I would like to thank Alexander Kurke for his permission to reproduce his part of the brief.

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The Mental Element

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The Law Reform Commission of Canada ("LRCC") in its Report 31: Recodifying Criminal Law ("Report 31"), indicates that its four objectives in producing a new Code include comprehensiveness, simplicity, systematization and principle.[38] The result succeeds in resolving many of the difficulties inherent in the current *Criminal Code*. Unfortunately, in many instances, new problems are created, problems that vitiate the LRCC's Code as it now stands. The mental element is obviously a crucial component of the final product. However, while the LRCC has achieved some measure of comprehensiveness in its provisions setting out the mental element, it appears in many instances to have equated simplicity with compression, and too often to have sacrificed simplicity to systematization.

The Application Section:

The LRCC has attempted to replace the principle of law that the use of any *mens rea* word imported into an offence provision applies to every element of the offence. Unfortunately, the LRCC's proposal takes us only a short step forward, by altering that principle to a limited extent, but at the cost of simplicity, elegance, and some certainty.

The LRCC, in s. 2(4)(a) of its Code, offers general requirements concerning levels of culpability to be read into the definition of individual crimes. Three applicable states are defined: (i) crimes requiring purpose; (ii) crimes requiring recklessness; (iii) crimes requiring negligence. Each of these levels of culpability is further subdivided, setting culpability levels for conduct, consequences, and circumstances, which are therefore determined to be the material components of the mental element. The provisions in s.2(4)(a) take their meaning from the definitions of "purposely", "recklessly", and "negligently" found in s. 2(4)(b). These definitions also speak in terms of conduct, consequences, and circumstances.

The process of interpretation of the Code would, therefore, involve (a) a consideration of a crime in the *Special Part*, and the level of culpability it requires; (b) reference to s. 2(4)(a), with its elemental requirements for conduct, consequences, and circumstances; and (c) consultations of the definitions in s. 2(4)(b)for each element of s. 2(4)(a).

Even a brief consideration of this mechanism reveals how cumbersome it is. Far from simplifying and clarifying the law, s. 2(4)(a) interposes an exegetical hurdle between an offence and the mental element involved.

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[38] *Supra* note 20 at 9.

The benefits of the "Application Section" in s. 2(4)(a) would appear to be definitional convenience and clarity, in that definitions that are contrary to common understanding are placed at a further remove from the offence in question. Do these benefits come unalloyed? Anne Stalker criticizes some of the definitional peculiarities and innovations of the LRCC in its application provision for "purpose" crimes, in particular, the requirement merely for recklessness with respect to circumstances in a purpose crime.[39] If such complex definitions could be avoided, then, presumably, the issue of definitional convenience would be rendered moot. Moreover, the undesirable complexity of thought and expression of these application sections do little to bring the criminal law within the understanding of the layperson.

Are there alternative means of setting out the mental element, that offer convenience and clarity? The scheme developed by the ALI in its Model Penal Code offers a superior alternative. S. 2.02 of the Model Penal Code offers General Requirements of Culpability. S. 2.02(1) provides:

> Minimum Requirements of Culpability. Except as provided in Section 2.05, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.[40]

The Model Penal Code then defines each state of mind in terms of its component mental elements: conduct, result, and circumstances. When individual states of mind are required for elements of an offence, they are inserted directly into the definitions of individual offences.

If a scheme such as that employed by the Model Penal Code were to be employed in Canada, not only could the levels of culpability defined in the *General Part* be employed with much greater specificity in the *Special Part* definitions of offences, but if necessary, new levels of culpability could be defined and implemented without the need to rework the cumbersome *Application Section.*

Purpose and Knowledge:

In its Working Paper 29, the LRCC commented on the place of knowledge in criminal liability:

> Knowledge ... is the necessary condition for criminal liability. It is not, however, a sufficient condition for several reasons. First, the definition of the offence in

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[39] Anne Stalker, "The Fault Element in Recodifying Criminal Law: A Critique" (1989) 14 Queen's L.J. 119 at 123-124.

[40] *Supra*, note 23.

> question may require some special purpose on the part of the accused. Second, the offence may be one which can be committed only with some motive connected with the value infringed by that offence, e.g. without lawful excuse, fraudulently, corruptly, etc. Third, an accused may act knowingly but still not be liable because of the operation of some general defence, e.g. duress, necessity or self-defence. In all these situations knowledge alone will not entail liability but lack of knowledge precludes guilt. Knowledge, then, remains the *sine qua non* of liability for crimes.[41]

The Code offered in Report 31 accords with this train of thought. The Application Section, s. 2(4)(a), offers mental states of purpose, recklessness, and negligence, but not knowledge. Instead, knowledge is invoked for purpose crimes in s. 2(4)(a)(i)(C). What is particularly unfortunate, therefore, is that s. 2(4)(b), which offers definitions of "purposely", "recklessly", and "negligently", offers no definition for "knowingly". It has been submitted above that the Application Section is unnecessary and overly complex. A knowledge definition should be included among the other definitions if the *Application Section* is abandoned. However, even if the Application Section scheme is retained, it is evident that a knowledge definition should find its way into s. 2(4)(b).

In many instances, purpose and knowledge differ. The LRCC has done much to accommodate these situations in its scheme. The fact that the LRCC offers solutions to many problems is undeniable. However, in provisions as central to the criminal law and its public reception as those concerning the mental element, simplicity, where it can be achieved, ought to be the primary concern.

To begin, consider the situation where an actor desires one result, which can not be achieved without another undesired result coming to pass as well. The LRCC has provided for this situation in s.2(4)(b) "purposely" (ii), in which purposefulness as to a consequence is presumed, if the actor brings about a consequence she knew would come about, in the course of bringing about a desired consequence. The LRCC comments on this provision:

> As applied to consequences, the term "purposely" covers not only the usual case where the consequence is what the accused aims at but also cases . . . where his aim is not that consequence but some other result which, to his knowledge, will entail it: for example, if D destroys an aircraft in flight to recover the insurance money on it and thereby kills the pilot V, he is still guilty of killing V on purpose even though this is not in fact his aim.[42]

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[41] LRCC, Criminal Law – The General Part: Liability and Defences, (Working Paper 29)(Ottawa: Law Reform Commission,1982), at 26.

While the provision would appear to accomplish its end, it would be beneficial to phrase the provision in terms of "knowingly" and include a definition in s. 2(4)(b). What purpose is served by confusing the issue and semantically implying that D wanted to kill the pilot? If it is enough that D knew the pilot would die, then why not simply say so?

What of a situation such as that in Steane, where the accused made broadcasts for the enemy during World War II, his desire being to protect his family from retribution by the Germans, but presumably knowing that the Germans would be assisted by his activities.[43] At trial, Steane had been convicted of doing acts likely to assist the enemy "with intent to assist the enemy", but the Court of Criminal Appeals effectively read the statute as though it read "for the purpose of assisting the enemy". Similarly, in Morris,[44] involving a murder conviction, an evidentiary point revolved around whether a witness, Taylor, was an accessory after the fact to the murder. Taylor had witnessed Morris's attacks on the deceased, and had telephoned the police. However, when the police arrived, Taylor told them that "she is alright, she's just sleeping." In fact, the victim was dead. S. 23(1) of the *Criminal Code* makes someone an accessory after the fact who, "knowing that a person has been a party to an offence . . . assists him for the purpose of enabling him to escape." In a plea reminiscent of that in Steane, Taylor claimed he had spoken these words because he was afraid of Morris, and feared being charged with her death himself. For the majority of the Supreme Court of Canada, Ritchie J. felt that the words were not spoken to enable Morris to escape, while Spence J., for the minority felt that Taylor's fears were irrelevant. In any case, as in Steane, there seems to be an essential distinction between desiring a consequence, and merely knowing it will come to pass. Legislation can indicate this distinction (or be found to do so) if it indicates a further purpose involved in an activity, beyond a mere knowledge that a consequence will come about. What is wanted is not merely a means of "catching" individuals such as Taylor or Steane, whom the defence of duress may assist anyway, but a principled understanding that knowledge that a result will come about could also attract liability. An actor with knowledge that a prohibited consequence will result from her actions should likely be punished, but she should not be presumed to desire such a consequence.[45]

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[42] *Supra* note 20 at 24.

[43] R. v. Steane, [1947] 1 K.B. 997 (C.C.A.). Steane's plight might be dealt with under the new Code through duress, but it is noteworthy that there will be no protection for those who feel pressured to do an act, knowing that it will bring about a prohibited consequence, but the pressure does not amount to the level required for the defence of duress.

[44] Morris v. R., [1979] 2 S.C.R. 1041.

[45] This is perhaps a criticism that can be levelled generally at the LRCC's choice of the term "purpose" to denote intent. While it does not carry the semantic baggage of the general and specific intent controversy (as illustrated, for example, in R. v. George, [1960] S.C.R. 871), the term "purpose", if it is defined to include mere knowledge, may prove confusing.

Some offences are virtually defined by the knowledge of the accused. Thus, for instance, possession of property obtained by crime requires that the accused know that "all or part of the property or thing or of the proceeds was obtained by or derived directly or indirectly from the commission in Canada of an offence punishable by indictment".[46] The LRCC focuses on the activity rather than the nature of the property. Since knowledge as to circumstances is part of purpose offences, it could be argued that possession is still a crime, but it has become a purpose offence. Thus, s. 18(6) of the proposed Code, "Possession of Things Obtained by Crime" provides:

> Everyone commits a crime who has possession of any property or thing, or the proceeds of any property or thing, obtained by a crime committed in Canada or committed anywhere, if it would have been a crime in Canada.

Under the new Code, this would be a "purpose" crime, through the residual rule in s. 2(4)(d).

While it must be admitted that the approach taken by the LRCC works in these circumstances, one is left wondering whether it would not be better to acknowledge most offences in terms of knowledge, and preserve the category of "purpose" for those offences actually requiring a higher level of culpability than mere knowledge. The preservation of a distinction between knowledge and purpose would result in greater clarity of thought, and avoid the awkward definition of purpose as including knowledge.

In addition, the *Criminal Code* is not the sole criminal instrument in the federal arsenal. Other statutes, defining other offences, also exist and depend upon definitions offered in the *Criminal Code*. Thus, s. 2 of the *Narcotics Control Act*[47] defines "possession", a critical concept for that statute, as "possession as defined in the *Criminal Code*." Will that definition now entail the wholesale importation into the *Narcotics Control Act* of the *Application Section* of the new Code, with its absorption of knowledge into purpose?

Lastly, as much as possible, a statute, to be effective, should be drafted in terms and conceptions familiar and clear to the people it serves. It is submitted that compression can not stand in for clarity, and that indirect forms of thought, such as in defining mere knowledge as purpose, may well render the new Code, which is destined to be one of the most important of all federal statutes, unintelligible to Canadians.

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[46] *Criminal Code*, R.S.C. 1985, c. C-46, s. 354(1)(a).
[47] R.S.C. 1985, c. N-1.

Knowledge and Wilful Blindness:

Intimately connected with knowledge is the concept of wilful blindness. In its classic sense, wilful blindness serves as a halfway house between intention and recklessness. While recklessness involves actual knowledge of a risk, but a decision to continue one's conduct nonetheless, wilful blindness involves an awareness that an inquiry should be taken into a risk, but a decision to proceed without the inquiry, in order to avoid knowledge. The LRCC has not directly confronted the issue of wilful blindness.

In essence, the notion of wilful blindness serves to convert recklessness into actual knowledge.[48] The English Law Commission notes:

> 8.10 *"knowingly": knowledge and "wilful blindness".* . . . English criminal law has commonly treated a person as knowing something if, being pretty sure that it is so, he deliberately avoids taking advantage of an available means of "actual knowledge". It is this state of mind which, we believe, has to be captured by a short form of words. Clause 18(a) therefore treats a person as acting "knowingly" with respect to a circumstance "not only when he is aware that it exists or will exist, but also when he avoids taking steps that might confirm his belief that it exists or will exist."[49]

It is submitted that this reasoning is equally appropriate in the Canadian context. A definition of "knowledge" should be added to the General Part of the *Criminal Code*, and should be defined to include wilful blindness.

Recklessness:

The LRCC has offered alternative provisions on recklessness in s. 2(4)(b):

> "Recklessly." A person is reckless as to consequences or circumstances if, in acting as he does, he is conscious that such consequences will probably result or that such circumstances probably obtain.
>
> *[Alternative*
>
> *"Recklessly." A person is reckless as to consequences or circumstances if, in acting as he does, he consciously takes a risk, which in the circumstances known*

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[48] Colvin, *supra*, note 25 at 125.
[49] *Supra*, note 24 at 191-192.

to him is highly unreasonable to take, that such consequences may result or that such circumstances may obtain.]

The LRCC preferred the first formulation above, and noted:

> The first formulation of "recklessly" locates the central meaning of the term in the notion of consciousness of probability. The accused need not aim at the consequences but need only know they are probable; he must foresee their likelihood. Likewise he need not know of the existence of the circumstances specified by the definition but need only know that they probably exist; he must realize their likelihood.[50]

This formulation does indeed capture the idea that what is involved is the likelihood of a consequence coming about or a circumstance existing. The central idea relates recklessness directly to the near certainty required for knowledge or purpose, and defines recklessness to include some lesser level of certainty on the actor's part.

However, a crucial element has been omitted from this definition. That element is the objective analysis of the risk involved in the conduct. Risk should not be seen merely as involving subjective knowledge of likelihood of an event happening, but also as involving a further objective calculus of whether the risk was justifiable in the circumstances. The LRCC offers examples of the operation of the alternative definition:

> The alternative formulation defines "recklessly" as a function of two factors: (1) the risk consciously taken, and (2) the objective unreasonableness of taking it in the circumstances known to the accused. A risk may be one of less than fifty per cent but may still be most unreasonable and therefore reckless: if D deliberately points a loaded gun at V, this would generally be regarded as reckless despite a less than fifty per cent chance of the gun going off. Conversely, there may be a high probability of a consequence without recklessness if the risk is not unreasonable in the circumstances: a surgeon performing an operation with more than a fifty per cent chance of death will not necessarily be reckless, as when, for example, he performs a dangerous operation on a consenting patient to save his sight, hearing or other faculty.[51]

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[50] *Supra* note 20 at 24.
[51] *Ibid.*

A mixed objective and subjective test offers a greater degree of certainty in assessing whether conduct is deplorable or defensible, but does require the interposition of a trier of fact to determine when the risk has been unjustifiable. In Canada, under the LRCC's alternative definition, the trier of fact would be asked to determine whether the risk was "highly unreasonable to take."

Further support for this definition may be found in judicial authority. Thus, Martin J.A. defined recklessness:

> The term "recklessly" is here taken to denote the subjective state of mind of a person who foresees that his conduct may cause the prohibited result but, nevertheless, takes a deliberate and unjustifiable risk of bringing it about.[52]

While judicial dicta alone should not circumscribe the process of law reform, justice and accuracy also favour the accepted definition of recklessness. For the above reasons, the LRCC's alternative definition of recklessness is the better choice for a new codification of the criminal law.

The Residual Rule:

In s. 2(4)(d) of their proposed Code, the LRCC provides:

> Residual Rule. Where the definition of a crime does not explicitly specify the requisite level of culpability, it shall be interpreted as requiring purpose.

The LRCC's only note on this provision is that it will avoid the repetition of fault elements in purpose crimes in the *Special Part*, but of course levels of culpability must still be specified in "reckless" and "negligent" crimes.

Inasmuch as most definitions in the *Special Part* do not explicitly specify a requisite level of culpability, it can be inferred that the LRCC intends most crimes to require purpose, which, we have seen, also includes knowledge. But is this the proper "default" level of culpability? As we explore this question, one must bear in mind that the only functional distinction currently drawn in the LRCC *Application Section* scheme between purpose crimes and crimes of recklessness, lies with respect to the consequences of someone's actions (see s. 2(4)(a)(i)(B) and s. 2(4)(a)(ii)(B)).

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[52] R. v. Buzzanga and Durocher (1979), 49 C.C.C. (2d) 369 (Ont. C.A.), at 379.

The law, where no culpability level is indicated, currently extends culpability down to recklessness. Thus Martin J.A. notes:

> The general *mens rea* which is required and which suffices for most crimes where no mental element is mentioned in the definition of the crime, is either the intentional or reckless bringing about of the result which the law, in creating the offence, seeks to prevent[.][53]

Undoubtedly, such a rule will result in holding more people culpable for offences than if purpose were required. However, the response to this concern lies in extending the residual rule to recklessness, but punishing recklessness less severely than purpose or knowledge. As Stalker notes:

> [F]or most offences, risk-taking is as culpable as purpose in the eyes of most Canadians and should at least found conviction, even if the sentence is less severe.[54]

Such a rule also the further advantage of requiring that the higher culpability levels be stated explicitly when they are mandated for an offence.

Conclusion:

The LRCC, in its Report 31, is to be commended for making a good start to the recodification process. However, simply because the document appears in a finished format, it ought not therefore be considered to be uncontroversial. Much work remains to be done, particularly in the central provisions concerning the mental element.

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[53] *Ibid.* at 381. See also Pappajohn v. R., [1980] 2 S.C.R. 120 per Dickson J., at 146.

[54] *Supra*, note 39 at 129.