CRIMES OF CARELESSNESS IN THE UNITED STATES

by Prof. Paul H. Robinson*

I. Introduction

Since the publication of the Proposed Official Draft of a Model Penal Code by the American Law Institute in 1962, there has been a clear trend in the United States toward the use of the four-tiered system of culpable states of mind proposed therein: "purposely" (or "intentionally"), "knowingly", "recklessly", and "negligently". I take the term "carelessness", as used in describing the topic for discussion here, to include both "recklessness" and "negligence", as those terms are defined below.

The Model Penal Code defines recklessly and negligently as follows:[1/]

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. ...
>
> A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. ...

This accurately reflects common usage in the United States and highlights the distinction between the two concepts. The essence of negligence is the failure to be aware of a risk that one ought to have been aware of (that the ordinary, reasonable person would have been aware of). Recklessness requires that the actor actually have been aware of the risk yet consciously disregarded it. The common denominator between recklessness and carelessness is, then, the existence of a risk; and I take this to be the pertinent element of "carelessness."

The Model Penal Code also describes the nature of the risk which must be involved. For recklessness,

> The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

For negligence,

> The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

These terms of culpability, as used in the Model Penal Code and as often used by criminal lawyers and theoreticians, serve a different function, however, than they will in our discussion. In the Model Penal Code these culpable states of mind describe the mental element which must accompany a particular element of

an offense. For example, with regard to an offense of statutory rape, which prohibits sexual intercourse with a female less than ten years old, we say the conduct, sexual intercourse, must be done "knowingly"; that is, one must be aware of the nature of one's conduct. On the other hand, an actor need only be shown to have been "reckless" as to the circumstance that the female was less than ten years old, but have consciously disregarded that risk. Nonetheless, the definitions given remain accurate when used, as here, to describe crimes rather than elements of a crime.[2/]

Thus, we can discribe "crimes of recklessness" as those crimes in which a risk of harm exists and in which the defendant is aware of the risk. "Crimes of negligence" can be described as those in which a defendant is not, but should be, aware that a risk of harm exists. But when using "recklessness" and "negligence" in this broader context, simple transplantation is insufficient. We must add the requirement that not only must the risk of harm exist, but the defendant must be legally liable for it either because he has created the risk (e.g., by driving recklessly) or because he has a legal duty to affirmatively act to eliminate the risk and avoid the harm (e.g., as when a railroad engineer sees, or should see, an obstruction on the track ahead). The latter cases are, of course, cases of omissions.

II. Criminalization of Reckless and Negligent Conduct

There is some difficulty in describing the criminalization of reckless and negligent conduct in the "United States" since there are 51 independent legal jurisdictions, each of which have their own Criminal Code embodying a somewhat different criminalization policy. One can, however, identify certain common features.

The chart below presents a generalized view of the criminalization of reckless and negligent conduct involving injury or risk of injury to the person. Recklessness and negligence are listed across the top. They differ in the defendant's actual awareness of the risk of harm (present in recklessness, but not in negligence). The other most significant variable is the harm which occurs. The range of possible harms is shown down the left-hand side. The harms listed concern only those against the person since these best highlight the pertinent distinctions in the area of recklessness and negligence. Similar patterns of criminalization exist for harms and risks of harm to property or to various societal interests, although they are, generally, punished less severely.[3]

Two things are immediately obvious from the chart. First, when a death occurs, apparently unique principles apply in such a way as to expand the assignment of criminal liability beyond that normally applied in non-homicidal offenses of similar

Criminalization of Reckless and Negligent Conduct Resulting in Harm or Risk of Harm to the Person According to Harm Caused

Harm caused:	Defendant caused harm through: recklessness	criminal negligence (or ordinary negligence with a dangerous instrumentality)	no culpability[6]
Death	"Depraved Heart" Murder[4] or Manslaughter	Involuntary Manslaughter[5]	# [felony-murder; misdeameanor-manslaughter[7]]
Injury	Battery	#	#
No harm, but risk created	Reckless endangerment [or, with a vehicle, reckless driving]	#	#
No harm, and no (or minimal) risk created	#	#	#

In these cases there is usually either no criminal liability or quasi - criminal liability in the form of a "violation" or an "infraction".

culpability (see section "A" below). And second, in non-homicidal cases there is an apparent reluctance to assign criminal liability on the basis of anything less than recklessness (see "B." below).

A. VARYING DEGREES OF CARELESSNESS IN CAUSING DEATH

Recklessness and Negligence. In Jurisdictions which have adopted the statutory structure for homicide proposed by the Model Penal Code, three unintended forms of homicide are provided. Conduct by which one recklessly causes the death of a person may be sufficient for a conviction for murder if done in circumstances which manifest an extreme indifference to human life. Though there is no intent to kill or to do serious bodily injury, there is usually a very high degree of risk of death or serious bodily injury. Playing a game of "Russian roulette"[8] with another person may evidence such extreme indifference by the very high risk of death, as would firing a gun into a room containing several persons. Where a person recklessly causes a death, but where no such extreme indifference to life is present, he would be convicted of manslaughter, a lesser form of homicide. Negligently causing a death would result in conviction for negligent homicide, a still lesser form.

The structure most commonly used before the drafting of the Model Penal Code, and still in use in a majority of jurisdictions, punishes recklessly causing a death under circumstances manifesting on extreme indifference to human life as murder --quaintly called "depraved heart" or "malignant and abandoned heart" murder--and punishes negligent homicide as involuntary manslaughter.[9] Recklessly causing a death, without manifesting extreme indifference to human life, is thus, under this structure, often treated no differently than negligently causing a death; both are involuntary manslaughter.

Note that "negligence" as used here, and throughout, has the Model Penal Code definition noted above. It is something more than ordinary tort negligence.[10] How much more, or what additional elements must be present, is a matter of some vagueness, perhaps necessarily so. In describing this greater degree of negligence courts and statutes have called it "gross" or "culpable" or "criminal" negligence without describing precisely what those adjectives mean. The Model Penal Code speaks of "a gross deviation from the standard of care that a reasonable person would observe in the actor's situation." In the last analysis the tribunal must "evaluate the actor's failure of perception and determine whether, under all the circumstances, it was serious enough to be condemned .... The jury must find fault and find it was substantial..."[11]

Whatever the quantitative demands of the standard of care for negligence, it is clear that it is nearly always an "objective" or "external" standard. That is, in determining whether negligence is present the question to be resolved is whether the defendant had met a particular standard of conduct

--the standard being what the reasonable man would have done under the circumstances? Whether the defendant at hand could have met the standard is usually irrelevant. Individual weaknesses are not ignored, but rather are left to the operation of general principles of responsibility. Immaturity, mental illness, duress, and a variety of other reasons for individual failure to meet an objective standard, are all recognized as valid defenses. There will be a number of cases, however, where an individual could not have met the standard because of a personal characteristic not recognized by a general principal or because of a recognized characteristic not sufficiently acute to qualify under the stated formulation of the general principle (e.g., mental illness not amounting to legal insanity). While the objective standard is maintained in these cases, the courts have on occassion considered certain personal characteristics as "circumstances" in which the reasonable man is to be placed when applying that objective test. The Model Penal Code expressly provides this flexibility in its definition of negligence, quoted earlier, through the use of the phrase "reasonable person... in the actor's situation." (emphasis added). The commentary to this section explicitly notes:

> There is an inevitable ambiguity in "situation." If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered, as they would be under present law. But the heredity, intelligence or temperament of the actor would not now be held material in judging negligence; and could not be without depriving the criterion of all its objectivity. ... The draft is not intended to displace discriminations of this kind; it is designed to leave the issue to the courts.

Felony-murder and misdemeanor-manslaughter[12/]. These forms of murder and manslaughter are included on the chart because they are essentially punishment of risk-taking. In its original form the felony-murder doctrine categorized as murder any unintended death caused in the commission or attempted commission of a felony. The misdemeanor-manslaughter doctrine had a parallel effect by permitting a manslaughter conviction for an unintended death caused during the commission of a misdemeanor. The modern trend has been to introduce a number of restrictions on the doctrines (and, in a few jurisdiction, to abolish them altogether).

These forms of murder and manslaughter are listed in the "no culpability" column of the chart only because the degree of culpability as to risk-taking is unclear. It need not be shown that the actor recklessly or negligently caused the death, although it is common that at least recklessness or negligence (if not intention) are present. In fact, one theory underlying the doctrines is that by committing a felony or misdemeanor one necessarily creates a risk that a death will be caused. This gains some logical support from the nature of the restrictions placed on these doctrines. The felony-murder doctrine is often limited to particularly dangerous felonies (where the risk of causing death is

high) such as robbery, rape, arson, burglary, and kidnapping. The misdemeanor-manslaughter doctrine is usually limited to misdemeanors (or unlawful acts) which are malum in se or acts creating a danger of death or serious bodily injury to another person. The risk-taking nature of the felony-murder doctrine is also illustrated by the doctrine's treatment in the Model Penal Code. The Code ostensibly eliminates the felony-murder doctrine, but in fact it includes a provision under the "recklessly causing death with extreme indifference to human life" form of murder which creates a rebuttable presumption of such indifference when the death is caused during the commission of certain dangerous felonies. Similarly, where the misdemeanor-manslaughter rule has been abolished it appears to have been in the presence of enactment of reckless and neglent homicide statutes. Also consistent with the risk-taking nature of these doctrines is the fact that where a death is merely coincidental with the offense (i.e., is not within the risk created by the offense), the death will not envoke operation of the doctrines.

No Culpability. There may be criminal liability even without culpability, but such is usually limited to quasi-criminal forms such as "violations" or "infractions." It is a common, but not necessarily an accepted, view that such offenses should not be punished by imprisonment, although substantial fines and other alternatives to incarceration may be imposed. This is discussed in more detail below, under the heading "strict liability."

B. CULPABILITY LESS THAN RECKLESSNESS

Negligence as a Basis for Criminal Liability. Except for homicide with its uniquely harmful result, there is a general reluctance surrounding the imposition of criminal liability for negligence. Negligence has been attacked as an unjustifiable and abnormal basis for criminal liability which is contrary to the common law tradition. Without concurring in them, let me present the arguments most often used. One distinguished American writer concludes[13]:

> ...the likelihood is that at least from the seventeenth century on, if not from the very beginning of the common law, negligent harm was generally not criminal. The doubt is almost wholly restricted to homicide; where the negligent behavior violated all standards of decent performance the grievous consequences probably cause the normal penal bounds to be extended.

Another American writer expresses the objection to negligent liability as follows:[14]

> If the defendant, being mistaken as to material facts, is to be punished because his mistake is one which an average man would not make, punishment will sometimes be inflicted when the criminal mind does not exist. Such a result is contrary to fundamental principles, and is plainly unjust, for a man should not be held criminal because of lack of intelligence.

Recklessness, on the other hand, has been generally accepted even though,

like negligence, it deals only with the risk of causing harm, not the intention. The distinction, of course, is the awareness of the risk required for reckless, but not for negligence. To punish a person without such awareness is to punish a person who acts without consciousness of wrongdoing, a concept the common law claims to hold dear. Indeed, foresight of the harmful consequences of one's conduct (that is, at least awareness of a risk of the harm occurring) is said by some to be an absolute and fundamental principle of the common law, upon which present American criminal law is based.

One well known writer states[15] "[I]t should now be recognised that at common law there is no criminal liability for harm...caused by inadvertence." The same writer sets out the three fundamental prerequisites of criminal liability as follows. It must be established[16] (1) that the defendant's conduct contributed to the actus reus; (2) that his conduct was voluntary; and "(3) that he foresaw at the time that his acts or omissions might produce or help to produce certain consequences. The nature of [the] consequences [which must be foreseen are] fixed by law for each specific crime." In broader terms, negligence is considered such an inferior ground for criminal liability because it appears to rest upon a purely "objective" or "external" standard, rather than upon the "subjective" inquiry made in the other three forms of culpability.

Having presented the most common theoretical position taken in the academic community, I am obliged to point out two parodoxes, which go beyond the obvious response, discussed earlier, that in fact the standard of negligence is not purely objective. First, while it is often claimed that recklessness was the common law's lowest acceptable level of criminal culpability and that foresight of consequences was required, the historical evidence is to the contrary. Imposition of criminal liability where there was no foresight of consequences or consciousness of wrongdoing was common throughout the common law and, indeed, such matters of awareness were held entirely irrelevant at early common law.[17] Such liability was, and still is, imposed for example, in instances of negligent homocide, as noted above; felony-murder and misdemeanor-manslaughter, as have been discussed above; and a variety of other cases where "implied malice", "constructive malice" or "malice in law" supplied the malice for murder where forsight of the death was not present. Such liability also resulted from the definition of such offenses as obscene libel; criminal (or defamatory) libel; criminal contempt of court; bigamy; battery and related offenses; indecent exposure; burglary; and public (or common) nuisance. Further, the generally accepted principles of vicarious liability, complicity, and the rejection of the defenses of mistake of fact (where the mistake does not negate an element of the offense), mistake of law, and self-induced intoxication often generate criminal liability where there is no consciousness of wrongdoing, foresight

of harmful consequences, or awareness of a risk of harm or criminal liability.

Strict Liability. The second paradox, and to my mind a much more troublesome one, is that while negligence is viewed with distrust and avoided, "strict" or "absolute" liability is common. Strict liability is imposed where there is no culpable state of mind required to be proved. Nor is there a requirement that an "objective" or "external" negligence standard have been violated. It is not entirely "absolute," however, in that the normal principles of exculpation based on lack of responsibility (e.g., immaturity, insanity) still apply.

There is, to be sure, considerable debate about the propriety of strict liability in the criminal law. But there can be no doubt that American criminal law now abounds with strict liability, and the trend continues. Many of the common law instances of criminal liability without recklessness, noted above, are instances of strict liability. Much more common, however, are relatively recent statutory offenses. The drafters of the Model Penal Code, in their comment upon that Code's strict liability section, list 42 groups of offenses as an indication of the range of instances in which strict liability is imposed in the United States. They are reproduced in the margin.[18]

Because of their diversity, it is difficult to make generalizations about the nature of strict liability offenses. Many offenses concern industries and activities where there is a great potential for harm to a large number of innocent members of the public, as in the preparation and distribution of drugs and food, or the sale of firearms and explosives. They generally include what are called "public welfare offenses." Many apply not to the general public, but to certain trades that supply the public. In other areas, where the group of potential offenders is larger, such offenses are limited to very few activities. Many of the offenses presuppose a continuing activity, such as carrying on a business, rather than an isolated act. And most of the offenses are modern additions to the prohibition of the criminal law, dealing with regulatory intricacies made necessary in a post-industrial revolution economy.

The paradoxical growth of strict liability in a society which claims to object to even negligent criminal liability might be explained under the notion that if the common law tradition is to be perverted, strict liability is no more a sacrilege than negligence. More likely, however, is the view taken by some, that the American criminal law community has tended to avoid analysis and clarification of basic issues of criminal responsibility, and have thereby failed to adequately develop and use notions of criminal risk-taking.[19] There is evidence that this trend may have recently begun to turn around. The Model Penal Code's four-tiered culpability structure, which includes negligence, yet frowns on strict liability (at least as a true criminal sanction), has had a significant impact. Indeed, in a recent case before the United States Supreme Court, three of the nine justices reinterpreted

the Dotterweich case, perhaps the principle case cited as Supreme Court approval for the use of strict liability. They took the case to mean that criminal liability could be imposed for negligence.[20/] This is a very weak indicator, to be sure, but there may well be a stronger trend to more openly recognize negligence as a basis for criminal liability, and to substitute it in some cases now treated as strict liability.

Such a trend is not so surprising, and strict liability is not so distressing, when one sees that even as it now exists strict liability in the United States is in many ways simply a form of negligence. For example, even strict liability is often barred where the actor could not have been aware of the standard of conduct he was obliged to meet. Thus the Supreme Court would not permit, even after approving the doctrine of strict liability, the criminal conviction of a felon who failed to register with police, where the felon did not know of such a legal obligation to register (despite the common law maxim "ignorance of the law is not excuse" and "all men are presumed to know the law"). In practice we find that there are often some special circumstances which give notice to persons that they may be exposed to strict liability. Involvement with an industry or activity in which there is a great potential for extensive harm to the public (e.g., mass transportation, preparation and distribution of drugs and food, firearms and explosives), as noted previously, is a common form of notice. Such involvement tells the actor "because of the greater potential for harm, your conduct must satisfy a higher standard of care than the criminal law ordinarily requires." Subsequent imposition of criminal liability for failure to meet the standard may be, admittedly, punishment where there is no fault when measured by the normal standard of negligence; but, in fact, negligence is present when the conduct is measured against the higher standard set for the special activity. Thus, there is culpability. It rests in the failure to meet on external standard, a standard higher than that for normal criminal negligence, yet a standard of which the actor is probably on notice.

The term "probably" points out the shortcoming of this justification and the fundamental objection which can still be raised against strict liability in the United States. As long as the negligent nature of strict liability is not officially recognized and reflected in the statutes, liability may in certain instances be imposed in a truly absolute sense -- where the actor is not only measured by a higher external standard but where he did not and could not have had any notice that such a higher standard of conduct would be required. We may say of the druggist or the person selling a firearm that if they can not meet the higher standard they should get out of the business and leave it to others who can. But if absolute liability is to be imposed without possibility of notice, it is indeed a cruel

criminal law which we all must fear.

An alternative view of strict liability is that it is negligence conclusively presumed from the occurrence of harm.[21/] But here again, while the negligent nature of strict liability is a theoretical saving grace, the potential errors in application which can result from the conclusiveness of the presumption make the doctrine ultimately objectionable.

Whatever the real relationship between negligence and strict liability in the United States, it is clear that some such fundamental connection probably exists, and that in the absence of more concerted efforts to analyze the relationship, the United States will no doubt continue to have difficulty in rationally imposing liability in strict liability cases.

For a more detailed discussion of these issues see the text of my speech.

III. Sentencing and Corrections for Crimes of Carelessness

There is no special sentencing or correctional system in the United States for crimes of carelessness. Nor are there special sentencing rules or correctional treatment for this class of offenders. It is possible, however, to hazard some generalizations about how such offenders are treated differently than other offenders, although any such differences are likely to be the result of a source other than the specific recognition of careless offenders as a group meriting special treatment.

A. SENTENCING PRINCIPLES

I should note preliminarily that sentencing policies in the United States are very much in disarray. Each jurisdiction has a different set of procedures, resulting from both historical accident and varying sentencing philosophy. Even within a single jurisdiction sentencing practices vary greatly. While jurisdictional differences might have some legitimate basis, the latter form of disparity in sentencing is, of course, entirely unjustifiable because it often generates different treatment of similar offenders who have violated the same law of the jurisdiction under similar circumstances.

This unjustifiable disparity is a symptom of a more fundamental problem: the failure of nearly all jurisdictions to articulate the purposes and goals of sentencing. In the midst of these conditions it can be no surprise that there is no coherent policy for the sentencing of careless offenders. The only encouraging fact is that the state of sentencing in the United States is generally recognized. Sentencing reform is now receiving more attention by both the criminal justice community and the public than any other criminal justice issue of the past decade. A number of jurisdictions, including the federal government, are in the process of enacting new sentencing legislation.

From past performance and the reform efforts undertaken to date, one can make some general observations as to what the sentencing policies in the United States would be if they were clearly articulated.

clearly articulated.

Four purposes of sentencing are commonly recognized: rehabilitation (of an offender for whom treatment of some nature is effective), incapacitation (of an offender who is likely to cause further harm), deterrence (of this and other potential offenders), and just punishment (based upon the amount of punishment deserved by the offender).

For crimes of recklessness, rehabilitation is rarely relevant. Recklessness is usually not associated with a psychological disorder, drug dependence, or similar detrimental characteristic susceptible to rehabilitation; although in some cases additional education can significantly reduce the possibility of further recklessness. The essence of recklessness, of course, is the disregarding of the risk of injury to others or other's property, usually for some benefit to one's self or out of simple indifference. This is a classic situation in which deterrence can serve an important purpose. A substantial sentence tells other that they must not disregard the risk of harm or they too will face a substantial criminal sanction. Incapacitation is a purpose not usually considered appropriate in this context. The threat of punishment (deterrence) is usually considered sufficient. Just punishment is always an important purpose to be served, although cases of recklessness generally call for a less severe punishment than intentional offenses causing the same harm. This has been illustrated in the previous discussion on punishment for differing forms of homicide.

For crimes of negligence, where the fault lies in the failure to perceive a risk, deterrence is again an appropriate purpose to be served. Punishment of negligence can cause persons to more conscienciously look for risks of harm which their conduct may create or perpetuate. Just punishment can also be appropriate, especially where a substantial harm is caused. But again, this purpose will only justify a sentence less than that for recklessly causing a similar harm. Incapacitation and rehabilitation are generally not relevant, for the same reasons stated above with regard to crimes of carelessness.

These abstract observations unfortunately give little insight into sentencing principles for crimes for carelessness. About the most one can say is that crimes of carelessness should be, and generally are, punished less harshly than intentional crimes, and that in a reformed system the sentences for such crimes are not usually based upon a person's current dangerousness or rehabilitative progress. Even the former, and more obvious principle, has its limitations, however. Most sentencing systems look not only to the nature of the offense (intentional or careless), but to the characteristics of the actor[22/] in satisfying these four possible purposes of sentencing.

B. SENTENCING PRACTICE

The punishment principles noted above can of course have only an imperfect

translation into practice. This is due not only to the actual practices in sentencing, which I shall discuss below, but to other practical aspects of the criminal justice system. Both police and prosecutors have the ability to significantly influence the ultimate patterns of imposition of punishment through the exercise of discretion at their respective points of involvement with the criminal justice system. Their discretion is often used to compensate, in practice, for doctrinal weaknesses. For example, speeding, like most traffic offenses, is essentially a strict liability offense. It is no defense to say "I didn't know I was speeding" or "my speedometer was broken." However, it is a very common practice for police to charge speeding only where a driver is exceeding the legal limit by 10 miles per hour or so. Persons exceeding the speed limit by over 10 miles per hour are, arguably, more likely to be intentionally or knowingly speeding. The police enforcement pattern, then, as a practical matter limits the imposition of strict liability.

Authorized Sentences. As a general matter, with some significant exceptions, the lower the level of culpability, the lower the maximum sentence authorized by statute. The exact penalty structure varies substantially from jurisdiction to jurisdiction. For example, in the case of careless homicide offenses, discussed previously, some typical statutory provisions are as follows:

In New York (New York Penal Law, 1967) the maximum terms of imprisonment a court may impose are as follows: [23]

Murder: recklessly causing the death of another person "under circumstances evincing a depraved indifference to human life"; or felony-murder - life.

2nd Degree Manslaughter: recklessly causing the death of another person - 15 years.

Criminally negligent homicide: 4 years.

In California (California Penal Code[24]), the comparable penalty structure includes maximum authorized terms as follows:

1st Degree Murder: felony-murder (for certain serious felonies) - death (where special circumstances exist) or life.

2nd Degree Murder: "when the circumstances attending the killing show an abandoned and malignant heart"; or felony-murder - life.

Involuntary Manslaughter: unlawful act-manslaughter; or negligently causing the death of another person during a lawful act "which might produce death" - 15 years.

Vehicular Manslaughter: with gross negligence - 5 years.
without gross negligence [but with negligence] - 1 year.

Homicide is of course a unique offense in the gravity of the harm and the corresponding severity of the punishment. In non-homicidal offenses, while there are no rules but only weakly discrenible trends, it is often true that reckless crimes are

only misdemeanors, punishable by one year in prison at most. Crimes of negligence probably receive similar treatment in the statutes. Crimes of strict liability are more often limited to much shorter terms or none at all. The Model Penal Code recommends that imprisonment not be permitted as a sanction for offenses of strict liability. Sentences Imposed.

Sentences Imposed. The statutorily authorized sentences noted above are imposed in only the most aggravated cases, and even then very rarely. In practice, crimes of carelessness generally receive very short terms of imprisonment or, more likely, fines, sentences of probation, or other alternatives to incarceration, especially non-homicidal crimes of carelessness.

Statistics to illustrate this generalization are difficult to find because they are rarely kept according to the culpability requirements of the offense. "Regulatory offenses" are often crimes of carelessness, however, and statistics are sometimes grouped under this heading. Federal government statistics on sentences for violations of such federal regulatory statutes as the Food and Drug Act, the Motor Carrier Act, the Fair Labor Standards Act, Customs Laws, Postal Laws, and Agricultural Acts (some of the violations undoubtedly were intentional) show the following[25/]: Of 3,814 defendants sentenced for such violations in 1975 (37,433 defendants were sentenced in the federal system that year), 543 received some sentence of imprisonment, 2,106 received probation instead of imprisonment, and 1,111 received a fine only. Of the 543 defendants imprisoned, 255 received a sentence of one year or less, and another 109 received a special "split sentence" in they were to spend some time on probation and some time (not exceeding 6 months) in prison. In the federal system, all prisoners are eligible for early release on parole after serving a portion of their sentence, one-third at most. If not released after serving one-third, prisoners must be released after serving two-thirds unless special extenuating circumstances can be shown which justify continued imprisonment.

I should note a growing trend to impose more severe penalties, including substantial prison terms, on so-called "white collar offenders." This term is used to describe offenders who are business executives, politicians or other offenders of previously good reputation and holding positions of responsibility. Their offenses are usually related to their position, and typically include such things as corruption, fraud, or public welfare offenses. Many of these offenses are intentional in nature, but many others are crimes of carelessness. There is a danger that the distinction commonly made between intentional and careless offenses will be obscured by this concern for increased punishment of certain offenders.

Administration of Sentences. The correctional system employed for the administration of sentences is no different for crimes of carelessness than for other crimes. To the extent that careless offenders, as a class, are less violence prone that most intentional offenders, lower security measures will be applied to them during terms of imprisonment.

FOOTNOTES

*/ National Reporter, United States; Rutgers Law School - Camden.

1/ Model Penal Code, Sections 2.02(2)(c) and (d).

2/ As used in the topic before us it appears that the concern is for reckless and negligent crimes, rather than recklessness and negligence as to elements of a crime. I assume that the phrase "Crimes of Carelessness" does not refer to all crimes in which carelessness is the state of mind required as to some element -- this would encompass most crimes, since the level of culpability usually required as to a circumstance is recklessness, and, of course, most offences have at least one circumstance as an element -- but to crimes in which a risk of harm is created or continued, either intentionally, knowingly, recklessly, or negligently. The risk we will discuss is not the risk that a required circumstance of the offence existed or that a required result of the offense would occur, but the risk that the conduct would cause harm. Unfortunately, this scope of our discussion excludes a number of interesting areas including, for example, instances in which criminal liability is imposed because an actor is reckless as to the existence of a circumstantial element (e.g., the age of the female in the rape example just discussed).

3/ Treason is an exception. It usually carries a penalty similar to murder. Of course it can not be committed recklessly or negligently and therefore is not pertinent here.

4/ If done in circumstances manifesting an extreme indifference to human life (e.g., very high risk of death).

5/ Sometimes separated from manslaughter, called "negligent homicide," and assigned a lower penalty than involuntary manslaughter.

6/ These cases are discussed in more detail below under the heading "strict liability."

7/ If death is caused in the commission of a felony, the killing is considered murder; if in the course of an unlawful act less than a felony, it is manslaughter. The offense is essentially punishment of risk-taking, but neither recklessness nor negligence need be shown (although they are usually present). See text.

8/ "Russian roulette" is a game in which a single bullet is placed in the revolving cylinder of a gun which is then spun. The participants then take turns firing the gun at each other's, or their own, head. See, e.g., Commonwealth v. Malone, 354 Pa. 180, 47 A.2d 445 (1946).

9/ Voluntary manslaughter includes various intentional forms of killing which, because of certain mitigations, are not considered murder.

10/ It should be noted, however, that in some states ordinary tort negligence is sufficient for conviction of involuntary manslaughter.

11/ American Law Institute, Model Penal Code, Tentative Draft No. 4, p. 126 (Comment to section 2.02) (1955).

12/ In some jurisdictions the underlying offense for manslaughter may be any unlawful act, not necessarily a misdemeanor. In such cases the doctrine is more accurately called "unlawful act manslaughter".

Under current usage, a felony is any offense punishable by imprisonment for one year or more; a misdemeanor is one year or less. A variety of terms (including petty offense, violation, and infraction) are used to describe an even lower class of offense. Originally, all felonies were capital offenses; so it made little difference whether the felon was hanged for the felony or the murder.

13/ Jerome Hall, General Principles of Criminal Law (2nd ed., 1947), p. 122.

14/ Keedy, Ignorance and Mistake in the Criminal Law, 22 Harvard Law Review 75, 84 (1908). In response, however, it should be noted, as discussed earlier, negligence is not always based on a purely objective standard.

15/ J. W. C. Turner, Kenny's Outlines of Criminal Law (18th ed., 1962), p. 34.

16/ Id. at p. 40

17/ See, e.g., F. Pollock and F.W. Maitland, The History of English Law (2nd ed., reissued 1968), Vol. II, p. 470; W.S. Holdsworth, A History of English Law (1903-1966), Vol. II, p. 51.

18/ Pure Food and Drug; Giving False Weight; Selling over Ceiling Prices; Minimum Wage Laws; Liquor Laws; Soliciting Insurance for Unlicensed Insurer; Borrowing Bank Funds by Bank Officer; Receiving Mental Patients Without Authorization; Possession of Counterfeit Ration Stamps; Using Another's Trademark; Purchasing Army-Issue Supplies Without Authorization; Making False Statement in Shipping Declaration; Fishing in Prohibited Area; Polluting Streams; Entering Polling Booth With Voter Without Authorization Card; Possessing a Machine Gun; Shooting Game Birds Which Have Been Lured by Grain Bait; Failure to Have Common Carrier Permit; Possession of Lottery Slips; Owning House Used for Prostitution; Shipping Wild Game Out of State; Selling Margarine; Possession of Auto with Defaced Serial Numbers; Passing School Bus Stopped for Discharging Children; Carrying Altered Passport; Shooting Domesticated Pigeons; Cutting Timber Without Authorization; Criminal Syndicalism; Selling or Possessing Narcotics; Blue Sky Laws; Obstructing Justice; Misleading Advertising Statements; "Unknowingly" Possessing Explosives under Suspicious Circumstances; Converting Public Funds by Public Official; Official Misfeasance; Carrying Concealed Weapons; Voting Illegally; Using Proceeds of Securities Sales for Purposes Outside Those Stated in Prospectus; "Public Officers" Misappropriating or Mishandling Funds; Selling Liquor Wholesale to Unauthorized Vendee; Failing to Give Notice to Respondent in Administrative Proceeding; and Publishing Without Permission Accounts Relating to Conduct of War.

19/ Fletcher, The Theory of Criminal Negligence, A Comparative Analysis, 119 U. Penn. L.R. 401 (1971).

20/ U.S. v. Park, 95 S. Ct. 1903 (1975).

21/ Wasserstrom, Strict Liability in the Criminal Law, 12 Stanford L. Rev. 731 (1960).

22/ These might include, for example, a defendant's age, education, vocational skills, mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant, physical condition including drug dependence, previous employment record, family ties and responsibilities, community ties, role in the offense, criminal history, and degree of dependence upon criminal activity for a livelihood.

23/ Note that this is similar to the Model Penal Code structure, except that felony-murder is retained as an independent doctrine.

24/ This sentencing structure is currently being revised.

25/ Administrative Office of the United States Courts, 1975 Annual Report of the Director (1976), pp. A-54, A-55.

END