

7-1-1976

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### Recommended Citation

Jeff Essman, *A Primer on the Element of Mental State in the Montana Criminal Code of 1973*, 37 Mont. L. Rev. (1976).  
Available at: <http://scholarship.law.umt.edu/mlr/vol37/iss2/5>

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# A PRIMER ON THE ELEMENT OF MENTAL STATE IN THE MONTANA CRIMINAL CODE OF 1973

Jeff Essman

## I. INTRODUCTION

Montana's present code lacks any unified classification of offenses and is difficult to use. It is inconsistent, ancient, and obsolete and demonstrates a desperate need in Montana for a modern criminal code. The basic purpose to be achieved by the proposed code is to provide a simplified, comprehensive, and systematic body of criminal law which will serve as a useful instrument of social control in a modern community.<sup>1</sup>

This statement, contained in the foreword to the proposed Montana Criminal Code of 1973,<sup>2</sup> succinctly articulated the problems of Montana's old criminal statutes and the underlying concept of the new laws. A simple analysis can be applied to the statutory offenses in the new code to identify the material elements of proof required for conviction. All offenses, except those which impose absolute liability, require proof of an act<sup>3</sup> and a mental state.<sup>4</sup> Certain crimes, such as homicide<sup>5</sup> and assault,<sup>6</sup> also require the state to establish the elements of cause and result.<sup>7</sup> This note will examine the treatment of the element of mental state in the Montana Criminal Code of 1973, and will discuss two recent decisions of the Supreme Court of

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1. Hon. Wesley Castles, FOREWORD TO REVISED PROPOSED MONTANA CRIMINAL CODE OF 1973,2 (1972).

2. LAWS OF MONTANA (1973) ch. 513 (MONTANA CRIMINAL CODE OF 1973, Title 94, REVISED CODES OF MONTANA (1947), Effective January 1, 1974).

3. REVISED CODES OF MONTANA (1947) [hereinafter cited as R.C.M. 1947], § 94-2-102. Voluntary Act. A material element of every offense is a voluntary act, which includes an omission to perform a duty which the law imposes on the offender and which he is physically capable of performing. Possession is a voluntary act if the offender knowingly procured or received the thing possessed, or was aware of his control thereof for a sufficient time to have been able to terminate his control.

4. R.C.M. 1947, § 94-2-103. General requirements of criminal act and mental state.

(1) A person is not guilty of an offense, other than an offense which involves absolute liability unless, with respect to each element described by the statute defining the offense, he acts while having one (1) of the mental states described in sections 94-2-101(28), 94-2-101(32), and 94-2-101(53).

5. R.C.M. 1947, § 94-5-101.

6. R.C.M. 1947, § 94-5-201.

7. R.C.M. 1947, § 94-2-105. Causal relationship between conduct and result.

(1) Conduct is the cause of result if:

(a) without the conduct the result would not have occurred; and

(b) any additional causal requirements imposed by the specific statute defining the offense are satisfied.

Montana in which the mental state element was at issue, *State v. Jimison*<sup>8</sup> and *State v. Klein*.<sup>9</sup>

## II. EVOLUTION OF THE MENTAL STATE ELEMENT

Montana's approach to the element of mental state originated in the Model Penal Code. Herbert Wechsler, the Chief Reporter of the Model Penal Code, wrote:

American law has employed an abundance of *mens rea* terms, such as general and specific intent, malice, wilfulness, wantonness, recklessness, scienter, criminal negligence and the like—exhibiting what Mr. Justice Jackson in a famous Supreme Court opinion called “the variety, disparity and confusion” of “definitions of the requisite but elusive mental element.” Clarification was essential and it was attempted by a bold submission in the draft.<sup>10</sup>

To alleviate the confusion, the Model Penal Code recognized only four kinds of culpability: purpose, knowledge, recklessness, and negligence.<sup>11</sup>

The Commission which drafted the new Montana code also relied on the Illinois Criminal Code of 1961<sup>12</sup> as a source of many provisions.<sup>13</sup> Although similar to the draft provisions of the Model Penal Code, the Illinois definition of mental states included several significant changes.<sup>14</sup> The Illinois commission replaced the term “purposely” with the term “intent” although the substance of the “purposely” definition was retained.<sup>15</sup> The Illinois version of “knowledge” included awareness of the existence of a material fact as part of its definition, in addition to the Model Code provision defining “knowledge” as awareness of conduct, circumstance, and result.<sup>16</sup> Illinois also changed the definition of “negligence” by imposing liability for a substantial deviation from the reasonable per-

8. *State v. Jimison*, \_\_\_ Mont. \_\_\_, 540 P.2d 315 (1975).

9. *State v. Klein*, \_\_\_ Mont. \_\_\_, 547 P.2d 75, (1976).

10. Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1436 (1968) citing *Morrisette v. United States*, 342 U.S. 246, 252 (1952). See also *State v. Klein*, *supra* note 9 at 288.

11. MODEL PENAL CODE § 2.02, Comment at 124 (Tent. Draft No. 4, 1955). As used here “culpability” means only moral responsibility for the conduct. It is not used in the popular sense as equivalent to criminal guilt.

12. ILLINOIS REVISED STATUTES, 1963 [hereinafter cited Ill. Rev. Stat. 1963], ch. 38.

13. Hon. Wesley Castles, FOREWORD TO THE REVISED PROPOSED MONTANA CRIMINAL CODE OF 1973, 2 (1972).

14. Committee Comments—1961 (Revised by Charles H. Bowman) Ill. Rev. Stat. 1963, § 4-3 (Smith-Hurd Ann. ed. 1972).

15. Ill. Rev. Stat. 1963, § 4-4. Intent. A person intends, or acts intentionally or with intent, to accomplish a result or engage in conduct described by the statute defining the offense, when his conscious objective or purpose is to accomplish that result or engage in that conduct.

16. Ill. Rev. Stat. 1963, § 4-5. See MODEL PENAL CODE § 2.02(2)(b) (1962).

son standard, instead of the gross deviation required by the Model Penal Code.<sup>17</sup> Unfortunately, the Illinois code failed to make a clean break from the antiquated terminology of the common law and included the terms "wilfully" and "wantonly" as the equivalents of "knowingly" and "recklessly".<sup>18</sup>

Another source of mental state definitions for the new Montana code was the 1965 revision of the New York Penal Law.<sup>19</sup> The New York definitions of "recklessly" and "negligently" mirrored the Model Penal Code in requiring a gross deviation from the reasonable person standard for liability.<sup>20</sup>

### III. THE MENTAL STATE ELEMENT IN THE MONTANA CODE

The old criminal statutes of Montana contained an abundance of mental state terms.<sup>21</sup> The treatment of mental state was further complicated by case law.<sup>22</sup> To free the new code from those difficulties, the Montana Criminal Law Commission followed the Model Penal Code and revisions of Illinois and New York in adopting a specific statutory treatment of the mental state element.

The Montana code uses only three classifications<sup>23</sup> in evaluating the defendant's mental state: purposely,<sup>24</sup> knowingly,<sup>25</sup> and neg-

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17. Ill. Rev. Stat. 1963, § 4-7; MODEL PENAL CODE § 2.02(2)(d) (1962).

18. Ill. Rev. Stat. 1963, §§ 4-5 and 4-6. See also Committee Comments—1961 (Revised by Charles H. Bowman) Ill. Rev. Stat. 1963, § 4-3 (Smith-Hurd Ann. ed. 1972).

19. MONTANA CRIMINAL LAW COMMISSION, MONTANA CRIMINAL CODE OF 1973, ANNOTATED § 94-2-101(32) at page 52 (W.F. Crowley ed. 1973) [hereinafter cited MONT. CRIM. CODE ANN.].

20. NEW YORK PENAL LAW 1965, § 15.05; MODEL PENAL CODE § 2.02(2)(c) and (d) (1962).

21. *E.g.*, wilfully, feloniously, and maliciously, R.C.M. 1947, § 94-502; with intent to kill, R.C.M. 1947, § 94-601; with intent to injure, wrongfully, with intent to commit a felony, R.C.M. 1947, § 94-602; corruptly, R.C.M. 1947, § 94-804; knowingly, R.C.M. 1947, § 94-908; fraudulently, R.C.M. 1947, § 94-1501; with malice aforethought, R.C.M. 1947, § 94-2501; deliberate and premeditated, R.C.M. 1947, § 94-2503; with intent to deprive and defraud, R.C.M. 1947, § 94-2701; carelessly and negligently, R.C.M. 1947, § 94-3210; intentionally, R.C.M. 1947, § 94-3313; ignorantly, R.C.M. 1947, § 94-3505. All repealed by Laws of Montana (1973) ch. 513, § 32.

22. For a discussion of case law complication of specific intent under the old assault statute see Note, *Criminal Assault in Montana: A New Face for an Old Code*, 35 MONT. L. REV. 178 (1974).

23. See *State v. Klein*, *supra* note 9 at 78; MONT. CRIM. CODE ANN. § 94-2-103 Comment at page 95.

24. R.C.M. 1947, § 94-2-101(53). "Purposely"—A person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is his conscious object to engage in that conduct or cause that result. When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense. Equivalent terms such as "purpose" and "with the purpose" have the same meaning.

25. R.C.M. 1947, § 94-2-101(28). "Knowingly"—A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware of his conduct or that the circumstance exists. A person acts knowingly with respect to the result of the conduct if he is aware that it is highly

ligerly.<sup>26</sup> These mental state classifications are defined in relation to four objectively measurable conditions or occurrences: conduct, circumstances, facts, and result.<sup>27</sup> However, all four criteria do not apply to each mental state.<sup>28</sup> "Purposely", which means with a conscious objective, relates to conduct or result.<sup>29</sup> "Knowingly", defined as "awareness", relates to conduct, circumstances, facts or result.<sup>30</sup> "Negligently" relates only to circumstances and result.<sup>31</sup> Thus, two functions are performed in analyzing a statute which describes an offense: first, determining which mental state must be proved,<sup>32</sup> and second, determining to which of the four conditions or occurrences the mental state relates.

A simple example will clarify how these conditions are used to evaluate mental state. Defendant, angered by an insult he received while drinking at a local tavern, retrieves a loaded revolver from his pickup truck. Upon returning to the crowded bar, he shouts, "Nobody calls me a liar," and fires two shots. One shot kills the person who made the insult. The second injures a person standing a short distance behind the first victim.

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probable that such result will be caused by his conduct. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence. Equivalent terms such as "knowing" or "with knowledge" have the same meaning.

26. R.C.M. 1947, § 94-2-101(32). "Negligently"—A person acts negligently with respect to a result or circumstance described by a statute defining an offense when he consciously disregards a risk that the result will occur or that the circumstance exists; or if he disregards a risk of which he should be aware that the result will occur or that the circumstance exists. The risk must be of such a nature and degree that to disregard it involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. Gross deviation means a deviation that is considerably greater than the lack of ordinary care. Relevant terms such as "negligent" and "with negligence" have the same meaning.

27. The Model Penal Code used only conduct, circumstance, and result as defining criteria. MODEL PENAL CODE § 2.02, Comments at page 124 (Tent. Draft No. 4, 1955). The addition of "facts" as a criterion is due to the adoption of the Illinois version of "knowledge". Ill. Rev. Stat. 1963 § 4-5.

28. Much of the following statutory explanation was developed from the lectures and classroom material of Professors W.F. Crowley and Larry M. Ellison of the University of Montana School of Law, both of whom served on the Montana Criminal Law Commission.

29. MONT. CRIM. CODE ANN. § 94-2-101(28) comment at 46. See text of statute *supra* note 22.

30. R.C.M. 1947, § 94-2-101(28) See text *supra* note 23. Note also that awareness of a particular fact is satisfied if objective indications point to a high probability that defendant was aware. Since the definition was amended by Laws of Montana (1975) ch. 443, awareness of a result is satisfied if there is knowledge that the occurrence of the result is highly probable.

31. R.C.M. 1947, § 94-2-101(32). See text *supra* note 24. The wording of the negligence definition comes primarily from the New York source, but also borrows language from the Model Penal Code. It should be noted that this definition includes the concept of "recklessness" with the phrase "consciously disregards . . ." Under the New York law, recklessness is a higher mental state than negligence. Since the distinction between negligence and recklessness is often difficult for juries to make, it has been avoided in the Montana code. MONT. CRIM. CODE ANN. § 94-2-101(32) comment at 52.

32. Shipman, *How to identify single mental states* is indicated by the statute, it must be established in relation to each element of the offense. R.C.M. 1947, § 94-2-103(2).

“Conduct” involves the actions of the defendant: his acts of retrieving his weapon, making his statement, and firing the shots. “Circumstances” are the conditions surrounding the conduct in question: the crowded nature of the tavern, the position of the bystander near the intended victim. “Facts” are legal or physical realities that might be important to evaluate the prohibited conduct as expressed in the statute defining the offense: the shooting victims were human beings,<sup>33</sup> the revolver was a weapon.<sup>34</sup> “Result” is the end product of the prohibited conduct: the death of the first victim, the injury of the bystander.

To convict the defendant of deliberate homicide<sup>35</sup> or aggravated assault,<sup>36</sup> the state must prove he acted either purposely or knowingly. Whether the defendant acted purposely with regard to the homicide is determined by examining his conduct and the result. If it appears by objective determination that it was the conscious object of the defendant to fire his weapon or to cause the death of the victim, the mental state of purposely has been proven.

Applying the same analysis to the wounding of the bystander, all four criteria may be used to determine if the defendant acted “knowingly” in commission of the aggravated assault. If the defendant was aware that he fired (conduct) his weapon (fact), was aware of the bystander’s position (circumstance), and was aware that it was highly probable that injury might result to another (result) the mental state of knowingly has been proven. The defendant’s mental state is thus determined by objective assessment of the factors specified by the statutory design.

#### IV. THE CASES

Two recent Montana cases deal with the issue of mental state in the new criminal code. The first, *State v. Jimison*,<sup>37</sup> involved a conviction for two counts of theft. The decision reversing the convictions turned on the peculiar facts of the case. The defendant admittedly had possession of the stolen articles prior to January 1, 1974, the effective date of the new code.<sup>38</sup> However, he was charged with theft<sup>39</sup> under the new code on the theory that he had exerted unau-

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33. Under R.C.M. 1947, § 94-5-101, a legal fact which is required by the statutory definition is that the victim must be a human being. See also R.C.M. 1947, § 94-2-101(22).

34. Under R.C.M. 1947, § 94-5-202(1)(b), a legal fact required by the statutory definition is that a weapon was used to cause the bodily injury. See also R.C.M. 1947, § 94-2-101(66).

35. R.C.M. 1947, § 94-5-102.

36. R.C.M. 1947, § 94-5-202.

37. *State v. Jimison*, *supra* note 8.

38. Record at 164, *State v. Jimison*, *supra* note 8.

39. R.C.M. 1947, § 94-6-302.

thorized control over the goods on June 5 and 6, 1975,<sup>40</sup> when the goods were seized on defendant's ranch. The court concluded that since some of the elements of the crime had occurred prior to the effective date of the new code, the transition statute<sup>41</sup> required the state to prosecute under the old receiver of stolen property statute.<sup>42</sup>

The opinion contained troublesome *dicta* in a directive to the county attorneys of Montana:

Second, for future guidance, the state is in error in its argument as it pertains to proof of criminal intent through proof of taking and the exercise of control as sufficient proof to support a conviction of theft under the new code. *This is a specific intent crime and the proof required is that for specific intent.* In the instant case, suspicious circumstances in connection with the control do not meet this burden of proof, after an unrefuted explanation of possession by the defendant. [Emphasis added]<sup>43</sup>

This enigmatic reference to theft as a specific intent crime raised the possibility that the court may have reinstated in the new code the concept of specific intent with all its analytical problems.

The term "specific intent" was commonly used to designate the special intention that is required for guilt of a particular offense in addition to the intentional performance of the prohibited act.<sup>44</sup> It was distinguished from "general intent", usually defined as the mental state necessary for commission of a crime.<sup>45</sup> The distinction varied because the terms were used inconsistently.<sup>46</sup> Use of "specific" as an adjective for "intent" was criticized as superfluous since an essential characteristic of any intention is that it is directed toward a definite end.<sup>47</sup>

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40. See Note, *Receiving Stolen Property: State v. Watkins and the New Criminal Code*, 35 MONT. L. REV. 172 (1974) for a discussion of prosecution of the old crime of receiving stolen property under the new theft statute.

41. LAWS OF MONTANA (1973) ch. 513, § 33. The Montana Criminal Code and all other provisions of this act are effective January 1, 1974 and shall apply to all offenses alleged to have been committed on or after that date. The Montana Criminal Code and all other provisions of this act do not apply to offenses committed prior to its effective date and prosecutions for such offenses shall be governed by prior law, which is continued in effect for that purpose, as if the act were not in force. For purposes of this section, an offense was committed prior to the effective date of this act if any of the elements of the offense occurred prior thereto.

42. R.C.M. 1947, § 94-2721. Repealed by LAWS OF MONTANA (1973) ch. 513, § 32.

43. *State v. Jimison*, *supra* note 8 at 317.

44. *State v. Fitzpatrick*, 149 Mont. 400, 427 P.2d 300, 301 (1967); CLARK & MARSHALL, A TREATISE ON THE LAW OF CRIMES § 5.06 (7th ed. 1967); R. PERKINS, PERKINS ON CRIMINAL LAW 762 (2d ed. 1969); W. LAFAVE & A. SCOTT, Handbook on Criminal Law 202 (1972).

45. W. LAFAVE & A. SCOTT, Handbook on Criminal Law 201 (1972).

46. W. LAFAVE & A. SCOTT, Handbook on Criminal Law 201 (1972), see J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 141-145 (2d ed. 1960), Perkins, *A Rationale of Mens Rea*, 52 HARV. L. REV. 905, 926 (1939).

The drafters of the Model Penal Code termed the concept of specific intent "awkward",<sup>48</sup> found general intent to be "an abiding source of ambiguity and confusion in the penal law",<sup>49</sup> and abandoned the terminology.<sup>50</sup> In place of distinctions which were not useful for determining the defendant's mental state, the new Montana code, following the Model Penal Code, creates a simple system for mental state analysis. The design uses a limited number of terms with appropriate qualifying language throughout the code.<sup>51</sup> The *Jimison dicta*, therefore, threatened to defeat the Commission's effort to simplify treatment of the mental state element.

Closer analysis of *Jimison*, however, suggests an interpretation which would preserve the mental state design of the new code. Theft<sup>52</sup> is one of the few offenses which requires proof of two mental state elements.<sup>53</sup> Beside proving the defendant purposely or knowingly exerted unauthorized control over the property of the owner, the state must prove one of three additional requirements in the subsections of the statute.<sup>54</sup>

The first subsection<sup>55</sup> requires proof of the purpose to deprive, the traditional mental state of theft. The second and third subsections involve special situations where it is difficult to prove the specific purpose to permanently deprive.<sup>56</sup> To satisfy the requirements of the second subsection, the state must prove an act, plus an additional mental state. That is, the use, concealment, or abandonment of the property so as to deprive the owner must be performed purposely or knowingly.<sup>57</sup> The last subsection is similar to the second, but reduces the mental state requirement to that of "knowing" the acts will "probably" deprive the owner.<sup>58, 59</sup>

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48. MODEL PENAL CODE § 2.02, Comment at 125 (Tent. Draft No. 4, 1955).

49. MODEL PENAL CODE § 2.02, Comment at 128 (Tent. Draft No. 4, 1955).

50. W. LAFAVE & A. SCOTT, Handbook on Criminal Law 202 (1972).

51. MONT. CRIM. CODE ANN. § 94-2-103 comment at 96, R.C.M. 1947, § 94-2-103 Commission Comment.

52. R.C.M. 1947, § 94-6-302. Theft. (1) A person commits the offense of theft when he purposely or knowingly obtains or exerts unauthorized control over the property of the owner, and:

(a) has the purpose of depriving the owner of the property; or  
(b) purposely or knowingly uses, conceals or abandons the property in such a manner as to deprive the owner of the property; or  
(c) uses, conceals, or abandons the property knowing such use, concealment, or abandonment will deprive the owner of the property.

53. Another offense which requires proof of two distinct mental states is aggravated kidnapping, R.C.M. 1947, § 94-5-303.

54. R.C.M. 1947, § 94-6-302(1)(a), (b), or (c). See text of statute *supra* note 52.

55. R.C.M. 1947, § 94-6-302(1)(a).

56. R.C.M. 1947, § 94-6-302. Commission Comment.

57. R.C.M. 1947, § 94-6-302(1)(b).

58. R.C.M. 1947, § 94-6-302(1)(c).

59. See Note, *The Old Montana Dilemma and the New Approach to Larceny by Trick*



Unfortunately, in *Jimison*, the state's brief, quoted at length by the Court,<sup>60</sup> contained a poorly phrased explanation of the theft statute:

All that is necessary to support a conviction for theft under 94-6-302 is some exercise of control over the property of the owner. That exercise need not be for any particular length of time but rather, any length of time which is sufficient to show an intent to deprive the owner of the use of the property is sufficient. [Emphasis by the court]<sup>61</sup>

The court's directive about the specific intent nature of theft is apparently in response to the state's misstatement of the law. The court's response must be considered in light of the dual mental state requirement of the theft statute. When thus considered, the court's language may be viewed as an attempt to emphasize that one of the three additional requirements had to be proved. In other words, the court said that the state cannot meet the burden of proof by showing mere intent to control "through proof of taking and the exercise of control . . ." <sup>62</sup> when the additional purpose to deprive is demanded by the statute.

This analysis of the court's dicta is supported by the later decision of *State v. Shults*.<sup>63</sup> In ruling the offense of unauthorized use of motor vehicles<sup>64</sup> is a lesser included misdemeanor of theft, the court said, "unauthorized use of the automobile is the common element in both the original charge and the amended charge, the [theft charge] requiring the *additional element of an intent or purpose to deprive the owner of his property.*" (Emphasis added)<sup>65</sup>

In *State v. Klein*,<sup>66</sup> the Montana supreme court directly addressed the issue of the mental state element. The defendant appealed from a conviction of robbery.<sup>67</sup> He contended that the jury must consider "specific intent" as well as "purposely" and "knowingly". He maintained the district court erred in refusing instruc-

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*and Obtaining Goods by False Pretenses*, 35 MONT. L. REV. 161, 168 (1974) for a comprehensive discussion of the new theft statute.

60. *State v. Jimison*, *supra* note 8 at 316.

61. *Id.*

62. *Id.* at 317.

63. *State v. Shults*, \_\_\_ Mont. \_\_\_, 544 P.2d 817 (1976).

64. R.C.M. 1947, § 94-6-305.

65. *State v. Shults*, *supra* note 63 at 819.

66. *State v. Klein*, *supra* note 9.

67. R.C.M. 1947, § 94-5-401. Robbery. (1) A person commits the offense of robbery if, in the course of committing a theft, he:

(a) inflicts bodily injury upon another; or

(b) threatens to inflict bodily injury upon any person or purposely or knowingly puts any person in fear of immediate bodily injury; or

tions offered to that end.<sup>68</sup> The court answered the question raised by the *Jimison dicta* in rejecting those contentions.

The court said, in construing the robbery statute:

The proscribed conduct under section 94-5-401(1)(b) is "threatens to inflict bodily injury upon any person or . . . puts any person in fear of immediate bodily injury." However, such conduct is criminal only if done "purposely" or "knowingly". Therefore the specific intent required before a conviction for the crime of robbery may be had is that the accused must have acted either "purposely" or "knowingly".<sup>69</sup>

It is apparent the court did not use the term "specific intent" in its traditional sense. Instead, it used the term as a shorthand expression for "mental state", the term preferred by the drafters of the new code.<sup>70</sup> The court rejected the proposition that any mental state beyond that required by the statutory scheme need be proved.<sup>71</sup> It appears the court will properly require proof only of the statutory elements of the offenses, thus rejecting any call to return to the common law definitions of the crimes.<sup>72</sup>

Consistent use of "specific intent" as synonymous with "mental state" will probably avoid the possibility raised by *Jimison* that the new code would be interpreted as a simple recodification of the old criminal law offenses troubled with the same analytical problems. However, progress and consistency in the analysis and application of the new code in Montana will be promoted if the court and members of the bar stop using the outdated terminology of the old law. The analytical mischief the new criminal code attempts to remedy should not be permitted to slip back into the law through inadvertent or careless use of language.

## V. CONCLUSION

The Montana Criminal Code of 1973 classifies the mental state elements of criminal offenses in three terms: purposely, knowingly,

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(c) commits or threatens immediately to commit any felony, other than theft.

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(3) "In the course of committing a theft" as used in this section includes acts which occur in an attempt to commit or in the commission of theft, or in flight after the attempt or commission.

68. *State v. Klein*, *supra* note 9 at 78.

69. *Id.* at 78.

70. *See, e.g.*, R.C.M. 1947, §§ 94-2-103, 94-2-104, 94-2-107(1), and Commission Comments under the following statutes: R.C.M. 1947, §§ 94-2-102, 94-2-103, 94-2-109, and 94-2-110. However, even the Commission was not free from lapses into usage of the old terminology. The annotation the court cited in *Klein*, *supra* note 9 at 78, referred to "specific intent" instead of mental state, also.

71. *State v. Klein*, *supra* note 9 at 288.

72. R.C.M. 1947, § 94-1-104(2) and Commission Comment thereunder.

and negligently. The mental states are objectively measured against four criteria: conduct, circumstances, facts, and result. *Jimison* raised the possibility that the new code would be affected by the maladies of the old criminal statutes, but *Klein* laid that concern to rest by demonstrating that the Montana supreme court now uses the term "specific intent" as a synonym for "mental state". To insure that the new code will serve as a useful instrument of social control, the bench and bar of Montana must recognize and implement the changes in analysis and application of the criminal law, especially in the determination of the defendant's mental state.