

WHAT DOES INTENT MEAN?

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I. INTRODUCTION

Imagine a case featuring a manufacturing shop boss who sent his employees into a toxic work environment. As happens at many job sites, hazardous chemicals unavoidably were nearby, and safety always was a matter of reducing their concentration. This attempted solution, however, may mean that dangerous levels of chemicals remain. But this time, the level of toxicity was far higher than usual. There is strong evidence that the shop boss knew about the danger, at least well enough to have realized that it probably had reached a deadly level, but the shop boss disputes this evidence. The employees all became ill, and one of them has died.

The survivors sue in an attempt to recover damages for wrongful death. The employer's defense, of course, is that recovery for the death of an employee covered by worker's compensation is limited to a relatively low insured amount: a defined benefit level under a worker's compensation statute, which is a mere fraction of tort recovery.¹ The good news for the workers is that there is one potentially applicable exception to this defense. Specifically, the worker's compensation defense is not available if the employer caused the injury "intentionally"²—whatever that means.³ Therefore, if the survivors can prove intent, they can recover in tort, and they can hope to receive a judgment for a much larger amount, possibly many millions of dollars more.

Naturally, the shop boss vehemently denies that he intended to kill anyone:

It was not my desire to cause this man's death. Maybe it wasn't a wise decision that I made, to send these guys in there, but my purpose was to complete the task, not to hurt anyone. I was taking serious pain medicine at the time, and I just couldn't think straight, anyway. Besides, I had to follow company policy, and that meant finishing the job. The place had been cleaned out just a few days before. I didn't know that anything like this would happen. I didn't intend to hurt anyone.⁴

1. See, e.g., OHIO REV. CODE ANN. § 4123.74 (West 2007) (establishing exclusive remedy as insurance claim).

2. See, e.g., *Blankenship v. Cincinnati Milacron Chem., Inc.*, 433 N.E.2d 572, 576 (Ohio 1982) (establishing this exception by court decree).

3. The problem, and the point of this Article, is that the meaning of intent is shifting and complex. See, e.g., *Ulrick v. Kunz*, 349 F. App'x 99, 101 n.3 (6th Cir. 2009) (recounting history of three attempts by Ohio legislature to refine the test for intent and Ohio courts' responses); *Fyffe v. Jeno's, Inc.*, 570 N.E.2d 1108, 1112 (Ohio 1991) (establishing a three-pronged test for intent).

4. Each of these is a time-honored response to an allegation of intent, and each can be

And so, with this barrage of denials, the question arises: What does “intent” mean? The issue appears frequently in civil cases, like this one,⁵ and it arises even more often in criminal prosecutions.⁶ Unless the actor confesses his intent, proof of this element must be supplied circumstantially by inductive inference.⁷ There are many varieties of rebuttals of intent, some of which resemble the shop boss’s denial of purpose or knowledge, and some of which take other approaches.⁸ Meanwhile, although the word “intent” sounds clear, and often is treated in the law as though it were,⁹ any appearance of clarity dissolves in real situations, such as the one previously described. There are many meanings of intent, and outcomes often depend upon which meaning the decision maker consciously or unconsciously adopts.¹⁰ Furthermore, there are many terms that describe fault levels lesser than intent, such as negligence, recklessness, knowledge, and other culpable mental states,¹¹ but distinguishing them from intent is not always easy.

This Article considers the many meanings of intent. Part II examines some definitions of intent. For example, there is intent as “purpose”: a narrow approach that requires a conscious desire to perform the act or bring about the result.¹² There is also intent as “knowledge”: a relatively clear perception that the act or result will come about, coupled with an indifference toward that outcome.¹³ There are definitions that are less stringent, including some that are surprisingly vague.¹⁴ Part III describes why the question matters, by examining the problem of proof of intent, the range of possible rebuttals of intent that arise in different circumstances, and the way in which some frequent conceptions of intent affect outcomes. Part IV considers which definition should apply to which kinds of situations, and it attempts to identify factors that should guide the decision of this question. Part V contains the author’s

surprisingly difficult to overcome even if untrue. *See infra* Part III.B.

5. A Westlaw search for “‘worker’s compensation’ & ‘intentional injury’ ‘intent to injure’” performed on Sept. 25, 2010 in the “ALLCASES” database disclosed 601 documents.

6. A Westlaw search for “‘criminal prosecutions’ ‘worker’s compensation’ & ‘intentional injury’ ‘intent to injure’” performed on Sept. 25, 2010 in the “ALLCASES” database disclosed 1287 documents.

7. *See infra* note 82-84 and accompanying text.

8. *See infra* Part III.B.

9. *See, e.g.*, *State v. Hansen*, 224 P.3d 509, 514 n.6 (Idaho Ct. App. 2009) (“[N]o definition of ‘intent’ or ‘intentionally’ really needed to be given to the jury.” (citing *State v. Hoffman*, 55 P.3d 890, 893 (Idaho Ct. App. 2002))).

10. *See infra* Part II.

11. *See* MODEL PENAL CODE § 2.02(2)(b)–(d) (Proposed Official Draft 1962) (defining “knowingly,” “recklessly,” and “negligently” as levels of culpability).

12. *See infra* Part II.A.

13. *See infra* Part II.B.

14. *See infra* Part II.C.

conclusions, which include the suggestion that different meanings of intent may be useful to cover different situations, but that each meaning should be tied to the situations in which it should be invoked.

II. PROTOTYPICAL EXAMPLES OF INTENT DEFINITIONS

A. *Intent as Purpose*

Offhand, one might think that “intent” and “purpose” might be close in meaning or even synonymous. But the difference between the two can be significant. Defining intent in terms of purpose narrows the definition so that it becomes an awkward fit with some kinds of situations.¹⁵ On the other hand, there are times when a definition of intent in terms of purpose is appropriate.¹⁶

Jurisdictions that follow the Model Penal Code (“MPC”) have a formal definition of intent that makes its meaning close to that of purpose. In fact, the MPC calls this state of mind “purpose,”¹⁷ although it may be better to retain the more ordinary word “intent,” as some jurisdictions that follow the MPC do.¹⁸ In MPC jurisdictions, the definition of intent requires proof that it was the actor’s “conscious . . . desire” to engage in the questioned conduct or to cause the relevant result.¹⁹ “Conscious desire” creates a particularly narrow definition of intent. To see how narrow, imagine a defendant who says, “Yes, I killed this man, but I didn’t really intend to. I knew that what I did was going to result in his death, but I just didn’t care whether he died or not.” Technically, this state of mind is not sufficient for a finding of MPC-type intent. Surprisingly, the actor’s indifference means that the “conscious desire” that is the essence of this state of mind is missing.²⁰ Although this kind of “I didn’t care” testimony is not likely to impress a jury, a finding of absence of intent would be required by the literal language of the definition if the jury believed (or even reasonably doubted) the actor’s statements. The real point here is that it is easy to

15. See *infra* notes 17-26 and accompanying text.

16. See *infra* notes 125-29 and accompanying text.

17. See MODEL PENAL CODE § 2.02(2)(a) (Proposed Official Draft 1962) (defining “purposely” as a level of culpability).

18. For example, the Texas Penal Code contains a definition virtually identical to that of “purpose” in the MPC, but it labels the mental state as intent. See, e.g., TEX. PENAL CODE ANN. § 6.03(a) (West 2003) (“A person acts intentionally . . . with respect to the nature of his conduct . . . when it is his conscious objective or desire to engage in the conduct . . .”).

19. See, e.g., *id.*

20. See MODEL PENAL CODE § 2.02(a)(i) (stating that a person acts purposely with regard to the element of an offense when it is their “conscious object” to engage in the required conduct).

find situations in which the jury is likely to follow testimony that requires a finding of non-intent, when the “conscious desire” formula is the controlling law.²¹

Instead, the “I didn’t care” killing fits the definition of “knowledge,” not “intent.” Knowledge under jurisdictions influenced by the MPC is defined as a mental state in which the actor is “aware” or “practically certain” that he is engaging in the questioned conduct or will cause the relevant result.²² This definition creates a much broader range of qualifying mental states than the “conscious desire” formula does for intent.²³ Actually, the MPC defines the crime of murder so that *either* intent or purpose will suffice as the guilty mental state.²⁴ If it did not include knowledge, the MPC would create an odd result: killings committed with complete indifference to the fate of the victim could not be murders.²⁵ This feature of the MPC does not mean, however, that there are not situations in which its narrow definition of intent causes serious problems.²⁶

B. *Intent as Knowledge, Awareness, or the Like*

The Restatement (Third) of Torts features what it calls a “dual definition” of intent.²⁷ One prong of the definition depends upon purpose. It applies if the actor “acts with the purpose of producing [the] consequence” in question.²⁸ This formula resembles the definition of intent in the MPC, and it sets out a narrow view of the concept.²⁹ The

21. See *infra* Part III.B (discussing various possible rebuttals to a claim of intent).

22. MODEL PENAL CODE § 2.02(2)(b).

23. Compare *id.* (defining the mental state of “knowledge”), with TEX. PENAL CODE ANN. § 6.03(a) (defining the mental state of intent).

24. See MODEL PENAL CODE § 210.2(1) (defining murder in terms of “knowingly” or “purposely,” and also in terms of extreme recklessness).

25. See *id.*; see also *supra* notes 17-21 and accompanying text (discussing how murders committed with complete indifference are murders committed without “conscious desire,” and therefore fall outside the definition of intent when its definition is closely related to the meaning of “purpose”).

26. See, e.g., MODEL PENAL CODE § 210.5 (causing or aiding suicide can only be committed with intent, which is defined as “purposely”). Under this section, an actor who knows that he is doing the act, but just doesn’t care, must be exonerated. See MODEL PENAL CODE & COMMENTARIES § 210.5 cmt. 5 (Official Draft and Revised Comments 1980) (“Thus, casual conduct not seriously intended to aid or persuade another to take his own life may not be punished under this subsection, no matter how plain it seems in retrospect that the actor’s behavior contributed to a suicide.”); see also *infra* notes 117-21 and accompanying text (using the example of Dr. Kevorkian as an example of how this issue led to strange results).

27. 1 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 1 cmt. a (2005).

28. See *id.* § 1(a).

29. See *id.* § 1 cmt. a (stating that its definition of intent can be “compared and contrasted to

second prong, however, broadens the reach of intent by including a knowledge component.³⁰ “A person acts with the intent to produce a consequence if: (a) the person acts with the purpose of producing that consequence; or (b) the person acts *knowing that the consequence is substantially certain* to result.”³¹ This definition includes conduct that is undertaken with indifference to consequences if the actor knows that the consequences are “substantially certain” to result.³² The “I didn’t care” killing discussed above would be intentional under this definition.

The Restatement definition is carefully calibrated to produce sensible results in intentional tort cases.³³ It is designed to reach cases in which liability should be imposed, but not those in which it should not be.³⁴ This kind of calibration is neither easy nor unerring. The Restatement commentary includes examples of situations in which intent should be found to exist, as follows:

[*An example of intent as purpose:*] Wendy throws a rock at Andrew, someone she dislikes, at a distance of 100 feet, wanting to hit Andrew. Given the distance, it is far from certain Wendy will succeed in this; rather, it is probable that the rock will miss its target. In fact, Wendy’s aim is true, and Andrew is struck by the rock. Wendy has purposely, and hence intentionally, caused this harm.

[*An example of intent as knowledge:*] The Jones Company runs an aluminum smelter, which emits particulate fluorides as part of the industrial process. Jones knows that these particles, carried by the air, will land on neighboring property, and in doing so will bring about a range of harms. Far from desiring this result, Jones in fact regrets it. Despite its regret, Jones has knowingly, and hence intentionally, caused the resulting harms.³⁵

Equally importantly, the Restatement commentary includes examples of situations in which intent does *not* exist, and in which it might be socially undesirable for intentional tort liability to attach.³⁶ One example involves a police officer named Steve who proceeds on a high-

the Model Penal Code”); *see also supra* Part II.A (arguing that a definition of intent based on purpose is a narrow one).

30. 1 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 1(b).

31. *Id.* § 1 (emphasis added).

32. *Id.* § 1(b).

33. *See id.* § 1 cmt. b.

34. *See id.* § 1 cmts. a–e (explaining how the Restatement definition of intent is designed to impose liability only in proper situations).

35. *Id.* § 1 cmt. c, illus. 2–3.

36. *See id.* § 1 cmt. c, illus. 4–5.

speed chase of an alleged criminal, knowing, of course, that the nature of the chase creates a danger of injury to others:

[*An example in which knowledge does not create intent:*] Steve is well aware there is a significant likelihood that someone will suffer physical harm, either personal injury or at least property damage, in the course of the chase. In fact, the escaping car strikes the car owned by Ruth, which she is driving carefully on the highway. Steve . . . has not intentionally harmed Ruth or her car. Steve did not harbor a purpose that Ruth (or anyone else) suffer any harm; while Steve knew there was a significant likelihood of such harm, the harm was not substantially certain to occur.³⁷

Even if harm is “substantially certain” to occur, intent may be absent if the actor is unaware beforehand of this certain harm, and the Restatement contains an example to illustrate this point, too.³⁸

However, the most difficult problem lies not in these examples, but elsewhere. There are many socially desirable activities that inevitably cause small numbers of injuries.³⁹ The actors in these activities therefore are “substantially certain” that injury will occur to some unknown individuals at some time, but obviously, the law should not criminalize industrial accidents with a broad brush.⁴⁰ To solve this problem, the Restatement commentary suggests a limit that unfortunately is not part of the Restatement text. The harmful consequences, it says, should be of a type that affects one identifiable person, or a small class of persons: “The applications of the substantial-certainty test should be limited to situations in which the defendant has knowledge to a substantial certainty that the conduct will bring about harm to a particular victim, or to someone within a small class of potential victims within a localized area.”⁴¹ The commentary offers several examples:

37. *Id.* § 1 cmt. c, illus. 4.

38. *See id.* § 1 cmt. c, illus. 5 (“Joanne, a physician, provides medication to her patient, Mark. Because Joanne has confused one medication with another, the medication she gives Mark is certain to cause harm to Mark. Such harm ensues. Joanne has not intentionally harmed Mark. While Joanne’s conduct was substantially certain to cause him harm, Joanne lacked the knowledge that this would happen.”).

39. *See id.* § 1 cmt. b (“[P]eople all the time voluntarily engage in conduct—swinging a golf club, raising a stick so as to separate two dogs, turning a steering wheel in order to turn a car on a highway, selling a product, transmitting electricity through power lines—that turns out to result in harm.”).

40. *See id.* § 1 cmt. e (asserting that the substantial certainty test should not be applied in situations where strict liability could be imposed despite a total lack of negligence on the part of the defendant).

41. *Id.*

[A]n owner of land, arranging for the construction of a high-rise building, can confidently predict that some number of workers will be seriously injured in the course of the construction project; the company that runs a railroad can be sure that railroad operations will over time result in a significant number of serious personal injuries; the manufacturer of knives can easily predict that a certain number of persons using its knives will inadvertently cut themselves. Despite their knowledge, these actors do not intentionally cause the injuries that result.⁴²

It would have been better if this important qualification had been made part of the actual Restatement text. But there is a greater problem still. What size class qualifies as “small”? One might reconsider the example at the beginning of this Article, about the shop boss who sends his employees into a dangerous, toxic environment. Are the employees in the shop a “small” enough class? Perhaps if they are two or three, the principle makes sense. On the other hand, imagine that there are many thousands of employees who visit the toxic environment over a long period of time because the organization is large and injuries from exposure are delayed. This group may not be a “small” class. But the shop boss’s mental state is the same. It seems ironic that the Restatement’s principle finds intent where only a few are injured, but refuses to find it with equally blameworthy mental states when there are many injured people.

C. Imprecise Definitions, Including Those Not Requiring Either Purpose or Knowledge

Unfortunately, federal law features imprecise definitions of intent and, indeed contradictory definitions. The Supreme Court has pointedly stated that the term intent is “ambiguous.”⁴³ For example, in *Schiro v. Farley*,⁴⁴ the Supreme Court held that a criminal intent to kill could be supplied by knowledge of the circumstances, and it did not require purposefulness on the part of the defendant.⁴⁵ In *Posters ‘N’ Things, Ltd. v. United States*,⁴⁶ a civil case, the Court likewise held that purposefulness was not required for intent, and further held that knowledge of probable results is enough.⁴⁷ A requirement of only “probable” results contrasts sharply with the Restatement definition,

42. *Id.*

43. *Farmer v. Brennan*, 511 U.S. 825, 838 (1994).

44. 510 U.S. 222 (1994).

45. *See id.* at 234-35.

46. 511 U.S. 513 (1994).

47. *See id.* at 523-24.

which requires not mere probability for intent, but substantial certainty.⁴⁸ In fact, the Court ensconced this mere probability rule in a place of treasured tradition when it said, in *Giles v. California*,⁴⁹ that “the oldest rule of evidence [is] that a man is presumed to intend the natural and probable consequences of his acts.”⁵⁰ The courts have repeatedly announced this principle.⁵¹ Under this standard, imprecision is accompanied by a lowering of the standard, because instead of requiring a substantial certainty, intent is reduced to a showing of an awareness of likelihood (perhaps as small as awareness of preponderance), or a sense that there is a fifty-one percent likelihood, which is a mere “probability.” Later, in *Holloway v. United States*,⁵² the Court seemed to dilute the standard more, by holding that neither certainty nor a firm purpose was required for intent.⁵³ A “conditional” motivation, which may (or may not) reflect a desire to cause the event to occur, is sufficient.⁵⁴ These four relatively recent decisions show the confusion that is created by the term “intent” when there is no unified definition, as there is not in the federal system.

The Court has even considered the possibility, in *Farmer v. Brennan*,⁵⁵ that in some situations, intent may not require any subjective state of mind, and that “objective” blameworthiness arguably can suffice.⁵⁶ Thus, the Court suggested that perhaps “‘intent’ is an ambiguous term that can encompass objectively defined levels of blameworthiness.”⁵⁷ The Court ultimately concluded that in the type of case before it, a subjective requirement must also be met, but it is possible to read this portion of the opinion as proposing that in some

48. 1 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 1(b) (2005).

49. 128 S. Ct. 2678 (2008).

50. *Id.* at 2698 (Breyer, J., dissenting) (quoting *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 570 (1973)).

51. *See, e.g.*, *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 511 (1940) (stating that in order to find intent to commit conspiracy to restrain under the Sherman Act, one need only show “that such restraint is the natural and probable consequence[] of the conspiracy”); *Bancinsure, Inc. v. BNC Nat’l Bank, N.A.*, 263 F.3d 766, 771 (8th Cir. 2001) (“‘You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.’” (quoting *First Dakota Nat’l Bank v. St. Paul Fire & Marine Ins. Co.*, 2 F.3d 801, 813 (8th Cir. 1993))); *Willis v. State Farm Fire & Cas. Co.*, 219 F.3d 715, 719 (8th Cir. 2000) (“[T]he jury could reasonably infer that [the plaintiff] intended the ordinary and probable consequences of his actions.” (citing *Bennett v. State*, 36 S.W. 947 (Ark. 1896))).

52. 526 U.S. 1 (1999).

53. *See id.* at 7-9, 12.

54. *See id.* at 9.

55. 511 U.S. 825 (1994).

56. *See id.* at 838-40.

57. *Id.* at 838 (emphasis added).

unspecified circumstances, intent may be defined in objective terms.⁵⁸ In other words, although the possibility is raised by no more than a suggestion, it may be that in some situations, neither knowledge nor purpose nor even awareness of probability is necessary to prove intent, and that intent can be made out by blameworthy circumstances without any subjective mens rea at all.⁵⁹

It is one thing to say that some crimes (or torts) can be committed by a lesser mens rea than purpose or knowledge. Some crimes and torts require only recklessness or negligence, and there are crimes and torts of strict liability, of course.⁶⁰ It is another thing, and surprising, to see a suggested treatment of intent that dispenses with purpose and knowledge and substitutes only an objective kind of blameworthiness.

D. *Specific Intent: What Does It Mean?*

Then, there is the conundrum posed by the concept of “specific” intent. Some crimes are said to be specific intent crimes, while others are crimes of general intent.⁶¹ The term ultimately is illogical to the extent that it seems to imply a particularized kind of intent, because the intent that makes out specific intent is not really different from intent as it might be defined by the particular jurisdiction for non-specific intent.⁶² What specific intent really means is that the actor has intent to commit (or knowledge that he is committing) all of the elements of the crime or tort at issue.⁶³ *Black’s Law Dictionary* probably provides the most serviceable definition by saying that specific intent is “[t]he intent to accomplish the precise criminal act that one is . . . charged with.”⁶⁴

58. *See id.*

59. *See id.* at 836; *see, e.g.*, *United States v. Lavallie*, 666 F.2d 1217, 1219 (8th Cir. 1981) (“Rape is a crime requiring general intent—only that indicated by the commission of the offense.” (citing *United States v. Thornton*, 498 F.2d 749, 752-53 (D.C. Cir. 1974))). The *Thornton* court noted that “[s]ome criminal offenses require only a general intent. Where this is so, and it is shown that a person has knowingly committed an act which the law makes a crime, intent may be inferred from the doing of the act.” *Thornton*, 498 F.2d at 751 (citation omitted).

60. *See* MODEL PENAL CODE §§ 210.3(1)(a), 210.4(1) (Proposed Official Draft 1962) (defining manslaughter, which can be committed recklessly, and negligent homicide); *see also id.* § 2.05(2)(a) (allowing for crimes that do not require mental elements, i.e., strict liability crimes).

61. *See* DAVID CRUMP ET AL., *CRIMINAL LAW: CASES, STATUTES, AND LAWYERING STRATEGIES* 176-78 (2d ed. 2010) (discussing the difference between general and specific intent crimes).

62. *See* JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 142 (2d ed. 1960) (“[A]n essential characteristic of [intent] is that it is directed towards a definite end. To assert therefore that an intention is ‘specific’ is to employ a superfluous term . . .”).

63. *See infra* notes 65-70 and accompanying text.

64. *BLACK’S LAW DICTIONARY* 826 (8th ed. 2004).

As we shall see momentarily, this definition merely means that the mens rea must extend to all elements of the crime or tort. The Supreme Court illustrated this point in *Clark v. Arizona*,⁶⁵ by treating “specific intent” to kill a law enforcement officer as synonymous with killing a law enforcement officer while having “knowledge that he was doing so,” meaning knowledge that the victim was a law enforcement officer, as opposed to intent to kill a person who happened to be a law enforcement officer without knowing that the person was a law enforcement officer.⁶⁶ Without the knowledge that the assaultee was an officer, the crime would have been of a lower degree.⁶⁷ In federal criminal law, assaulting a federal officer is usually viewed as a general intent crime.⁶⁸ But some courts have held that assault on a federal officer *with a deadly weapon* is a specific intent crime.⁶⁹ This is an issue that arises most frequently when the officer is undercover.⁷⁰

Consider the following two hypothetical situations, which may produce different outcomes, for the enhanced offense of assaulting an officer with a deadly weapon, if specific intent is required.

Case No. 1: No Specific Intent. Dan Defendant uses a deadly weapon to assault a plainclothes individual named I.B. Kopp. Mr. Kopp is in fact an undercover federal officer working for the Drug Enforcement Agency (“DEA”). Dan has no reason to know that Kopp is a DEA agent. He thinks Kopp is a co-conspirator, which is what Kopp is pretending to be. Dan uses a firearm, a deadly weapon, to assault Kopp for an independent reason, such as that he believes Kopp is cheating at cards. In

65. 548 U.S. 735 (2006).

66. *Id.* at 743.

67. *See id.* at 743 n.1 (“[A] person commits first degree murder if . . . [i]ntending or knowing that the person’s conduct will cause death to a law enforcement officer, the person causes the death of a law enforcement officer who is in the line of duty.” (quoting ARIZ. REV. STAT. ANN. § 13-1105(A)(3) (2005))).

68. *See* United States v. Feola, 420 U.S. 671, 684, 686 (1975) (holding that criminal liability will attach so long as there is a finding of “intent to assault”; “intent to assault a federal officer” is not required). The qualification “usually” is required because some courts have interpreted (or misinterpreted) *Feola* as requiring specific intent. *See, e.g.,* United States v. Manelli, 667 F.2d 695, 696 (8th Cir. 1981) (“Specific intent is an essential element of the crime of assaulting a federal officer in the performance of his duties.” (citing *Feola*, 420 U.S. at 686)).

69. *See Manelli*, 667 F.2d at 696 (“The district court properly instructed the jury that the government was required ‘to prove beyond a reasonable doubt that [Manelli] aimed his automobile at FBI Agent Meyer, with the specific intent to use the vehicle as a deadly weapon.’” (alteration in original) (citation omitted)). Other courts, even in the same circuit, have held the opposite. *See* United States v. Oakie, 12 F.3d 1436, 1443 (8th Cir. 1993) (explaining that conflicting decisions exist as to whether specific intent is required).

70. *See, e.g.,* United States v. Alvarez, 755 F.2d 830, 836, 842-44 (11th Cir. 1985) (holding that a finding of specific intent is not necessary to convict defendant of assaulting an undercover federal officer with a deadly weapon).

jurisdictions requiring specific intent for the enhanced offense of assaulting an officer with a deadly weapon, *Dan is guilty only of assaulting a federal officer, because specific intent is lacking.*

Case No. 2: Specific Intent Is Present. Dan Defendant assaults a plainclothes officer, who is the same I.B. Kopp, with a deadly weapon. But this time, Dan is substantially certain that Kopp is a law enforcement officer: a DEA agent. He has just learned Kopp's identity, and enraged, he beats Kopp, or shoots him. This time, *Dan is guilty of assaulting a federal officer with a deadly weapon, because his knowledge that the victim is a federal officer means that Dan has specific intent.* In fact, it does not matter what Dan's motivation is. A purpose to assault a federal officer is not required; only knowledge is required. Thus, if Dan were to know of Kopp's status as an officer, but not care about that, and if Dan were to shoot Kopp because he believed Kopp cheated him at cards, Dan would still be guilty of assaulting a federal officer with a deadly weapon, because knowledge supplies the required specific intent.

The Supreme Court followed this line of analysis in *Clark* under a state statute, by holding that the defendant's specific intent to assault an officer was supplied by his committing the offense against a law enforcement officer while having "knowledge that he was doing so."⁷¹

It would be a good thing, actually, if the law were to dispense altogether with the concept of specific intent. It causes confusion. It does not imply a different kind or character of intent; it only means that mens rea is attached to all elements of the crime.⁷² This meaning follows from the definition offered in *Black's Law Dictionary*, because "intent to accomplish the precise criminal act" simply means that the actor has a guilty mind, or in other words knowledge, of all of the crime elements the actor is committing.⁷³ The MPC, in fact, does not use the concept of specific intent; instead, it specifies the mental state attached to each element or, absent that specification, provides a default rule specifying that the relevant mental state applies to all elements.⁷⁴ At the same time, general intent is not exactly the opposite of specific intent, and it is also a distracting term. For example, although assault on a federal officer is said to be a general intent crime,⁷⁵ it requires intent to commit the

71. *Clark*, 548 U.S. at 743, 747.

72. *See supra* notes 63-70 and accompanying text.

73. BLACK'S LAW DICTIONARY, *supra* note 64, at 826.

74. MODEL PENAL CODE § 2.02(4) (Proposed Official Draft 1962).

75. *See supra* note 68 and accompanying text.

assault,⁷⁶ just as assaulting an officer with a deadly weapon does.⁷⁷ The relevant difference, in some jurisdictions, is not the type of intent but the extension of mens rea requirements to the other elements of assaulting an officer with a deadly weapon.⁷⁸ Thus, “[t]he ‘general intent’ designation . . . does not define a particular *mens rea*; it merely clarifies that the crime does not require ‘specific intent.’”⁷⁹ “‘It remains to define what that intent is.’”⁸⁰ In other settings, such as murder, the statement that the crime is a general intent crime is doubly confusing, because it may be used to mean that the mens rea for murder can be less than intent.⁸¹ In summary, specific intent and general intent are terms of obfuscation, although lawyers must be able to deal with them because the courts, unfortunately, use them.

III. THE AMBIGUITY OF THE INTENT DEFINITIONS

A. *Proof of Intent and Its Implications for Defining Intent: Circumstantial Evidence and the Jury*

Aside from the problem of confusion, why does it matter how we define intent? The answer begins with the proposition that intent, of course, cannot be seen directly by witnesses.⁸² It eludes all five senses. It is known only to the actor, and even here, only sometimes, because some definitions of intent allow the actor to readily believe that there is no intent, even when there is.⁸³ There really are only two ways of proving intent: by an admission of the actor whose intent is in question (one that is admissible in evidence), or by circumstantial evidence.⁸⁴ As

76. See *United States v. Feola*, 420 U.S. 671, 684 (1975) (“All the statute requires is an intent to assault . . .”).

77. See *United States v. Staggs*, 553 F.2d 1073, 1074, 1076 (7th Cir. 1977) (holding that “specific intent to commit assault is a prerequisite to conviction” for assaulting a federal officer with a deadly weapon).

78. See *United States v. Jim*, 865 F.2d 211, 212-13 (9th Cir. 1989).

79. *United States v. Grajeda*, 581 F.3d 1186, 1193 (9th Cir. 2009) (citing *People v. Rocha*, 479 P.2d 372, 376 (Cal. 1971)).

80. See *id.* at 1193 (quoting *Rocha*, 479 P.2d at 376).

81. See, e.g., *United States v. Brown*, 287 F.3d 965, 974 (10th Cir. 2002) (stating that second-degree murder is a general intent crime that can be proved by recklessness, which requires a lesser degree of culpability than “intent”).

82. See *Commonwealth v. Pond*, 846 A.2d 699, 707 (Pa. Super. Ct. 2004) (“Often, intent cannot be proven directly but must be inferred from examination of the facts and circumstances of the case.” (quoting *Commonwealth v. Willetts*, 419 A.2d 1280, 1281 (Pa. Super. Ct. 1980))).

83. See, e.g., 1 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 1 cmt. c, illus. 3 (2005) (using the “Jones Company” illustration to demonstrate this point).

84. See *Long v. State*, 867 N.E.2d 606, 614 (Ind. Ct. App. 2007) (stating that intent is a “mental function,” which “may be proven by circumstantial evidence” in the absence of a

the Supreme Court put it in *Devenpeck v. Alford*,⁸⁵ “intent is *always* determined by objective means.”⁸⁶ The corollary is “the oldest rule of evidence[, which is] that a man is presumed to intend the natural and probable consequences of his acts.”⁸⁷ In other words, the law evaluates intent by what the actor does, which means that the law evaluates intent by circumstantial evidence.

At the same time, intent is easily denied or rebutted, even when it exists, and sometimes the denial is accompanied by convincing belief on the part of the actor.⁸⁸ Circumstantial evidence is inherently ambiguous, and the denial may make it more so.⁸⁹ It is in this situation that the precise meaning of intent matters most. This is true unless the actor confesses. But often, the precipitating event for a confession is the actor’s realization that the circumstantial evidence, when compared with the definition of intent, is very strong.⁹⁰ In other words, absent an epiphany on the part of the actor, the interface between circumstantial evidence and the definition of intent is always critical.

For example, imagine a case in which a conscious desire to cause harm on the part of the actor is missing, but the actor knows that the harm is probable. This description may fit the hypothetical case that began this Article, in which the shop boss sends workers into a toxic environment with awareness that harm is “probable,” though he does not desire that harm, and in fact regrets it. The necessary result may be unexpected to the casual observer. In a criminal case, a reasonable doubt is enough to acquit.⁹¹ If the evidence strongly suggests that the shop boss knew, but not convincingly, it might appear at first blush that intent would be present. But it is not. The “purpose” type of intent is missing,

confession).

85. 543 U.S. 146 (2004).

86. *Id.* at 154.

87. *Giles v. California*, 128 S. Ct. 2678, 2698 (2008) (Breyer, J., dissenting) (quoting *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 570 (1973)).

88. *See, e.g., General Mills, Inc. v. Kellogg Co.*, 824 F.2d 622, 624, 627 (8th Cir. 1987) (upholding the district court’s ruling that General Mills had successfully rebutted intent to infringe on Kellogg’s trademark).

89. *See, e.g., Williamson Oil Co. v. Philip Morris U.S.A.*, 346 F.3d 1287, 1300 (11th Cir. 2003) (“The problem with . . . reliance on circumstantial evidence [in price fixing cases] is that such evidence is by its nature ambiguous, and necessarily requires the drawing of one or more inferences in order to substantiate claims of illegal conspiracy.”).

90. *See* Saul M. Kassir & Gisli H. Gudjonsson, *True Crimes, False Confessions*, SCI. AM. MIND, June 2005, at 24, 29, available at <http://www.martytankleff.org/PDF/TrueCrimesFalseConfessions.pdf> (“Although most suspects confess for a combination of reasons, the most critical is their belief about the strength of the evidence against them.”).

91. *See Victor v. Nebraska*, 511 U.S. 1, 5 (1994) (“The government must prove beyond a reasonable doubt every element of a charged offense.” (citing *In re Winship*, 397 U.S. 358, 361 (1970))).

because the shop boss does not desire the harm.⁹² In addition, intent as indifference coupled with knowledge is missing, at least under the Restatement definition, because there is a reasonable doubt whether the shop boss was “substantially certain” that death would result.⁹³

Given this situation, lawyers who address juries usually try to use word-pictures to get across the way in which intent is proved. The process begins with the explanation that intent can’t be seen and is judged by the person’s actions.⁹⁴ Then, a plaintiff or government attorney may tell the venire or the jury, “If a person inside this courtroom were to walk to the door in a normal way, open the door, and smoothly walk out of this courtroom, that would be evidence that he intended to leave the courtroom. On the other hand, if a group of people were to drag that same person out of here kicking and screaming, that would be evidence that he didn’t intend to leave.” Sometimes the analogies are quaint: “Even a dog can tell the difference between being kicked and being tripped over. The dog knows what intent means.” And these pronouncements may be followed by a question to a venireperson: “Ms. Jones, do you think you can judge the defendant’s intent by what the defendant’s employees did?” A defendant, of course, is likely to use similar kinds of formulas, with the opposite meaning. “If I walked into the wrong courtroom, realized the mistake, and left, that would be evidence that I didn’t really intend to walk into that particular courtroom.”⁹⁵

The correspondence of these dueling analogies to the relevant concept of intent may be crude sometimes, but always, the rhetoric is chosen by adversaries so that it nudges the jury toward the desired results.⁹⁶ Lawyers understand the ambiguity of definitions of intent, and they exploit that ambiguity—as lawyers are expected and taught to do.⁹⁷ The inevitable tendency of adversaries to bend concepts of intent, especially when there is plenty of wiggle room, is another reason for concern about the definition of intent.⁹⁸ The definition needs to be

92. See *supra* notes 4, 15-26 and accompanying text.

93. See 1 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 1(b) (2005); *supra* notes 4, 27-42 and accompanying text.

94. See *supra* notes 82-84 and accompanying text.

95. These hypothetical remarks are constructed from the author’s own experience in trying jury trials. See generally David Crump, *Attorneys’ Goals and Tactics in Voir Dire Examination*, 43 TEX. B.J. 244 (1980) (describing tactics in voir dire).

96. See *id.* at 244 (explaining how lawyers can use voir dire to emphasize favorable law or facts, and limit the effect of unfavorable law or facts).

97. See W. David Slawson, *Changing How We Teach: A Critique of the Case Method*, 74 S. CAL. L. REV. 343, 343-44 (2000).

98. See Crump, *supra* note 95, at 244 (explaining how lawyers manipulate the presentation of law or facts during voir dire).

considered with precision, but more than that: It needs to take account of the way in which adversaries may push the definition into shapes that would not have been what lawmakers wanted if they had seen how their words might be interpreted. It can be anticipated, for example, that the two lawyers in the toxic environment case that began this Article would each try to nudge the jury to accept opposing word-pictures that made it more likely for the jury to view intent as the opposite states of mind required for them, respectively, to win.

And the definition of intent needs to take into account that it is the understanding of intent by lay jurors that matters, not the understanding of the lawyers who wrote the law.⁹⁹ In front of a jury, part of a lawyer's job is to take advantage of ambiguity by interpreting the definition so that the jury's understanding of intent fits the client's interests, even if the interpretation is far from the expectations of lawgivers.¹⁰⁰ Lay jurors, in turn, cannot be expected to know what lawmakers had in mind when they used the word intent, and it makes sense for jurors sometimes to listen, and adopt, meanings of a word that were never contemplated.

B. The Situations in Which Intent Is Placed in Controversy, and the Range of Rebuttals that May Oppose It

As the example that opened this Article shows, a claim involving intent may be answered in any one of several ways. In fact, it may be answered by a blizzard of denials that internally reinforce each other. In front of a jury, with a poorly calibrated (or no) definition of intent, these rebuttals may have success in varying degrees, even when they should not, according to the understanding of the law by the courts. There is an infinite variety of denials that actors may offer, of course, but they tend to run in patterns. Some may be legitimate interpretations of the word, while some usually are not. But again, this aspect of denials does not always determine their success. With no claim of completeness, I offer the following catalogue of rebuttals of intent.

The Involuntary Act Rebuttal. "The gun went off without my having pulled the trigger."¹⁰¹ "I was forced to do it by company

99. Cf. *Matarese v. Buka*, 897 N.E.2d 893, 897 (Ill. App. Ct. 2008) (pointing out that pattern jury instruction was improved to make it "more understandable to a jury").

100. See Slawson, *supra* note 97, at 343, 345 (stating that students are taught to "read . . . adversarially" so that they can learn to take advantage of ambiguities in the law on behalf of future clients).

101. See, e.g., *People v. Jackson*, No. D053958, 2009 WL 3823950, at *1-3 (Cal. Ct. App. Nov. 17, 2009) (defendant claimed that "the gun went off accidentally" but was not believed and was convicted of murder). A Westlaw search of "'the gun went off'" performed on Sept. 25, 2010 in the "ALLCASES" database produced 4836 documents, indicating that this rebuttal of intent is a

policy.”¹⁰² This rebuttal takes the form of a claim that someone else, or some force of nature, was the true agency that caused the event.¹⁰³ Sometimes, the claim is not credible, as is usually the case when there is a claim of a spontaneously-shooting firearm.¹⁰⁴ Sometimes, the rebuttal is credible, but furnishes a dubious argument for exoneration, as with the company policy defense. Sometimes, it is credible and leads to exoneration.¹⁰⁵

And sometimes it is hard to sort it all out. The case that begins this Article furnishes a knotty problem here. Notice that the shop boss who sent workers into the toxic environment rebutted intent, partly, on the ground that “company policy” required him to proceed with the task. On the one hand, this claim probably is largely irrelevant, even if it is true. Company policy is not a general defense to homicide. On the other hand, a jury may credit it—and may give significance to it. Jurors are not given instructions so case specific that they eliminate company policy from consideration.¹⁰⁶ There will be jurors, probably influential ones, who have had to deal with dysfunctional company policy. Jurors may even reason, with a certain logic, that following company policy is one indication that the actor did not see ensuing harm as substantially certain, and thus, as a rebuttal of intent. If no definition of intent is given, as it is not in some jurisdictions,¹⁰⁷ the problem of jury misunderstanding is exacerbated. In this toxic environment case, it is important for intent to be defined in a careful way. Perhaps the Restatement definition¹⁰⁸ is the best that can be conveyed meaningfully, given that the only engineering we have to get across the concepts is words. It should be recognized, however, that before a jury, intent may take on a meaning that none of the lawmakers ever wanted.

frequent one.

102. *See, e.g.,* *Burke v. Lab. Corp. of Am.*, No. 8:08ocvo2072oTo24oTGW, 2009 WL 3242014, at *1 (M.D. Fla. Oct. 6, 2009) (explaining that defendant waited until the plaintiff had returned from sick leave to fire her because of company policy requirements). A Westlaw search of “‘forced required’ /s ‘company policy’” performed on Sept. 25, 2010 in the “ALLCASES” database produced 1742 documents.

103. *See, e.g.,* *Burke*, 2009 WL 3242014, at *1; *Jackson*, 2009 WL 3823950, at *1.

104. *See Jackson*, 2009 WL 3823950, at *3.

105. *See, e.g.,* *Ferriolo v. City of New York*, 888 N.Y.S.2d 400, 400 (App. Div. 2009) (gun went off accidentally while being transferred from one place to another; transferor not charged).

106. *See, e.g.,* FLA. SUPREME COURT, STANDARD JURY INSTRUCTIONS—CIVIL CASES § 414.5, [http://www.floridasupremecourt.org/civ_jury_instructions/2010/400/414\(5\).rtf](http://www.floridasupremecourt.org/civ_jury_instructions/2010/400/414(5).rtf). (model jury instruction for issues on claim in worker’s compensation cases, which contains no reference to company policy).

107. *See supra* notes 9-10 and accompanying text.

108. *See supra* Part II.B.

Blackout or Impairment. “I blacked out, and I guess that’s when the gun went off.”¹⁰⁹ “I was taking cold medicine, and I had no idea what was happening because my head was stuffed up.”¹¹⁰ A similar rebuttal appears in the hypothetical case that began this Article, with the shop boss claiming impairment by medicine.

Lack of Awareness that the Outcome Was Substantially Certain. “I fired a warning shot just to scare him. I didn’t think it was likely that it would hit him.”¹¹¹ This rebuttal may take the form of an admission of carelessness, but not intent, or it may deny carelessness as well as intent.¹¹² Again, the toxic environment case provides an illustration. The shop boss’s rebuttal of intent includes the claim that “I didn’t know anything like this would happen.” His intent cannot be seen with the eye or touched by fingers; it can be proved only circumstantially. If there is strong evidence that the shop boss knew that the danger was great—if, for example, he had called a manager to complain about having to send the workers in because “someone’s likely to be killed”—intent may be clear, at least if intent is defined in terms of knowledge. Or it may not. Jurors may consider that the manager’s instructions to go ahead indicate a lack of knowledge. And in this worker’s compensation case, it should be remembered, negligence or recklessness is not enough. The plaintiff’s claim requires proof of intent by a preponderance of the evidence.¹¹³

Lack of Knowledge that the Outcome Was Even Possible. The denial of knowledge may go farther and take the form of an expressed belief that the harm that occurred was not even within the realm of possibility. “Not only did I not intend to fire the gun, I actually checked the chamber and saw that there wasn’t a bullet in it—or at least that’s what I saw. I brandished the gun just to warn him and scare him off.”¹¹⁴

109. See, e.g., *State v. Garcia*, 2009 WL 3808269 (N.J. Super. Ct. App. Div. Nov. 6, 2009) (per curiam) (defendant claimed he “blacked out,” contrary to wedding video that showed him deliberately shooting bride who was his ex-girlfriend; purposeful murder conviction affirmed). A Westlaw search performed on Sept. 25, 2010 in the “ALLCASES” database showed 877 documents responsive to “‘defendant’ /s ‘blacked out.’”

110. See, e.g., *State v. Zubrowski*, 921 A.2d 667, 675 (Conn. App. Ct. 2007) (defendant claimed that prescription medication rendered him intoxicated, which negated specific intent to kill; murder conviction affirmed).

111. Cf. *People v. Vanvels*, No. 285138, 2009 WL 3014940, at *1-2 (Mich. Ct. App. Sept. 22, 2009) (defendant claimed “warning shot”; murder conviction affirmed). A Westlaw search of “‘defendant’ /s ‘warning shot’” performed on Sept. 25, 2010 in the “ALLCASES” database produced 606 documents.

112. See, e.g., *id.* at *1-2 (defendant claims carelessness, but not intent); *State v. Cruz*, 691 S.E.2d 47, 50, 52 (N.C. Ct. App. 2010) (defendant denies both carelessness and intent by claiming that he meant to fire a warning shot to help him get away from his assailant).

113. See *supra* note 2 and accompanying text.

114. See, e.g., *In re Mora*, No. E043685, 2008 WL 934015, at *8, *10 (Cal. Ct. App. Apr. 8, 2008) (defendant claimed there was no bullet in the chamber; parole denial upheld). A Westlaw

This claim, like the others, may be true or untrue. If it is true—or if a jury has a reasonable doubt about it—it successfully rebuts intent. Notice that in the toxic environment case, the shop boss claims that “[t]he place had been cleaned out just a few days before.”¹¹⁵ He believed that its having been scrubbed recently meant that the danger did not exist, or so he wants the jury to believe. As in the case of a denial that the actor was aware of a substantial certainty of harm, this denial of awareness that the harm was even possible exonerates the actor, if it is true—or rather, in the real world, it exonerates him if a jury has enough doubt about its truth.

A Claim of Intent Only to Obtain Result X, but Not to Obtain Result Y, Even Though Result Y Was the Mechanism for Achieving Result X. When it is stated in this way, this rebuttal sounds ridiculous. It usually is not stated in a way that makes it quite so baldly illogical. “I meant to stab him to [allegedly] defend myself, but I didn’t mean to hurt him.” A rebuttal virtually identical to this one appears in at least one appellate opinion,¹¹⁶ and it undoubtedly has been used in too many other cases to count.

A similar theory of rebuttal, in a quite different situation, appeared in one of the high-profile prosecutions of Dr. Jack Kevorkian, the so-called “Doctor Death.”¹¹⁷ Dr. Kevorkian designed a “suicide machine,” which could dispense a sequential cocktail of lethal substances into a suffering patient.¹¹⁸ His defense to an aiding suicide prosecution included the claim that he did not intend to help cause his patients’ death; he intended only “to end their pain.”¹¹⁹ Since the mechanism for ending the pain was to cause death, the denial of intent ultimately was unsuccessful, but it worked in some early cases.¹²⁰ In fact, it seems to have fooled television correspondents who reported on the Kevorkian story.¹²¹

search of “‘defendant’ /s ‘no bullet’” performed on Sept. 25, 2010 in the “ALLCASES” database produced 189 documents, although many were not analogous to the example.

115. See *supra* note 4 and accompanying text.

116. See *Martinez v. State*, 16 S.W.3d 845, 847-48 (Tex. Crim. App. 2000).

117. See *People v. Kevorkian*, 639 N.W.2d 291, 300 (Mich. Ct. App. 2001).

118. See *People v. Kevorkian*, 527 N.W.2d 714, 733 (Mich. 1994) (describing Kevorkian’s “suicide machine” in detail).

119. See *Frontline: The Kevorkian Verdict* (PBS television broadcast May 14, 1996), <http://www.pbs.org/wgbh/pages/frontline/kevorkian/kevorkianscript.html>.

120. *Id.*

121. The *Frontline* narrator said, “Was [Kevorkian] guilty because he intended to help his patients commit suicide? Or was he not guilty because he only intended to end their pain and suffering?” *Id.* Kevorkian intended, actually, to do both: to do the former as a means of doing the latter. See *Kevorkian*, 639 N.W.2d at 296, 300.

And this “not-X-but-Y-even-though-Y-requires-X” rebuttal also appears in the hypothetical case of the shop boss who sent workers into the toxic environment. The shop boss claims that his “purpose was to complete the task, not to hurt anyone.”¹²² If this claim is believed, it may rebut intent of the “purpose” type. The shop boss’s argument is that he did not want to injure anyone. In fact, he may have regretted the fact that any harm occurred and thus, he lacks intent if intent is defined as “purpose.” This meaning of intent allows the shop boss to state his rebuttal vehemently, with heartfelt conviction; he knows that he did not want any harm to occur, and that is what he believes intent means. But if intent is defined to include substantial certainty, the result may be different. By hypothesis, there is evidence that the shop boss knew of the danger.¹²³

Everything ultimately depends, however, upon the jury’s ability to combine several kinds of inquiry. The jurors must first decide whether the shop boss knew of probable danger. Then, they must assess just how strong that danger was, and how well the boss knew of the danger. Finally, the jurors must keep straight in their minds the two different kinds of intent. They must perceive that the shop boss’s denial of intent, though strongly stated, rebuts only the “purpose” type of intent. They must retain awareness that intent can also be supplied by substantial certainty under the Restatement, if that applies under the court’s instructions. As silly as the “X-and-Y” rebuttal seems at first blush, it may not be easy for jurors to follow all of these steps. The Restatement commentary contains simple examples to illustrate its principles,¹²⁴ and if these are needed for licensed lawyers to be able to follow the ideas reliably, one can expect that the task would be harder for lay jurors.

IV. WHICH DEFINITIONS OF INTENT SHOULD BE USED FOR WHAT KINDS OF MISCONDUCT?

There are circumstances in which it makes sense to define the meaning of intent narrowly. In those situations, the appropriate definition will require purpose, or a “conscious object” to engage in the conduct or cause the result.¹²⁵ Several factors might contribute to a decision to adopt this narrower definition. The availability of proof of this kind of intent is one factor. Thus, it may make sense to use a

122. See *supra* note 4 and accompanying text.

123. See *supra* Part I.

124. See 1 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 1, illus. 1–5 (2005).

125. MODEL PENAL CODE § 2.02(2)(a) (Proposed Official Draft 1962).

conscious object standard for the assault element of assaulting a law enforcement officer, but to require only knowledge of the officer's status as the required mental state for this element, since knowledge of that status may be relatively easy to prove when motive (in other words, precipitation of the assault by the officer's status, as opposed to some other cause) may be much more difficult to show by evidence.¹²⁶ Another factor is the placement of the violation in the hierarchy of crimes or torts—more serious crimes or torts may sometimes call for more serious kinds of intent. Thus, it makes sense for capital murder, which is subject to the death penalty in some states,¹²⁷ to require a more concentrated mental state, such as conscious objective to kill, than would be required for murder, which the MPC allows to be made out by intent and lesser mental states.¹²⁸ And still another factor may be a concern that the definition of the particular violation needs to be narrowly defined because it is easily confused with innocent conduct. An example of this factor is provided by the treatment of attempt crimes in the law. For example, the MPC requires a high level of intent for the crime of criminal solicitation,¹²⁹ as part of the MPC's protection against confusion of innocent conduct with incomplete, but intended, criminal acts.

Likewise, there is a place for a lesser standard of intent. Sometimes, a serious crime can result from indifference just as it can from conscious desire.¹³⁰ A killer, who commits his crime in the spur of the moment, with indifference toward the result, should be guilty of murder just as a killer who desires the result. In recognition of this idea, the MPC defines murder so that it can be found upon proof of either purpose or knowledge.¹³¹ Absent this dual standard, the indifferent killer would be entitled to an acquittal or conviction of a lesser crime.¹³² Another factor is the likely availability of proof. This factor is the corollary of the principle that a probability of readily available proof may justify a high standard of intent. Conversely, a lesser likelihood of definitive evidence probably should be a factor in preferring a standard of knowledge, or substantial certainty, rather than conscious object or purpose. Again, assaulting a law enforcement officer should require only knowledge that

126. See *supra* Part III.A.

127. See, e.g., TEX. PENAL CODE ANN. §§ 12.31, 19.03 (West 2003) (illustrating that the death penalty is available for a capital murder conviction).

128. See MODEL PENAL CODE § 210.2(1)(a)–(b).

129. See *id.* § 5.02(1) (requiring “purpose”).

130. See *supra* Part II.A (discussing how a killing committed out of indifference would not fit the narrow “purpose” definition of intent).

131. See MODEL PENAL CODE § 210.2(1)(a).

132. See *id.* §§ 210.3–4 (defining manslaughter and negligent homicide).

the victim is an officer, rather than a conscious desire to assault the victim for that precise reason, which may be too evanescent to prove. Finally, a lesser kind of intent probably should be considered when the concern for confusion with innocent conduct is less. Thus, the Restatement (Third) of Torts defines intent so that an intentional tort can be made out not only by purpose or desire to do harm, but also by knowledge that the harmful result will occur, or rather by substantial certainty to that effect.¹³³

Vague definitions of intent that do not measure up to these standards are more difficult to justify. For example, when federal law allows intent to be proved not only by purpose or by knowledge, but also by some undefined degree of mere probability,¹³⁴ the meaning of intent is compromised. The standard becomes not intent, but recklessness or even negligence.¹³⁵ Certainly, some kinds of crimes as well as torts should be found on the basis of recklessness or negligence, and for that matter strict liability is appropriate in some circumstances. But calling such a state of mind intent is distortion. A nomenclature that is out of touch with an artificially defined meaning assigned to it invites application not of the correctly defined meaning, but of idiosyncratic notions conjured by the nomenclature. In other words, telling the jury that intent must be proved, but then telling the jury that intent does not require what we usually think of as intent, is likely to produce arbitrary results. It is as if we showed the jurors a picture of a horse, but told them to think of it as a duck. The genius of the MPC lies largely in its five clearly defined mental states of purpose, knowledge, recklessness, criminal negligence, and strict liability. The MPC has its share of dubious provisions,¹³⁶ but it would be a good thing if more jurisdictions, including the federal, were to adopt the MPC mental states—provided, of course, they correctly assign them to appropriate crimes and torts by using principles similar to those in the preceding paragraphs of this section.

V. CONCLUSION

Intent sounds like an easy concept. However, it is not quite as easy as it seems. It gives the appearance of a precise concept. It is not that, at all. Some definitions of intent confine it to desire or purpose. That

133. See 1 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 1 (2005).

134. See *supra* notes 46-57 and accompanying text.

135. See *supra* notes 57-60 and accompanying text.

136. See *supra* notes 24-26 and accompanying text.

meaning confines intent to situations in which the actor consciously wills the result, and this is a narrow definition. Some definitions allow knowledge without purpose, with indifference being sufficient so long as there is awareness. This meaning broadens the definition to include, as intent, a state of mind in which the actor has an awareness that the result is likely. Different jurisdictions provide different standards for the required likelihood of which the actor must be aware. The Restatement's substantial certainty definition contrasts against definitions that require only an awareness of some degrees of probability without setting any levels of probability. There even are statements that intent can be made out by "objective" blameworthiness, statements that appear to dispense with any requirement of mental intermediation altogether.

In spite of this variation, the definition of intent matters. Intent is the quintessential jury issue,¹³⁷ and if the definition as understood by lay jurors fits poorly with the expectations of lawmakers, we can expect arbitrary results. After all, there is no way for jurors to divine the plans of lawmakers except by the words they are given. Furthermore, the definition of intent is particularly sensitive because intent cannot be seen, heard, or touched. It must be proved, as the Supreme Court has said, by "objective means," which is to say that it must be proved by circumstantial evidence.¹³⁸ An ill-fitting definition can mean that intent becomes impossible to prove. At the same time, intent is readily denied, even when it exists. And because there are different concepts of intent, the actor may sound utterly convincing and be, himself, convinced of the denial, because he happens to be using a narrow definition of intent when the law calls for a broader concept. By the same token, overly-broad definitions of intent might make the jury find it to exist when only negligence is present, so that the label results in a mistaken verdict of conviction or liability. The trick is in validating those kinds of rebuttals of intent that the lawmakers' plans would wish to exonerate, while rejecting those rebuttals that lawmakers believe should not negate intent, when both kinds of rebuttals are likely to sound convincing.

This conclusion leads to the idea that different concepts of intent should apply to different situations. The appropriate definition should depend upon factors such as the likely availability of proof, the seriousness of the offense or tort, its severity within a hierarchy of other offenses, and the difficulty of otherwise distinguishing innocent

137. See *McCormick v. United States*, 500 U.S. 257, 270 (1991) ("It goes without saying that matters of intent are for the jury to consider." (citing *Cheek v. United States*, 498 U.S. 192, 203 (1991))).

138. *Devenpeck v. Alford*, 543 U.S. 146, 154 (2004).

conduct.¹³⁹ A definition of intent that depends upon purpose or desire should be reserved for offenses involving high likelihood of proof, high degrees of seriousness, top positions in the hierarchy of crimes or torts, and difficulty in distinguishing innocent conduct. This conclusion implies that a lower standard of knowledge or substantial certainty should apply to offenses with lesser likelihood of proof, less seriousness, lower status, and lesser difficulty in separating inoffensive actors.

The concept of specific intent is an obfuscation, as is the contrasting label of general intent. A standard of specific intent should be defined as a mere requirement that mens rea extend to all of the elements of the offense or tort. Thus, it would be good if the Supreme Court were to clarify the point that specific intent is not a special variety of intent, but only an expression of the requirement that the actor must intend the specific crime accomplished.¹⁴⁰ Better yet, it would be a good thing if the label were abolished in favor of the solution adopted by the MPC: that of specifying mens rea for all elements of crimes. And finally, the law should avoid concepts of intent that are composed only of requirements that actors be aware of unspecified probabilities that harmful results may occur. It is unnatural and confusing to refer to these states of mind as intent, and they really refer instead to recklessness, negligence, or no mental state at all. In other words, conduct reachable only by strict liability. All of this can be summed up by saying that intent is a knotty concept with many faces, and the law should define it as carefully as words will allow, while applying different definitions to different situations.

139. *See supra* Part IV.

140. *See supra* Part II.D.