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NEW MEXICO MENS REA DOCTRINES AND
THE UNIFORM CRIMINAL JURY INSTRUCTIONS:
THE NEED FOR REVISION

LEO M. ROMERO*

INTRODUCTION

New Mexico courts have had difficulty in dealing with the mens rea requirement in criminal cases. Lacking a coherent mens rea concept, the courts seized upon generalizations that obscure sound analysis, causing confusion and inconsistent holdings.

In an effort to avoid the problems created by this failure to devise a coherent theory of criminal intent, uniform jury instructions were adopted by the Supreme Court of New Mexico in 1975.1 Because they attempt to reflect the then existing law,2 the instructions largely reflect the imprecision of analysis of criminal intent that has plagued the courts.

It is the purpose of this article to analyze the New Mexico approach to mens rea issues. It will look at these issues in the context of jury instructions on criminal intent and in the context of the mens rea defenses. In particular, this article will analyze the New Mexico decisions attempting to define the mens rea requirement

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1. The Supreme Court of New Mexico adopted Uniform Jury Instructions for Criminal Cases by Order dated June 24, 1975. The Uniform Jury Instructions were prepared by the New Mexico Supreme Court Uniform Jury Instructions Criminal Rules Committee. The Instructions were not complete on that date, and new Instructions have been adopted as they have been prepared. At present, the Supreme Court of New Mexico has adopted instructions for most felony offenses in New Mexico.

2. Although there is no statement in the Approved Committee Commentaries or in any order of the New Mexico Supreme Court that the Uniform Jury Instructions for Criminal Cases are to reflect the existing New Mexico law, the Approved Committee Commentaries on every Instruction include the relevant New Mexico cases as support for the Instructions. New Mexico Jury Instructions Criminal, Approved Committee Commentaries 1975.

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*Professor of Law, UNM School of Law. The author wishes to acknowledge the valuable comments of his colleagues and the assistance of his research assistants, Antonio Silva, Nancy Hollander and Charlotte Roosen. The insights gained in discussions of these issues in my Criminal Law class over the past five years were especially helpful in preparing this article.
and will evaluate the New Mexico Uniform Jury Instructions for Criminal Cases to assess their adequacy in formulating a coherent approach to the resolution of these problems. Finally, it will set forth the Model Penal Code's method of analysis as a solution for the difficulties encountered in the New Mexico approach to mens rea issues.

THE MENS REA PROBLEM

Criminal liability rests on two basic requirements: proscribed conduct that includes a voluntary act or omission and a blameworthy state of mind. These requirements are termed actus reus and mens rea, respectively. Neither is sufficient to establish liability; both must be present.

The actus reus usually is easily discernible by reference to the definition of the crime. It consists of three elements: an act, attendant circumstances and, sometimes, a result. For example, in the New Mexico Criminal Code murder is defined as the "unlawful killing of one human being by another with malice aforethought, either express or implied, by any of the means with which death may be caused." The actus reus of murder, therefore, consists of the following elements: (1) an act or omission that may cause death, (2) the circumstance that the victim be a human being other than the one who did the act or omitted to do something that caused the death, and (3) the result of death. Any crime may be similarly dissected to discover the actus reus elements.

A more difficult task, however, is the formulation of a simple statement of the requisite of mens rea. It is unnecessary to go into the history of mens rea or even to explore in detail the jurisprudence underlying the mens rea requirement. Suffice it to say that moral blameworthiness is a deeply rooted precondition to the imposition of penal sanctions. The moral condemnation that is expressed by guilt and punishment, therefore, requires for the commission of a crime some mental state that denotes fault or

6. For a discussion of the history of both rationales underlying the mens rea concept, see generally the authorities set forth in note 3 supra.
culpability. The term *mens rea* refers to the mental element necessary for the particular crime.\(^7\) In the example of murder, the requirement of malice aforethought refers to the requisite mental state, or *mens rea*, that must accompany the *actus reus* in order to establish liability.

The term *mens rea* refers to the mental state required for commission of a crime but it does not, however, indicate what particular mental state or states is required. It is not easy to ascertain which state of mind is sufficient to establish criminal liability for several reasons. First, many statutes are silent with respect to a mental element.\(^8\) Second, an abundance of *mens rea* terms are utilized by the legislatures and the courts. Words such as criminal intent,\(^9\) general intent,\(^10\) specific intent,\(^11\) dishonest intent,\(^12\) feloniously,\(^13\) malice,\(^14\) willfully,\(^15\) deliberately,\(^16\) wanton,\(^17\) depraved,\(^18\) unlawfully,\(^19\) conscious wrongdoing,\(^20\) and a host of others have caused much confusion and obscured meaningful analysis of the mental element.\(^21\) Indeed, courts have admitted their inability to define satisfactorily many of these terms.\(^22\)

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7. There are two definitions of *mens rea*. One definition uses the term *mens rea* to denote the mental state required for commission of a crime. The other definition of *mens rea* refers generally to legal responsibility. The latter definition thus includes all of the qualifications to criminal liability—defenses such as insanity and infancy in addition to the absence of a required mental state. See S. Kadish & M. Paulsen, Criminal Law and Its Processes 87-88 (3d ed. 1975); H. Packer, supra note 3, at 105-06. Kadish refers to the first definition as *mens rea* in its “special sense” and the second definition as *mens rea* in its “general sense.” This article uses *mens rea* in its special sense.


21. See W. LaFave & A. Scott, supra note 3, at 193-94.

The difficulty in ascertaining the mental element of a criminal offense is due in part to a third reason—the variety of conduct with which a criminal code deals. There is no single mens rea for all crimes. Different crimes often have different mens rea requirements. For example, a homicide may be murder in the first degree or involuntary manslaughter depending upon the mental state that accompanied the act of killing. If the actus reus for a homicide was done with a willful, deliberate, and premeditated state of mind, it is murder in the first degree. If, however, the killing was reckless with respect to the result of death, it is involuntary manslaughter. Thus, murder and manslaughter each have a different mens rea although both rest upon the same actus reus. This difference in mens rea also exists for crimes that do not share the same actus reus elements.

A fourth reason underlying the difficulty of determining the mens rea requirement for a particular crime is the fact that the state of mind accompanying the actus reus may vary among the different elements of a single crime. Given a charge of unlawful taking of a vehicle, for example, the prosecution normally must prove that the taking was intentional. Other circumstances also are essential to establish commission of the crime. The object of the taking must be a vehicle and the taking must be without the consent of the owner. These elements may be accompanied by different mental states. The defendant may know that he does not have the consent of the owner or he may be reckless or negligent in believing that he has the owner's consent. The same range of possible mental states exists for each element of the offense.

The mens rea problem is thus the ascertainment of the mental state or states that will suffice to establish criminal liability. In other words, what combinations of possible mental states will satisfy the mens rea requirement for a particular offense.

THE NEW MEXICO APPROACH TO THE MENS REA PROBLEM

The New Mexico approach to the mens rea problem is premised on common law principles. As a general rule, "a crime isn't com-

23. J. Hall, supra note 3, at 103.
26. The actus reus for each crime includes the killing of one human being by another.
27. W. LaFave & A. Scott, supra note 3, at 194-95; H. Packer, supra note 3, at 104-05.
mitted if the mind of the person doing the unlawful act is innocent.\textsuperscript{29} \textsuperscript{29} The commission of a crime requires a guilty mind or, in the terms of the New Mexico courts, criminal intent.\textsuperscript{30} \textsuperscript{30}

Although the legislature is vested with the authority to define crimes, statutory provisions rarely specify the mental elements required for the commission of a crime.\textsuperscript{31} \textsuperscript{31} The courts have been left with two tasks in defining the requisite mental state for particular crimes: Did the legislature intend to dispense with a guilty-mind requirement and, if not, what mental element or elements satisfy the guilty-mind requirement?

The determination of whether a crime requires criminal intent is a matter of statutory construction.\textsuperscript{32} \textsuperscript{32} The courts construe a crime to impose strict liability only when the legislature clearly and unambiguously intends to impose liability without respect to fault or blameworthiness.\textsuperscript{33} \textsuperscript{33} Crimes that omit any reference to a mental element have been construed to require criminal intent where the legislative intent is unclear.\textsuperscript{34} \textsuperscript{34} Thus, the courts have construed most criminal statutes in New Mexico to require criminal intent. Only certain regulatory offenses have been interpreted as dispensing with criminal intent and imposing strict liability.\textsuperscript{35} \textsuperscript{35}

In determining that most crimes require \textit{mens rea}, the New

\textsuperscript{29} State v. Blacklock, 23 N.M. 251, 254, 167 P. 714, 715 (1917).

\textsuperscript{30} See, e.g., State v. Shedoudy, 45 N.M. 516, 118 P.2d 280 (1941).

\textsuperscript{31} Statutes are either silent regarding any mental element or ambiguous in view of the variety of \textit{mens rea} terms used. See notes 9-21 supra and accompanying text.

\textsuperscript{32} In State v. Shedoudy, 45 N.M. 516, 524, 118 P.2d 280, 286 (1941), the Supreme Court of New Mexico stated, "Whether a criminal intent is to be regarded as essential, is a matter of construction, to be determined from a consideration of the matters prohibited, and the language of the statute, in the light of the common law rule."

\textsuperscript{33} Id. at 524, 118 P.2d at 286. However, the New Mexico Court of Appeals recently stated a view of strict liability that includes at least one type of fault. In State v. Lucero, 87 N.M. 242, 531 P.2d 1215 (Ct. App. 1975) the violation of a statute that included negligence as a basis of criminal liability was said to be an example of a strict liability crime. \textit{Id.} at 244, 531 P.2d at 1217. This view of strict liability is not consistent with the usual definition of strict liability without any fault. See, e.g., W. LaFave & A. Scott, supra note 3, at 218; H. Packer, \textit{supra} note 3, at 127-29, H. L. A. Hart, \textit{supra} note 3, at 149-152. Negligence is generally viewed as a type of fault, although there is disagreement as to whether negligence ought to serve as the basis for the imposition of the criminal sanction. See, e.g., J. Hall, \textit{supra} note 3, at 133-141; G. Williams, \textit{supra} note 3, at 122-24; H. Packer, \textit{supra} note 3, at 127-29; H. L. A. Hart, \textit{supra} note 3, at 136-157; Wasserstrom, \textit{Strict Liability in the Criminal Law}, 12 Stan. L. Rev. 731, 741-45 (1960).

\textsuperscript{34} See, e.g., the statute construed in State v. Shedoudy, 45 N.M. 516, 118 P.2d 280 (1941).

\textsuperscript{35} See, e.g., State v. Alva, 18 N.M. 143, 134 P. 209 (1913); Territory v. Church, 14 N.M. 226, 91 P. 720 (1907); State v. Vickery, 85 N.M. 389, 512 P.2d 962 (Ct. App.) cert. denied, 85 N.M. 380, 512 P.2d 953 (1973); State v. Dennis, 80 N.M. 262, 454 P.2d 276 (Ct. App. 1969). \textit{But see} State v. Lucero, 87 N.M. 242, 531 P.2d 1215 (Ct. App.) cert. denied, 87 N.M. 239, 531 P.2d 1212 (1975), where a statute was construed to impose strict liability
Mexico courts have used the term criminal intent. Although the term suggests an intentional state of mind, criminal intent may also include a knowing and perhaps even a reckless or negligent frame of mind. Apparently recognizing that the term criminal intent means more than intent and, in effect, signifies the requirement of a guilty mind, the New Mexico courts settled on "conscious wrongdoing" as the definition of criminal intent. This definition, however, provides little guidance as to the state of mind that satisfies the guilty mind requirement. Conscious wrongdoing may suggest a knowing state of mind, but the definition is ambiguous. Does it also suggest an intentional, reckless, or negligent state of mind?

The use of a single term like criminal intent, however defined, to denote the requirement of a guilty mind is inadequate in view of the possible different states of mine which may accompany the different elements of a crime. The use of a single mens rea term raises several important questions. Does the term apply to all elements of the offense or only to some of them? Does the term include recklessness or negligence as a basis of culpability? The use of a single mens rea, such as criminal intent or conscious wrongdoing, thus obscures the problem of determining what mental states must accompany each element of the actus rea. The assumption that although the statutory language included the terms "knowingly, intentionally, or negligently." Crimes that are construed to impose strict liability often still require some culpability. Strict liability usually refers only to the mental state that must accompany one element of the offense. With respect to the other elements, some culpable state of mind is required. See H. Packer, supra note 3, at 126.


37. In State v. Craig, 70 N.M. 176, 372 P.2d 128 (1962), the New Mexico Supreme Court held that the failure to instruct that a knowing state of mind was required for conviction was error in view of the court's conclusion that the statute requires criminal intent.

38. Some jurisdictions include these states of mind within the term criminal intent. See, e.g. W. LaFave & A. Scott, supra note 3, at 194. The New Mexico Court of Appeals, however, apparently does not include negligence within the doctrine of criminal intent; instead, a crime of negligence is viewed as a strict liability crime. State v. Lucero, 87 N.M. 242, 531 P.2d 1215 (Ct. App. 1975).


40. See W. LaFave & A. Scott, supra note 3, at 194.

41. Some jurisdiction include these states of mind within the term criminal intent. See id. at 201.
each crime requires but a single mens rea prevents meaningful analysis of mens rea issues.

The General Intent-Specific Intent Distinction

For those criminal offenses that require criminal intent, New Mexico, like many jurisdictions, makes a distinction between crimes of general intent and crimes of specific intent. Historically, the distinction between specific and general intent evolved as a limitation to use of intoxication as a defense.\(^2\) Intoxication was not allowed to negate a general intent, but it could be used to negate a specific intent. This limitation persists in New Mexico and will be examined later.

New Mexico courts,\(^3\) and courts in other jurisdictions,\(^4\) have had some difficulty in defining and distinguishing general and specific intent. General intent has been used synonymously with criminal intent.\(^5\)

General intent refers to the mental state with which the act or actus reus is done.\(^6\) Crimes of specific intent

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42. Regina v. Monkhouse, 4 Cox Crim. Cas. 55 (1849). See also I. J. Bishop, Bishop on Criminal Law 299 (9th ed. 1923); Hall, Intoxication and Criminal Responsibility, 57 Harv. L. Rev. 1045 (1944).
See Thompson & Gagne, The Confusing Law of Criminal Intent in New Mexico, 5 N.M.L. Rev. 63, 64 (1974), for an account of the confusion and frustration expressed by some of the appellate judges in defining and distinguishing general and specific intent.
44. See, e.g., the opinion of Justice Traynor in People v. Hood, 1 Cal. 3d 444, 462 P.2d 370, 82 Cal. Rptr. 618 (1969). Justice Traynor acknowledged that general and specific intent have been notoriously difficult terms to define and that the difference between them is often only linguistic. Id. at 456, 462 P.2d at 377-78, 82 Cal. Rptr. at 625-26.
When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a further consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent. When the definition refers to defendant's intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent.
See also W. LaFave & A. Scott, supra note 3, at 201-02; R. Perkins, supra note 3, at 744-45, 750-51.
require something more—a particular mental state in addition to the state of mind that accompanies the act. This additional mental state often involves an intent to do a further act or to achieve a further consequence. For example, one may enter a building with intent to enter and with knowledge of nonconsent. But such an entry is not a burglary unless it is accompanied by the intent to steal or to commit a felony in the building. This additional intent to steal or commit a felony is termed a specific intent and is an essential requirement of the crime of burglary. Without the intent to steal, the crime is criminal trespass, a general intent crime, because the intent to enter and the knowledge of nonconsent refer only to the *actus reus* elements of the crime. The following diagrams illustrate the difference between a crime of general intent and one of specific intent.

**Criminal Trespass**

<table>
<thead>
<tr>
<th>Actus Reus</th>
<th>Mens Rea</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Entry</td>
<td>Purposely</td>
</tr>
<tr>
<td>2. Building</td>
<td>Knowingly</td>
</tr>
<tr>
<td>3. Without consent</td>
<td>Knowingly</td>
</tr>
</tbody>
</table>

Criminal Trespass is a crime of general intent because the states of mind refer to the different elements of the *actus reus*.

**Burglary**

<table>
<thead>
<tr>
<th>Actus Reus</th>
<th>Mens Rea</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Entry</td>
<td>Purposely</td>
</tr>
<tr>
<td>2. Building</td>
<td>Knowingly</td>
</tr>
<tr>
<td>3. Without consent</td>
<td>Knowingly</td>
</tr>
<tr>
<td></td>
<td>With intent to steal or commit a felony therein</td>
</tr>
</tbody>
</table>

Burglary is a crime of specific intent because the fourth element, with intent to steal or commit a felony, is a mental state required in addition to the states of mind that must accompany the *actus reus*. Whether a crime requires a specific intent is largely a matter of statutory formulation. If by definition the offense requires an intent beyond the mental states accompanying the *actus reus*, it is a specific intent crime. If the legislative definition does not include an additional intent, the crime requires only a general or criminal intent.

Although the distinction between general and specific intent seems simple enough, the use of the term intent in both phrases has caused the courts some difficulty. In three 1974 cases concerning the Con-
trolled Substances Act, the New Mexico Court of Appeals held that specific intent is an element of the crime of distributing a controlled substance or possessing a controlled substance with intent to distribute.\textsuperscript{4,7} The court failed to distinguish between the two ways in which the statute may be violated. Intentionally distributing does not require any additional intent beyond the state of mind required to accompany the \textit{actus reus}. The Supreme Court of New Mexico, in a 1978 case, correctly analyzed this section of the statute as a general intent crime and overruled the earlier cases which held that it defined a specific intent crime.\textsuperscript{4,8} The second part of the statute, however, requires an additional intent. It requires that possession—intentional possession or knowing possession—be accompanied by the additional intent to distribute. An intent to use or to destroy would not satisfy this part of the statute even though the defendant possessed the controlled substances intentionally and knowingly.

The general-specific intent dichotomy is significant in New Mexico only insofar as several defenses are limited to crimes of specific intent.\textsuperscript{4,9} The application of the defense of intoxication to the above provisions of the Controlled Substances Act illustrates the significance of this distinction. Intoxication that precludes the intent to distribute is a defense to the part of the statute that prohibits possession with intent to distribute because this part of the statute requires a specific intent. Intoxication that has the effect of negating the same intent is not a defense, however, to the part of the statute that proscribes intentional distribution because this part requires a general intent only. Apart from the concern for whether the intoxication defense should be premised on the general-specific intent distinction, the application of the distinction artificially draws a line between two crimes that include the same mental state. The only difference between the intents to distribute in each crime is formal rather than substantive, and such a formal difference should not be a premise upon which legal consequences turn.

\textit{Jurisdictional Problem}

Much of the problem in New Mexico in defining criminal intent stems from the fact that most \textit{mens rea} issues have been presented in


\textsuperscript{49} Intoxication and mental disease or disorder. \textit{See} note 89 and accompanying text \textit{infra} for a discussion of the intoxication defense. The defense of mental disease or disorder is discussed \textit{infra} at note 145.
the context of jurisdictional error. Questions of jurisdiction may be raised on appeal for the first time even if no objection was made at trial. New Mexico courts have held that failure to instruct the jury on every essential element of a crime is a jurisdictional error. Since criminal intent is an essential element in every crime in New Mexico with the exception of strict liability crimes, many cases have held that failure to instruct on criminal intent is a jurisdictional error that may be raised for the first time on appeal.

Jurisdictional error for failure to instruct on criminal intent has proved bothersome to the New Mexico courts for several reasons. The major problem lay in developing a standard against which to measure the adequacy of the instruction given by the trial court. In developing a standard, the appellate courts had to determine first what types of criminal intent the particular offense required (specific or general intent) and then define the requisite intent. The standard finally adopted was that an instruction would be sufficient and would therefore avoid jurisdictional error if it either defined “criminal intent in terms of ‘conscious wrongdoing’ or its equivalent,” or defined the criminal offense “in terms of the statute if it [the statute] defines the requisite intent.”

The effect of this standard was to generate litigation questioning whether the statutory definition of particular crimes sufficiently defined the requisite intent. The jurisdictional posture in which many mens rea issues were litigated did not assist the New Mexico courts in defining what mental elements are required for commission of any crime. When raised on appeal as a jurisdictional matter, the mens rea issue was decided in the abstract and without reference to any elements of the offense charged. The defendant did not raise a mens rea defense at trial because no mens rea instruction was requested. For the appellate courts to decide in this posture what instruction on criminal intent was necessary in order to avoid a


51. See DesGeorges v. Grainger, 76 N.M. 52, 412 P.2d 6 (1966), for the types of issues that may be raised for the first time on appeal.

52. See notes 33-35 supra and accompanying text.


reversal is to decide an important question out of context. The result has been the development of a *mens rea* doctrine that assumes that a single mental element, such as "conscious wrongdoing," applies to every crime and that fails to recognize that each element of an offense may be accompanied by a different state of mind.

This litigation brought forth calls for uniform jury instructions on intent in the hope that they would prevent appeals based on jurisdictional error. Yet an instruction in the language of the statute should be sufficient to avoid jurisdictional error, even if the statute is silent with respect to the mental element. Any additional instruction on the required mental state should not be a jurisdictional matter but an issue that must be raised at trial by submission of a requested instruction. The variety of ways in which a *mens rea* defense may arise suggests that no single broad definition of criminal intent will adequately inform the jury of the essential mental elements that the particular defendant denies. It is better to evaluate the adequacy of the jury instruction on *mens rea* in the context of a record where the *mens rea* issues were raised by objection or by requested instructions.

**The Uniform Jury Instruction on General Criminal Intent**

The New Mexico Supreme Court adopted Uniform Jury Instructions for Criminal Cases in 1975. The uniform instructions are mandatory and not subject to modification. Instruction 1.50 concerns general criminal intent and provides that

> In addition to the other elements of ____________, the State must prove to your satisfaction beyond a reasonable doubt that the defendant acted intentionally when he committed the crime. A


56. This view was expressed by Judge Sutin in State v. Lopez, 84 N.M. 453, 454, 504 P.2d 1086, 1087 (Ct. App. 1972) (dissenting opinion).


58. By order of the Supreme Court of New Mexico, the Instructions became effective September 1, 1975. See also note 1 *supra*.

59. See note 1 *supra* for the General Use Note that applies to the New Mexico Uniform Jury Instructions Criminal.
person acts intentionally when he purposely does an act which the law declares to be a crime, even though he may not know that his act is unlawful. Whether the defendant acted intentionally may be inferred from all of the surrounding circumstances, such as the manner in which he acts, the means used, [and] his conduct, [and] any statements made by him. (Brackets in the original)

The Use Note following this instruction provides that it must be used with every crime except for "(1) the relatively few crimes not requiring criminal intent, and (2) first and second degree murder and voluntary manslaughter."

Instruction 1.50 and its Use Note changed the existing law in several respects. First, it must be given even if the language of the statute includes the requisite intent.60 Previously, a separate instruction on criminal intent was not required if the jury was instructed in the terms of the statute and those terms included the requisite intent.61 The second change from the prior case law involves the use of instruction 1.50 in crimes of specific intent. In cases decided prior to the adoption of the Uniform Jury Instructions, an instruction on general criminal intent was unnecessary if the jury was correctly instructed as to the requisite specific intent.62 Third, the uniform instruction sets forth a new definition of criminal intent, replacing the "conscious wrongdoing" definition.63

The first two changes solved the jurisdictional error problem that previously beset the New Mexico appellate courts.64 Appeals predicated on jurisdictional error due to the failure to instruct the jury correctly as to the required mental state are now foreclosed, at least for those crimes requiring only a general criminal intent, because instruction 1.50 must be given for every crime that includes criminal intent as an essential element.65

Unfortunately, the change in the definition of criminal intent in the uniform instruction does not eliminate the confusion and ambiguity in the earlier formulations of the mens rea requirement. The new definition, like earlier ones, provides inadequate guidance as to the mental state or states that satisfy the guilty mind requirement.

60. Use Note for N.M. U.J.I. Crim. 1.50.
62. Id.
63. See cases cited in note 39 supra.
64. See note 50 and accompanying text supra for a discussion of the jurisdictional error problem.
65. Jurisdictional error may still arise with respect to specific intent crimes. Failure to instruct the jury as to the requisite specific intent would not be cured by N.M. U.J.I. Crim. 1.50.
Instruction 1.50 defines criminal intent as "purposely doing an act which the law declares to be a crime." This definition is ambiguous in that it does not state what an "act" is.\textsuperscript{66} Does "act" include all of the \textit{actus reus} elements of a crime\textsuperscript{67} or does it mean only a bodily movement?\textsuperscript{68} If "act" includes all of the elements of a crime, this definition of criminal intent would require that the defendant act intentionally with respect to every element of the crime. Take, for example, the three elements of the crime of unlawful taking of a motor vehicle: (1) taking, (2) of a vehicle, (3) without the owner's consent.\textsuperscript{69} If a purposeful state of mind is required for each of the elements of this crime, a conviction is precluded where the defendant's mental state with respect to the owner's consent is either reckless or negligent.

This construction of "act" assumes that one state of mind is involved in conduct that embraces the various elements of a crime. This assumption ignores the fact that a person may have different states of mind with respect to the different elements of a crime.\textsuperscript{70} A person may purposely take a vehicle, but he may be reckless, negligent, or even reasonable regarding his belief that he had the owner's consent.

The requirement of a purposeful state of mind for every element of a crime, as this construction of instruction 1.50 prescribes, is inconsistent with the mistake instruction in instruction 41.15, which makes a mistake of fact a defense only if the mistake is reasonable. Any mistake, reasonable or unreasonable, would logically negate the purposeful state of mind required by 1.50. Suppose, for example, that a defendant purposely takes a vehicle believing that he has the owner's consent because the vehicle was unlocked and the keys were in the ignition. If a jury were to find that the defendant honestly but unreasonably believed that he had the owner's consent, there would be no criminal intent because the defendant did not act

\textsuperscript{66} The word "act" itself is ambiguous. It is often used to denote different degrees of generality. R. Perkins, \textit{supra} note 3, at 547, offers the following example of the degrees of generality that have been attached to the word: "If death has resulted from a pistol shot, shall the \textit{act} be said to be (1) killing, (2) impinging the bullet upon the body of the victim, (3) shooting, (4) pulling the trigger, or (5) crooking the finger?"

\textsuperscript{67} J. Salmond, \textit{On Jurisprudence} 503 (9th ed. 1937); G. Williams, \textit{supra} note 3, at § 11. The definition of "act" includes (1) a willed movement (or omission), (2) certain surrounding circumstances, and (3) certain consequences. \textit{Id.}


\textsuperscript{70} This construction, on the other hand, may assume that any mental state other than intent is an insufficient basis for criminal liability. This assumption conflicts, however, with the reasonableness requirement for mistakes of fact in N.M. U.J.I. Crim. 41.15.
purposely with respect to every element. Since criminal intent is required for commission of the crime, this unreasonable mistake would provide a defense under this interpretation of instruction 1.50. However, instruction 41.15 would preclude this defense because the mistake was unreasonable. Actually, the mistake of fact instruction suggests that negligence is a sufficient \textit{mens rea} for every element of a crime because an unreasonable mistake is, in essence, a negligent mistake. Under the supposed facts stated above, the defendant would be acting negligently, rather than intentionally, with respect to the owner's consent. Thus, the two instructions, 1.50 and 41.15, set forth completely different and inconsistent \textit{mens rea} requirements. There is no way to accommodate these instructions as presently drafted.

The other interpretation of "act" in instruction 1.50 offers no better guidance as to the mental states required for commission of a crime. If "act" is construed to encompass only the action element of the \textit{actus reus} and not the attendant circumstances or results, instruction 1.50 then offers absolutely no guidance as to the remaining elements of the crime. Using the earlier example, this reading would require that the defendant purposely take a vehicle; but it would say nothing about what state of mind would suffice for the elements of the owner's nonconsent. This interpretation of instruction 1.50, read together with the mistake instruction in 41.15, would result in a negligent \textit{mens rea} for all elements of a crime except for the action element. Thus, in our example, an unreasonable mistake as to the owner's nonconsent would not be a defense, and this would be inconsistent with this interpretation of instruction 1.50. This interpretation of criminal intent would in effect place the definition of the requisite \textit{mens rea} for crime generally in the instruction addressed to the mistake of fact defense. In essence, criminal intent would mean negligence.

Neither interpretation of instruction 1.50 is very helpful in determining which mental states ought to be required for commission of a crime. Except for solving the jurisdictional error problem, the Uniform Jury Instruction on criminal intent suffers from the same problems of confusion and ambiguity that existed under the earlier formulations. The expectation that a uniform instruction on criminal intent would avoid confusion was, unfortunately, unrealistic under the existing \textit{mens rea} doctrine in New Mexico.

71. N.M. U.J.I. Crim. 1.50 solves the jurisdictional error problem only for general intent crimes. It does not deal with specific intent crimes.

72. The committee that drafted the New Mexico Uniform Jury Instructions Criminal believed that they would "substantially remedy much of the confusion in at least the
fairness to the drafters of the Uniform Jury Instruction, they were constrained by the existing law. Notwithstanding the new definition of criminal intent, the instructions were intended to reflect existing doctrine in terms that are understandable to juries. The problem with instruction 1.50 lies, however, not in its new definition of criminal intent, in its reflection of existing law on criminal intent, nor in its phrasing for a jury. Rather, the problem lies in the shortcomings of the law of intent that the instruction reflects.

THE MODEL PENAL CODE'S APPROACH TO THE MENS REA PROBLEM

The solution to the confusion and ambiguity in the mens rea concept in New Mexico should be addressed not by jury instructions but by the legislature. An approach similar to that set forth in the American Law Institute's Model Penal Code is needed. This approach recognizes that in order to analyze clearly the mens rea requirements for criminal liability, the question of the kind of culpability essential to establish the commission of an offense must be faced separately with respect to each material element of the crime. Section 2.02(1) of the Model Penal Code, for example, provides that 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.” The Model Penal Code thus acknowledges that each element of the actus reus is accompanied by some mental state and that the requisite mental state may differ from element to element.

The Model Penal Code also provides guidance in resolving the problem of which mental state is required for each element of the actus reus. If a criminal statute is silent with respect to a mens rea requirement, section 2.0(3) provides that acting purposely, knowingly, or recklessly will suffice for each material element of the offense. However, if the definition of a crime uses a particular mental state, without indicating to which element or elements it practical applications of criminal intent in New Mexico.” Thompson & Gagne, The Confusing Law of Criminal Intent in New Mexico, supra note 43, at 65 n. 16. There were reservations, however, that uniform jury instructions on intent would end the confusion and controversy surrounding mens rea issues. Id. at 89 n. 195.

73. See note 2 supra.
76. Model Penal Code § 2.02(1) (Prop. Official Draft 1962). This approach has been recognized as one of the Code's most important contributions. See, e.g., G. Williams, supra note 3, at 52; H. Packer, supra note 3, at 105-06.
77. Id. at § 2.02(3).
refers, section 2.02(4) provides that the specified mental state shall be applicable to all of the elements of the offense, unless a contrary purpose plainly appears. By these rules of statutory construction, the Model Penal Code attempts to resolve the confusion and ambiguity in penal legislation which results from statutes that are drafted with little or no consideration of the *mens rea* component.

Another virtue of the Model Penal Code approach is the use of only four states of mind for the *mens rea* requirement; purposeful, knowing, reckless, and negligent. Each kind of culpability is clearly defined so as to make possible meaningful distinctions among them in terms of relative culpability. Thus, the vagueness of terms such as general criminal intent, maliciously, scienter, wilfully, feloniously, and conscious wrongdoing are avoided.

The value of the Model Penal Code can be best illustrated by applying its terms to the example we used earlier—the unlawful

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78. *Id.* at § 2.02(4).

79. Purposely, knowingly, recklessly and negligently are defined as follows:

(a) **Purposely.**

A person acts purposely with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and

(ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstance or he believes or hopes that they exist.

(b) **Knowingly.**

A person acts knowingly with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and

(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

(c) **Recklessly.**

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.

(d) **Negligently.**

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.

*Id.* at § 2.02(2).
taking of a motor vehicle. In New Mexico, this crime is defined as follows: "Any person who shall take any vehicle intentionally and without consent of the owner thereof shall be guilty of a felony."\textsuperscript{80} The Model Penal Code would preclude conviction unless a defendant acted with one of the four types of culpability with respect to each of the three elements of the offense—(1) taking, (2) of a vehicle, and (3) without consent of the owner. The statute defining the offense uses the word "intentionally." Assuming that "intentional" means "purposeful" as defined by the Model Penal Code, to which element or elements of the offense does "purposeful" refer? Several interpretations are possible. First, purposeful could be read, because of its placement in the sentence, as referring only to the first two elements—(1) taking (2) of a vehicle. Under this interpretation, we are still left with the question of what type of culpability is required for the third element—(3) without the owner's consent. The Model Penal Code would answer this question by requiring either a purposeful, knowing, or reckless state of mind for this element.\textsuperscript{81} Thus, if a defendant knew that he did not have the consent of the owner and therefore acting knowingly, or was aware of the risk of nonconsent but disregarded the risk, therefore acting recklessly, he would have acted with the requisite culpability with respect to that element.

The second interpretation yields a different result. Purposeful could be read as not applying to any element in particular. Then the Model Penal Code would require a purposeful state of mind for each element of the offense.\textsuperscript{82} Under this interpretation, a defendant could be convicted only if he (1) purposely took, (2) what he knew\textsuperscript{83} to be a vehicle, (3) knowing\textsuperscript{84} that he did not have the consent of the owner. Acting recklessly, with awareness of the risk, with respect to the element of the owner's nonconsent, therefore, would not suffice to establish criminal liability.

The Model Penal Code provides an analytical framework within which one can determine what mental states will satisfy the \textit{mens rea} requirement for a particular crime. In summary, this framework recognizes (1) a clearly defined terminology for the distinct possible states of mind, (2) that each element of the \textit{actus reus} is accom-

\begin{itemize}
\item \textsuperscript{81} Model Penal Code § 2.02(3) (Prop. Official Draft 1962).
\item \textsuperscript{82} \textit{Id.} at § 2.02(4).
\item \textsuperscript{83} According to the Model Penal Code, a person acts purposely with respect to attendant circumstances if "he is aware of the existence of such circumstances or he believes or hopes that they exist." \textit{Id.} at § 2.02(2)(a)(ii). The requirement that the object taken be a vehicle is an attendant circumstance of the crime.
\item \textsuperscript{84} \textit{Id.} The element of nonconsent is an attendant circumstance.
\end{itemize}
panied by some mental state, (3) that the requisite mental state may differ from element to element, and (4) that certain rules of construction are necessary to assist the courts in determining what states of mind are sufficient for each element of the actus reus when the statute does not specify the requisite mental state for every element of the crime.

The Model Penal Code's provisions on mens rea have had considerable influence on criminal law reform. The proposed Federal Criminal Code, for example, follows the mens rea approach of the Model Penal Code. Adoption of the Model Penal Code's framework would alleviate in large measure the present difficulties in dealing with mens rea problems in New Mexico.

THE MENS REA DEFENSES

A mens rea defense denies that the defendant possessed a required mental element. Basically, there are two claims that logically negate an essential state of mind. The first argues that the defendant was unable to form the state of mind required to convict him of committing the crime. This inability may be the result of intoxication, mental disease, or defect. The second charges that a mistake produced a state of mind inconsistent with the mental state required for commission of the offense. This claim may be viewed as another aspect of incapacity to form a requisite intent, that is, by misapprehension of certain facts, but mistake is more properly viewed as a circumstance that produces a state of mind rather than a circumstance that impairs the formation of a particular mental state.

These two types of mens rea defenses have been recognized in New Mexico, although they have been circumscribed in large measure. These defenses will be set forth below as they were defined first by the New Mexico courts and then by the Uniform Jury Instructions.


See S. Kadish & M. Paulsen, supra note 7, at 219, for a discussion of the types of minor differences between recent criminal code revisions and the Model Penal Code's provisions.

86. S. 1437, 95th Cong., 2d Sess. §§ 301-303.

87. See generally G. Williams, supra note 3, at 521-27 (mental disease), 568-74 (intoxication); W. LaFave & Scott, supra note 3, at 325-32 (mental disease), 341-47 (intoxication).

88. See generally G. Williams, supra note 3, at 140-54; W. LaFave & A. Scott, supra note 3, at 356-69.
Intoxication as a Defense

I. The Voluntary Intoxication Defense in New Mexico

New Mexico follows the general rule with respect to intoxication as a defense. Voluntary intoxication is not a defense to a crime of general intent, but it may be a defense to a crime of specific intent if the intoxication prevented the formation of the requisite specific intent. Intoxication may be the result of alcohol or drug consumption.

The availability of intoxication as a defense, therefore, depends upon the general-specific intent distinction. For example, voluntary intoxication would not be a defense to the crime of battery which requires an intentional touching. It would be a defense, however, to aggravated battery, which requires the unlawful touching of another with intent to injure. This result would obtain even though intoxication may negate both an intent to touch and an intent to injure. Thus, intoxication that in fact negates a required mental state is or is not a defense simply by reason of the classification of the crime according to the general-specific intent distinction.

II. The Voluntary Intoxication Defense Under the Uniform Jury Instructions

The New Mexico Uniform Jury Instructions—Criminal generally reflect the existing case law in New Mexico concerning voluntary intoxication as a defense. Such intoxication is not a defense to a general intent crime, but it is a defense to a specific intent crime.

Instruction 41.05, which may not be read to the jury, is the instruction that is intended to deny the defense of intoxication in general intent crimes. Its provisions, however, go beyond the purpose as stated in the Committee Commentary. Instruction 41.05, by its

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94. The Use Note for N.M. U.J.I. Crim. 41.05 provides, in capital letters: "No Instruction on this subject shall be given." There are a number of instructions in addition to N.M. U.J.I. Crim. 41.05 that may not be read to the jury.
terms, prohibits the defense in all crimes, including specific intent crimes. It provides:

Evidence has been presented that the defendant was intoxicated from use of [alcohol] [drugs]. An act committed by a person while voluntarily intoxicated is no less criminal because of his condition. If the evidence shows that the defendant was voluntarily intoxicated when allegedly he committed the crime[s] of ________________, that fact is not a defense. (Brackets in original)

The conflict between the terms of instruction 41.05 and the instructions that provide for intoxication as a defense to specific intent crimes is obviated, fortunately, by the Use Note for instruction 41.05. It states that instruction 41.05 shall not be given to the jury. According to the Approved Committee Commentary, the Committee preferred that in general intent crimes no instruction on intoxication be given rather than giving an instruction that intoxication is no defense. An instruction that intoxication is no defense, it was believed, might be misleading where evidence of intoxication was admitted on some issue other than intent.

The instructions that afford a defense of intoxication in specific intent crimes are 41.10 and 41.11. Instruction 41.10 deals specifically with a first degree murder charge and permits voluntary intoxication to negate a willful, deliberate, and premeditated killing if intoxication rendered the defendant incapable of forming such a state of mind. Instruction 41.11 allows a defense for intoxication in nonhomicide cases where the effect of intoxication is to prevent the formation of a specific intent that is required for commission of an

95. Id.
96. N.M. U.J.I. Crim., Approved Committee Commentaries 41.05 (1975). The Approved Committee Commentaries were drafted by the same New Mexico Supreme Court Committee that drafted the Instructions. They are included in the book, New Mexico Uniform Jury Instructions Criminal (1975).
97. N.M. U.J.I. Crim. 41.10 provides.

Evidence has been presented that the defendant was [intoxicated from use of (alcohol) (drugs)] [suffering from a mental disease or disorder]. You must determine whether or not the defendant was ____________, and if so, what effect this had on the defendant’s ability to form the deliberate intention to take away the life of another.

If the defendant was not capable of forming a deliberate intention to take the life of another, you must find him not guilty of a first degree murder by deliberate killing. [The deliberate intention to take away the life of another required for a first degree murder by deliberate killing is not an element of __________________. If you find the defendant not guilty of first degree murder by deliberate killing, you must proceed to determine whether or not he is guilty of __________________.]
Both instructions require the jury to determine whether the defendant was intoxicated from the use of alcohol or drugs and, if so, to determine what effect the intoxication had on the defendant's ability to form the requisite specific intent. If the effect of the intoxication is to render the defendant incapable of forming such intent, the intoxication is a defense to that crime.

If there is a lesser included offense that is not a specific intent crime, neither 41.10 nor 41.11 provide for complete exculpation. Thus, if intoxication prevented premeditation and deliberation, intoxication is a defense to first degree murder but not to second degree murder because second degree murder is deemed to be a general intent crime. Indeed, both instructions explicitly provide that the jury should proceed to consider the issue of guilt or innocence of any other offense or lesser included offense if they find the defendant not guilty of the specific intent crime charged due to the effect of intoxication. Although a first degree murder charge will always include the lesser included offense of second degree murder, not all nonhomicide specific intent crimes necessarily include lesser offenses. If such specific intent crimes are charged, instruction 41.11 affords a complete defense.

The way in which the intoxication instruction are structured in instructions 41.05, 41.10 and 41.11 presents a conflict with the general intent instruction in 1.50. Instruction 1.50 must be given to the jury in every case, and this instruction affords a defense if the

98. N.M. U.J.I. Crim. 41.11 provides:

Evidence has been presented that the defendant was [intoxicated from the use of (alcohol) (drugs)] [suffering from a mental disease or disorder]. You must determine whether or not the defendant was ___________ and, if so, what effect this had on the defendant's ability to form the intent to

If the defendant was not capable of forming such intent to ___________, you must find him not guilty of ___________.

[Intent to ___________ is not an element of the crime of ___________. If you find the defendant not guilty of ___________, you must proceed to determine whether or not he is guilty of the crime of ___________.]

(Brackets in original.)

99. A lesser included offense is not defined in N.M. U.J.I. Crim. 41.11, its Use Note, or the Approved Committee Commentary. See State v. Reed, 39 N.M. 44, 50, 39 P.2d 1005, 1011 (1934), where a lesser included offense is defined as one that is necessarily included in the crime charged. In other words, the lesser offense must necessarily be committed if the greater is committed. For example, robbery is a lesser included offense of armed robbery and assault is a lesser included offense of aggravated assault.


101. See note 60 and accompanying text supra for the text of N.M. U.J.I. Crim. 1.50.
defendant did not act with intent. Although instruction 41.05 states that intoxication is not a defense, this instruction may not be given to the jury. It would appear, therefore, that a jury instructed in the terms of instruction 1.50 could find the defendant not guilty where intoxication negates general intent. This result may be even more likely where the crime charged is one of specific intent that includes a lesser general intent crime. In such a case the jury would be instructed that intoxication is a defense to the specific intent crime if it rendered the defendant incapable of forming a specific intent (instruction 41.11). In addition, under instruction 1.50, they would be instructed that it is a defense to the lesser included general intent crime if the defendant did not act purposely. Since the jury would not be instructed that intoxication is not a defense to a general intent crime, it is not mere speculation to suggest that a jury, instructed according to instructions 1.50 and 41.11, might not comprehend that intoxication is not a defense to a general intent crime. New Mexico Supreme Court Uniform Jury Instructions Rule Committee, without considering the relationship between the intoxication instructions and instruction 1.50, assumed that instructions 41.10 and 41.11 would limit the defense of intoxication to specific intent crimes without the need for a separate instruction concerning the effect of intoxication on general intent crimes.  

The Committee's assumption was considered by the New Mexico Court of Appeals in *State v. Kendall,* where a defendant requested an instruction that "would have directed the jury to consider the effect of intoxication on defendant's ability to form a general criminal intent." The requested instruction was refused, and the Court of Appeals found no error in the refusal. The court based its decision on New Mexico case law holding that voluntary intoxication "is not a defense to the question of whether a defendant had a general criminal intent." This decision supports the view of the Committee Commentary that the Uniform Jury Instructions do not authorize an instruction that intoxication is a defense to a general intent crime. This decision, however, does not support the Committee's assumption that the new instructions limit the defense of intoxication to specific intent crimes. The Court of Appeals decided only that the jury could not be instructed that intoxication is a

102. N.M. U.J.I. Crim., Approved Committee Commentaries 41.05 (1975).
104. Id. at 240-41, 561 P.2d at 939-40.
105. Id. at 240, 561 P.2d at 939.
defense to a general intent crime. It did not hold that the jury should be instructed not to consider the effect of intoxication on the ability to form a general criminal intent. Thus, the intoxication instructions and instruction 1.50 are still inconsistent after Kendall; and it is indeed possible that juries may, without the benefit of an instruction authorizing it, consider intoxication as a means of negating intent as defined in instruction 1.50.

Although the Uniform Jury Instructions fairly restate the pre-existing law on the defense of intoxication, the doctrine that they posit is inconsistent with the requirement of *mens rea*. Intoxication is not a defense even if it negates general criminal intent, a material element of every offense in New Mexico that is not of the strict liability variety. Thus, the Uniform Jury Instructions prohibit a defense of intoxication where in many cases the effect of intoxication is to disprove one of the elements of the crime.

The limitation of the intoxication defense to specific intent crimes is based largely on an historical compromise rather than on logic.\(^{106}\) In fact, the general-specific intent distinction was born in an attempt to accommodate two competing interests.\(^{107}\) On the one hand, conduct under the influence of intoxication is less blameworthy than similar conduct that was subject to no such influence. On the other hand, society is unwilling to excuse all persons who commit crimes while voluntarily intoxicated, especially when the effect of intoxicating liquor or drugs is to “distort judgment and relax the controls on aggressive and anti-social impulses.”\(^ {108}\)

The general-specific intent dichotomy is ill-suited to properly accommodate these competing interests.\(^ {109}\) Its distinction is dependent upon the statutory formulation of a criminal offense, and legislative wording is hardly a valid basis for determining whether a particular crime ought to be subject to the defense of intoxication. Indeed, legislative definition of crimes is most likely made without regard to the defense of intoxication.

The general-specific intent distinction is irrelevant to the central question of whether intoxication has prevented the formation of the required mental state. It likewise fails to take into account situations

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\(^{106}\) See I. J. Bishop, Bishop on Criminal Law 299 (9th ed. 1923).


\(^{109}\) See Young, *Rethinking the Specific-General Intent Doctrine in California Criminal Law*, 63 Calif. L. Rev. 1352, 1357-63 (1975) for a critique of the specific-general intent basis of the intoxication defense.
in which intoxication ought not to be a defense. These considera-
tions led Justice Traynor of the California Supreme Court to aban-
don the specific-general intent approach to intoxication and to turn
directly to policy considerations. Faced with the question of
whether intoxication may be a defense to the crime of aggravated
assault, Justice Traynor, without deciding whether assault was a crime
of general or specific intent, held that the defense of intoxication
does not apply to an assault. He stated that it would be anomalous to
allow evidence of intoxication to relieve a person of responsibility
for crimes such as assault that are frequently committed by rash and
impulsive acts when the effect of alcohol is to distort judgment and
relax controls on aggressive and anti-social impulses. In Justice
Traynor’s view, these policy considerations provided a much sounder
basis for deciding the applicability of the intoxication defense.

In addition, the general-specific intent basis for the intoxication
defense does not allow for total exculpation in most cases because
most specific intent crimes include a lesser general intent offense.
The effect of the defense is thus to reduce the degree of the crime.
For example, if a person is so intoxicated that he is unaware of the
nature of the controlled substances that he acquires, the defense of
intoxication is available to the crime of possession with intent to
distribute as it is a specific intent crime. The anomalous
results of the general-specific intent formula for intoxication is then
vividly illustrated if the same person is charged with intentionally
distributing. Since this crime is a general intent crime, the
same unawareness occasioned by intoxication does not afford a
defense. Although the two results illustrated above may be rational-
ized as the manifestation of a valid policy of mitigation, but not total
exculpation, mitigation ought to be accomplished according to prin-

t\footnotesize{110. Id. at 1357-58. See also Hall, Intoxication and Criminal Responsibility, supra note
107, at 1079-80, 1084.
112. Justice Traynor stated that an assault may be characterized as either a general intent
or a specific intent crime. Id. at 457-58, 462 P.2d at 378, 82 Cal. Rptr. at 626.
113. Id. at 458, 462 P.2d at 379, 82 Cal. Rptr. at 626-27.
114. The specific-general intent basis for the intoxication defense in California was
revived two years later in People v. Rocha, 3 Cal. 3d 893, 479 P.2d 372, 92 Cal. Rptr. 172
(1971). See Young, Rethinking the Specific-General Intent Doctrine in California Criminal
Law, supra note 109, at 1360-63, for a critique of the Rocha decision.
115. See note 99 supra.
117. State v. Bender, 91 N.M. 670, 579 P.2d 796 (1978); State v. Gonzales, 86 N.M.
556, 525 P.2d 916 (Ct. App. 1974).
86 N.M. 556, 525 P.2d 916 (Ct. App. 1974).}
ciple rather than according to the statutory formulation of a crime. Moreover, some specific intent crimes do not have lesser included general intent crimes. For those offenses, therefore, voluntary intoxication is an exculpatory rather than a mitigating defense.

The New Mexico courts and legislature should reexamine the defense of intoxication with a view toward revision on a more principled basis. One such basis is to permit intoxication to be a defense whenever it is relevant to disprove the required mens rea.\textsuperscript{120} In essence, this view would require no special rule for intoxication; instead, intoxication would be dealt with under the mens rea doctrine.

III. The Voluntary Intoxication Defense Under the Model Penal Code.

Another principled basis is the position taken by the Model Penal Code. The Code allows intoxication as a defense if it negatives an element of the offense.\textsuperscript{121} However, when recklessness establishes an element of the offense, and the defendant, due to intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.\textsuperscript{122} The effect of these provisions of the Model Penal Code is to recognize intoxication as a mens rea defense in all but two situations: where recklessness or negligence suffice to establish criminal liability. Thus, intoxication is a defense if it negates either a purposeful or a knowing state of mind.\textsuperscript{123} It is not a defense where negligence is a sufficient mens rea because intoxication cannot logically negate a negligent mens rea.\textsuperscript{124} A defendant who is unaware of a substantial risk due to intoxication is negligent because such unawareness is unreasonable when measured by the standard of the ordinary and sober person.\textsuperscript{125}

In the case of recklessness, the Model Penal Code creates a special rule that limits the defense of intoxication when its relevant effect is to negate recklessness.\textsuperscript{126} The rationale for this limitation on the defense of intoxication is stated in the Comments to the Model Penal Code.

[T]here is the fundamental point that awareness of the potential consequences of excessive drinking on the capacity of human beings

\textsuperscript{120} See Comments on Model Penal Code § 208, at 6-7 (Tent. Draft No. 9, 1959); G. Williams, supra note 3, at 573.
\textsuperscript{121} Model Penal Code § 2.08(1) (Prop. Official Draft 1962).
\textsuperscript{122} Id. at § 2.08(2).
\textsuperscript{123} Id. at 7-9.
\textsuperscript{124} W. LaFave & A. Scott, supra note 3, at 346.
\textsuperscript{125} Id.
\textsuperscript{126} Model Penal Code § 2.08(2) (Prop. Official Draft 1962).
to gauge the risks incident to their conduct is by now so dispersed in
our culture that we believe it fair to postulate a general equivalence
between the risks created by the conduct of the drunken actor and
the risks created by his conduct in becoming drunk. Becoming so
drunk as to destroy temporarily the actor’s powers of perception
and of judgment is conduct which plainly has no affirmative social
value to counterbalance the potential danger. The actor’s moral
culpability lies in engaging in such conduct.\textsuperscript{127}

The principle upon which the Model Penal Code bases its rules on the
defense of intoxication is thus one of culpability. If intoxication
negates culpability by precluding a required \textit{mens rea}, it is defense.
Intoxication does not negate culpability where recklessness is
involved because the Model Penal Code presumes that the act of
getting drunk establishes a reckless culpability.

One might reasonably question whether the Model Penal Code’s
presumption of recklessness in the act of becoming drunk is war-
ranted in all cases. Such a reservation has led to the suggestion that
rather than presume recklessness, a central inquiry should be whether
a person, in the act of becoming drunk, has, in fact, been reckless as
to the risk of dangerous behavior.\textsuperscript{128} According to this view, normal
persons who commit harms while intoxicated should not be punished
for recklessness unless, before voluntarily becoming intoxicated, they
had such prior experience as to anticipate the condition of intoxica-
tion and the possibility of dangerous behavior in that condition.\textsuperscript{129}
If a person had such prior experience and voluntarily consumed
intoxicating liquor or drugs, then such a person acts recklessly in
becoming intoxicated and is criminally responsible for any results
that are proximately caused.

The three suggested positions regarding intoxication as a defense
merit consideration by the New Mexico courts and the legislature.
All are based on principled choices and are significantly better solu-
tions to the problem of intoxication and crime then the present
doctrine that is carried forward in the New Mexico Jury Instructions.

\textit{IV. The Involuntary Intoxication Defense}

The New Mexico Jury Instructions—Criminal include a defense of

\textsuperscript{127} Comments on Model Penal Code § 2.08, at 9 (Tent. Draft No. 9, 1959).
\textsuperscript{128} J. Hall, supra note 3, at 552-57. \textit{Contra}, Paulsen, \textit{Intoxication as a Defense to
\textsuperscript{129} J. Hall, supra note 3, at 552-57; Hall, \textit{Intoxication and Criminal Responsibility,
supra} note 107, at 1078-80, 1084.
involuntary intoxication, although there is no statute or case in New Mexico recognizing this defense. Instruction 41.06 provides, in pertinent part:

If the defendant was involuntarily intoxicated and as a result of such intoxication he
[did not know what he was doing or understand the consequences of his act] [or]
[did not know that his act was wrong] [or]
[could not prevent himself from committing the act]
then you must find him not guilty.
(Bracketed material in original text.)

The instruction defines intoxication as involuntary if "a person is forced to become intoxicated against his will," or "a person becomes intoxicated by using (alcohol) (drugs) without knowing the intoxicating character of the (alcohol) (drugs) and without willingly assuming the risk of possible intoxication."

The involuntary intoxication defense in instruction 41.06 effectively relieves the defendant of criminal responsibility and is essentially identical to the insanity test set forth in instruction 41.00, the M'Naghten test plus the incapacity to control conduct test. The only difference between 41.06 and 41.00 is the source of irresponsibility; instruction 4.06 requires involuntary intoxication, while instruction 41.00 requires a mental disease.

Instruction 41.06 is similar to the involuntary intoxication defense
found in the Model Penal Code § 2.08(4). Both provisions include intoxication that occurs when a person is forced to take drugs against his will. New Mexico's instruction 41.06, however, differs from the Model Penal Code with respect to a second type of involuntary intoxication. It provides that intoxication is involuntary if the person either had no knowledge of the intoxicating effect of the substance he took or did not willingly assume the risk of possible intoxication. If willingly assuming the risk requires awareness of the risk, this defense would be available to a person who negligently believed that the substance he took was not intoxicating. The Model Penal Code, on the other hand, apparently requires that the person's belief as to the nonintoxicating character of the substance be reasonable. The Model Penal Code includes a third type of intoxication in its defense. It provides that pathological intoxication, defined as intoxication grossly excessive in degree, given the amount of the intoxicant, which is caused by an abnormal bodily condition not known to the actor, is a defense if the effect of such intoxication establishes the grounds for insanity. The only other difference between instruction 41.06 and the Model Penal Code relates to the use of a different test for insanity.

The defense of involuntary intoxication affects a small percentage

132. Model Penal Code § 2.08(4) (Prop. Official Draft 1962) provides: "Intoxication which (a) is not self-induced or (b) is pathological is an affirmative defense if by reason of such intoxication the actor at the time of his conduct lacks substantial capacity either to appreciate its criminality [wrongfulness] or to conform his conduct to the requirements of law." (Brackets in original.)

133. See the text of N.M. U.J.I. Crim. 41.06 in the text accompanying note 130 supra; Model Penal Code § 2.08(5)(b) (Prop. Official Draft 1962) defines "self-induced intoxication" as "intoxication caused by substances which the actor knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them pursuant to medical advice or under such circumstances as would afford a defense to a charge of crime." Intoxication that is not self-induced is thus any intoxication that does not meet the definition of self-induced intoxication in § 2.08(5)(b).

134. See the text accompanying note 130 supra.

135. This language seems to mean that recklessness with respect to the intoxicating effect of a substance will not meet the definition of involuntary intoxication. See Model Penal Code § 2.02(2)(c) (Prop. Official Draft 1962) for a workable definition of recklessness.

136. If a person becomes intoxicated who is unaware of the risk of possible intoxication, he did not willingly assume that risk. Whether that person was negligent in not realizing the risk is immaterial.

137. If a person "knows or ought to know" the tendency of a substance to cause intoxication, any resulting intoxication is self-induced. Model Penal Code § 2.08(5)(b) (Prop. Official Draft 1962).


139. Model Penal Code § 2.08(4) uses the same test for exculpation that is used by the insanity defense in Model Penal Code § 4.01(1) (Prop. Official Draft 1962).

of intoxication cases. Most cases concerning the effect of intoxication on criminal responsibility arise in the context of voluntary intoxication. Nevertheless, the defense of involuntary intoxication is an important limitation on criminal liability, especially where the defense of voluntary intoxication is limited so that it does not always measure culpability and responsibility.

Mental Disease or Disorder as a Defense

I. The Mental Disease or Disorder Defense in New Mexico

A mental disease or defect is most commonly a defense if it meets the requirements of the insanity defense. The insanity defense in New Mexico is not a *mens rea* defense; it does not focus on the mental elements of a crime. Instead, it is concerned with the defendant's understanding of his act and his responsibility for the crime with which he is charged. Called the M'Naghten rule, the insanity test in New Mexico requires that a mental disease or defect render the defendant incapable of comprehending the wrongfulness of his act or the nature and quality of his act. This rule has been extended by adding to the defense the incapability of preventing oneself from committing the act. Under both parts of the insanity defense in New Mexico, the particular mental elements required for the commission of a crime are irrelevant.

A mental disease or defect may, however, logically prevent the formation of the mental state required for commission of a crime. This possibility exists whether or not the test for insanity is met. The New Mexico Supreme Court first recognized a *mens rea* defense for a mental disease or disorder in *State v. Padilla*. The Court held in that case that a disease of the mind short of legal insanity could prevent premeditation and deliberation and could be a defense to first degree murder. Analogizing a mental disorder to intoxication, the court said, "If alcohol or drugs can legally prevent a person from truly deliberating, then certainly a disease of the mind, which has the same effect, should be given like consideration."

The New Mexico courts have not extended the *mens rea*-mental

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141. See generally J. Hall, supra note 3, at 538-44.
142. It is not a *mens rea* defense in the special sense of the term. It is a *mens rea* defense in its general sense. See note 7 supra.
145. See N.M. U.J.I. Crim. 41.00 for the Instruction on the insanity defense. The text of the Instruction is set forth in note 131 supra.
146. 66 N.M. 289, 347 P.2d 312 (1959).
147. Id. at 294, 347 P.2d at 315.
disease defense to second degree murder or to voluntary manslaughter. Logically, a mental disease or defect could render the defendant incapable of forming the requisite mental states for those offenses. Intoxication has not been available as a defense for these homicides either.

The use of mental disease as a *mens rea* defense arose originally in the context of homicide offenses, yet this defense is not limited to a premeditated and deliberate murder charge. The *Padilla* opinion appears to equate a mental disease with intoxication in terms of the effect on a person’s ability to form a specific intent. The Supreme Court of New Mexico quoted with approval a Colorado case in which the Colorado Supreme Court held that evidence of a mental disease may be introduced to show the absence of a specific intent, that is, the absence of premeditation or deliberation. The emphasis on the similarity between a mental condition and intoxication suggests that, apart from legal insanity, a mental disease is a defense if it negates a specific intent. Like the intoxication defense, a

149. See, e.g., People v. Conley, 64 Cal. 2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966); People v. Gorshen, 51 Cal. 2d 716, 336 P.2d 492 (1959). These cases held that “malice aforethought,” the *mens rea* requirement for murder, may be negated by evidence of an abnormal mental condition that did not amount to legal insanity. The California Supreme Court construed malice aforethought to be a separate mental state—the ability to comprehend the duty to govern one’s actions in accord with the duty imposed by law. This new mental state is a specific intent and the ability to achieve this state of mind due to a mental disease, defect, or intoxication is a defense. *See* Young, *Rethinking the Specific-General Intent Doctrine in California Criminal Law* , supra note 111, at 1367.

The murder statute in New Mexico also uses the term “malice aforethought” to denote the *mens rea* for murder. N.M. Stat. Ann. § 40A-2-1 (Supp. 1975). New Mexico, like most jurisdictions, has never defined malice aforethought as a separate state of mind. Instead, malice aforethought is a label connoting the various states of mind that are sufficient to make a homicide murder. These states of mind are (1) intent to kill, (2) intent to inflict grievous bodily harm, (3) gross recklessness (depraved heart type of murder), and (4) the state of mind associated with the felony under the felony murder doctrine. *See generally*, W. LaFave & A. Scott, *supra* note 3, at 528-30; N.M. Stat. Ann. § 40A-2-1 (Supp. 1975). Therefore, if an intent to kill is proven, there is malice aforethought in New Mexico. In California, however, even if there exists an intent to kill, there may not be malice aforethought.

Even with the traditional definition of malice aforethought in New Mexico, it is logically possible that a mental disease or disorder may prevent the formation of one of the mental states included within the term “malice aforethought.” A mental disease may preclude an intent to kill or injure, or the awareness of a substantial risk of death.

mental disease or defect most likely would not be a defense to a general intent crime, although there is no case in New Mexico that has so held.

II. The Mental Disease or Disorder Defense Under the Uniform Jury Instruction

The New Mexico Uniform Jury Instructions on the use of a mental disease or disorder as a defense to a criminal prosecution, apart from insanity, are the same as those for the defense of voluntary intoxication. Under instructions 41.10 and 41.11, a mental disease or defect is a defense to a specific intent crime if the mental disease or defect precludes the formation of the required specific intent. This defense is often termed the defense of diminished capacity or partial responsibility. Instruction 41.10 is a specialized application of the defense to the crime of first degree murder by means of a willful, deliberate, and premeditated killing. This instruction provides that if by reason of a mental disease or disorder "the defendant was not capable of forming a deliberate intention to take the life of another, you must find him not guilty of a first degree murder by deliberate killing." Instruction 41.11 permits this defense to operate in non-homicide cases where the effect of the mental disease or disorder renders the defendant incapable of forming a required specific intent. Both 41.10 and 41.11 provide that the jury, if it determines that a mental disease or disorder negates a specific intent, should proceed to ascertain whether the defendant is guilty of any lesser included offense that does not require a specific intent.

The instructions on mental disease as a defense are inconsistent with the general intent instruction in the same way as the instructions on voluntary intoxication. Instructions 41.10 and 41.11 limit the defense of mental disease or disorder to those crimes that require a specific intent. For general intent crimes, instruction 1.50 affords a defense if the defendant did not purposely commit a criminal act. Neither instruction 1.50 nor instructions 41.10 and 41.11 expressly prohibit a jury from considering the effect of a mental disease on the defendant’s ability to form a general intent. No instruction attempts to exclude the defense in general intent crimes.

154. See, e.g., W. LaFave & A. Scott, supra note 3, at 325-26; H. Packer, supra note 3, at 135; R. Perkins, supra note 3, at 878-83; G. Williams, supra note 3, at 540-41.
155. See note 97 supra for the text of N.M. U.J.I. Crim. 41.10.
156. See note 98 supra for the text of N.M. U.J.I. Crim. 41.11.
157. See note 99 supra.
158. See the discussion of the inconsistency between N.M. U.J.I. Crim. 1.50 and the instructions on intoxication, N.M. U.J.I. Crim. 41.10 and 41.11, in the text accompanying notes 101-05 supra.
Since instructions 1.50, 41.10, and 41.11 neither authorize nor prohibit consideration of the effect of a mental disease or disorder on the ability to form a general intent, the instructions are ambiguous as to whether such a condition may legally negate intent as defined in instruction 1.50. This ambiguity is the result of the Uniform Jury Instruction Committee's assumption that instructions 41.10 and 41.11 limit the defense of diminished capacity to specific intent crimes, an assumption that did not take into account the relationship between these instructions and instruction 1.50.

In attempting to limit this defense to specific intent crimes, the Uniform Jury Instructions conflict with the *mens rea* doctrine. This doctrine affords a defense whenever the mental state required for commission of an offense is not established. If a mental disease or defect is relevant to preclude the existence of any required mental element, it is logically a defense. Where the presence of a mental disease or disorder disproves a general criminal intent, however, the Uniform Jury Instruction deny this defense.

The availability of a mental disease as a *mens rea* defense under the Uniform Jury Instructions, therefore, depends upon the general-specific intent distinction as does the intoxication defense. There is even less justification for the use of the general-specific intent distinction with respect to a mental disease or disorder. With respect to intoxication, there arguably are valid policy grounds for limiting the defense where intoxication was voluntarily self-induced. No such policy reasons justify a limitation of the diminished capacity defense where the mental disease or disorder logically tends to prove that the defendant did not have the state of mind essential for conviction.

By treating the defenses of intoxication and mental disease or defect in an identical manner, the Uniform Jury Instructions ignore a critical difference between the two conditions. Intoxication, when self-induced, may involve some measure of culpability, but a mental disease or disorder is a condition beyond the defendant's control.

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159. See note 102 *supra*.
161. See Young, *Rethinking the Specific-General Intent Doctrine in California Criminal Law*, *supra* note 109, at 1375-76, for a discussion of why the defense of diminished capacity should not be limited to specific intent crimes even if the intoxication is so limited.
162. See note 111-14 *supra* and accompanying text.
163. See Young, *Rethinking the Specific-General Intent Doctrine in California Criminal Law*, *supra* note 111, at 1372-78, for a critique of People v. Noah, 5 Cal. 3d 469, 487 P.2d 1009, 96 Cal. Rptr. 441 (1971), which denied the defense of diminished capacity for a general intent crime.
and, therefore, involves no culpability. While legitimate reasons exist for limiting the defense of intoxication, there is no justification for limiting the defense of diminished capacity when a mental disease or disorder is relevant to preclude mens rea for either a general or specific intent crime.

III. The Mental Disease or Disorder Defense Under the Model Penal Code

The New Mexico courts and legislature should rethink the defense of diminished capacity with a view toward separating it from the defense of intoxication and removing the specific intent limitation. Such a position is proposed by the Model Penal Code, § 4.02(1): “Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense.” Recognizing no justification for a limitation on this defense, the Comments by the drafters of the Model Penal Code state that if states of mind “are accorded legal significance, psychiatric evidence should be admissible when relevant to prove or disprove their existence to the same extent as any other relevant evidence.”

The Model Penal Code treats diminished capacity as a true mens rea defense; if the presence of the mental disease or defect precludes the existence of a required mental state, whether a specific intent or a general intent, it is a defense because there is no culpability.

The Model Penal Code’s position that mental disease is a mens rea defense is a necessary complement to the defense of insanity. The insanity defense in New Mexico is concerned with the defendant’s overall understanding of and responsibility for the nature, quality, and wrongfulness of his act, and with his ability to avoid committing that act. The state of mind required for commission of the offense may not be relevant to the insanity question. Evidence of a mental disease or disorder may or may not persuade the trier of fact that the defendant is not responsible for his act. Nevertheless, the same evidence may be relevant to disprove the existence of a mental state that is an essential element of the offense charged. The Model Penal Code recognizes that evidence of a mental disease or disorder may be relevant to both issues. In each case, the defendant is not culpable and, therefore, ought not be subject to the criminal sanction.

166. State v. White, 58 N.M. 324, 270 P.2d 727 (1954); N.M. U.J.I. Crim. 41.00.
Mistake as a Defense

I. The Defense of Mistake in New Mexico

No New Mexico case speaks in terms of mistake as a defense. Several cases, however, recognize mistake as a defense without denominating their result in those terms. Significantly, these cases approach the problem not in terms of mistake but in terms of whether the requisite criminal intent can be proven in view of the mistake.

State v. Craig presents a classic mistake problem. The defendant in that case was charged with selling property he did not own and had not been given the right to sell. The property that he sold was a house on land he was purchasing. The house belonged to someone other than the seller of the land. The defendant claimed he thought he had the right to sell the house based upon the consent of the owner and the advice of counsel. He requested an instruction to the effect that the offense charged required proof that he knew he had no right to sell the house. This instruction was refused. The Supreme Court of New Mexico reversed, stating, "We believe that the statute in question demands the inclusion of intent as an element of the crime of which appellant was convicted, and that the jury should have been instructed that criminal intent was an element of the crime which the State must prove beyond a reasonable doubt."

Although the defendant and the Supreme Court framed the issue in terms of the requisite intent for commission of the crime, the essence of the defense was mistake. His claim that he believed he had the right to sell the house was essentially a claim of mistake, a mistake that precludes a criminal intent.

The New Mexico Court of Appeals has taken the same view of mistake that was suggested by the Supreme Court in Craig. In State v. Austin, the court of appeals rejected the defendant's argument that the offense of unlawfully taking a vehicle might cover a person who took a vehicle with the mistaken belief that the vehicle was his. The court of appeals answered defendant's argument not in terms of mistake but in terms of criminal intent: "Defendant's apprehension that a person who by mistake or in the honest belief that the car was
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owned by him, took a vehicle without the consent of the owner
might be punished, even though innocent, is unwarranted. Criminal
intent is required.71

Thus, New Mexico courts have focused on the mens rea require-
ment rather than on the mistake. Did the defendant possess the
essential criminal intent? A mistake is relevant if it precludes the
requisite intent.

Unlike other jurisdictions, New Mexico courts have made no
distinction between a mistake of fact and a mistake of law.172
Either mistake may be a defense if the mistake negates the mens rea
requirement. The mistake claimed by the defendant in Craig is often
termed a mistake of law because the mistake involved defendant’s
legal right to sell the house.173 The only mistake that may not be a
defense under the New Mexico view is a mistake as to whether one’s
conduct is lawful or not.174 Such a mistake, often called ignorance
of the law, does not negate criminal intent. Intent to violate the law,
or knowledge that one is violating the law, is rarely an element of a
crime. This position is consistent with that taken by courts in other
jurisdictions.175

It should also be observed that the New Mexico courts have never
required that a mistake be reasonable in order to preclude criminal
intent.176 The claim of mistake is addressed in the context of its
effect on the mental states required for commission of any crime. If
the mistake precludes the requisite mens rea, it is a defense; the
reasonableness or unreasonableness of the mistake is, presumably,
immaterial if the mistake has that effect. A reasonable mistake
would, of course, negate any criminal intent. An unreasonable mis-
take would clearly negate a specific intent, and it would logically
preclude both a knowing or a reckless state of mind. An unreason-
able mistake as to an element of a crime that may be committed

171. Id. at 750, 461 P.2d at 232.

172. For authorities that have made this distinction see Long v. State, 44 Del. 262, 65
A.2d 489 (1949); R. Perkins, supra note 3, at 935-38; Perkins, Ignorance and Mistake in

173. See J. Hall, supra note 3, at 392-93 (mistake as to private law); R. Perkins, supra
note 3, at 935-38 (mistake as to nonpenal law); G. Williams, supra note 3, at 287, 305,
327-28 (mistake as to civil law).

174. There is no reported New Mexico decision on this issue. See note 59 and
accompanying text supra for a discussion of this issue under the New Mexico Uniform Jury
Instructions.

175. See J. Hall, supra note 3, at 376-87; W. LaFave & A. Scott, supra note 3, at 362-65;
R. Perkins, supra note 3, at 920-25; G. Williams, supra note 3, at 288.

N.M. 748, 461 P.2d 230 (Ct. App. 1969), imposed a requirement of reasonableness or even
alluded to it.
negligently would be no defense, since an unreasonable mistake would establish the requisite negligence.

**II. The Defense of Mistake Under the Uniform Jury Instructions**

A. The Distinction Between Reasonable and Unreasonable Mistakes

The New Mexico Uniform Jury Instructions on mistake as a defense change the pre-existing law in several major respects. The most significant change is the adoption of an objective standard for mistakes of fact. Only reasonable mistakes of fact afford a defense. Instruction 41.15 provides:

Evidence has been presented that the defendant believed that _____________ . If the defendant [acted] [omitted to act] under an honest and reasonable belief in the existence of those facts, you must find him not guilty. The burden is on the State to prove beyond a reasonable doubt that the defendant did not act under such belief. (Brackets in original.)

According to the New Mexico Supreme Court Uniform Jury Instructions Criminal Rules Committee,177 this instruction was derived from California Jury Instructions178 because no reported New Mexico decision on mistake of fact was found. However, two New Mexico cases recognize mistake as a defense, and neither imposes a requirement that the mistake be reasonable.179 The decisions focus on the effect of the mistake. If the mistake, reasonable or unreasonable, negates criminal intent, apparently it would be a defense.

The New Mexico case law approach is essentially that used by the Model Penal Code.180 This approach recognizes that mistake is relevant only if it has an effect on the required *mens rea*. An unreasonable mistake is a defense whenever its effect is to negate a requisite mental state. An unreasonable mistake logically may preclude the existence of any subjective state of mind required for

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(1) Ignorance or mistake as to a matter of fact or law is a defense if:

(a) The ignorance or mistake negative the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense; or

(b) The law provides that the state of mind established by such ignorance or mistake constitutes a defense.
commission of a crime.\textsuperscript{181} The words purposely, knowingly, and recklessly are used in the Model Penal Code to describe these states of mind.\textsuperscript{182} Negligent culpability, on the other hand, uses the objective standard of a reasonable person.\textsuperscript{183} An unreasonable mistake establishes, rather than negates, a requirement of negligence. A reasonable mistake logically negates the four types of culpability recognized by the Model Penal Code. It precludes negligence and all of the higher degrees of culpability.

By requiring that all mistakes be reasonable, New Mexico's instruction 41.15 is inconsistent with the pre-existing mistake doctrine in New Mexico.\textsuperscript{184} This instruction treats mistake as if it were a defense apart from its effect on the \textit{mens rea} requirement. In fact, the instruction makes no reference to criminal intent, and there is no requirement that the mistake negate criminal intent.\textsuperscript{185} By requiring that all mistakes be reasonable, instruction 41.15 by implication imposes a negligent \textit{mens rea} for all crimes, be they specific intent or general intent.

Instruction 41.15 is also inconsistent with the definition of general criminal intent as it appears in instruction 1.50: "purposely [doing] an act which the law declares to be a crime." If criminal intent, as defined in that instruction, excludes negligence as a type of culpability,\textsuperscript{186} only subjective states of mind—purposeful, knowing, or reckless—will suffice to establish criminal liability. These mental states cannot co-exist with a mistake as to a material element, even if the mistake is unreasonable. It is inconsistent to tell the jury that they may not convict unless the defendant acted purposely and then to tell them that a mistake is a defense only if it is reasonable.

When instruction 41.15 is used as a defense to a crime of specific

\textsuperscript{182} Model Penal Code § 2.02(2)(a)-(c) (Prop. Official Draft 1962).
\textsuperscript{183} Id. at § 2.02(2)(d).
\textsuperscript{184} See note 176 supra and accompanying text.
\textsuperscript{185} But see State v. Fuentes, 91 N.M. 554, 577 P.2d 452, 455 (Ct. App.), cert. denied, 91 N.M. 610, 577 P.2d 1256 (1978), where Judge Wood said that the "mistake of fact instruction is just another way of saying that a defendant cannot be convicted when he does not have the mental state required for commission of the offense charged."
\textsuperscript{186} Thompson & Gagne, The Confusing Law of Criminal Intent in New Mexico, supra note 43, at 65-66, in which crimes of criminal intent are said to be different from negligent crimes and negligent crimes are said to have no element of intent. This is not accurate since so-called negligent crimes such as involuntary manslaughter do require criminal intent. That crime requires that the act causing death be done purposely although the defendant was negligent with respect to the risk of death. See N.M. U.J.I. Crim. 1.50 (1975); see also W. LaFave & A. Scott, supra note 3, at 193-94. There is no New Mexico case known to the author that states that a negligent crime is not a general intent offense. For possible interpretations of N.M. U.J.I. Crim. 1.50, see notes 66-71 and accompanying text supra.
intent, it is even more troublesome. It is possible that a mistake may negate a specific intent but at the same time be unreasonable.\textsuperscript{187} For example, a person may take another's briefcase under the mistaken belief that it is his. Even if the ordinary and prudent person would have looked inside to satisfy himself that the briefcase was indeed his, the mistake would still negate the required intent to deprive the owner permanently of the briefcase. Under the instruction for larceny in New Mexico instruction 16.00, the jury would be told that the defendant could be convicted only if the state proved beyond a reasonable doubt that the defendant intended permanently to deprive the owner of the briefcase; and, under instruction 41.15, the jury would be instructed that the mistake as to ownership of the briefcase must be reasonable.

The inconsistency between instruction 41.15 and the intent instructions could easily be avoided by redrafting the mistake instruction to reflect prior New Mexico law. The new instruction would simply provide that a mistake is a defense if it negates the required \textit{mens rea}. Since such an instruction refers to the \textit{mens rea} requirement, it is important that the mental state or states required for commission of a crime be defined with particularity. Concepts such as general criminal intent should be abandoned, and the Model Penal Code's approach to \textit{mens rea} should be adopted.

\textbf{B. The Distinction Between Mistake of Fact and Law}

The second major change brought about by the new Uniform Jury Instructions on mistake is the limitation of the defense to mistakes of fact. Instruction 41.15 is entitled "Ignorance or Mistake of Fact," and the terms of the defense refer only to "facts." If instruction 41.15 is interpreted to exclude mistakes as to legal matters as a defense, the Uniform Jury Instructions depart from prior New Mexico decisions on mistake. These decisions made no distinction between mistakes of fact and mistakes of law as long as the effect of the mistake was to negate criminal intent.\textsuperscript{188}

\begin{itemize}
  \item It is important to determine whether a mistake as to a legal circumstance is one of fact or law.\textsuperscript{189} Suppose that a person believes that he is not married because he mistakenly believes that his recent divorce is valid.\textsuperscript{190} This may be termed a mistake of fact because the
\end{itemize}

\textsuperscript{187} See W. LaFave & A. Scott, \textit{supra} note 3, at 140-41, 201-05; R. Perkins, \textit{supra} note 3, at 940-43.


\textsuperscript{189} See G. Williams, \textit{supra} note 3, at 287.

\textsuperscript{190} For a discussion of the bigamy cases involving this claim, see J. Hall, \textit{supra} note 3, at 395-401; W. LaFave & A. Scott, \textit{supra} note 3, at 358-59; R. Perkins, \textit{supra} note 3, at 944-48; G. Williams, \textit{supra} note 3, at 176-83.
mistake concerns a fact—whether one is married. It may be considered a mistake of law in the sense that the mistake involves a legal question—whether the divorce is legally valid. If such a mistake is one of fact, under instruction 41.15 it is a defense if reasonable. If it is deemed to be a mistake of law, it is not a defense even if reasonable.

The ambiguity in instruction 41.15 with respect to what is a mistake of fact was avoided by the prior New Mexico approach and by the Model Penal Code. Under the New Mexico approach, no such ambiguity arose because no distinction was made between mistakes of fact and law. The only inquiry concerned the effect of the mistake. If the mistake, however denominated, precluded criminal intent, it was a defense. The Model Penal Code avoids the problem by specifically providing that either a mistake of fact or law is a defense if it negates a state of mind required for commission of an offense.191

III. Ignorance of the Law Doctrine Under the Uniform Jury Instructions

Where the mistaken belief has no effect on the mens rea requirements of the crime charged, the New Mexico Uniform Jury Instructions-Criminal reflect the traditional position that such a mistake is not a defense.192 This doctrine of ignorantia legis non excusat is embodied in instruction 41.16:

> Evidence has been presented that the defendant was [ignorant of] [mistaken about] the law which he is accused of violating. When a person voluntarily does that which the law forbids and declares to be a crime, it is no defense that he did not know that his act was unlawful or that he believed it to be lawful. (Brackets in original.)

Since instruction 41.16 may not be given to the jury,193 the only instruction that precludes a defense for this type of mistake is instruction 1.50. It provides in pertinent part: "A person acts intentionally when he purposely does an act which the law declares to be a crime, even though he may not know that his act is unlawful." [Emphasis added.]

The type of mistake to which instructions 41.16 and 1.50 pertain is very different from the mistake considered earlier. This mistake does not concern an element of the crime with which a person is charged; instead, it concerns the very law with which he is charged.194 In this type of mistake, the defendant claims that he

192. See note 175 supra.
193. Use Note for N.M. U.J.I. Crim. 41.16.
194. See the authorities cited in note 173 supra concerning the two types of mistake.
erroneously believed that his conduct was lawful either because he was ignorant of the law or believed that the law did not cover his conduct. A defendant who claimed that he did not know it was against the law to have multiple spouses would be raising this type of mistake. This is a substantially different mistake than the one where the defendant erroneously believed that he was married to only one spouse following an invalid divorce. In the former example, the mistake has no effect on the *actus reus* or *mens rea* elements of the crime of bigamy. The latter mistake may logically negate the *mens rea* requirement of the offense—that the defendant not be married at the time that he takes a spouse.

The difference in the two types of mistakes can be illustrated best by means of a diagram. Consider the effect of each mistake, supposing that the crime of bigamy is composed of the following elements:

<table>
<thead>
<tr>
<th>Bigamy</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Actus Reus</strong></td>
</tr>
<tr>
<td>(1) Act of marrying</td>
</tr>
<tr>
<td>(2) Another</td>
</tr>
<tr>
<td>(3) While married</td>
</tr>
</tbody>
</table>

The claim that one did not know it was against the law to have several spouses does not disprove any element of the *actus reus* or *mens rea*. The claim that one believed he was not married at the time he married another may negate a purposeful, knowing, reckless, or even negligent state of mind.

Although instruction 41.16 and 1.50 follow the traditional doctrine that ignorance of the law is no excuse, no reported New Mexico cases deal with this second type of mistake of law. Although this doctrine has been justified as necessary for a workable system of criminal justice,\(^1\) it has been questioned on the ground that it is inconsistent with the premise of criminal law that requires culpability in order to impose criminal liability.\(^1\) A number of exceptions to this doctrine have been recognized,\(^1\) and it has been proposed

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that ignorance or mistake of law ought to be a defense if the mistake or ignorance is not culpable.\textsuperscript{198} This latter proposal would replace the ignorance of law doctrine with a new precept, that is, no person may be convicted of any crime who, at the time of his act, was unaware that his actions were criminal, unless his unawareness is blameworthy, i.e., reckless or negligent.\textsuperscript{199}

The Model Penal Code follows the traditional doctrine that ignorance of the law is no excuse.\textsuperscript{200} It recognizes, however, two limited exceptions.\textsuperscript{201} If a person is unaware that his conduct constitutes a crime because the penal law has not been published or otherwise reasonably made available prior to his conduct, the Model Penal Code provides a defense.\textsuperscript{202} In addition, if a person’s belief that his conduct is lawful is due to reasonable reliance upon an official statement of the law, later determined to be invalid or erroneous, he has a defense.\textsuperscript{203} The official statement of the law must, however, be contained in either a statute, a judicial pronouncement, an administrative order, or an official interpretation by the public officer or body responsible for the interpretation, administration or enforcement of the law defining the offense.\textsuperscript{204}

With respect to the Model Penal Code’s defense that the law is not published or otherwise reasonably available, it is not clear how broad the defense is intended to be. The defense states that the statute must be unknown to the defendant.\textsuperscript{205} If this provision is read to establish a negligence standard for the defendant’s ignorance, the


\textsuperscript{199} Note, Ignorance of the Law: A Maxim Reexamined, supra note 198, at 684-89; Note, Mistake and Ignorance in Criminal Cases, supra note 198, at 652-53.

\textsuperscript{200} Model Penal Code § 2.02(9) (Prop. Official Draft 1962). This provision does not speak in terms of the traditional doctrine but, instead, provides that "[n]either knowledge nor recklessness or 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." The Model Penal Code chose this formulation in order to avoid the overstatement of the principle that ignorance or mistake of law is no excuse. See Comments on Model Penal Code § 2.02(9) at 131 (Tent. Draft 4, 1955).

\textsuperscript{201} Model Penal Code § 2.04(3) (Prop. Official Draft 1962).

\textsuperscript{202} Id. at § 2.04(3)(a).

\textsuperscript{203} Id. at § 2.04(3)(b).

\textsuperscript{204} Id.

\textsuperscript{205} Id. at § 204(3)(a).
Model Penal Code would in effect abolish the rigidity of the ignorantia legis maxim. The breadth of the Model Penal Code's defense for reasonable reliance upon an official statement of the law is also unclear. Suppose for example that there is no official statement of the law but that the defendant reasonably believes a superior who informs him that such an official statement exists. Would this reasonable belief establish a defense under the Model Penal Code? If an official statement of the law is not required, and a reasonable belief that there is such a statement will suffice to invoke this defense, this proposal would go a long way toward eroding the traditional doctrine that ignorance is no excuse.

A related problem concerns the official interpretation provision of the reasonable reliance defense. Is a defendant entitled to rely on this defense (1) if an interpretation is not official but he reasonably believes that it is, or (2) if the officer giving the interpretation is not charged by law with the responsibility for the interpretation, administration or enforcement of the law but the defendant reasonably believes the officer is? If a defense is available in the above situations, the Model Penal Code's exceptions leave little of the general rule and go quite far in making only nonculpable ignorance a defense.

CONCLUSION

The New Mexico approach to mens rea issues as set forth in the New Mexico Uniform Jury Instructions-Criminal is in need of reform. The instruction on criminal intent does not adequately define the mental state or states required for commission of a crime; and the instructions on intoxication, mental disease, and mistake are in part inconsistent with the instruction on criminal intent and with the requirement of culpability. In addition, the instructions retain

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207. This interpretation of Model Penal Code § 2.04(3)(b) (Prop. Official Draft 1962) is quite similar to the defense raised and rejected by the defendants in United States v. Barker, 546 F.2d 940 (D.C. Cir. 1976). See also Note, Reliance on Apparent Authority as a Defense to Criminal Prosecution, 77 Colum. L. Rev. 775 (1977).


209. See note 207 supra.

210. For example, the defense of ignorance based upon reasonable reliance upon advice of an attorney would not be recognized by the Model Penal Code. See W. LaFave & A. Scott, supra note 3, at 368-69, for a discussion of this exception to the ignorantia legis doctrine.
the specific-general intent distinction—a distinction that serves no purpose and only causes confusion and needless litigation.

The New Mexico legislature should, like a growing number of other jurisdictions, seriously consider a comprehensive revision of the New Mexico Criminal Code to reflect the Model Penal Code's approach to *mens rea* issues. The Model Penal Code's provisions on culpability represent a modern and coherent treatment of *mens rea* problems. Its definitions of the four types of culpability, its analytic framework for resolving *mens rea* questions, and its formulations of the defenses for intoxication, mental disease, and mistake all offer significant improvement over the current New Mexico doctrines as reflected in the New Mexico Uniform Jury Instructions-Criminal. It is time that New Mexico give up outdated doctrines and adopt a modern and superior approach to issues of culpability.