents such an outstanding achievement that there is understandable hesitation in suggesting lack of perfection at any point. If, however, those who think improvements are possible do not hesitate to make suggestions, and the points thus raised are adequately discussed pro and con, the result cannot be harmful.

## The Dearth of Definition

One disturbing aspect of the Code is the dearth of true definitions in Part II, "Definitions of Specific Crimes." For the most part the offenses are indicated rather than defined. A true definition is made up of three parts: (1) the term, (2) the genus and (3) the differentia. The term is the subject of the definition—the word or phrase to be defined; genus is a category of classification, a class or group ranking beneath a family and above a species; differentia is the attribute or characteristic by which one species of a genus is distinguished from every other. In other words a true definition must give (1) the word or phrase to be defined (the term), (2) the placement of this thing in a group of like things (the genus) and (3) the peculiarity which distinguishes this particular thing from other like things (the differentia).

For example, crime is any social harm defined and made punishable by law. Crime is the term; social harm is the genus, the kind of thing crime is; and the requirement that it be defined and made punishable by law distinguishes it from every other kind of social harm. Parking overtime in a restricted zone may be defined and made punishable by law, but it is not social harm. It belongs in a different genus—social inconvenience—and hence is not a crime. On the other hand, cheating by means of a false promise is social harm, but in most jurisdictions today it is not made punishable by law and hence (in such jurisdictions) is also not a crime. It belongs to the genus but is excluded by the differentia.

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The Official Draft of the Model Penal Code is unavailable. Unless otherwise indicated, all references are to the Proposed Final Draft (1962).

One who undertakes to define, without having given careful thought to the true purpose of a definition, will often start in terms of "when" or "where" or "what." "Murder is when . . ." nor "Murder is where . . ." for example, although neither time nor place represents any genus of which murder is a species. A true definition of common-law murder must be in some such form as this: "Murder is homicide committed with malice aforethought." The genus is homicide, the kind of thing murder is, and the requirement that it be committed with malice aforethought distinguishes it from every other kind of homicide.

A small boy asked to define a screwdriver came up with this suggestion: "A screwdriver is what drives screws." This may convince us that he could recognize one on sight but it is quite unsatisfactory as a definition. It neither tells us what kind of thing a screwdriver is nor offers anything in the nature of differentia. Had he said, "A screwdriver is a tool for driving and withdrawing screws by turning them," we would have had a true definition. It is not intended by this illustration to indicate that it represents the type of definition employed in the Code, for much in the way of differentiae will be found there, although the genus is seldom named. A definition of a screwdriver, following the general plan of the Code would be as follows: "A person is using a screwdriver if he drives or withdraws a screw by turning it."

True definitions are employed for the offenses at the start of Part II of the Code. Thus murder, manslaughter and negligent homicide are all assigned to the sub-genus "criminal homicide," each with its appropriate differentia. This would be excellent if criminal homicide were defined in the Code as homicide committed without justification or excuse—which would seem to be the proper definition. Section 210.1, however, is worded: "(1) A person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being. (2) Criminal homicide is murder, manslaughter or negligent homicide."

Under earlier provisions of the Code (Articles 2-4) homicide may be justifiable or excusable although committed purposely or knowingly (under specified circumstances) with the result that we shall have justifiable and excusable murder. At common law homicide may be justifiable or excusable but there is no such common-law concept as justifiable or excusable murder—and there should not be. It is to be hoped that any state adopting the Code will redefine this section as follows:

### Section 210.1 Homicide.

- (1) Homicide is the killing of one human being by another.
- (2) Criminal homicide is homicide committed without justification or excuse.
- (3) The grade of criminal homicide is murder, manslaughter or negligent homicide.

Except at the very start of Part II, the specific crimes are presented by the Code without resort to the true-definition technique. It should be emphasized, however, that while crime is any social harm defined and made punishable by law, a true definition, while desirable, is not indispensable. If a crime is indicated with such precision that those who would be law-abiding will have no doubt what must be avoided, and those accused will know exactly what type of misconduct has been charged against them, it can be said, loosely, to be defined. There are disturbing indications, however, that the dearth of true definitions resulted from a desire to allow the courts a certain amount of leeway to develop each crime on a case by case basis.<sup>1</sup>

## The Use of Deadly Force

The privilege of using deadly force had its common-law development primarily in the areas of law enforcement and crime prevention, and the extent of the development is not surprising since all felonies were punishable by death in the early days. As the felon had forfeited his life by the perpetration of his crime, it was quite logical to authorize the use of deadly force if this reasonably seemed necessary to

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<sup>1</sup> "I'm afraid that it is precisely the sort of thing which we consciously delegated to the decision of the courts." 35 ALI PROCEEDINGS 343 (1958). "We are leaving to judicial determination whether the requirement of strong corroboration is to be viewed as an element of the crime. I would say that on the draft as it stands there is so much deliberate ambiguity on this point, at least it was deliberate on my part anyhow." 37 ALI PROCEEDINGS 142 (1960). "Just trust the judges. Obviously a term like 'legitimate purpose' is an invitation to judicial development." 38 ALI PROCEEDINGS 225 (1961). "Yes, we undertook to consider the scope of animals, and wondered whether insects and worms, and so on, should be covered, and we finally decided that that was an issue we would trust to the court under the general zoological consideration of 'animal.'" 39 ALI PROCEEDINGS 219 (1962). "We didn't wish to define the absolute scope of this." *Id.* at 154. "No, there is no definition. We tried one . . . and this is one of those calculated ambiguities. This would have to be worked out through continuing litigation of this subject." *Id.* at 215. "There will be room, of course, for interpretation of the breadth of meaning carried by the word 'situation,' precisely the room needed in our view." MODEL PENAL CODE at 48 (Tent. Draft No. 9, 1959). "The Draft does not attempt to solve the problem by explicit formulation but here, as in the Section on complicity . . . we believe that it affords sufficient flexibility for satisfactory decision as such cases may arise." MODEL PENAL CODE at 113 (Tent. Draft No. 10, 1960).

bring him to justice. And since the officer had a duty to arrest for felony he could not be required to act at his peril on the question of actual guilt. If he had authority to make an arrest for a felony he was authorized to use deadly force if to do so reasonably seemed necessary to effect it.

Another consequence of the extreme penalty for felony was that deadly force was privileged if this reasonably seemed necessary to prevent its perpetration. Anyone was authorized to use deadly force, for example, if this reasonably seemed necessary to prevent rape, and obviously a woman could not be required to do less if she herself was the intended victim. Anyone who was himself free from fault was privileged to use deadly force if this reasonably seemed necessary to prevent the murder of an innocent victim—including himself. The English judges, it should be emphasized, regarded any such use of force as within the privilege of crime prevention. Only confusion results from the mistaken notion, sometimes entertained, that the starting point was the privilege of self-defense, to which other privileges were added later.

Self-defense was a secondary and imperfect privilege developed by the judges to give some protection to the person who was too much at fault to be entitled to the privilege of crime prevention. The typical illustration is the case of the man who had provoked, or willingly entered into, an unlawful, nondeadly scuffle with an adversary who suddenly and unexpectedly seized a weapon with intent to kill. The one first mentioned had forfeited his privilege of crime prevention, which would have permitted him to stand his ground and use whatever force reasonably seemed necessary to prevent the threatened felony. But his fault was so far exceeded by the greater fault of the other that the secondary privilege was recognized for his protection—the privilege of self-defense. This required him to retreat, if a safe retreat was available, and if he killed the other as a last resort, when his back was “at the wall,” this homicide was in the ancient days not justifiable but only excusable. He was not entitled to an acquittal but was recommended for a pardon. As a pardon seems never to have been denied in such a case, it came to be issued “as a matter of course” without referring the matter to the king. And still later, one who met the strict requirements of self-defense was entitled to a verdict of not guilty.

Some of the courts in this country misunderstood the English cases on self-defense and thought they applied to the innocent victim of a murderous attack. The result is the so-called “retreat rule” juris-

dictions in which no one is privileged to resist an attack with deadly force if an obviously safe retreat is available unless there is some exceptional situation such as the victim's being within his "castle" at the time. Except for this modification, which developed in some jurisdictions by accident, and the general limitation of the use of deadly force in crime prevention to the so-called dangerous felonies such as murder, robbery, burglary, arson, rape and mayhem, the privilege of using deadly force today is governed by the harsh rules of a primitive society in which capital punishment was deemed appropriate for every felony.

This would be drastically changed by the adoption of the Code in which the primary emphasis is upon self-defense, so far as the privilege of using deadly force is concerned. Thus the innocent victim of a murderous assault would have no privilege of crime prevention but only the privilege of self-defense which, as therein formulated, follows in general the position taken in the "retreat rule" jurisdictions. And to prevent the commission or consummation of such felonies as arson, burglary or robbery, the use of deadly force would be privileged only if the actor believes that the wrongdoer "(1) has employed or threatened deadly force against or in the presence of the actor; or (2) the use of force other than deadly force to prevent the commission or consummation of the crime would expose the actor or another in his presence to substantial danger of serious bodily harm."<sup>2</sup>

Suppose an armed bank messenger, carrying 25,000 dollars from the bank to a nearby establishment, is approached by thugs who demand that he hand over the briefcase containing the money. On his refusal they say they intend to take the briefcase by force, but they are unarmed and assure him that he will not be harmed in any way. He realizes that he cannot protect the money with his own physical strength alone, but also that by reason of their superior strength and numbers they will be able to take it without injury to him. Is he privileged to shoot if this reasonably seems necessary to prevent being robbed? The answer of the common law is "yes," because the privilege of crime prevention authorizes the use of deadly force if this reasonably seems necessary to prevent a so-called "dangerous felony," such as robbery. The answer of the Code would be "no," because he would be privileged to use deadly force only in self-defense and he is not in personal danger.

The privilege of using deadly force needs to be seriously curtailed,

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<sup>2</sup> MODEL PENAL CODE § 3.06(3)(d)(ii).

but the Code goes too far. The bank messenger should be privileged to prevent that robbery.

### Criminal Attempt

The Code provides: "A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for the commission of the crime, he: (a) purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or . . . ."<sup>3</sup>

This would permit conviction of an attempt to commit a crime although its perpetration was legally impossible, which seems unsound. Something has to be said about legal impossibility because the phrase has resulted in extreme confusion. If it is said, for example, that it is legally impossible to receive stolen property if no property has been stolen, this may be supported, in a sense, but such an approach prevents any meaningful distinction between legal and factual impossibility. It is comparable, in reverse so to speak, to classifying the erroneous notion that deadly force is privileged, if this reasonably seems necessary to prevent larceny, as a mistake of fact—since as a matter of fact the law is otherwise. On such a basis every mistake could be reduced to a mistake of fact.

The use of the phrase "legal impossibility" should be restricted to those situations in which the impossibility results from the criminal incapacity of the actor. Under the common law of England a boy under the age of fourteen was legally incapable of committing rape and since the crime was legally impossible, his effort to have such forcible intercourse did not constitute an attempt to commit rape. Under the common law a partner is legally incapable of committing larceny from his own firm, and hence his effort to appropriate such property does not (where the rule remains unchanged) constitute an attempt to commit larceny. And if under the law of a particular jurisdiction a holdup by a juvenile does not constitute robbery, but an entirely different kind of misconduct known as "juvenile delinquency,"<sup>4</sup> such an effort by him (whether successful or otherwise) should not be held to be attempted robbery.

The wording of the Code would cause no difficulty in ordinary situations such as these because the attendant circumstances are exactly as the actor believes them to be—but it could happen otherwise.

<sup>3</sup> MODEL PENAL CODE § 5.01(1).

<sup>4</sup> *People v. Roper*, 259 N.Y. 170, 181 N.E. 88 (1932).

In the type of jurisdiction mentioned a juvenile, because of a mistaken notion as to the date of his birth, might believe his age to be such that he was no longer within that favored category. Although a holdup by him would be robbery if the attendant circumstances were as he believes them to be, the legal impossibility should prevent it from being recognized as attempted robbery.<sup>5</sup> The Code should take the position that there is no criminal attempt if perpetration is legally impossible, with the explanation that, as used, the term applies only to situations in which the impossibility results from the criminal incapacity of the actor.

The grading of criminal attempt also seems open to question. Except for a capital offense or a felony of the first degree<sup>6</sup> the punishment for a criminal attempt under the Code would be the same as that provided for the completed offense itself.<sup>7</sup> It should be mentioned in this connection that much which is classified as mere preparation under existing law would be sufficient for an attempt under the Code. Thus one might be held to have committed attempted burglary although he had gone no farther than to "case the joint," to use the underworld expression. Many *ad hoc* statutes have been moving in this direction, such as acts providing penalties for possessing burglar's tools with intent to commit burglary, mingling poison with food with intent to kill or injure, assembling combustibles with intent to burn the property of another, and so forth.

The Code approaches criminal attempt from the standpoint of *res ipsa loquitur*—in its literal sense: "the thing itself speaks." What would constitute mere preparation under the common law would be sufficient for a criminal attempt under the Code if, but only if, the circumstances are "strongly corroborative of the actor's criminal purpose."<sup>8</sup> This is quite an improvement—apart from the problem of gradation, but it seems excessive to provide the same penalty for the possession of burglar's tools under circumstances strongly corroborative of the actor's criminal purpose as for the actual perpetration of burglary. The Code wisely provides that one who has gone far enough to incur guilt of criminal attempt may purge himself of the crime by a timely, complete and voluntary renunciation of his criminal purpose.<sup>9</sup> No

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<sup>5</sup> To take the position that the age of the actor is not an "attendant circumstance" would open up endless disputes as to what is included within the phrase.

<sup>6</sup> A felony of the first degree is one punishable by a maximum sentence of life imprisonment. MODEL PENAL CODE § 6.06.

<sup>7</sup> MODEL PENAL CODE § 5.05(1).

<sup>8</sup> MODEL PENAL CODE § 5.01(2).

<sup>9</sup> MODEL PENAL CODE § 5.01(4).

doubt many a man who has possessed burglar's tools under circumstances strongly corroborative of his criminal purpose has, when the time approached, completely and voluntarily abandoned the intended burglary. Under the Code, if such a one who would not have carried out his original burglarious intent is arrested before he has manifested a complete and voluntary renunciation of his criminal purpose, he is subject to the same punishment as if he had actually committed burglary. On the other hand, if a gangster in carrying out an intent to murder shoots at, but misses, his intended victim the punishment is much milder, under the Code, than if he had successfully completed his intended crime.<sup>10</sup> Although it may be doubted whether the same penalty should be provided for an attempt as for the completed offense, there is at least much more reason for applying it in the latter case than in the former.

### Criminal Negligence

The concept of criminal negligence made its first appearance in the law of manslaughter. In the development of the homicide cases the early judges tended to concentrate on the extremes: (1) Was the killing with malice aforethought and hence murder, and if not, (2) was it under such circumstances of justification or excuse as to constitute innocent homicide? Thus manslaughter developed as a catch-all concept—in one sense a negative concept: it was homicide which was neither murder nor innocent. At the start of this development it seems that no homicide was deemed excusable if it resulted from negligence, but eventually the courts came to recognize "a marked distinction between simple or ordinary negligence, giving one a right of action for damages, and culpable negligence, rendering one guilty of a criminal offense."<sup>11</sup>

There has been some tendency, under certain statutes, to hold ordinary negligence sufficient for criminal guilt, but in general more is required. Negligence may be "advertent" or "inadvertent," depending upon whether the actor is or is not aware of the unreasonable risk he is creating, and one possible solution would have been to hold the former sufficient for criminal guilt and the latter insufficient. This would have been unsatisfactory, however, since either type of negligence may be slight or it may be extreme. The position taken by the common law is that either type of negligence may be sufficient to

<sup>10</sup> MODEL PENAL CODE §§ 5.05(1), 6.06.

<sup>11</sup> *State v. Baublits*, 324 Mo. 1199, 1211, 27 S.W.2d 16, 21 (1930).

establish criminal guilt if, but only if, it represents conduct which falls far short of the standard of care required by law—that of a reasonable man under like circumstances. Needless to say this applies only to a crime, such as manslaughter, which does not require some other type of culpability such as intent or knowledge. To represent the greater type of fault required for conviction various adjectives have been employed, such as that the negligence must be “gross,” “culpable” or “criminal.”

To establish criminal guilt on a negligence basis the Code requires conduct which “involves a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.”<sup>12</sup> If such a deviation is advertent it would, under the Code, constitute a greater degree of culpability—recklessness (done “recklessly”). Thus homicide resulting from such an advertent deviation would constitute manslaughter whereas if the deviation had been inadvertent it would have created the lesser offense of negligent homicide.<sup>13</sup> This represents a marked improvement over existing law and the only objection is to the terminology—the Code would substitute the word “negligence” for the phrase “criminal negligence.” It is true that considering only the Code it is a little simpler to speak of one who has acted “negligently” rather than “with criminal negligence,” but if the Code is adopted it will not be alone but will be part of the general body of law of the jurisdiction. The result will be to give the word “negligence” one meaning in criminal law and an entirely different meaning in the law of torts—a type of linguistic confusion far from unique in the law but not to be deliberately encouraged. It is to be hoped that in legislation this concept will be expressed in terms of “criminal negligence.”

### Malice

The Code does not use the word “malice,” which is regrettable because this represents a very useful concept despite some unfortunate language employed at times in the effort to express it. Thus the recurring phrase “abandoned and malignant heart”<sup>14</sup> seems more suggestive of cardiac tumor than a state of mind. In the homicide cases, moreover, there has been distortion by certain additions such as the felony-murder rule, which additions are quite foreign to the concept

<sup>12</sup> MODEL PENAL CODE § 2.02(2)(d).

<sup>13</sup> MODEL PENAL CODE §§ 210.3, 210.4.

<sup>14</sup> Malice is “the dictate of a wicked, depraved and malignant heart.” 4 BLACKSTONE, COMMENTARIES \*198. The term has found its way into statutes. See, *e.g.*, CAL. PEN. CODE § 188.

itself. Basically malice, as a legal concept, is made up of two components, one positive and the other negative. On the positive side malice requires an intent to cause particular harm (such as to take human life, if the crime is murder; to burn another's dwelling, if the crime is arson; to publish defamation of another, if the crime is libel), or an intent to act with wanton and wilful disregard of the obvious likelihood of causing such harm. On the negative side it requires the absence of any circumstance of justification, excuse or recognized mitigation.

We shall have some rather astounding concepts under the Code, such as "justifiable criminal mischief." It provides that a person is guilty of criminal mischief if he "damages tangible property of another purposely"<sup>15</sup> although this might be done justifiably as, for example, under the judgment or order of a competent court.<sup>16</sup> Had the offense been worded in terms of malicious mischief any damage to the property of another under circumstances of justification or excuse would have been excluded by definition.

### Absolute Liability

Deeply ingrained in human nature is the tendency to distinguish intended results from accidental happenings. This is the everyday experience of the man on the street. One who has been greatly benefited by the act of another may be very much pleased in any event, but his feeling toward the other will not be the same if it was quite an accidental result as it would be if it was the very purpose intended. And one who has been painfully injured by another's act will not have the same personal resentment if it was obviously accidental as he will if the harm was inflicted upon him intentionally. "I didn't mean to" is an explanation so frequently accepted that it is often one of the early acquisitions of small children. In the words of Mr. Justice Holmes, "even a dog distinguishes between being stumbled over and being kicked."<sup>17</sup> Thus pure conjecture might lead to the conclusion that the ancient criminal law held a man answerable only for his intentional misdeeds, and that punishability for certain unintended results came as a later development, but all the evidence points the other way. "Law in its earliest days tries to make men answer for all the ills of an obvious kind that their deeds bring upon their fellows."<sup>18</sup>

<sup>15</sup> MODEL PENAL CODE § 220.3(1)(a).

<sup>16</sup> MODEL PENAL CODE § 3.03(1)(c).

<sup>17</sup> HOLMES, *THE COMMON LAW* 3 (1881).

<sup>18</sup> 2 POLLOCK & MATTLAND, *HISTORY OF ENGLISH LAW* 470 (2d ed. 1899).

"Punishment in those days apparently did not hang upon proof of any guilty state of mind."<sup>19</sup>

The emergence and gradual development of the mens-rea concept have been detailed elsewhere<sup>20</sup> and need not be repeated here. The result was the position, firmly established, that there is no criminal guilt without fault.<sup>21</sup> This was extended, moreover, to those offenses which are not true crimes, originally referred to as offenses *mala prohibita*, and more recently as public welfare offenses or civil offenses.<sup>22</sup> As to these, however, there was a resurgence of strict liability, starting over a hundred years ago,<sup>23</sup> and carried to unreasonable lengths. A butcher was convicted of selling unsound meat although he was unaware of the unsoundness and could not have discovered it by any examination which he could have been expected to make.<sup>24</sup> By rail a seller shipped pure milk which was adulterated in transit by some unknown person. Starting with the premise that title did not pass until receipt by the consignee, the court held that the seller had committed the offense of selling adulterated milk although he "was entirely innocent morally, and had no means of protecting himself from the adulteration of this milk in the course of transit. . . ."<sup>25</sup> The height of extremity was reached in the case which held: "It is no defense to a prosecution for driving an overloaded truck in violation of the Vehicle Code that defendant had first obtained a weight certificate from a licensed weight-master which indicated that the truck was not overloaded."<sup>26</sup>

<sup>19</sup> Sayre, *The Present Signification of Mens Rea in the Criminal Law*, in HARVARD LEGAL ESSAYS 399, 401 (1934).

<sup>20</sup> 2 POLLOCK & MAITLAND, *op. cit. supra* note 17, at 470-71, 479-80, 490-91, 499; Sayre, *Mens Rea*, 45 HARV. L. REV. 974 (1932).

<sup>21</sup> "Contrary to general belief there are no common law offenses in which mens rea is not required, notwithstanding an insignificantly small number of badly reasoned cases to the contrary." Mueller, *On Common Law Mens Rea*, 42 MINN. L. REV. 1043, 1101 (1958).

<sup>22</sup> Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933). In certain rural areas, for the protection of the farming interest, statutes were enacted forbidding the selling or serving of oleomargarine which was not plainly marked as such so it could be rejected by all who wanted butter. See *Welch v. State*, 145 Wis. 86, 129 N.W. 656 (1911). As the only feasible means of enforcement, penalties were provided for the violation of such statutes. Down through the ages the violation of such a penalty clause has been recognized as something other than a true crime.

<sup>23</sup> "The new movement in England dates from the case of *Regina v. Woodrow* [15 M. & W. 404, 153 Eng. Rep. 907], decided in 1846 . . ." Sayre, *The Present Signification of Mens Rea in the Criminal Law*, in HARVARD LEGAL ESSAYS 399, 407 (1934).

<sup>24</sup> *Hobbs v. Winchester Corp.* [1910] 2 K.B. 471.

<sup>25</sup> *Parker v. Adler*, [1899] 1 Q.B. 20, 25 (1898).

<sup>26</sup> *Commonwealth v. Olshefski*, 64 Pa. D. & C. 343 (Montour County Ct. 1948).

Fortunately the peak of this resurgence of strict liability has now been passed and the tendency is to return to a more reasonable basis of enforcement.<sup>27</sup> A civil offense does not have the normal mens-rea requirement but this means only that it does not require the same degree of fault as is needed for conviction of a true crime. Ordinary negligence is sufficient for conviction and many of the regulatory statutes to which penalty clauses are attached require a very high degree of care—so that anything less is negligence. But if the prohibited result was brought about inadvertently, proof that this happened despite the exercise of a high degree of care to prevent it should be recognized as an excuse.

During the resurgence of strict enforcement, the courts tended to go to extremes but in modern times we have had no offense enforceable on the basis of absolute liability.<sup>28</sup> Minor traffic violations might be suggested for such a position, but it is submitted that if gangsters, fleeing from the scene of their robbery, should “commandeer” a car stopped for a red light and force the driver, under threat of death at pistol-point, to proceed without waiting for the signal to change and at a speed in excess of that permitted by law, this compulsion would be recognized as an excuse.<sup>29</sup> “[P]resumably no court would convict a psychotic person . . . of any offense.”<sup>30</sup> To the extent that the ancient doctrine of marital coercion survives, a wife who acts under the command of her husband has an excuse.<sup>31</sup> And the least astute officer on any force would not think of “booking” a two-year-old for “jay-walking.”<sup>32</sup>

This is comparable to the case in which the vendor's precaution of having a sample of feeding meal analyzed did not protect him from conviction when it was shown that the product did not measure up to what was certified in the analyst's report. *Laird v. Dobell*, [1906] 1 K.B. 131 (1905).

<sup>27</sup> Perkins, *Alignment of Sanction with Culpable Conduct*, 49 IOWA L. REV. 325, 346-51 (1964).

<sup>28</sup> “Indeed, there is no such thing as a ‘strict liability’ offense except in terms of a partial rather than a complete discarding of *mens rea* . . . .” Packer, *Mens Rea and the Supreme Court*, THE SUPREME COURT REVIEW 107, 140 (1962). “Liability, then, we suggest, was never absolute. ‘Strict liability’ seems to be a better term.” Winfield, *The Myth of Absolute Liability*, 42 L.Q. REV. 37, 46, 51 (1926).

<sup>29</sup> See *Goodwin v. State*, 63 Tex. Crim. 140, 142, 138 S.W. 399, 400 (1911). A farmer who shot a house pigeon feeding upon his land in order to protect his crop was not guilty of violating the statute which provided a penalty for the killing of such a bird. *Taylor v. Newman*, 4 B. & S. 89, 122 Eng. Rep. 393 (1863).

<sup>30</sup> HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 342 (2d ed. 1960). *Accord*, Mueller, *How to Increase Traffic Fatalities: A Useful Guide for Modern Legislators and Traffic Courts*, 60 COLUM. L. REV. 944, 958 (1960).

<sup>31</sup> *People v. Statley*, 91 Cal. App. 2d Supp. 943, 206 P.2d 76 (App. Dep't Super. Ct. Los Angeles 1949); *Commonwealth v. Daley*, 148 Mass. 11, 18 N.E. 579 (1888).

<sup>32</sup> A conviction of a twelve year old girl for having made a prohibited sale of

The Code, unfortunately, undertakes to introduce the concept of absolute liability. Section 2.05(1) reads:

The requirements of culpability prescribed by Sections 2.01 and 2.02 do not apply to:

- (a) offenses which constitute violations, unless the requirement involved is included in the definition of the offense or the Court determines that its application is consistent with effective enforcement of the law defining the offense; or
- (b) offenses defined by statutes other than the Code, insofar as a legislative purpose to impose absolute liability for such offenses or with respect to any material element thereof plainly appears.<sup>33</sup>

Under this provision and an appropriately-worded drug act, as pointed out by the author elsewhere,<sup>34</sup> a pharmacist who handed a narcotic to one not entitled to receive it could be convicted though he had acted unwillingly under fear of death at pistol-point. We have no such liability at present and should not have. If it be argued that the section quoted is subject to qualification by other sections which provide an excuse in cases of compulsion, insanity or infancy, the answer is that if the liability is qualified it is *not absolute* and should have no such label. If the provision is held actually to mean absolute liability it should, and no doubt would, be held unconstitutional if adopted, but we should not ask the legislature to adopt what the court should hold to be invalid. In addition, the resurgence of strict liability has passed its peak, and the trend is to require that guilt of even a civil offense (or "violation" to use the Code's term) must be based upon some degree of fault even if it is only the failure to exercise an exceedingly high degree of care. Proposed legislation should promote this very wholesome trend rather than frustrate it and it is to be hoped that the label "strict liability" will be substituted with the appropriate explanation.

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liquor was reversed because it was not shown that she had the necessary capacity. *Commonwealth v. Mead*, 92 Mass. 398 (1865). Professor Sayre thinks the defense of infancy should not be recognized in such a case but does not question its availability in favor of a child under seven. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 76 (1933).

<sup>33</sup> References to "absolute liability" appear also in subdivision 2 of this section and in sections 2.03(4) and 2.07(2).

<sup>34</sup> PERKINS, *supra* note 27, at 388.

