

CRIMINAL LAW REFORM AND THE PERSISTENCE OF STRICT LIABILITY

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ABSTRACT

Two reform movements transformed American criminal law in the quarter century that began in the late 1960s. Their origins and effects were starkly different, and their conflict meant that, on core choices about the basis for criminal liability, one movement had to win and the other had to lose. The first movement was the wave of criminal code reform inspired by the American Law Institute's Model Penal Code (MPC), first published in 1962. The MPC movement sought to increase the role of culpability as a prerequisite for liability by presumptively requiring proof of mens rea for every element of criminal offenses—a policy that rejected longstanding use of strict liability for significant offense elements. The second movement, which could be called the tough-on-crime movement, became the more significant. This movement led to the transformation of American criminal-justice policy that expanded criminal offenses, enforcement, and sentences, resulting in a national incarceration rate that quintupled and became by far the world's highest.

This Article identifies the twenty-four states that codified the MPC's culpability rules and then recounts an extensive survey of the case law in those states to assess the reforms' effect on judicial interpretation of mens rea requirements. It finds that legislative codifications of presumptions for mens rea have had surprisingly little effect on courts that define mens rea requirements when interpreting criminal statutes. It describes the recurrent rationales that courts use to impose strict-liability elements in a wide range of crimes, notwithstanding statutes that direct presumptions to the contrary. It then offers an explanation for this outcome—a substantial failure of the MPC-inspired revision of criminal codes—that emphasizes the continuing normative appeal of strict liability, the influence of

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instrumental rationales for punishment, and the limits of the judicial role in an era in which the legislative and executive branches are vastly expanding the reach and severity of criminal punishment.

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INTRODUCTION

Two significant reform movements transformed American criminal law in the quarter century that began in the late 1960s. Both are familiar, yet in the continuing story of American criminal law they rarely appear in the same narrative. In part that is surely because

their origins and effects were starkly different; in critical ways they were in conflict. That conflict meant that, on core questions of criminal law, one reform movement had to win and the other had to lose. The effects of the movements' conflict continue today in the administration of state criminal law.

The first movement was the wave of criminal-code reform inspired by the American Law Institute's (ALI's) Model Penal Code (MPC), which was first published in 1962.¹ Broadly speaking, the MPC had two ambitions. One was to bring analytical clarity to the definition and interpretation of criminal statutes that were encrusted with ill-defined common-law terms such as "malice aforethought."² A tradition of poor drafting plagued these statutes, so they commonly employed multiple mens rea terms and conduct-defining terms in the same offense.³ The second ambition was substantive: the MPC advocated a criminal law committed to a pervasive requirement of subjective culpability with respect to every significant element of every offense.⁴ MPC policy, in other words, rejected strict liability⁵ for any element of a crime, which resulted in liability being imposed

1. MODEL PENAL CODE (Proposed Official Draft 1962).

2. Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1431–40 (1968); Paul H. Robinson & Markus Dirk Dubber, An Introduction to the Model Penal Code 8–13 (Mar. 12, 1999) (unpublished manuscript), available at <https://www.law.upenn.edu/fac/phrobins/intromodpencode.pdf>.

3. Wechsler, *supra* note 2, at 1436; Robinson & Dubber, *supra* note 2, at 8.

4. See Herbert L. Packer, *The Model Penal Code and Beyond*, 63 COLUM. L. REV. 594, 594–95 (1963) ("The most important aspect of the Code is its affirmation of the centrality of liability and of the various modes of culpability to which attention must be paid in framing the definitions of the various criminal offenses.").

5. The phrase strict liability in felony criminal statutes bears specification. Offenses that require mens rea for one element (typically conduct) but lack culpability on one or more other elements are considered strict-liability offenses. Courts and statutes use the term in this way. See, e.g., UTAH CODE ANN. § 76-2-102 (LexisNexis 2008) (describing strict-liability offenses); *Ex parte Murry*, 455 So. 2d 72, 75–79 (Ala. 1984) (noting that a capital offense that did not require knowledge as to the victim's identity as a police officer would be a strict-liability offense), superseded by Undercover Officers Protection Act of 1987, No. 87-709, 1987 Ala. Laws 1252 (codified as amended at ALA. CODE § 13A-5-40 (LexisNexis 2005)). Scholars do so as well; Professor Antony Duff denotes this "substantive" strict liability:

Liability is strict if it requires no proof of fault as to *an* aspect of the offence: while *mens rea* must be proved as to some elements in the offence definition, it need not be proved as to every fact, consequence or circumstance necessary for the commission of the offence. . . . Liability is substantively strict if it does not depend on proof of some appropriate moral culpability as to some aspect of the offence—proof of some fault that would justify condemning the defendant for committing the offence.

R.A. Duff, *Strict Liability, Legal Presumptions, and the Presumption of Innocence*, in APPRAISING STRICT LIABILITY 125, 125–26 (A.P. Simester ed., 2005).

more proportionately to an actor's moral fault than was true in the common-law tradition.

The second reform movement was less singular in its origin and in the identity of its leading reformers, but it was indisputably more significant. This tough-on-crime movement represented the transformation of criminal law, enforcement, and sentencing policy triggered by the rising crime rates and social disorder of 1960s—and arguably by the political transformations of the civil rights movement, which occurred concurrently. Familiar features of this movement include a dominant tough-on-crime political discourse, a national incarceration rate that quintupled in three decades to become the world's highest, an increased racial disproportionality in inmate populations, a creation of broad new criminal offenses and pretrial detention policies, a punitive approach to problems of illicit drug use and distribution, and a rejection of punishment practices based on individualized assessments of offenders in favor of retributive and deterrence rationales codified in nondiscretionary sentencing rules.⁶

The MPC is generally considered a success for having inspired roughly half the states to revise their criminal codes in ways that indisputably reveal the MPC's influence.⁷ But a closer look at state

6. The literature recounting this wide-ranging reformation is considerable. *See generally*, e.g., DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2002) (charting the changes in crime and in the criminal-justice system in Britain and the United States since the 1970s); DOUGLAS N. HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2008) (investigating the “increased size and scope of the criminal law” and criminal-justice system in the United States); MARC MAUER, *RACE TO INCARCERATE* (2d ed. 2006) (assessing the increased reliance on incarceration in the United States criminal-justice system); PEW CTR. ON THE STATES, *ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS* (2009), available at http://www.pewstates.org/uploadedFiles/PCS_Assets/2009/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf (investigating patterns behind rising incarceration rates in the United States); JONATHAN SIMON, *GOVERNING THROUGH CRIME* (2007) (examining the emergence of “a new civil and political order structured around the problem of violent crime”); WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011) (citing failures of the American criminal-justice system); MICHAEL TONRY, *SENTENCING MATTERS* (1997) (discussing the development of the American sentencing system and proposing reforms); BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* (2006) (investigating the relationship between incarceration and inequality); Vesla M. Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 21 *STUD. AM. POL. DEV.* 230 (2007) (explaining the relationship between race and increased criminalization in the latter half of the twentieth century).

7. *See* Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 *CALIF. L. REV.* 943, 948 (1999) (“The success of the [MPC] in stimulating American jurisdictions to codify or recodify their criminal law was unprecedented.”); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 *MICH. L. REV.* 505, 511 (2001) (“The Model Penal Code . . . is

codes, and their interpretation since the 1970s, reveals that the MPC's analytical ambition was a much greater success than its substantive goal, and further that the failure of the latter undermines the former. The MPC's substantive agenda turned out to be poorly timed; legislatures took up code reform at the same time that they sought to dramatically increase criminal law's effectiveness as a tool against violent crime and drug markets, which they did by increasing sentences, the range of offenses, and the scope of individual crime definitions. The MPC's substantive agenda cut the other way by seeking to limit liability unjustified by a finding of fault through proof of *mens rea*. When the MPC reform movement conflicted with the tough-on-crime movement, it was, unsurprisingly, the MPC's reform efforts—the efforts of legal professionals and academics more than politicians—that lost.

Yet that loss is not readily apparent, because twenty-four state codes notably resemble the MPC, especially as to the central culpability rules in MPC “Part I: General Provisions”—the provisions that provide definitions, premises, and interpretive rules for specific offenses.⁸ Those provisions define the critical elements of the MPC's

widely (though not universally, and perhaps not correctly) regarded as a great success.”); *id.* at 584 & n.279 (stating that the MPC inspired a large number of state code revisions).

8. MODEL PENAL CODE pt. I (Official Draft 1985). By my criteria, in 2011, twenty-four states had “general principles” or “rules of construction” that adopted variants of MPC § 2.02(3) and § 2.02(4). They are: ALA. CODE §§ 13A-2-3 to -4 (LexisNexis 2005); ALASKA STAT. § 11.81.610 (2010); ARIZ. REV. STAT. ANN. § 13-202 (2010); ARK. CODE ANN. § 5-2-203 (2006); COLO. REV. STAT. §§ 18-1-502 to -503 (2012); CONN. GEN. STAT. ANN. § 53a-5 (2007); DEL. CODE ANN. tit. 11, § 251 (2007); HAW. REV. STAT. ANN. §§ 702-204, -207 (LexisNexis 2007); 720 ILL. COMP. STAT. ANN. 5/4-3 (West 2002); IND. CODE ANN. § 35-41-2-2 (LexisNexis 2009); KAN. STAT. ANN. § 21-5202 (Supp. 2011); KY. REV. STAT. ANN. § 501.040 (West 2006); ME. REV. STAT. ANN. tit. 17-A, § 34 (2006); MO. ANN. STAT. §§ 562.021, -.026 (West 2012); N.H. REV. STAT. ANN. § 626:2 (LexisNexis 2007); N.J. STAT. ANN. § 2C:2-2 (West 2005); N.Y. PENAL LAW § 15.15 (McKinney 2009); N.D. CENT. CODE § 12.1-02-02 (2012); OHIO REV. CODE ANN. § 2901.21 (West 2006); OR. REV. STAT. §§ 161.095, -.105, -.115 (2011); 18 PA. CONS. STAT. ANN. § 302 (West 1998); TENN. CODE ANN. § 39-11-301 (2010); TEX. PENAL CODE ANN. §§ 6.01 to -.04 (West 2011); UTAH CODE ANN. § 76-2-102 (LexisNexis 2008). Kentucky, however, is a marginal case: it lacks an equivalent to MPC § 2.02(4), and it codified only a weakened modification of § 2.02(3) in KY. REV. STAT. ANN. § 501.040 (West 2006); *see also infra* note 19. I exclude Montana's code because it includes no version of MPC § 2.02(3) or § 2.02(4), even though it reflects MPC influence because its code requires at least negligence “with respect to each element described by the statute.” MONT. CODE ANN. § 45-2-103 (2011); *see also id.* § 45-2-104 (requiring culpability for “each element of offense”). This negligence requirement was adapted from MPC § 2.02(1) and § 2.05. Washington is also excluded because its code lacks any reference to the MPC's *mens rea* presumptions, although its definitions of culpability terms track the MPC. WASH. REV. CODE ANN. § 9A.08.010 (2009). Louisiana is also excluded because its culpability definitions reflect little MPC influence. Most notably, it retains the common law terms “general intent” and “specific intent” and does not adopt the MPC's

analytical advance: an exclusive list of clearly defined mens rea terms coupled with a set of interpretive rules that both imply mens rea requirements in offense definitions that lack a mens rea term and that presume that an explicit mens rea term in a statute applies to all of its elements.⁹ The problem is that the MPC's analytical and substantive agendas are not easily separated. Rejecting the commitment to proportional, subjective culpability undermines the MPC's approach to consistent analytical clarity in the interpretation of criminal offenses, and thus in the clarity of criminal law generally.

The project of this Article is, first, to document how the MPC-inspired analytical advances in state criminal codes have turned out to be less significant than they initially seemed. The second ambition is to explain why American criminal law turned out this way. One explanation lies, as noted above, in recent political history. A second explanation, however, is situated in contemporary criminal-law theory, where debates continue, by courts as well as scholars, regarding the normative appeal of the MPC's commitment to proportional culpability. More broadly, the debate is about the meaning of criminal law's core premise, *actus non facit reum nisi mens sit rea*:¹⁰ no guilty act without a guilty mind. Anglo-American criminal

culpability terms and definitions. *See* LA. REV. STAT. ANN. §§ 14:7–14:12 (2007) (setting out general principles of criminal law).

9. *See* MODEL PENAL CODE § 2.02(3) (“When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto.”); *id.* § 2.02(4) (noting that an explicit culpability term applies to all material elements “unless a contrary purpose plainly appears”). These are the two most important provisions, and I use primarily these two to classify jurisdictions as “MPC states” in Parts I and II. The MPC, however, contains additional provisions that address culpability requirements and their effect on liability. *See, e.g.*, MODEL PENAL CODE § 2.02(1) (stating that guilt requires at least proof of negligence for each material element); *id.* § 2.03 (stating that causation is not established unless a result was “within the purpose or the contemplation of the actor” or “within the risk of which the actor . . . should be aware”); *id.* § 2.04(2) (“[I]gnorance or mistake . . . shall reduce the grade and degree of the offense of which [the defendant] may be convicted to those of the offense of which he would be guilty had the situation been as he supposed.”); *id.* § 2.05 (“[W]hen absolute liability is imposed with respect to any material element of an offense . . . the offense constitutes [only a non-criminal] violation . . .”).

10. *R v. Tolson*, (1889) 23 Q.B.D. 168, 172 (Eng.) (internal quotation mark omitted); *see also, e.g.*, *Morrisette v. United States*, 342 U.S. 246, 251 (1952) (noting that liability requires the “concurrence of an evil-meaning mind with an evil-doing hand”); *People v. Valley Steel Prods. Co.*, 375 N.E.2d 1297, 1305 (Ill. 1978) (“It would be unthinkable to subject a person to a long term of imprisonment for an offense he might commit unknowingly.”). William Blackstone has also noted that “to constitute a crime against human laws, there must be first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will.” 4 WILLIAM BLACKSTONE, COMMENTARIES *21; *see also* *State v. Rutley*, 171 P.3d 361, 363 & n.3 (Or. 2007) (citing

law has long moved on from the most restrictive understanding of this premise, labeled the “unlawful act” theory, attributed to Sir Edward Coke and according to which the voluntary commission of *any* criminal *conduct* made one criminally liable for *any* resulting *harm*. On Coke’s view, wrongfully shooting at a chicken and unforeseeably killing a person constituted murder.¹¹ Its antipode is the MPC position, found in some state codes¹² and defended by many criminal law scholars, that criminal liability requires that an actor be culpable—meaning he has intent, knowledge, or recklessness—as to each significant element of an offense.¹³ Among English scholars, this idea is called the principle of correspondence.¹⁴ On both the American and English accounts, the effect of mens rea requirements for each offense element provides its normative appeal: the degree of liability and punishment will be *proportionate* to culpability and *limited* by it. Yet the dominant view in contemporary courts regarding mens rea requirements lies between Coke’s view at one end of the spectrum and the MPC position at the other. Especially in states that adopted the MPC’s culpability provisions, this represents a failure of those statutes (and the MPC model) to constrain and direct judicial decision making. More broadly, the courts’ dominant position reveals that the MPC’s substantive position on culpability—or the correspondence principle—has proven normatively unpersuasive to courts, which adopt instead a more limited, intermediate role for culpability in criminal liability.

Blackstone’s remark to support the statement that “[i]n Oregon, criminal liability generally requires an act that is combined with a particular mental state”).

11. See 3 EDWARD COKE, *INSTITUTES OF THE LAWES OF ENGLAND* 56 (London, W. Clarke & Sons 1809) (1669) (“[If the Defendant has shot] at any tame fowle of another mans, and the arrow by [mistake] had killed a man, this had been murder, for the act was unlawfull.”).

12. See, e.g., N.J. STAT. ANN. § 2C:2-2(a) (West 2005) (noting that, with specified exceptions, “a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently . . . with respect to each material element of the offense”).

13. See, e.g., Andrew Ashworth, *A Change of Normative Position: Determining the Contours of Culpability in Criminal Law*, 11 *NEW CRIM. L. REV.* 232, 235–38 (2008) (noting that “[s]ubjectivist justifications for culpability focus on the elements of choice and belief, and so may be found at the opposite end of the spectrum of liability for resulting harm”). This idea of proportional culpability appears in the constitutional law governing capital murder. See, e.g., *Enmund v. Florida*, 458 U.S. 782, 800 (1982) (“American criminal law has long considered a defendant’s intention—and therefore his moral guilt—to be critical to ‘the degree of [his] criminal culpability,’ and the Court has found criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing.” (alteration in original) (citation omitted) (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975))).

14. E.g., ANDREW ASHWORTH, *PRINCIPLES OF CRIMINAL LAW* 76 (6th ed. 2007); VICTOR TADROS, *CRIMINAL RESPONSIBILITY* 93–97 (2005).

This debate over culpability requirements matters for broader reasons of political legitimacy—the justifications of state authority to punish individuals and the practical meaning of state respect for individual rights. The correspondence principle has been defended as essential to respect for autonomy; it ensures that one is punished only for choices one has made, not for events one did not will or anticipate.¹⁵ It reflects basic values of classical liberalism and rejects the state’s power to use individuals for public ends, even for a laudable goal like harm prevention.¹⁶ State codes that fail to abide by the correspondence principle implicitly assert a different justification for criminal law, for state power over citizens’ liberty and individual autonomy. Yet most do fail to adhere to the correspondence principle, even the states that enacted MPC culpability provisions. The prevalence of strict-liability elements in state felony crimes, typically for result and circumstance elements, demonstrates this pervasive failure. These strict-liability elements frequently define the difference between greater and lesser offenses, and thus the sole ground for greater (sometimes mandatory) punishments.¹⁷ This form of strict liability, affirmed and expanded by widespread interpretive practices of courts in MPC states, means that punishment bears no *proportional* relation to culpability, despite states’ codification of MPC-based culpability rules.

Finally, this Article’s assessment of contemporary criminal law in the wake of the MPC and tough-on-crime reform movements generates insights on issues of judicial craft and institutional role. State courts’ patterns of criminal statutory construction provide another lesson in the challenges of simplifying and stabilizing judicial methods of statutory interpretation. In the wake of state legislatures

15. See Ashworth, *supra* note 13, at 238 (“Starting from respect for the moral autonomy of all individuals, subjectivists argue that criminal liability should not be imposed in respect of a given harm unless [the defendant] intended to cause or knowingly risked causing that harm . . .”).

16. See ASHWORTH, *supra* note 14, at 87 (noting the link between the correspondence principle and individual autonomy); TADROS, *supra* note 14, at 93–97 (highlighting the arguments supporting and undercutting the connection between the correspondence principle, subjectivity, and autonomy).

17. See, e.g., COLO. REV. STAT. § 18-6-401(7)(a)(I)–(II) (2012) (defining knowing or reckless child abuse as a class 2 felony if death results and a class 3 felony if serious bodily injury results). Even the MPC cannot avoid some offense distinctions based on results without corresponding proof of a culpable mental state. Compare MODEL PENAL CODE §§ 210.1, -3 (Official Draft 1985) (defining manslaughter as reckless conduct causing death), with *id.* § 211.2 (defining reckless endangerment as conduct putting another at risk of death but not causing death).

adopting MPC-based interpretive rules for their criminal codes, state courts have frequently disregarded them. When they have not, they frequently construe those interpretive provisions themselves in a way that undercuts their effect. Perhaps more notably, this Article also reveals the limited capacity and inclination of American courts to resist abetting political trends in criminal-justice policy. And this is so even when those trends breach the *codified commitments* of criminal law, and when courts' alternative is merely to adhere to the legitimate judicial role of narrowly construing criminal statutes and leaving expansions of liability to the political branches. Part I offers a broad survey of judicial interpretations of mens rea requirements in "MPC states"—states I identify based on their codification of the most important MPC culpability presumptions. It identifies recurrent rationales and interpretive choices from decisions in a representative range of MPC states. I then discuss how courts use these rationales to limit or avoid the full effect of their states' MPC-based culpability presumptions. Part II looks more closely at the language of culpability provisions that state legislatures have enacted. It classifies all of the MPC states according to the strength of those presumptions. Most MPC states enacted strong presumptions—meaning rules equivalent to the MPC provisions. A notable minority chose to weaken those presumptions and give legislative approval of strict liability. But those "weak presumption" jurisdictions are not the only ones in which judges favor strict liability, and the strength of the state codes' presumptions do not correlate well with judges' interpretive behavior in those MPC states. Part III describes the implicit limited-culpability principle that prevails among state courts to justify strict liability. The dominant judicial view requires proof only of culpable *conduct*, or culpability for some basic offense, to which additional strict-liability elements are added to create a more serious offense. Culpability serves only to make actors *eligible* for punishment; beyond that, instrumental rationales determine offense grades and sentencing severity. Part IV builds on this account to explain why courts have continued to widely endorse strict criminal liability despite legislative codification of presumptions for culpability requirements. The explanatory story describes the normative appeal of a *limited* role for culpability and also emphasizes courts' institutional role during the last half century's vast expansion of criminal punishment.

I. JUDICIAL INFERENCE OF CULPABILITY AND STRICT LIABILITY

A. *A Note on Methodology*

Although a complete survey of all state statutory provisions governing culpability and adopted from the MPC is presented in Part II, a comprehensive account of judicial interpretation practices for mental-state requirements in the twenty-four MPC states would be a more daunting endeavor than I undertake here. Fortunately, that is not necessary for the present purpose, which is to identify trends in the uses of MPC culpability presumptions and to identify the effects that those presumptions have had in states that codified some version of them. To identify interpretive practices in state courts, I first reviewed all state criminal codes to identify those that codify an identifiable variation of the MPC's key interpretive rules and presumptions regarding culpability requirements for elements of criminal offenses—MPC § 2.02(3) and § 2.02(4).¹⁸ I coded twenty-four states as “MPC states” on these criteria, listed in Table 1.

18. The two most important provisions are MPC § 2.02(3), which states that courts should infer recklessness for any material element for which a culpability requirement is not specified, and § 2.02(4), which states that an explicit culpability term applies to all material elements “unless a contrary purpose plainly appears.” Only states that codified a variation of at least one of these are listed as MPC states here.

For other important MPC provisions governing mens rea, see § 2.02(1), which requires at least proof of negligence for each material element, and § 2.05, which states that “when absolute liability is imposed with respect to any material element of an offense . . . the offense constitutes [only a noncriminal] violation.” Sixteen of the twenty-four MPC states adopted a version of § 2.02(1). *See, e.g.*, KY. REV. STAT. ANN. § 501.030(2) (West 2006); ME. REV. STAT. ANN. tit. 17-A, § 32 (2006); MO. ANN. STAT. § 562.016(1) (West 2012); MONT. CODE ANN. § 45-2-103 (2011); N.J. STAT. ANN. § 2C:2-2(a) (West 2005); 18 PA. CONS. STAT. ANN. § 302(a) (West 1998); TENN. CODE ANN. § 39-11-301(a)(1) (2010); TEX. PENAL CODE ANN. § 6.02(a) (West 2011). Seven have some version of MPC § 2.05. *See, e.g.*, 720 ILL. COMP. STAT. ANN. 5/4-9 (West 2002 & Supp. 2012); MO. ANN. STAT. § 562.026 (West 2012); MONT. CODE ANN. § 45-2-104 (2011). For a detailed accounting of state codes that incorporate MPC § 2.05 in varying ways, see 1 WAYNE R. LAFAYE, SUBSTANTIVE CRIMINAL LAW § 5.5(c) n.47 (2d ed. 2003).

Table 1.

| MPC States | 2011 Code Sections | MPC States | 2011 Code Sections |
|-------------|---|------------------|---|
| Alabama | ALA. CODE §§ 13A-2-3 to -4 | Maine | ME. REV. STAT. ANN. tit. 17-A, § 34 |
| Alaska | ALASKA STAT. § 11.81.610 | Missouri | MO. ANN. STAT. § 561.021, -.026 |
| Arizona | ARIZ. REV. STAT. ANN. § 13-202 | New Hampshire | N.H. REV. STAT. ANN. § 626:2 |
| Arkansas | ARK. CODE ANN. § 5-2-203 | New Jersey | N.J. STAT. ANN. § 2C:2-2 |
| Colorado | COLO. REV. STAT. §§ 18-1-502 to -503 | New York | N.Y. PENAL LAW § 15.15 |
| Connecticut | CONN. GEN. STAT. ANN. § 53A-5 | North Dakota | N.D. CENT. CODE § 12.1-02-02 |
| Delaware | DEL. CODE ANN. tit. 11, § 251 | Ohio | OHIO REV. CODE ANN. § 2901.21 |
| Hawaii | HAW. REV. STAT. ANN. §§ 702-204, -207 | Oregon | OR. REV. STAT. §§ 161.095, -.105, -.115 |
| Indiana | IND. CODE ANN. § 35-41-2-2 | Pennsylvania | 18 PA. CONS. STAT. ANN. § 302 |
| Illinois | 720 ILL. COMP. STAT. ANN. 5/4-3 | Tennessee | TENN. CODE ANN. § 39-11-301 |
| Kansas | KAN. STAT. ANN. § 21-5202 | Texas | TEX. PENAL CODE ANN. §§ 6.01 to -.04 |
| Kentucky | KY. REV. STAT. ANN. § 501.040 | Utah | UTAH CODE ANN. § 76-2-102 |

As Part II describes in more detail, I subclassified these states as “strong” MPC states if their codes included versions of *both* MPC § 2.02(3) and § 2.02(4) and did not significantly weaken these sections’ presumptions of mens rea, and as “weaker” or “weak” MPC states if they either significantly modified one of those MPC presumptions or failed to adopt one altogether.

To survey the case law addressing mens rea issues governed by these MPC-based statutes, I limited the inquiry to court decisions from eleven of these twenty-four MPC states—six in the stronger category and five in the weaker.¹⁹ For narrative ease, I focus on the

19. To target states with larger bodies of case law, I biased selection toward states with larger populations (thus avoiding, *inter alia*, Alaska, Delaware, and North Dakota). See *Annual*

text primarily in seven states: Colorado, Connecticut, Illinois, Missouri, Ohio, Oregon, and (to a lesser degree) Texas. Largely in the footnotes, I add case law from the other four states—Alabama, Indiana, New Jersey, and New York—that have case law that is basically consistent with the case law discussed in the text.

To identify relevant decisions, I read every state appellate decision available on Westlaw in each of the eleven states that cited that state's statutes codifying an MPC-based interpretive presumption for mens rea requirements.²⁰ From this search, a set of offenses defined in nearly all eleven states appeared—primarily drug offenses, weapons offenses, and offenses involving minors, all of which present recurrent questions of mens rea requirements for critical elements such as a weapon's characteristics or a minor's age.²¹ This method has a limit, however, which is itself an indicator of the limited influence of these MPC-based interpretive rules: state courts sometimes address interpretive questions about mens rea requirements without any reference to their states' statutes that govern these questions.²² To

Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2011, U.S. CENSUS BUREAU (Dec. 1, 2011), <http://www.census.gov/popest/data/state/totals/2011/tables/NST-EST2011-01.xls> (listing estimated state populations as of July 2011). I also avoided states that adopted MPC-based statutes comparatively recently. Thus I did not study Kansas case law because that state revised its code in 2011, Act effective July 1, 2011, 2010 Kan. Sess. Laws 1409 (codified as amended in KAN. STAT. ANN. ch. 21 (Supp. 2011)), and so little case law exists under the new provisions. Additionally, I did not select Kentucky because its code only marginally fits my criteria as an MPC state; it has no version of MPC § 2.02(4) and a weak analog to § 2.02(3). *See* KY. REV. STAT. ANN. § 501.040 (West 2006) (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of such offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such culpable mental state.”); *id.* § 501.030 (defining recklessness as the lowest “culpable mental state”). I avoided North Dakota because its code's equivalents to those MPC provisions are uniquely worded (and poorly drafted) revisions. *See* N.D. CENT. CODE § 12.1-02-02(2) (2012) (“If a statute . . . defining a crime does not specify any culpability and does not provide explicitly that a person may be guilty without culpability, the culpability that is required is willfully.”); *id.* § 12.1-02-02(1)(e) (defining “willfully” as “engag[ing] in the conduct intentionally, knowingly, or recklessly”).

20. I located these decisions two ways: (1) running a Westlaw search in each state's appellate case law database for the relevant code provisions; and (2) using all cases listed in the annotations to each state's MPC-based statute.

21. The MPC itself includes one offense that expressly attaches strict liability to a significant offense element, which is the element of the minor victim's age (ten years old or less) in sexual assaults. *See* MODEL PENAL CODE § 213.6(1) (“Whenever . . . the criminality of conduct depends on a child's being below the age of 10, it is no defense that the actor did not know the child's age, or reasonably believed the child to be older than 10.”).

22. *See, e.g.,* Steelman v. State, 602 N.E.2d 152, 154–56 (Ind. Ct. App. 1992); State v. Smith, 963 A.2d 281, 285–89 (N.J. 2009); Massey v. State, 933 S.W.2d 582, 584 (Tex. Ct. App. 1996).

find a sampling of these decisions, I searched state appellate databases and annotated codes for the type of offense that, in *other* MPC jurisdictions, had presented a mens rea issue that led a court to cite an MPC-based culpability rule. I also identified some decisions in this category by their citation to earlier decisions that had cited the MPC statutes. Finally, I supplemented these approaches by reference to published surveys of state decisional law on specific crimes and prior scholarship on mens rea rules in specific jurisdictions.²³

The survey reveals widespread judicial endorsement of strict-liability elements in MPC jurisdictions, despite state statutes that dictate presumptions otherwise.²⁴ Culpability presumptions have failed to displace judicial conventions of statutory interpretation that favor strict liability. The overall picture is one in which codifications of MPC-based mens rea provisions have had only modest effect.²⁵

23. My sources include: Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313 (2003) (studying age elements in state statutory rape offenses); Danye Holley, *The Influence of the Model Penal Code's Culpability Provisions on State Legislatures: A Study of Lost Opportunities, Including Abolishing the Mistake of Fact Doctrine*, 27 SW. U. L. REV. 229 (1997); Richard Singer, *Strict Criminal Liability: Alabama State Courts Lead the Way into the Twenty-First Century*, 46 ALA. L. REV. 47 (1994) (studying Alabama law); James R. Wyrsh & Jacqueline A. Cook, *The Missouri Mens Rea Requirement: New Missouri Supreme Court Opinion and How the Requirement Has Changed*, 66 U.M.K.C. L. REV. 499 (1998) (studying Missouri law); Colin Campbell, Annotation, *Mistake or Lack of Information as to Victim's Age as Defense to Statutory Rape*, 46 A.L.R.5th 499 (1997); Tracy A. Bateman, Annotation, *Validity, Construction, and Application of State Statutes Prohibiting Sale or Possession of Controlled Substances Within Specified Distance of Schools*, 27 A.L.R.5th 593 (1995); James N. Kourie, Annotation, *Mens Rea or Guilty Intent as Necessary Element of Offense of Contributing to Delinquency or Dependency of Minor*, 31 A.L.R.3d 848 (1970). Additionally, I reviewed Westlaw's case-law annotations under the culpability-presumption statutes of MPC jurisdictions.

24. As will be noted, describing court decisions as "contradicting" a codified interpretive rule is a judgment call, because the statute defining the interpretive rule must itself be interpreted, and at least in some cases reasonable disagreements can exist as to the better interpretation. For another study finding state high courts that ignore their state legislature's codified rules of statutory interpretation, see Abbe R. Gluck, *States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1787–91 (2010), which cites the Texas Court of Criminal Appeals as an example.

25. The modest effects of MPC provisions are disappointing at least from the perspective of the MPC's primary drafters and advocates, who were led by Professor Herbert Wechsler. For his views, see, for example, Herbert Wechsler, *Foreword* to MODEL PENAL CODE, at xi. In that *Foreword*, Professor Wechsler describes the MPC's influence two decades after the release of its preliminary draft, MODEL PENAL CODE (Proposed Official Draft 1962), and he counts thirty-four states as having revised their codes under some influence of the MPC. Wechsler, *supra*, at xi. That claim of thirty-four states is overstated in the sense that some of those code revisions borrowed only in minor respects from the MPC and rejected its most important components, including its Article 2 definitions of, and interpretive default rules for, culpability terms. See *supra* note 8. Specifically, ten of those states enacted none of the culpability provisions in their

Most courts in MPC states are far from committed to strong readings of the culpability presumptions in their codes.

B. Limits on Culpability Presumptions (Part One): Plain Language or Statutory Purpose

To begin, consider a routine mens rea question that faces state courts. Most states have a statute, such as the following, that increases the punishment for basic felony drug offenses upon proof of the additional fact that the conduct occurred within a certain distance from a school.²⁶ A common definition of the offense reads:

Any person who, as prohibited in another section, sells or possesses with intent to sell to another person any controlled substance within one thousand feet of any public or private school shall be imprisoned for a term of three years in addition and consecutive to any term of imprisonment for any other offenses arising from the same conduct. To constitute a violation of this subsection, an act of transporting or possessing a controlled substance shall be with intent to sell or dispense within one thousand feet of a school.²⁷

Note that the statute has an explicit mental-state requirement, “with intent to,” which appears in the predicate offense as well.²⁸ The mens rea issue arises from the ambiguity in the last sentence; the question is whether one must act with intent merely *to sell*, or *also* with intent that the sale *be within 1000 feet* of a school.

The Connecticut Supreme Court interpreted this statute in *State v. Denby*²⁹ and recognized that its legislature provided guidance for

codes: Georgia, Florida, Iowa, Kansas (although Kansas finally adopted them in 2011, Act effective July 1, 2011, § 13, 2010 Kan. Sess. Laws 1409, 1418–19 (codified at KAN. STAT. ANN. § 21-5202 (Supp. 2011))), Nebraska, New Mexico, South Dakota, Virginia, Washington, and Wyoming. For a comparable finding of the modest effects of state legislatures’ codification of statutory-interpretation rules, see Gluck, *supra* note 24, at 1787–91.

26. See Bateman, *supra* note 23 (collecting statutes and cases).

27. This is an edited version of Public Act No. 89-256, § 1(b), 1989 Conn. Acts 633, 634 (codified as amended at CONN. GEN. STAT. ANN. § 21a-278a(b) (West 2006)). The provision was amended in 1992 to increase the distance from school to 1500 feet. Public Act No. 92-82, 1992 Conn. Acts 235, 235–36 (codified as amended at CONN. GEN. STAT. ANN. § 21a-278a(b) (West 2006)). To accord with the analysis quoted in *State v. Denby*, 668 A.2d 682 (Conn. 1995); see *infra* text accompanying notes 29–36, however, I use the earlier version of section 21a-278a(b). The current form of the statutory provision was enacted in 1994. Public Act No. 92-82, § 1(b), 1994 Conn. Acts 1061, 1062 (codified at CONN. GEN. STAT. ANN. § 21a-278a(b) (West 2006)).

28. CONN. GEN. STAT. ANN. § 21a-277 (West 2006).

29. *State v. Denby*, 668 A.2d 682 (Conn. 1995).

this question in the mens rea presumption it adopted based on the MPC.³⁰ It recited, “When one and only one of such [mental-state] terms appears in a statute defining an offense, it is presumed to apply to every element of the offense unless an intent to limit its application clearly appears.”³¹ The language of the offense in light of this directive, the court concluded, made its meaning unambiguous.³² The offense “specifically requires a mental state of ‘intent,’ which must be applied to every element of that statute.”³³ The “plain language . . . dictates only one construction”³⁴—that the 1000-foot requirement is a *strict liability* element. The prosecutor must prove that the offense occurred within the 1000-foot zone, but she “is not, however, required to prove that the defendant knew that this location was within the zone.”³⁵ This is evident from the “plain language” of the statute, which overcomes the statutory presumption:

The mental state of knowledge that the location is within the 1000 foot zone is not set forth in § 21a-278a(b). An “intent” element is not synonymous with a “knowledge” element, each of which is specifically defined in the penal code. The absence of any statutory requirement that the defendant knowingly sell within the prohibited school zone demonstrates that the legislature did not intend to make knowledge an element of the crime.³⁶

30. *Id.* at 685.

31. *Id.* (quoting CONN. GEN. STAT. ANN. § 53a-5 (West 1988)) (internal quotation marks omitted). Section 53a-5 of the Connecticut Code was originally enacted by Public Act No. 828, § 5, 1969 Conn. Pub. Acts 1554, 1556 (codified at CONN. GEN. STAT. ANN. § 53a-5 (West 2007 & Supp. 2012)), twenty-five years before the school-zone drug offense, section 21a-278a(b), was enacted in its current form in 1994. For an example of the court establishing an interpretation of the offense prior to the enactment of the mens rea presumption, compare Public Act No. 828, § 5, 1969 Conn. Pub. Acts at 1556, with Public Act No. 92-82, § 1(b), 1994 Conn. Acts at 1062. Thus there is no issue of the court having established an interpretation of the offense prior to enactment of the mens rea presumption.

32. *Denby*, 668 A.2d at 685.

33. *Id.* (quoting CONN. GEN. STAT. ANN. § 21a-278a(b) (West 1988 & Supp. 1991)).

34. *Id.* The intermediate appellate court similarly found that “by the clear language of the statute, such an intent is not an element of the crime.” *State v. Denby*, 646 A.2d 909, 913 (Conn. App. Ct. 1994), *aff’d*, 668 A.2d 682 (Conn. 1995).

35. *Denby*, 668 A.2d at 685.

36. *See id.* (“If the legislature had wanted to make knowledge as to location of a school an element of the offense, it would have done so by specifically stating . . . that the defendant knew [he] was in, or on, or within 1000 feet of a school.”). One might explain this interpretation with reference to the Connecticut legislature’s revision to the MPC’s definitions of mental states when it adopted them. The legislature defined the term “intentionally” (the word that many states substitute for the MPC’s “purposely”) solely with reference to result conduct elements, for which intention means “conscious objective.” Public Act No. 828, § 3(9), 1969 Conn. Pub.

Denby is a representative example of the relatively low standard that state courts often apply to conclude that a legislative intention for strict liability *clearly* appears. In contrast to the Connecticut legislature's relative lack of clarity in specifying a strict-liability element, a few state legislatures that enacted both the MPC culpability presumptions and a similar school-zone offense made their intent to impose strict liability exceedingly clear. New Jersey's equivalent statute, for example, specifies that "it shall be no defense to a prosecution for a violation of this section that the actor was unaware that the prohibited conduct took place while on or within 1,000 feet of any school property."³⁷ Utah, another MPC state, did the same, as did Louisiana.³⁸

The details of the *Denby* analysis are specific to the decision but the holding is the same in nearly every state that adopted the MPC culpability presumptions, and in non-MPC states as well.³⁹ Several other states whose codes contain both a version of this offense and the MPC-based presumptions reached the same result, although the clarity of their reasoning varies and differences in statutory language provide some grounds for distinction.⁴⁰

Acts at 1555 (codified at CONN. GEN. STAT. ANN. § 53a-3(11) (West 2007)) (internal quotation marks omitted). In contrast, the MPC adds (a bit awkwardly) a definition of intent with respect to circumstances such as location: intention means one is "aware of the existence of such circumstances or he believes or hopes that they exist." MODEL PENAL CODE § 2.02(2)(a)(ii) (Official Draft 1985). *Denby* did not note the statutory definition of intention, but Connecticut's shorter version might help explain the court's assumption that "intent" could not apply to the school-zone element, forcing it to assess only whether "knowledge" was required. The absence of a knowledge term meant, to the state court, that an exception to the mental-state presumption "clearly appear[ed]." *Denby*, 668 A.2d at 685.

37. N.J. STAT. ANN. § 2C:35-7 (West 2005 & Supp. 2012); *see also* State v. Morales, 539 A.2d 769, 775–76 (N.J. 1987) (holding that the strict-liability offense is constitutional).

38. *See* LA. REV. STAT. ANN. § 40:981.3(B) (2012) ("Lack of knowledge that the prohibited act occurred on or within two thousand feet of school or drug treatment facility property shall not be a defense."); UTAH CODE ANN. § 58-37-8(4)(e) (LexisNexis 2007 & Supp. 2012) (providing that it is not a defense that the actor was unaware that the location where the act occurred was in or near a school or within one thousand feet of a school); *see also* State v. Williams, 729 So. 2d 1080, 1081–82 (La. Ct. App. 1999) (holding that the strict-liability offense is constitutional). Several statutes in non-MPC states do the same. *See, e.g.*, MASS. ANN. LAWS ch. 94C, § 32J (LexisNexis 2010 & Supp. 2012) (providing that it is not a defense that the actor was unaware that the act occurred in or near a school); WASH. REV. CODE ANN. § 69.50.435(2) (West 2007 & Supp. 2012) (same).

39. For examples from non-MPC states, *see* LA. REV. STAT. ANN. § 40:981.3(B) (2012) and Bateman, *supra* note 23.

40. In addition to cases discussed below, for Pennsylvania law, *see Commonwealth v. Murphy*, 592 A.2d 750, 754–55 (Pa. Super. Ct. 1991), which held that there is no mens rea requirement for school proximity because that factor was in a sentencing guideline provision

The Oregon Supreme Court reached the same interpretation of its school-zone drug offense, which lacks an express culpability term. Oregon’s statute reads: “Except as authorized [in other sections], it is unlawful for any person to manufacture or deliver a . . . controlled substance within 1,000 feet of the real property comprising a public or private . . . school (a) [A violation] is a Class A felony”⁴¹ In *State v. Rutley*,⁴² the court cited and discussed Oregon’s MPC-inspired statutes that define presumptions of culpability.⁴³ It quickly concluded that a culpability requirement must be implied into the offense, but it then focused on the mens rea provision that states, “[A] culpable mental state is not required if . . . an offense . . . clearly indicates a legislative intent to dispense with any culpable mental state requirement for the offense or any material element thereof.”⁴⁴ In a move common among courts in MPC states, the court then turned to traditional interpretive conventions—the ordinary meaning of language and statutory purpose. The language indicates strict liability because “the 1,000-foot distance is not logically or grammatically separated” from other components of the offense definition, and because the legislature’s purpose is explicitly instrumental: “to protect children from drug use.”⁴⁵ For these reasons, *Rutley* found clear indications for strict liability on the element of distance from the school.

rather than the offense definition. For Indiana law, see *Walker v. State*, 668 N.E.2d 243, 244–45 (Ind. 1996) and *Steelman v. State*, 602 N.E.2d 152, 154–56 (Ind. Ct. App. 1992), which held that the legislature did not intend to require awareness of proximity to a school. Even though the offense definition requires the drug offense to be committed “knowingly or intentionally,” in reaching the strict-liability holding for the school-zone element, neither decision makes any reference to section 35-41-2-2(d) of the Indiana Code, which states that “if a kind of culpability is required for commission of the offense, it is required with respect to every material element,” *id.*; see *Saxton v. Smith*, 315 S.W.3d 293, 296, 299 (Ky. 2010) (noting that neither mens rea presumptions nor the Constitution require proof of culpability for the school-distance element that would increase drug offense liability); *State v. Smith*, 48 S.W.3d 159, 165–69 (Tenn. Crim. App. 2000) (same).

41. OR. REV. STAT. § 475.904 (2011). At the time of *Rutley*, this statute was codified at OR. REV. STAT. § 475.999 (1990).

42. *State v. Rutley*, 171 P.3d 361 (Or. 2007).

43. *Id.* at 363–64 (citing OR. REV. STAT. §§ 161.095, .-105, .-115 (2005)).

44. *Id.* at 364 (quoting OR. REV. STAT. § 161.105(1)(b) (2005)) (internal quotation marks omitted).

45. *Id.* at 365. More fully: “[T]he statute at issue here required that the 1,000-foot distance be measured from ‘the real property comprising a public or private elementary, secondary or career school attended primarily by minors.’ In that phrase, the 1,000-foot distance is not logically or grammatically separated from the other school-related requirements.” *Id.* (citation omitted) (quoting OR. REV. STAT. § 475.999 (1999)).

Ohio provides a final variation of how an MPC state reaches the same conclusion. Subsection (A) of the Ohio offense defines the basic crime: “No person shall knowingly . . . [s]ell or offer to sell a controlled substance.”⁴⁶ Subsection (C) then specifies, without repeating “knowingly,” the grade of the offense according to a range of factors—drug type, quantity, and proximity of the conduct to a school.⁴⁷ In interpreting this offense, the Ohio Court of Appeals in *State v. Ward*⁴⁸ reached the same strict-liability holding as the courts in *Denby* and *Rutley*. And it did so with only the barest acknowledgement of Ohio’s version of the MPC culpability presumption,⁴⁹ which states that “[w]hen the section defining an offense does not specify any degree of culpability, and *plainly indicates* a purpose to impose strict criminal liability for the conduct described in the section, then culpability is not required.”⁵⁰ *Ward* did not quote this provision; it merely cited it as authority for this odd assertion: “[T]he Ohio legislature has attached criminal liability to criminal conduct without the requirement of a culpable mental state.”⁵¹ Instead of describing “plain indications” to impose strict liability, the court offered three brief rationales for the holding: the school-proximity offense “does not criminalize otherwise innocent behavior,”⁵² additional punishment serves the statute’s “purpose of protecting children in schools,”⁵³ and those who sell drugs near schools even unknowingly “deserve proportionately greater punishment.”⁵⁴ The last rationale is telling; it demonstrates a judicial conception of *proportionate desert* unconnected to an actor’s culpability and determined entirely by a strict-liability circumstance element.

46. OHIO REV. CODE ANN. § 2925.03(A) (West 2006).

47. *Id.* § 2925.03(C).

48. *State v. Ward*, 637 N.E.2d 16 (Ohio Ct. App. 1993).

49. *Id.* at 19; *see also State v. Harris*, 623 N.E.2d 1240, 1243–44 (Ohio Ct. App. 1993) (“The mens rea requirement is met by the knowing sale or offer to sell a controlled substance. This fact assures that the ‘schoolyard’ provision does not ‘criminalize a broad range of apparently innocent conduct.’ Under such circumstances, due process does not require that [defendant] specifically knew that the drug sale in which she took part was conducted within one thousand feet of a school.”).

50. OHIO REV. CODE ANN. § 2901.21(B) (West 2006).

51. *Ward*, 637 N.E.2d at 19.

52. *Id.*

53. *Id.* at 18 (quoting *United States v. Cross*, 900 F.2d, 66, 69 (6th Cir. 1990)).

54. *Id.*

In *Denby*, *Rutley*, and *Ward*, state courts employed various interpretive strategies that avoid or undermine their state codes' MPC culpability presumptions. Those decisions may represent judicial misunderstanding of those presumptions or resistance to them. These courts, by different rationales, applied culpability presumptions narrowly to justify strict liability; they took from the codification of culpability presumptions little legislative disfavor of strict liability, even for offenses in which a legislative choice for strict liability was not express. Alternately (or additionally), the decisions may signal the limits of what the MPC's interpretive canons can be expected to achieve. General interpretive rules themselves require interpretation, and these join a body of established interpretive conventions that they do not fully displace. As a result, MPC-based interpretive rules provide courts with less determinative guidance than their legislative drafters might have expected. Every state's culpability presumption, like the MPC's,⁵⁵ provide for exceptions to the presumption if legislative intent "plainly appears" or is "clearly indicated."⁵⁶ Courts identify those occasions with the traditional tools of statutory interpretation. They infer legislative intent, as *Rutley* put it, from "indirect indicators" such as plain language, grammatical analysis, sentence and paragraph structure, legislative history, or presumed purpose.⁵⁷ One convention, such as plain meaning in *Denby*, may be sufficient to find a clearly indicated exception. But *Rutley* and *Ward* illustrate the use of one especially important convention that state courts very often cite, when interpreting many

55. See MODEL PENAL CODE § 2.02(4) (Official Draft 1985) (noting that an explicit culpability term applies to all material elements "unless a contrary purpose plainly appears").

56. See statutes cited *supra* Table 1.

57. See *State v. Rutley*, 171 P.3d 361, 365 (Or. 2007) ("[T]his court has attempted to determine the legislature's intent by examining the offense or element of the offense and a variety of indirect indicators to determine whether the legislature would have had an obvious reason or reasons to omit a culpable mental state."). *Rutley* candidly noted that the legislature had not specified whether courts should use traditional statutory-interpretation tools to determine legislative intent under the MPC provisions; in the absence of guidance, it chose to do so. *Id.* at 364.

A typical statement of statutory-interpretation protocols in the context of mens rea is *State v. Robinson*, 718 P.2d 1313 (Kan. 1986):

Whether or not criminal intent or knowledge is an element of a statutory crime depends on the will of the legislature. Legislative intent is a matter of statutory construction, to be determined in a given case from consideration of the language of the statute in connection with the subject matter of the prohibition, the statute's manifest purpose and design, and the consequences of the several constructions to which the statute may be susceptible.

Id. at 1316.

different statutes, to justify strict liability. That convention is for courts to draw a strong inference of strict liability from a statute's instrumental purpose to protect a particular victim class or prevent a specific harm, a purpose that courts commonly infer from a statute's text or legislative history.⁵⁸

The Ohio Supreme Court has a notable record of finding strict-liability exceptions to the culpability presumption its legislature adopted in 1972.⁵⁹ In a 1981 case, *State v. Wac*,⁶⁰ the court interpreted Ohio's bookmaking offense,⁶¹ which punishes individuals who "[e]ngage in bookmaking, or knowingly engage in conduct that facilitates bookmaking."⁶² Mr. Wac was charged with engaging in bookmaking, and the state supreme court addressed whether the offense required proof of mens rea, in light of the state's presumption for a recklessness standard when an offense "does not specify any degree of culpability" and does not "plainly indicate[] a purpose to impose strict liability."⁶³ *Wac* found a plain indication for strict liability because no culpability term accompanies "engage in bookmaking," but one does accompany the subsequent phrase defining the facilitation offense.⁶⁴ This is odd, in part because bookmaking is defined as "the business of receiving or paying off bets."⁶⁵ It is hard to imagine one doing that conduct unknowingly, or—in recklessness terms—doing it while unaware of the risk one is receiving or paying bets. The legislature, rather than plainly indicating strict liability, probably sought to avoid redundancy: although one always receives or pays *bets* knowingly,⁶⁶ one could

58. *State v. Gandhi*, 989 A.2d 256 (N.J. 2010), provides another example, *see id.* at 271 ("[B]ased on the statutory language and the history to the statutory offense of stalking, we do not discern a legislative intent to restrict the applicability of the anti-stalking statute to a stalker-defendant who purposefully or knowingly intended that his course of conduct would cause a reasonable victim to fear bodily injury or death. Rather the plain language of the statutory offense, reasonably read, prohibits a defendant from purposefully or knowingly engaging in a course of conduct . . . that would cause such fear in an objectively reasonable person.").

59. Amended Substitute House Bill No. 511, § 2901.21, 1971 Ohio Laws 1866, 1897–98 (codified as amended at OHIO REV. CODE ANN. § 2901.21 (West 2006)).

60. *State v. Wac*, 428 N.E.2d 428 (Ohio 1981).

61. *Id.* at 431. OHIO REV. CODE ANN. § 2915.02(A)(1) (West 2006).

62. OHIO REV. CODE ANN. § 2915.02(A)(1) (West 2006).

63. *Id.* § 2901.21(B).

64. *Wac*, 428 N.E.2d at 431.

65. OHIO REV. CODE ANN. § 2915.01(A) (West 2006).

66. If one "pays a bet" *knowingly*, one must be unaware that one is giving money to another, or believe that one is giving money to another for some other reason—either of which,

easily *facilitate* another's bookmaking unknowingly, for instance by leasing property to another without knowing of his bookmaking activity.

Wac has become an oft-cited Ohio precedent for the rule that strict liability is "plainly indicated" when an offense includes a culpability term in one phrase of an offense but not in another phrase that specifies alternate conduct.⁶⁷ Ohio appellate courts commonly find further support for "plain" indications of strict liability in familiar instrumental rationales, such as whether strict liability facilitates a criminal statute's deterrence purpose.

A recent strict-liability interpretation of Ohio's aggravated robbery offense makes the point. The offense is defined as theft, which expressly requires knowledge, along with another element.⁶⁸ In *State v. Lester*⁶⁹ the issue was whether "the element of brandishing, displaying, using, or indicating possession of a deadly weapon has a mens rea of recklessness, or whether strict liability is imposed with regard to that element."⁷⁰ The Ohio Supreme Court in *Lester* held that it did not. After considering the code's presumption of culpability in the absence of a mens rea term unless strict liability was "plainly indicated," *Lester* concluded the indication was plain

if true, presents an occasion for conviction of an actor for innocent conduct. The purpose of culpability requirements is precisely to draw those distinctions and prevent that risk.

67. See, e.g., *State v. Parrish*, 465 N.E.2d 873, 874-75 (Ohio 1984) (per curiam) (noting that Ohio courts have permitted strict liability when "the General Assembly has expressly differentiated degrees of culpability" in the definition of the offense); *State v. Brewer*, 645 N.E.2d 120, 121-22 (Ohio Ct. App. 1994) ("The rule of law emerging from those cases is that a statute that neither specifies that a particular mental state is necessary to commit the offense nor plainly states that no mental state is necessary to commit the offense may nevertheless plainly indicate a legislative intent to impose strict liability if the statute is structured so as to proscribe an act with 'expressly differentiated degrees of culpability.'" (quoting *Parrish*, 465 N.E.2d at 874-75)); *State v. Ward*, 637 N.E.2d 16, 19 (Ohio Ct. App. 1993) ("We reject [the defendant's] argument that he must additionally know he was within one thousand feet of a school. The statute in question enhances the penalty when an additional element is proven and does not criminalize otherwise innocent behavior, as it applies only to people already in violation of a statute with a mens rea requirement."); see also *State v. Harris*, 623 N.E.2d 1240, 1244 (Ohio Ct. App. 1993) (interpreting Ohio's strict-liability standard regarding drug offenses in school zones).

68. See OHIO REV. CODE ANN. § 2913.02 (West 2006) (stating that one must "knowingly obtain or exert control over . . . [another's] property . . . [w]ithout the consent of the owner" and "with purpose to deprive the owner"). Ohio defines several other crimes as "[t]heft offense[s]" which can become robbery if committed with weapons. See *id.* § 2913.01(K)(1) (defining "[t]heft offense[s]" (internal quotation marks omitted)); *id.* §§ 2911.01 to -.02 (defining robbery and aggravated robbery as requiring commission of a "theft offense").

69. *State v. Lester*, 916 N.E.2d 1038 (Ohio 2009).

70. *Id.* at 1039 (interpreting OHIO REV. CODE ANN. § 2911.01(A)(1) (West 2006)).

enough,⁷¹ although to do so the court failed to recognize that *indicating* possession and *brandishing* a weapon are verbs that imply intentional or knowing conduct as a matter of ordinary meaning. The court reasoned that the amendment of the offense to add the display and brandish terms does not establish “that the General Assembly intended to require a specific mental element”⁷²—an analysis that Justice Lanzinger, concurring in the judgment only, argued displaced the requirement for plainly indicated strict liability with one requiring a plain indication for intent.⁷³ The majority’s support cited previous strict-liability decisions including *Wac*,⁷⁴ as well as common rationales used to infer strict liability. *Lester* invoked the instrumental rationale that the “risk of harm increases” from the conduct regardless of whether it is done knowingly.⁷⁵ And, reflecting a common judicial rejection of the idea that culpability is linked proportionally to liability, the court noted that the “brandishing” element does not serve to distinguish innocent from culpable conduct, so “it is reasonable that the General Assembly would impose strict liability on the additional [element] that enhances the seriousness of the criminal activity.”⁷⁶ The Ohio Supreme Court employed the same reasons more recently to affirm a strict-liability application of another clause

71. *Id.* at 1041–42 (internal quotation marks omitted).

72. *Id.* at 1042.

73. *Id.* at 1046 (Lanzinger, J., concurring in the judgment).

74. *Id.* at 1047 (“[A] culpable mental state . . . [i]s an element of facilitating bookmaking. Nevertheless, there is no such requirement in the same subsection for bookmaking per se. This exclusion plainly indicates a purpose to impose strict criminal liability” (quoting *State v. Wac*, 428 N.E.2d 428, 431 (Ohio 1981) (internal quotation marks omitted))). *Lester* also relied on *State v. Wharf*, 715 N.E.2d 172 (Ohio 1999), which interpreted the weapon-possession element of the robbery statute, OHIO REV. CODE ANN. § 2901.21(D)(1), as plainly indicating strict liability, *see Wharf*, 715 N.E.2d at 175 (“[B]y employing language making mere possession or control . . . , as opposed to actual use or intent to use, a violation, it is clear to us that the General Assembly intended . . . a strict liability offense.”); *see also Lester*, 916 N.E.2d at 1041–42 (citing *Wharf* for the proposition that “[t]he element of having a deadly weapon in one’s possession or under one’s control . . . does not . . . require that a defendant act with a specific intent”). The *Lester* court’s misreading was facilitated by its failure to acknowledge that “possession” is defined in section 2901.21(D)(1) of the Ohio Code as requiring that one “*knowingly* procured or received the thing” (emphasis added).

75. *Lester*, 916 N.E.2d at 1043 (“From the victim’s perspective, . . . the risk of harm increases when a defendant brandishes or displays the weapon.”). *Wharf* provides a more explicit instrumental rationale. *See Wharf*, 715 N.E.2d at 175 (invoking the legislature’s implicit goal “to remove the potential for harm that exists” from weapon possession during thefts and noting that “[m]erely *having* the weapon is the potentially dangerous factual condition warranting the more severe penalty” (quoting *State v. Edwards*, 361 N.E.2d 1083, 1086 (1976))).

76. *Lester*, 916 N.E.2d at 1042–43.

in the same statute.⁷⁷ And one finds the same reliance on instrumental aims of protecting victims or reducing harm in other states' strict-liability interpretations, despite MPC-inspired culpability presumptions.⁷⁸

C. Limits on Culpability Presumptions (Part Two): Restrictive Application and Non-Acknowledgement

Another set of strategies that facilitates strict liability despite MPC culpability presumptions merits note. One version occurred when the Ohio Court of Appeals, in *Ward*, paraphrased the MPC presumption with the proposition that the “legislature has attached criminal liability to criminal conduct without the requirement of a culpable mental state.”⁷⁹ Sometimes courts mischaracterize, or perhaps misunderstand, mental-state presumptions in their state codes. But some courts simply ignore them. A Texas appellate decision, *Massey v. State*,⁸⁰ provides a stark example of the latter tactic. In resolving the question of whether a sexual assault offense includes a mental-state requirement for the victim's age element, which triggers a grade and sentence enhancement, the court made no reference at all to the Texas statutes that codify mens rea rules based on the MPC.⁸¹ Instead, it cited only a more attenuated authority from a jurisdiction without MPC presumptions—a U.S. Supreme Court decision interpreting a federal pornography offense—for the principle that “[a]n additional allegation of culpable mental state is not

77. See *State v. Horner*, 935 N.E.2d 26 (Ohio 2010) (interpreting OHIO REV. CODE ANN. § 2911.01(A)(3) (West 2006)). In *Horner*, intentional injury would have been easy to prove. See *id.* at 29 (noting that the defendants “beat the victims and robbed them of cash”). Likewise, intent on the weapon elements would have been easy to prove in *Wharf* and *Lester*. Mr. Wharf pointed his rifle at the police before he was shot by them. *Wharf*, 715 N.E.2d at 173. Mr. Lester pointed a knife at a victim and said, “I will cut you.” *Lester*, 916 N.E.2d at 1039 (quoting Lester) (internal quotation marks omitted).

78. See, e.g., *Gorman v. People*, 19 P.3d 662, 666–67 (Colo. 2000) (citing, *inter alia*, the statute's purpose to protect victims as a reason not to infer a requirement that the defendant know a minor's age in the offense of “contributing to the delinquency of a minor,” COLO. REV. STAT. § 18-6-701 (1999), although the court inferred a knowledge requirement for the conduct that constitutes “contributing to delinquency,” in this case facilitating illegal drug sales).

79. *State v. Ward*, 637 N.E.2d 16, 19 (Ohio Ct. App. 1993).

80. *Massey v. State*, 933 S.W.2d 582 (Tex. Ct. App. 1996).

81. See TEX. PENAL CODE ANN. § 6.02 (West 2011) (establishing the basic mens rea requirements); *id.* § 6.03 (defining culpable mental states).

required for such an aggravating element.”⁸² *Massey* is not singular in this respect.⁸³

Additionally, courts find more forceful ways to narrowly interpret culpability presumptions than in *Denby*,⁸⁴ in which the court’s inference of clear legislative intent for strict liability did all of the work.⁸⁵ Some courts define offense components with labels that make the presumptions inapplicable. This was the Illinois court’s tactic to reach the same strict-liability holding as *Denby*, *Rutley*, and *Ward* for the Illinois school-zone element of the drug offense. In *People v. Pacheco*,⁸⁶ the Illinois appellate court’s analysis concluded that school proximity was not an *element* of the offense. It was instead “only an *enhancing factor* used to elevate the level of the felony to a Class 1 felony,”⁸⁷ and the state code’s interpretive presumptions speak

82. *Massey*, 933 S.W.2d at 584 (citing *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 n.3 (1994)). For a contrasting decision from another MPC state, see *People v. Ryan*, 626 N.E.2d 51, 55 (N.Y. 1993), *superseded by statute*, Act of June 10, 1995, 1995 N.Y. Laws 2180 (codified as amended at N.Y. PENAL LAW § 220.18 (McKinney 2008)). *Ryan* relied on codified mens rea presumptions, N.Y. PENAL LAW § 15.15 (McKinney 1992), to hold that an offense prohibiting knowing possession of 625 mg of a hallucinogen, *id.* § 220.18(5), requires proof that offender had knowledge of the weight of the drug—an element defined in a subsection of the law that increases the sentencing range, *Ryan*, 626 N.E.2d at 54–55; *see also* N.Y. PENAL LAW § 220.18 (McKinney 2008) (specifying the circumstances under which “[a] person is guilty of criminal possession of a controlled substance in the second degree”).

83. For example, the New Jersey Supreme Court in *State v. Smith*, 963 A.2d 281 (N.J. 2009), did not discuss section 2C:2-2 of the New Jersey Code, which requires a mental state for all terms unless contrary purpose plainly appears. Although noting that the firearm-possession statute, N.J. STAT. ANN. § 2C:39-3(d) (West 2007), is susceptible to “two plausible interpretations,” the court found that strict liability applied to the element that the gun be defaced, *Smith*, 963 A.2d at 285, 289. Similarly, *State v. Baker*, 636 S.W.2d 902 (Mo. 1982), did not discuss Missouri’s culpability presumption, MO. ANN. STAT. § 562.021 (West 1978), in finding circumstantial evidence sufficient to prove that the defendant knew the murder victim’s status as a law-enforcement officer; the court also declined to address “the unscrutable question of mens rea,” *Baker*, 636 S.W.2d at 907. Here, the jury was not instructed to find knowledge. *Id.*; *see also* Gluck, *supra* note 24, at 1787–91 (describing Texas Court of Criminal Appeals decisions that ignore and contradict other codified interpretive rules).

84. *See, e.g.*, *Gorman v. People*, 19 P.3d 662, 666–67 (Colo. 2000) (declining to infer a mens rea requirement as to the victim’s age, but inferring it as to the conduct element).

85. *See supra* notes 34–36 and accompanying text.

86. *People v. Pacheco*, 666 N.E.2d 370 (Ill. App. Ct. 1996).

87. *Id.* at 376 (emphasis added); *see also* *People v. Brooks*, 648 N.E.2d 626, 628–30 (Ill. App. Ct. 1995) (interpreting the drug offense statute for offenses committed within one thousand feet of public housing and holding that mental-state requirements do not extend to “[e]nhancing provisions” because they only “concern consequences of the offense which make [the offense] more serious”). *Pacheco* drew no inference from the fact that the basic drug offense is codified in one section of the Illinois Code, 720 ILL. COMP. STAT. ANN. 570/401 (West 1994), whereas the enhancement (committing the offense near a school) is separately codified in section 570/407(b).

only to culpability requirements “with respect to each *element* described by the statute defining the offense.”⁸⁸ The court embraced this approach more recently for another offense. In *People v. Stanley*,⁸⁹ the statute read: “A person who possesses any firearm upon which any such importer’s or manufacturer’s serial number has been changed, altered, removed or obliterated commits a Class 3 felony.”⁹⁰ *Stanley*’s strained interpretation “discern[ed] that the elements of this offense are properly [1] the *mens rea* and [2] the possession Though the defacement unmistakably bears upon the commission of the offense, it is *not an element* of the offense.”⁹¹ Although an “enhancing factor” is not used or defined in the Illinois penal code, this distinction between factors and elements, which limits culpability requirements to elements, has persisted.⁹² And it has done so despite the Illinois Supreme Court’s earlier holding that a

Some states expressly treat such aggravating facts as strict-liability sentencing factors, as Pennsylvania does with its school-zone drug offense, by placing the school-zone factor in its sentencing guidelines. See 35 PA. STAT. ANN. § 780-113 (West 2003 & Supp. 2012) (defining drug offenses); 204 PA. CODE § 303.10 (2012) (providing for a sentence enhancement for offenses in school zones); see also *Commonwealth v. Murphy*, 592 A.2d 750, 754–55 (Pa. Super. Ct. 1991) (holding that there is no mens rea requirement for proximity to a school zone because that fact is in the sentencing guidelines rather than the offense definition). The clarity of Pennsylvania’s grading and sentencing rule here says nothing about the soundness of its grading distinctions generally, which a careful study has ranked below average. See Paul H. Robinson, Michael T. Cahill & Usman Mohammad, *The Five Worst (and Five Best) American Criminal Codes*, 95 NW. U. L. REV. 1, 51, 60 (ranking Pennsylvania’s code as below average in the “grading liability and punishment” category but “above average” in other categories).

88. *Pacheco*, 666 N.E.2d at 375 (emphasis omitted) (quoting 720 ILL. COMP. STAT. ANN. 5/4-3(a) (West 1994)).

89. *People v. Stanley*, 921 N.E.2d 445 (Ill. Ct. App. 2010).

90. *Id.* at 451 (quoting 720 ILL. COMP. STAT. ANN. 5/24-5(b) (West 2006)) (internal quotation marks omitted).

91. *Id.* at 454 (emphasis added); see also *State v. Jordan*, 733 N.E.2d 601, 607 (Ohio 2000) (holding that, for the offense of unlawful possession of dangerous ordnance, the state does not need to prove that the defendant knew that the shotgun’s barrel length was less than eighteen inches).

92. Although there is no reference to enhancing factors in the interpretive provisions or elsewhere in the Illinois penal code, a state supreme court rule refers to factors that enhance a sentence in a provision that defines sentencing procedures. See ILL. S. CT. R. 451(g) (“When the death penalty is not being sought and the State intends, for the purpose of sentencing, to rely on one or more sentencing enhancement factors . . . the court may, within its discretion, conduct a unitary trial through verdict on the issue of guilt and on the issue of whether a sentencing enhancement factor exists.”); see also 725 ILL. COMP. STAT. ANN. 5/111-3(c) (West 2006 & Supp. 2012) (listing charging requirements for prosecutors pursuing enhanced sentences). For another example of an Illinois decision deciding whether an offense clause is an element or an enhancing factor, see *People v. Zimmerman*, 942 N.E.2d 1228 (Ill. 2010), which concluded that a clause in the statute defining the offense was an element and not a sentence-enhancement factor, *id.* at 1234.

fact that raised theft from a misdemeanor to a felony is *an element* of that offense, with the result that the government must prove that element at trial rather than merely address it in a sentencing hearing.⁹³

D. Counterexamples: Taking Culpability Presumptions Seriously

Not every state court adopts rationales to avoid legislative codification of culpability presumptions. Some courts take the enactment of these provisions as indicating legislative preference for mental-state requirements, and they apply them even with respect to statutes whose language, structure, or implied purpose would support strict-liability holdings in other jurisdictions and under non-MPC interpretive conventions. Despite its strict-liability decision in *Rutley* on the school-zone drug offense, the Oregon Supreme Court earlier in *State v. Blanton*⁹⁴ relied on presumptions in its state code to establish a culpability requirement to an age element in another drug offense.⁹⁵ Moreover, it did so when the culpability term “knowingly” appeared in the statute’s first subsection and the minor’s age element was placed in the fourth,⁹⁶ a structure that could be read to indicate strict liability. The separate age-element section increased the felony grade of the offense, but unlike Illinois and Ohio courts, *Blanton* inferred no distinction for “non-elements” or “enhancing factors.”⁹⁷ Its reasoning relied entirely on Oregon’s MPC-based statute, in which a “prescribed culpable mental state applies to each material element of the offense that *necessarily requires* a culpable mental state.”⁹⁸ *Blanton* found that the italicized clause (a revision of the MPC adopted by several states) to be “confusing” but concluded that

93. *People v. Hicks*, 518 N.E.2d 148, 150 (Ill. 1987), *superseded by statute*, Public Act 86-964, 1989 Ill. Laws 6509 (codified as amended at 725 ILL. COMP. STAT. ANN. 5/111-3 (West 2006 & Supp. 2012)).

94. *State v. Blanton*, 588 P.2d 28, 29 (Or. 1978) (en banc).

95. *Id.* at 29–30. *Blanton*, age twenty-one, was accused of providing marijuana to a seventeen-year-old. *Id.* at 29.

96. *Id.* At the time of *Blanton*, the statute read:

(1) A person commits the offense of criminal activity in drugs if he knowingly and unlawfully . . . furnishes . . . a narcotic or dangerous drug.

(2) . . . [C]riminal activity in drugs is a Class B felony

(4) . . . [I]f the defendant is 18 years of age or over and the conviction is for furnishing a narcotic or dangerous drug to a person under 18 years of age and who is at least three years younger than the defendant, criminal activity in drugs is a Class A felony.

Act of Mar. 12, 1974, § 2, 1974 Or. Laws Spec. Sess. 167, 168 (codified at OR. REV. STAT. § 167.207 (1974)), *repealed by* Act effective July 1, 1978, 1977 Or. Laws 701.

97. *See Blanton*, 588 P.2d at 29–30.

98. OR. REV. STAT. § 161.115(1) (2011) (emphasis added).

culpability was “necessarily require[d]” for all elements save those for “jurisdiction, venue and the like”⁹⁹—a reading that strengthens the provision’s presumption for mental-state requirements. Instead of emphasizing an instrumental protective purpose from the offense definition, *Blanton* emphasized the legislative intent of the MPC-based culpability presumption, which it read as displacing the common-law canon *actus non facit reum nisi mens sit rea*. “A policy against criminal liability without fault need not go so far as to protect a culpable defendant from an unanticipated extent of liability,” the court reasoned, but “the policy adopted by the legislature is to require a culpable mental state with respect to each element in the definition of an offense.”¹⁰⁰ Much more recently, the Oregon appellate court read another youth-endangerment drug crime the same way.¹⁰¹ A few other states had done so in the pre-MPC era.¹⁰²

One MPC jurisdiction did the same even with its school-zone drug offense. Missouri codifies the school-zone element in a separate section from the basic drug offense and lacks an express culpability term:

A person commits the offense [as prohibited in another section] of distribution of a controlled substance near schools if such person violates section 195.211 by unlawfully distributing or delivering any controlled substance to a person in or on, or within two thousand feet of, the real property comprising a public or private elementary or secondary school, public vocational school, or a public or private community college, college or university or on any school bus.¹⁰³

99. *Blanton*, 588 P.2d at 29 (quoting *State v. Blanton*, 570 P.2d 411, 413 (Or. Ct. App. 1977), *aff'd*, 588 P.2d 28 (Or. 1978)) (internal quotation marks omitted). In a later decision, the Oregon Court of Appeals was more blunt, labeling the clause “gibberish.” *State v. Rutley*, 123 P.3d 334, 335 (Or. Ct. App. 2005), *aff'd in part, rev'd in part*, 171 P.3d 361 (Or. 2007).

100. *Blanton*, 588 P.2d at 29.

101. See *State v. Dixon*, 83 P.3d 385, 387–88 (Or. Ct. App. 2004) (holding that mens rea applies to age in section 163.175(1) of the Oregon Code, which specifies liability for one who “knowingly . . . [p]ermits a person under 18 years of age to enter or remain in a place where unlawful activity involving controlled substances is maintained or conducted”). *But see State v. Rainoldi*, 268 P.3d 568, 579 (Or. 2011) (en banc) (reversing the court below by holding that proof of the defendant’s culpability regarding his felony status was not required).

102. See *Kourie*, *supra* note 23, § 4[b] (citing the following cases as requiring mens rea for the age of the victim: *Chambers v. State*, 215 N.E.2d 544 (Ind. 1966); *State v. Friedman*, 74 N.E.2d 285 (Ohio Ct. Com. Pl. 1947); *McGowan v. State*, 173 P.2d 227 (Okla. Crim. App. 1947), *rev'd on reh'g*, 176 P.2d 837 (Okla. Crim. App. 1947); and *Gottlieb v. Commonwealth*, 101 S.E. 872 (Va. 1920)).

103. MO. ANN. STAT. § 195.214 (West 2011). A violation raises the basic offense from a class B to a class A felony. For the basic class B drug offense, see *id.* § 195.211.

The Missouri Court of Appeals in *State v. White*¹⁰⁴ found the mens rea question settled by the state's MPC-based statute that directs, "[I]f the definition of any offense does not expressly prescribe a culpable mental state for any elements of the offense, a culpable mental state is nonetheless required and is established if a person acts purposely or knowingly."¹⁰⁵ That command, the court held, meant the state must prove a defendant's mental state as to the school-zone element.¹⁰⁶ It continued, "[I]n order for a defendant to be found guilty . . . , he must have acted purposely or knowingly. A person acts 'knowingly' . . . when, concerning his conduct or attendant circumstances, he is aware of the nature of his conduct or that those circumstances exist."¹⁰⁷ The legislature's placement of the basic offense and school-zone enhancement in separate sections did not affect the court's mens rea analysis. Neither did the statute's purpose to protect youth from drug markets, nor did the culpability provision's failure to specify that *implicit* mental-state requirements apply to all elements just as explicit ones do. Missouri's interpretation, however, is a singular outlier for these school-zone drug statutes.¹⁰⁸ Apparently no other state, MPC or non-MPC, has interpreted a similar drug offense to require proof of mens rea as to school proximity.¹⁰⁹

104. *State v. White*, 28 S.W.3d 391 (Mo. Ct. App. 2000), *mandate recalled* by 70 S.W.2d 644 (Mo. Ct. App. 2002).

105. *Id.* at 396 (quoting MO. REV. STAT. § 562.021(3) (1999) (internal quotation marks omitted). The Missouri statute also dictates that "reckless or criminally negligent acts do not establish such culpable mental state." MO. ANN. STAT. § 562.021(3) (West 2012). This statute is based on MPC § 2.02(3), *see supra* note 18, but departs from it by defining the minimum culpability to be inferred as knowledge rather than recklessness.

106. *White*, 28 S.W.3d at 396 (discussing the culpability requirements as they apply to the offense of distributing a controlled substance in school zone, MO. REV. STAT. § 195.214 (1999)).

107. *Id.* at 396 (quoting MO. REV. STAT. § 562.016(3) (1999)); *see also* *State v. Crooks*, 64 S.W.3d 887, 890 (Mo. Ct. App. 2002) (explaining that, with regard to the same statute, "the state must prove that . . . the sale was within 2000 feet of a school" and that this sale was completed "knowingly with regard to all of the facts and circumstances").

108. For more on Missouri courts' interpretation of mens rea requirements, including a discussion of recent changes, see generally Wyrsh & Cook, *supra* note 23. For Oregon, in addition to *Rutley*, see *State v. Jones*, 196 P.3d 97 (Or. Ct. App. 2008), which "conclude[d] that the legislature did not intend to require the state to prove a defendant's intent to steal property worth at least \$750 in order to convict him of first-degree theft," *id.* at 102.

109. The Washington Supreme Court, however, has held that its state statute requires proof of a culpable mental state when the school has an educational program on an upper floor of a commercial building with no public indication of its status as a school. *See State v. Akers*, 965 P.2d 1078, 1079 (Wash. 1998) ("[T]he State's evidence was insufficient to show that [defendant] had a readily ascertainable means of determining that he was in a school zone at the time of the drug transaction . . ."). In other applications, Washington's statute does not require mens rea.

More broadly, Oregon and Missouri are outliers in the degree to which MPC presumptions lead them to avoid strict-liability holdings.¹¹⁰ Despite a few strong applications of MPC culpability rules elsewhere,¹¹¹ state court interpretations of mental-state requirements under MPC rules mostly go the other way. Two primary impressions emerge from this survey of case law in MPC states. One is that, as an analytical matter, legislative specifications of culpability presumptions have not simplified statutory construction by displacing judicial use of other interpretive canons on mens rea questions. The second conclusion is more substantive: MPC-inspired statutory presumptions have proven to be weak mechanisms for shifting courts away from inferring strict liability in criminal offenses, even for elements that are the sole basis for increasing the felony offense grade and punishment severity.

E. Reasons for the Weak Effect of Culpability Presumptions

1. *Legislative Drafting.* Before taking a closer look at state MPC-based statutes for more explanations of this trend, there are a couple of reasons for the modest effect—or in some settings the failure—of the MPC culpability provisions. One is a product of legislative choice: state legislatures commonly have failed to follow MPC drafting conventions for crime definitions in the wake of adopting MPC general provisions on culpability in their codes. As a result, state offense definitions often are less clear than the MPC as to whether mental-state requirements apply to certain elements, especially those

See State v. Johnson, 68 P.3d 290, 295 (Wash. Ct. App. 2003) (“The statute provides that it is no defense to a prosecution for violation of the statute that the defendant is unaware the prohibited activity occurred inside a drug free zone.”); State v. Davis, 970 P.2d 336, 338 (Wash. Ct. App. 1999) (“[A] defendant’s knowledge of a school bus stop location is not required; rather, the mere existence of the stop is sufficient to warrant the sentencing enhancement.”). On the overwhelming trend to interpret such statutes without mens rea on the proximity element, see Bateman, *supra* note 23, §§ 6, 31, 31.5. One state, South Carolina, amended its statute in 2010 expressly to *add* a knowledge requirement. *See* Omnibus Crime Reduction and Sentencing Reform Act of 2010, No. 273, § 39, 2010 S.C. Acts 1937, 2009 (codified at S.C. CODE ANN. § 44-53-445(B) (Supp. 2011)) (“For a person to be convicted of an offense pursuant to subsection (A), the person must: (1) have knowledge that he is in, on, or within a one-half mile radius of the grounds of a public or private elementary, middle, or secondary school . . .”).

110. Oregon, however, has at least one decision to the contrary. *See* State v. Rainoldi, 268 P.3d 568, 579 (Or. 2011) (en banc) (holding that proof of the defendant’s culpability regarding his felony status was not required).

111. New York may be another state in which MPC-based culpability presumptions have a notable effect on state-court decisions. *See supra* note 82.

in separate subsections.¹¹² Poor drafting makes a state's culpability provisions harder to apply;¹¹³ courts are less confident that exceptions will be truly explicit, so they resort more readily to common-law interpretive canons in search of statutory meaning and set a lower bar for "plain" indications of strict liability. Furthermore, some MPC states, including Ohio and Illinois, did not adopt the MPC provision that specifies how culpability requirements apply to grading elements,¹¹⁴ which may give their courts further basis to invoke a traditional convention that mens rea does not attach to an "aggravating element" or "enhancing factor." This convention may undermine the basic code provisions defining a presumption of mens rea in the absence of any such term.

The last point supports a broader observation: even MPC-influenced legislatures that enacted the primary culpability presumptions may be neither as fully committed to mens rea requirements for all offense elements as codification of those presumptions might suggest, nor as committed to that position as advocates of the correspondence principle and the MPC are. Even when a legislature adopts these key provisions from the MPC, it does so in the context of a preexisting body of interpretive law and substantive criminal law.¹¹⁵ MPC adoptions often occur without accompanying codification of all supporting provisions in the MPC,

112. For detailed accounts of haphazard, ambiguous, and inconsistent offense drafting in the wake of a state's earlier MPC-based revision of its criminal code, see generally Paul H. Robinson, Thomas Gaeta, Matthew Majarian, Megan Schultz & Douglas M. Weck, *The Modern Irrationalities of American Criminal Codes: An Empirical Study of Offense Grading*, 100 J. CRIM. L. & CRIMINOLOGY 709 (2010), which examines the Pennsylvania Code, and ILL. CRIM. CODE REWRITE & REFORM COMM'N, FINAL REPORT OF THE ILLINOIS CRIMINAL CODE REWRITE AND REFORM COMMISSION (2003), available at <https://www.law.upenn.edu/fac/phrobins/illinois/IL%20final%20report%20Vol1.pdf>, which examines the Illinois Code. For an example of the MPC's clarity in defining mens rea across a statute with multiple subsections, see its definition of "theft by deception," which requires a culpable mental state of "purposely" in the chapeau of the offense definition, thus applying it to the four subsections that follow. MODEL PENAL CODE § 223.3 (Official Draft 1985).

113. Part of the blame might be the ALI's: the MPC contains no model offenses for drug crimes.

114. See MODEL PENAL CODE § 2.04(2) ("[I]gnorance or mistake of the defendant shall reduce the grade and degree of the offense of which [the defendant] may be convicted to those of the offense of which [the defendant] would be guilty had the situation been as [the defendant] supposed.").

115. Some states revised many of their specific crime definitions when they took up MPC-inspired code revision projects, but many took a more piecemeal approach. All state criminal codes later added many more crimes than the MPC contains, including in many areas that the MPC did not contemplate, most notably drug crimes.

such as the grading-elements provision.¹¹⁶ Furthermore, a culpability presumption in a real-world setting may legitimately be understood to mean something different from the same provision in the MPC itself. One reason for the modest influence of MPC-based culpability presumptions in state codes, then, may be that their adoption, without further and continuing indications of legislative commitment to their motivating principles, is an insufficient signal of a state's commitment to the MPC's culpability premises, particularly the proportional link of punishment to individual fault.¹¹⁷ These indications of a legislature's commitment to the strength of its own MPC presumptions draw additional support, as described more in the next Part, from many states' revisions of the MPC's formulation of the general-part culpability rules.

2. *Judicial Role—Inferring Intent Versus Enforcing Prior Commitments.* Conventions of statutory interpretation reflect a particular vision of how courts should defer to the democratic legitimacy of legislatures. Traditional canons mostly aim to help courts determine and facilitate legislative intent even when intent is not clear. That vision of legislative deference entails a weaker presumption in favor of culpability requirements than the MPC provisions do.¹¹⁸ In deferring to legislatures, courts making every

116. I identified code sections equivalent to the MPC grading provision in only three of the twenty-four MPC states. *See* HAW. REV. STAT. ANN. § 702-211 (LexisNexis 2007) (“When the grade or class of a particular offense depends on whether it is committed intentionally, knowingly, recklessly, or negligently, its grade or class shall be the lowest for which the determinative state of mind is established with respect to any element of the offense.”); N.J. STAT. ANN. § 2C:2-2(e) (West 2005) (containing equivalent language); WASH. REV. CODE ANN. § 9A.08.010(3) (West 2009 & Supp. 2012) (same).

117. Courts sometimes note legislative acquiescence to judicial interpretations of statutes. *See, e.g.,* State v. Smith, 963 A.2d 281, 285 (N.J. 2009) (“When, after a long period, the Legislature does not act to amend a statute to contradict our interpretation, then we may presume its acquiescence to the construction given to the provision.”).

118. The primary interpretive rules in favor of mens rea terms include the presumption that crimes require some “union of act and intent,” *see generally* LAFAYE, *supra* note 18, § 6.3(a) (“With those crimes which require some mental fault (whether intention, knowledge, recklessness, or negligence) in addition to an act or omission, it is a basic premise of Anglo-American criminal law that the physical conduct and the state of mind must concur.”); that strict liability is generally limited to “public welfare” or “regulatory” offenses, *see* United States v. Dotterweich, 320 U.S. 277, 280 (1943) (“[The Federal Food, Drug, and Cosmetic Act, ch. 653, 52 Stat. 1040 (1938) (codified at 21 U.S.C. § 301–392 (1940))] dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.”); and that statutes codifying common-law crimes implicitly require the mens rea required at common law, *see* Morissette v. United States, 342

effort to determine a statute's intended meaning set a comparatively low bar for how clear a legislature's rejection of a mens rea presumption must be, because courts might be confident that they can determine intent even when it is not clear.

By contrast, codification of mens rea presumptions should strengthen an inference of culpability requirements in ambiguous statutes and lead courts to require greater drafting clarity before finding that legislators intended to reject that presumption in a particular code section—more clarity than courts were able to find in decisions like *Denby*, *Rutley*, or *Ward* when using traditional canons. The New Jersey statute is an example of the clarity courts could require to avoid the general presumption of mens rea.¹¹⁹ By requiring greater clarity, courts' interpretive process should serve to discipline legislative drafting and thereby reduce ambiguity regarding legislative intent. Requiring greater clarity would also hold the legislature to its own prior, *codified* commitment for culpability requirements for all offense elements, unless clearly rejected in a particular instance.¹²⁰

MPC-inspired mens rea rules, in short, shift the institutional role of courts in the statutory-interpretation process. Under such rules, courts defer to legislatures not by making all efforts to infer intended meaning from particular offense definitions but by adhering to the legislature's general presumption of mens rea for all elements, as well as holding the legislature itself to that presumption. As the MPC intended, this approach would simplify judicial interpretation and make statutory meaning clearer and more predictable. Explanations for why many courts have not embraced this role, as discussed in Part IV, include the normative appeal of the strict-liability outcomes reached through traditional interpretive canons and courts' tendencies to join (or inability to resist) the political trend of the last generation toward harsher criminal law. In some MPC states, however, a simpler explanation may share some credit: the next Part surveys the explicit choices that many MPC-inspired legislatures made to retain strict liability and weaken general presumptions for culpability requirements.

U.S. 246, 251 (1952) (“As the states codified the common law of crimes, even if their enactments were silent on the subject [of mens rea], their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation.”).

119. See *supra* note 37.

120. Although, again, how strongly one can infer this dictate from a legislature's adoption of MPC provisions is debatable.

II. LEGISLATIVE SUPPORT FOR STRICT LIABILITY

Part II takes a closer look at variations among the twenty-four MPC states in their legislative commitment to the correspondence principle. It does so by highlighting several statutory departures from the MPC version of mens rea presumptions.¹²¹ Although many states revised the MPC's language when adopting provisions for their own codes, only a few states adopted the MPC's culpability provisions nearly verbatim.¹²² Many states' language modifications are not substantive. I categorize twelve of the twenty-four as strong MPC states because their codes include substantive equivalents to the MPC's presumption of mens rea when a crime definition lacks an explicit mental-state term and the presumption that express terms apply to all offense elements. The other half of MPC states either lack a statute codifying *one* of these presumptions or (in two cases, Arizona and Colorado) notably weaken the mens rea inference in the absence of an explicit requirement. In what follows, I identify and distinguish some of the most common and substantial alternatives or omissions regarding mens rea presumptions. I then highlight state codes that explicitly expand applications of strict liability in specific statutes, so as to trump any general presumption of a culpability requirement.

A. State Revisions to the MPC Culpability Presumptions

The most notable means by which MPC states weaken mens rea requirements in comparison to the MPC is by failing to adopt one of the two presumptions for culpability requirements. Holding aside the twelve strongest states, which do include both provisions,¹²³ two others

121. The relevant MPC provisions remain § 2.02(3), § 2.02(4), and § 2.02(1). *See supra* note 9.

122. Examples of codes that are the closest to the MPC include DEL. CODE ANN. tit. 11, §§ 243–264 (2007); HAW. REV. STAT. ANN. §§ 702-204, -207 (LexisNexis 2007); and 18 PA. CONS. STAT. ANN. §§ 103, 302, 305 (West 1998 & Supp. 2012).

123. ALA. CODE § 13A-2 to -4(b) (LexisNexis 2005); ARK. CODE ANN. §§ 5-2-203(a)–(b), -204 (2006); DEL. CODE ANN. tit. 11, §§ 243–264 (2007); HAW. REV. STAT. ANN. §§ 702-204, -207 (LexisNexis 2007); 720 ILL. COMP. STAT. ANN. 5/4-3, 5/4-9 (West 2002 & Supp. 2012); KAN. STAT. ANN. § 21-5202 (Supp. 2011); MO. ANN. STAT. § 562.026(2) (West 2012); N.J. STAT. ANN. § 2C:2-2(c)(3) (West 2005); N.Y. PENAL LAW § 15.15(2) (McKinney 2009); N.D. CENT. CODE § 12.1-02-02 (2012); OR. REV. STAT. § 161.105(1) (2011); 18 PA. CONS. STAT. ANN. § 302(d) (West 1998).

Ohio's provision, however, lacks MPC § 2.02(4)'s clear direction that express mental-state requirements presumptively apply to all elements, substituting instead language that “[t]he person has the requisite degree of culpability for each element *as to which a culpable mental*

(Arizona and Colorado) codify both presumptions but explicitly weaken the presumption of mens rea when an offense includes no express culpability term.¹²⁴ The remaining ten states lack any version of one of the two MPC presumptions. Five of the remaining states include only the presumption to imply mens rea when no such term is included in an offense; they do not have any equivalent to MPC § 2.02(4)'s presumption that an *express* mens rea term applies to all elements of the offense unless a statute clearly specifies otherwise.¹²⁵ Four states do the opposite: they include a presumption that express terms apply to all elements but fail to dictate a presumption of mens rea when no mens rea term is present.¹²⁶ Finally, Kentucky stands alone among the twenty-four, arguably such that it should not be counted as an MPC state: it lacks any presumption about the reach of express mens rea terms and includes only a weak presumption for mens rea when no term is apparent.¹²⁷ These groups are summarized in Table 2.

state is specified by the section defining the offense." OHIO REV. CODE § 2901.21(A)(2) (West 2006) (emphasis added).

124. ARIZ. REV. STAT. ANN. § 13-202(B) (2010) ("If a statute defining an offense does not expressly prescribe a culpable mental state that is sufficient for commission of the offense, no culpable mental state is required for the commission of such offense, and the offense is one of strict liability unless the proscribed conduct necessarily involves a culpable mental state. If the offense is one of strict liability, proof of a culpable mental state will also suffice to establish criminal responsibility."); COLO. REV. STAT. § 18-1-503(2) (2012) ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").





125. ALASKA STAT. § 11.81.610 (2010); OHIO REV. CODE § 2901.21(B) (West 2006); TENN. CODE ANN. § 39-11-301 (2010); TEX. PENAL CODE ANN. § 6.02 (West 2011); UTAH CODE ANN. § 76-2-102 (LexisNexis 2008).

126. CONN. GEN. STAT. ANN. § 53a-5 (West 2007); IND. CODE ANN. § 35-41-2-2 (d) (LexisNexis 2009); ME. REV. STAT. ANN. 17-A, § 34 (2006); N.H. REV. STAT. ANN. § 626:2 (LexisNexis 2007).

127. See KY. REV. STAT. ANN. § 501.030(2) (West 2006) ("A person is not guilty of a criminal offense unless . . . [h]e has engaged in such conduct intentionally, knowingly, wantonly or recklessly as the law may require, with respect to each element of the offense . . ."); *id.* § 501.040 (noting that offenses lacking an express mental-state requirement "may" require culpability for "some or all of the material elements"); see also *Saxton v. Commonwealth*, 315 S.W.3d 293, 299 (Ky. 2010) (interpreting the latter statute to mean that "even within the Penal Code, there is recognition that a culpable mental state may not be required as to an element of the offense").

The Connecticut legislature's official Comment attached to section 53a-5 of the Connecticut Code states that "whether a mental state is required is a question of statutory construction, depending on the general scope of the act and the nature of the evils to be avoided." CONN. GEN. STAT. ANN. § 53a-5 cmt. (1971).

Table 2.

| | | |
|---|---|--|
| Strongest  | <ul style="list-style-type: none"> • Equivalent to MPC presumptions for express mens rea terms; • Presumption to imply missing mens rea terms | Twelve: Alabama, Arkansas, Delaware, Illinois, Hawaii, Kansas, Missouri, New Jersey, New York, North Dakota, Oregon, Pennsylvania |
| Strong  | <ul style="list-style-type: none"> • Presumption for express terms; • Weak presumption to imply missing terms | Two: Arizona, Colorado |
| Moderate  | <ul style="list-style-type: none"> • Presumption to imply missing terms; • No presumption for express terms | Five: Alaska, Ohio, Tennessee, Texas, Utah |
| Moderate  | <ul style="list-style-type: none"> • Presumption for express terms; • No presumption to imply missing terms | Four: Connecticut, Indiana, Maine, New Hampshire |
| Weakest | <ul style="list-style-type: none"> • No presumption for express terms; • Weak presumption to imply missing terms | One: Kentucky |

The language by which some states weaken the implication of mens rea bears note. Arizona, Colorado, and Kentucky all employ the same alternative provision that explicitly preserves the legitimacy of strict-liability offenses. Colorado's substitute for MPC § 2.02(3) reads:

Although no culpable mental state is expressly designated[,] . . . a culpable mental state *may* nevertheless be required . . . with respect

to *some* or all of the material elements . . . , *if* the proscribed conduct necessarily involves such a culpable mental state.¹²⁸

Several other states employ effectively the same language but then also strengthen the presumption for mens rea by specifying that legislative intent for strict liability must be clear or plain. Alabama's version is representative. Following language similar to Colorado's, it adds: "A statute defining a crime, *unless clearly indicating a legislative intent to impose strict liability*, states a crime of mental culpability."¹²⁹ I coded these states with these provisions as adopting a strong presumption to imply mens rea, but this alternative language seems to be open to more ambiguity than the MPC: courts might view strict liability as not "clearly indicated" in a given offense yet also not find culpability to be "necessarily involved" in some element. Even under the MPC's clearer language, courts find the need for common-law interpretive canons to resolve whether strict liability is plainly intended for a given offense.¹³⁰

Many MPC states departed from the MPC culpability template in other ways that are not critical to emphasize here.¹³¹ The point to take is that even in the twenty-four states broadly categorized as MPC jurisdictions, roughly half of the state courts start with some

128. COLO. REV. STAT. § 18-1-503(2) (2012) (emphasis added); *see also* ARIZ. REV. STAT. ANN. § 13-202(B) (2010) (containing language identical to the Colorado statute); KY. REV. STAT. ANN. § 501.040 (West 2006) (same). Given the wording of the Colorado statute, a decision such as *Gorman v. People*, 19 P.3d 662 (Colo. 2000), has a more plausible claim of adhering to legislative intent. *See supra* notes 78, 84.

129. ALA. CODE § 13A-2-4(b) (LexisNexis 2005) (emphasis added); *see also* N.J. STAT. ANN. § 2C:2-2(c)(3) (West 2005) (employing equivalent language); N.Y. PENAL LAW § 15.15(2) (McKinney 2009) (same); TEX. PENAL CODE ANN. § 6.02(b) (West 2011) (same); UTAH CODE ANN. § 76-2-102 (LexisNexis 2008) (same). *But see* OHIO REV. CODE ANN. § 2901.21(B) (West 2006) ("When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in the section, then culpability is not required . . .").

130. *See, e.g.*, *State v. Bryant*, 15 A.3d 865, 870–72 (N.J. Super. Ct. App. Div. 2011) (using plain language and legislative history to conclude that the legislature intended a strict-liability element in the child-endangerment statute, N.J. STAT. ANN. § 2C:24-4 (West 2005)). Oregon's code also employs the "necessarily required" language to restrict application of *explicit* terms, OR. REV. STAT. § 161.115(1)–(2) (2011), but, as noted above, its supreme court reduced that route for strict liability, *see supra* notes 94–101 and accompanying text.

131. For example, Missouri and New Jersey made knowledge, rather than recklessness, the standard to imply in statutes lacking a mental-state term. MO. ANN. STAT. § 562.021(3) (West 2012); N.J. STAT. ANN. § 2C:2(c)(3) (West 2005). Oregon did the opposite, allowing mere negligence to be the inferred culpability level. OR. REV. STAT. § 161.115(1), (2) (2011). The sole Texas provision governing mens rea specifies a culpability presumption for *conduct* but does not mention result or circumstance elements. TEX. PENAL CODE ANN. § 6.02 (West 2011).

indications from their legislatures—sometimes modest, sometimes substantial—that strict-liability elements or offenses are more likely to be found in the state code than in those states that fully codified the MPC culpability presumptions. This variation explains little of the trend of state decisions surveyed in Part I. The Connecticut court in *Denby*, for example, declined to extend an express mens rea term to a statutory element even though Connecticut’s code includes the MPC’s culpability presumptions. And Ohio’s long line of strict-liability interpretations is governed by that state’s strong presumption to imply missing mens rea terms; the absence of a presumption to extend express terms to all elements did not matter in most of those decisions.¹³² Nonetheless, the statutory variation does not seem to fully account for variations in judicial interpretations. Ohio’s long record of strict-liability decisions is probably more extensive than its MPC modifications require. The Oregon code’s departures from the MPC example are greater than in some states, yet its courts have a comparatively strong record of inferring culpability requirements; the same is probably true of New York.

B. Other Legislative Approval of Strict Liability

Legislatures endorse strict liability not only by enacting weaker alternatives to the MPC culpability canons or by acquiescing to state court strict-liability interpretations. They also do so by enacting specific strict-liability rules. Kansas, Minnesota, New York, and Wisconsin each have a general statute dictating that “[c]riminal intent does not require proof of knowledge of the age of a minor even though age is a material element in the crime in question.”¹³³ New

132. On the other hand, Colorado’s weak version of a presumption to imply missing mens rea terms plausibly helps explain the decision in *Gorman*. In that case, the court inferred a knowledge requirement for one element but not another. *See supra* notes 78, 84. A stronger presumption could have led to a holding that knowledge was required for both—although case law in other states, such as Ohio, shows that adoption of a stronger presumption does not necessarily stop courts from readily inferring strict liability in comparable settings.

133. MINN. STAT. § 609.02(9) (2009); WIS. STAT. § 939.23(6) (2005); *see also* KAN. STAT. ANN. § 21-5204(b) (Supp. 2011) (“Proof of a culpable mental state does not require proof . . . that the accused had knowledge of the age of a minor, even though age is a material element of the crime with which the accused is charged.”); N.Y. PENAL LAW § 15.20(3) (McKinney 2009) (“[K]nowledge by the defendant of the age of [a] child is not an element of any . . . offense and it is not, unless expressly so provided, a defense . . . that the defendant did not know the age of the child . . .”). The Kansas statute survived the state’s MPC-based code revision in 2011. *See* JOHN W. WHITE & BRETT WATSON, KAN. CRIMINAL CODE RECODIFICATION COMM’N, 2010 FINAL REPORT TO THE KANSAS LEGISLATURE 21–23 (2010), available at <http://www.kansasjudicialcouncil.org/Documents/Studies%20and%20Reports/>

York has a similar statute stating that proof of a defendant's knowledge regarding the weight of illegal drugs is never required.¹³⁴ And legislatures sometimes make strict liability truly explicit in particular offense definitions; the New Jersey statute noted above, specifying strict liability on the school-zone element of drug offenses, is one example.¹³⁵ The New Jersey legislature, in fact, adds express strict-liability components to many offense definitions—some of which trigger substantial punishment increases,¹³⁶ including a notable (or notorious) strict-liability homicide offense.¹³⁷ And it has done so even though it also enacted strong culpability presumptions that track closely the original MPC language.¹³⁸ Pennsylvania, a state that

2010%20Reports/Recodification%20Final%20Report.pdf (citing the MPC in a discussion of changes to culpability provisions of the Kansas Code). For a survey of states with similar rules regarding age elements in statutory rape offenses, see Carpenter, *supra* note 23, at 385–91. The MPC has a comparable, but much more limited, general rule on the invalidity of a minor's consent. See MODEL PENAL CODE § 2.11(3) (Official Draft 1985) (“[A]ssent does not constitute consent if . . . it is given by a person who by reason of youth . . . is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmlessness of the conduct . . .”). For an example of an MPC offense to which the rule dictating strict liability for age elements would apply, see *id.* § 213.1(1), which defines rape.

134. N.Y. PENAL LAW § 15.20(4) (McKinney 2009).

135. N.J. STAT. ANN. § 2C:35-7 (West 2005 & Supp. 2012); see also *supra* note 37 and accompanying text.

136. New Jersey offenses with strict-liability elements include: N.J. STAT. ANN. § 2C:11-4(a)(2) (West 2005) (providing for strict liability as to manslaughter caused “while fleeing or attempting to elude a law enforcement officer”); *id.* § 2C:11-5.1 (stating that knowledge of death is not an element of the crime of leaving the scene of a motor vehicle accident causing death); *id.* § 2C:12-1(b)(6), (b)(8), (f) (requiring no mens rea for certain circumstances constituting aggravated assault); *id.* § 2C:12-3(a) (specifying that, with respect to the offense of making terroristic threats during an emergency, the existence of emergency is a strict-liability element); *id.* § 2C:20-25(h) (requiring no knowledge or intent with respect to whether an entity is a public agency for computer-related theft from a public agency); *id.* § 2C:21-22 (mandating that “caus[ing] injury to another” is a strict-liability element of the offense of unauthorized practice of law); *id.* § 2C:24-4(6) (providing for strict liability as to the child's age for the offense of endangering the welfare of children by engaging in sexual acts); *id.* § 2C:33-3(d) (stating that strict liability applies to the emergency component of triggering false public alarms during an emergency); *id.* § 2C:35-6 (mandating strict liability as to the minor's age for the offense of involving a minor in drug activity); *id.* § 2C:38-5(b)(2) (providing support to terrorist groups is a strict-liability offense as to the group's status as a terrorist organization).

137. See *id.* § 2C:35-9 (mandating homicide liability for drug sellers if their buyers die from voluntarily ingesting the drugs); see also *State v. Rodriguez*, 645 A.2d 1165, 1176 (N.J. 1994) (affirming a conviction under the statute after victims voluntarily ingested the drugs). For a similar statute and affirmation of a conviction, see MICH. COMP. LAWS § 750.317a (2004); and *People v. Liddell*, No. 2007-214278-FC, 2009 WL 529840, at *2 (Mich. Ct. App. Mar. 3, 2009). For a harsh criticism of such statutes, see HUSAK, *supra* note 6, at 45–54, 74–75.

138. N.J. STAT. ANN. § 2C:2-2(c) (West 2005). Strong general presumptions are not inconsistent, of course, with clearly specified exceptions.

adopted the MPC culpability rules nearly verbatim, added strict-liability elements, including in the school-zone element of its drug offense, in a different way—by shifting some result and circumstance elements into its sentencing guidelines, where they are treated as strict-liability *sentencing factors* rather than offense elements.¹³⁹ With respect to the clarity of legislative intent, at least, these two states are salutary models. Courts start with clear instructions not to infer strict liability unless such legislative intent is plain, and the legislatures provide plenty of examples of very explicit strict-liability elements. That combination should keep courts from too readily inferring, through non-MPC interpretive canons, strict liability in offenses without explicit language.

If courts nonetheless infer strict liability too easily,¹⁴⁰ it may be because courts take a signal from the legislature's repeated use of strict liability. Perhaps courts infer that strict-liability provisions adopted after the enactment of culpability presumptions indicate greater legislative acceptance of strict liability over time and a weaker commitment to ensuring that punishment is allocated proportionately to culpability. And rather than adhering to a judicial role that enforces the legislature's prior commitments to general presumptions save for clearly specified exceptions, courts shift to a role in which they infer and facilitate a diminished legislative acceptance for the correspondence principle throughout a broad range of statutes.

III. THE ALTERNATIVE TO PROPORTIONATE LIABILITY: STRICT LIABILITY WITHIN THE SCOPE OF CULPABLE CONDUCT

A. *The Implicit Parameters of Strict Criminal Liability*

The foregoing presents a picture of much wider adoption of strict liability in MPC states than one would expect from the MPC itself. The prevalence of strict liability is a result of choices by both legislatures and courts. Many legislatures signaled their disagreement with the MPC from the beginning by enacting revisions that weaken the critical presumption of mental-state terms attached to every element. Those that did not adopt such revisions often imposed strict liability in other ways.

139. For a discussion of Pennsylvania law, see *supra* note 87.

140. See *supra* notes 58, 130.

Working from their legislatures' MPC-inspired reforms—and often going farther than those statutory provisions require—many state courts have shown a notable and consistent willingness to infer legislative preference for strict liability. As a matter of judicial practice, the MPC provisions have not changed courts' statutory-interpretation methods as much as its supporters undoubtedly hoped. The exception for strict liability when intent for it “plainly appears” has proven to be a more frequently invoked rationale on which to infer strict liability than the MPC drafters intended. Even when applying the strong culpability presumptions found in many state codes, courts regularly invoke strict liability through other interpretive conventions—textual meaning, sentence and code-section structure, implicit statutory purposes, predicted effects, and the force of prior judicial decisions. Courts have generally declined to use the MPC canons as a reason to demand that legislatures express strict liability in the incontrovertibly clear terms that the New Jersey legislature frequently does. Instead, judges assume the role of quasi partners of legislators and search for subtle indications of intended strict liability in statutory language, even when that intent is far from plain.

The evidence allows this conclusion: even after the enactment of express culpability presumptions, courts and legislatures in those states mostly remain uncommitted to the correspondence principle as a core premise of criminal law. State adoption of MPC-based code reforms should not be taken as a signal that states thereby committed their criminal-justice systems to the premise that punishment is justified only in proportion to liability. Instead, courts in many states continue to give mens rea and proof of fault a more restricted role: proof of culpability as to some initial offense or core conduct element—some threshold that separates innocent actors from guilty ones—is morally sufficient. Contemporary criminal law is characterized neither by Coke's unlawful act theory,¹⁴¹ nor by the MPC's position, the correspondence principle. The premise of contemporary criminal law is somewhere in between.

The prevailing principle, which courts do little to elaborate, is suggested by the rationale that judges regularly invoke for strict-liability interpretations. The principle is the idea that no proof of culpability is *required* beyond that needed to ensure that an actor is

141. See *supra* note 11 and accompanying text.

not convicted for purely innocent conduct.¹⁴² This view describes much of what legislatures and courts widely take as the normatively acceptable, and preferable, relationship of punishment to culpability. The purpose of culpability is primarily, and often exclusively, to distinguish innocent actors from guilty ones.

State and federal courts frequently cite the U.S. Supreme Court for this point. Relying on *United States v. X-Citement Video, Inc.*,¹⁴³ courts emphasize “the presumption in favor of a scienter requirement should apply to each of the statutory elements [of an offense] *that criminalize otherwise innocent conduct*”¹⁴⁴—but no elements *beyond* those. Once proof of culpability reveals that a defendant is not an innocent actor, the essential work of mental-state requirements is done. Mens rea need not attach to other elements that serve only to *enhance* liability, from a lesser to a greater offense level, or that only serve to trigger greater punishment. Elements that merely distinguish greater from lesser offenses, or greater from lesser *sentences*, need no justification from proof of culpability to do that work. Those distinctions can be justified on grounds unrelated to moral fault. Relying on the common judicial formulation, this may be called the “otherwise innocent” principle. Alternately, it can be understood as a principle of “threshold culpability”: once an actor crosses the threshold from innocent to culpable, requirements for mens rea proof diminish.¹⁴⁵

The Illinois Court of Appeals in *People v. Brooks*¹⁴⁶ provided a typical statement: “Once the legislature has determined that certain conduct is criminal, it need not require the State to prove a

142. See, e.g., *In re C.R.M.*, 611 N.W.2d 802 (Minn. 2000) (“[G]reat care is taken to avoid interpreting statutes as eliminating mens rea where doing so criminalizes a broad range of what would otherwise be innocent conduct.”); *State v. Lester*, 916 N.E.2d 1038, 1042 (Ohio 2009) (“When the additional fact makes innocent conduct criminal, . . . it is unlikely that the General Assembly ‘plainly intended’ to impose strict liability.”).

143. *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994).

144. *Id.* at 72 (emphasis added). Similarly, *Liparota v. United States*, 471 U.S. 419 (1985), noted the particular care that the Supreme Court has taken to avoid construing a statute to dispense with mens rea where doing so would “criminalize a broad range of apparently innocent conduct,” *id.* at 426. For typical state court reliance on Supreme Court jurisprudence in MPC states, see *Saxton v. Commonwealth*, 315 S.W.3d 293 (Ky. 2010), which explains the role of the *Liparota* holding on state drug laws, *Saxton*, 315 S.W.3d at 296, and *Massey v. State*, 933 S.W.2d 582, 584 (Tex. Ct. App. 1996), which held that there is no culpability requirement for the age of minor victim in the sexual assault offense, TEX. PENAL CODE ANN. § 22.011 (West 1994).

145. Darryl K. Brown, *Federal Mens Rea Interpretation and the Limits of Culpability’s Relevance*, 75 LAW & CONTEMP. PROBS. 109, 111 (2012).

146. *People v. Brooks*, 648 N.E.2d 626 (Ill. App. Ct. 1995).

defendant's knowledge of a particular victim's infirmity before the criminal may suffer additional punishment because of that infirmity."¹⁴⁷ This view sharply conflicts with the Illinois code's culpability presumptions, according to which "the prescribed mental state *applies to each such element*," and "[i]f the statute does not prescribe a mental state applicable to an element," recklessness "*is applicable*."¹⁴⁸ The Ohio Supreme Court made the same point: "[C]ommitting a theft offense is not innocent conduct. Consequently, it is reasonable that the General Assembly would impose strict liability on the additional circumstance of [possessing a weapon], . . . [an] activity that enhances the seriousness of the criminal activity"¹⁴⁹ In *Ward*, an Ohio appellate court explained the strict-liability interpretation of the school-proximity drug offense by noting that it "does not criminalize otherwise innocent behavior."¹⁵⁰ The Oregon Supreme Court invoked the same idea for the same holding, noting that drug offenders, near a school or not, are "engaging in their illegal activity."¹⁵¹

The principle, more fully described, seems to be this: criminal liability must always require proof of culpability regarding whatever core elements of an offense define its wrongful nature. For theft, one must culpably *take* property, recognizing that it is property *of another*. Similarly for drug offenses, one must culpably *distribute*, aware of a drug's identity. Culpability thereby functions to ensure that actors know they are engaged in criminal rather than lawful conduct, or that they are reckless in that regard.

The critical normative point is that this proof shifts an actor's status from innocent to one justifiably eligible for punishment. Thereafter, strict liability is acceptable for further offense elements

147. *Id.* at 629 (explaining that mental-state requirements do not extend to "[e]nhancing provisions" because they only "concern consequences of the offense which make [the offense] more serious").

148. 720 ILL. COMP. STAT. ANN. 5/4-3(b) (West 2002) (emphasis added); *see also id.* § 5/4-9 (explaining that strict liability is limited to "clearly indicated" exceptions).

149. *State v. Lester*, 916 N.E.2d 1038, 1042–43 (Ohio 2009); *see also State v. Smith*, 963 A.2d 281, 289 (N.J. 2009) (providing similar reasoning for a strict-liability interpretation of the unlawful-firearm-possession offense, N.J. STAT. ANN. § 2C:39-3 (West 2005)); *State v. Maldonado*, 645 A.2d 1165, 1176 (N.J. 1994) (conceding that "differential treatment based on result and regardless of state of mind" occurs under "any strict liability statute").

150. *State v. Ward*, 637 N.E.2d 16, 18–19 (Ohio Ct. App. 1993).

151. *State v. Rutley*, 171 P.3d 361, 365 (Or. 2007).

that define a more serious offense or that increase punishment.¹⁵² On this view, culpability plays no role in those grade and sentence distinctions. Courts commonly presume this view to be the legislature's consistent principle that their interpretive choices should effectuate.¹⁵³

B. A Culpability-Based Rationale for Strict-Liability Elements

Despite the widely invoked otherwise-innocent principle and its stated disregard for allowing culpability to play any role in distinguishing offense and punishment levels, the case law reveals implicit limits, which courts breach only occasionally, on the types of offense elements to which strict liability can attach. Those breaches, I will argue, indicate that a case is wrongly decided. Largely, the offense elements to which strict liability attaches are consequences and circumstances that can be said to be *within the scope of the risk* of the unlawful activity for which culpability is required.¹⁵⁴

152. See *Brooks*, 648 N.E.2d at 629–30 (“Here the State was required to prove that defendant knew he was delivering cocaine. That conduct constituted a felony. The enhancing factor the State did not have to prove was that the defendant was aware of the proximity to public housing sites. That factor merely enhanced the offense to a more serious felony.”); *State v. Harris*, 623 N.E.2d 1240, 1244 (Ohio Ct. App. 1993) (explaining that the strict-liability element “merely enhances the sentence of the underlying drug trafficking offense” and that “[t]he *mens rea* requirement is met by the knowing sale or offer to sell a controlled substance,” which “assures that the ‘schoolyard’ provision does not ‘criminalize a broad range of apparently innocent conduct’”).

Punishment increases can be substantial. In *Denby*, the strict-liability school-zone element added a mandatory three consecutive years to a five-year sentence for the base drug offense. *State v. Denby*, 668 A.2d 682, 685 (Conn. 1995); see also CONN. GEN. STAT. ANN. § 21a-278a(b) (West 2006) (mandating that offenders “shall be imprisoned for a term of three years, which shall not be suspended and shall be in addition and consecutive to any term of imprisonment imposed for violation of section 21a-277 [authorizing up to fifteen years in prison for distributing hallucinogens or narcotics and up to seven years for other controlled drugs] or 21a-278 [setting a mandatory minimum sentence of five years—and a maximum of life in prison—for distributing more than half an ounce of cocaine and certain other drugs]”); *id.* § 21a-278a(a) (mandating a minimum sentence of two consecutive years in prison for distribution of controlled substances to a person under the age of eighteen).

153. See, e.g., *State v. Blanton*, 588 P.2d 28, 29 (Or. 1978) (en banc) (noting that “[a] policy against criminal liability without fault need not go so far as to protect a culpable defendant from an unanticipated extent of liability” but then concluding that the legislature had rejected this policy and had chosen “to require a culpable mental state with respect to each element in the definition of an offense”).

154. For an excellent theoretical development of basically this idea, see Kenneth W. Simons, *Is Strict Criminal Liability in the Grading of Offences Consistent with Retributive Desert*, 32 OXFORD J. LEGAL STUD. 445, 446 (2012), which argues that strict liability can be justified with regard to culpability, *inter alia*, when the risk as to the strict-liability element is intrinsic to the lesser crime and minimally foreseeable. This is the critical distinction from Coke's account that

If courts rarely describe the limits of their strict-liability inferences in these terms, that may be in part because the *statutes*, in an implicit sense, do so. Legislatures may leave unclear the extent of culpability requirements, but they do define the *elements* of offenses, and the result and circumstance elements to which strict liability attaches mostly have a plausible connection to the nature of the culpable conduct and the risks that such conduct might create. None of the judicial inferences of strict liability look quite as dramatically disproportionate as Coke's approval of murder liability for one who intended only unlawful chicken killing.¹⁵⁵

Consider the kinds of elements to which courts attach strict liability. Elements regarding the age of participants in drug transactions or of victims in sex-related and other assault offenses commonly lack a mental-state requirement.¹⁵⁶ But an actor can foresee that the other person *might* be under age eighteen (even if the actor in fact does not). And one is more likely to do so with activities that require interaction with the other person. Seeing another person provides at least a little information about age, and even though some teens appear a few years older than their age, the claim is not that only negligent actors make these mistakes. This is also true regarding a victim's status as an "at risk" or mentally disabled person incapable of consenting to sex. Similarly, one who takes or damages property can be aware of the possibility that the property may be worth much more than one intends or foresees; the same is true for the weight or quantity of contraband one possesses.

This account is related to the established rationale for strict liability in felony regulatory offenses, such as those governing

murder liability can rest on an actor's unlawful attempt to shoot fowl. *See supra* note 11. On the contemporary view, Coke's shooter might be strictly liable for shooting a protected species, hunting out of season, or hunting without a license. But liability for an entirely different risk and harm—murder—would not rest on strict liability today, particularly not in circumstances in which no one in the position of Coke's shooter would foresee injury to a person.

155. But for an argument that certain contemporary statutes in fact are grossly disproportionate, see HUSAK, *supra* note 6, at 45–54, 74–75, which criticizes a New Jersey drug offense, *see supra* note 137, for imposing strict homicide liability.

156. *See, e.g.*, N.J. STAT. ANN. §§ 2C:24-4(6), 2C:35-6 (West 2005) (mandating strict liability as to the minor's age for the offense of endangering the welfare of children by engaging in sexual acts and for the offense of involving minors in drug activities); *People v. Brooks*, 648 N.E.2d 626, 630 (Ill. App. Ct. 1995) ("A number of decisions of State courts, consistent with our decision here, uphold statutory provisions enhancing penalties for illegal drug activities which take place within a prescribed distance of schools even though the perpetrators are unaware of the existence of the schools."); *Carpenter*, *supra* note 23, at 385–91 (surveying and classifying statutory rape statutes).

firearms. Under that doctrine, knowledge that one is engaged in highly regulated conduct, such as possession of certain weapons, but not ordinary rifles,¹⁵⁷ displaces a need for culpability as to elements that make the conduct criminal, such as the weapon's unregistered status or absence of serial numbers.¹⁵⁸ In both settings, actors might be reasonable in not recognizing that the strict-liability element exists. Yet the element (nonregistration) bears a plausible relation to the knowing conduct (possession); it is within the scope of risks one can foresee from that conduct.

This description suggests an intelligible, if ultimately unpersuasive, normative justification for many strict-liability decisions.¹⁵⁹ Strict-liability elements are facts as to which actors, engaged in culpable conduct, oftentimes *are* negligent, and in some cases reckless. Although this is not true in every case—one who is engaged in sexual activity, for example, may have good reasons to think a particular partner is over a specified age—the *generalization* about negligence is plausible for most scenarios implicated by these sorts of strict-liability elements. If that is so, then strict-liability elements have more connection to culpability than they initially seem to. On this generalization, strict liability does not reject culpability's relevance but merely serves it imperfectly; strict liability is a clear rule with the inevitable weaknesses of clear rules—it is overinclusive for some cases and thus generates some “false positives.”¹⁶⁰ The critical supposition here is that, in many offenses, proof of offense elements, even without proof of *culpability for the strict-liability element*, nonetheless frequently allows an inference of minimal culpability—

157. *Staples v. United States*, 511 U.S. 600, 607 (1994).

158. *Id.* at 619; *People v. Stanley*, 921 N.E.2d 445, 452–54 (Ill. App. Ct. 2009); *State v. Jordan*, 733 N.E.2d 601, 606–07 (Ohio 2000).

159. For a more extensive and subtle development of a closely related argument, see Simons, *supra* note 154.

160. Professor Frederick Schauer wrote the definitive work on the nature, and virtue, of rules in this respect, developing the insight that rules that are clear and easy to administer but generate an imperfect record of outcomes across cases can be preferable to more costly, discretionary, individualized decision making. See generally FREDERICK F. SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1993); Frederick F. Schauer, *Formalism*, 97 *YALE L.J.* 509 (1988) (“At the heart of the word ‘formalism,’ in many of its numerous uses, lies the concept of decisionmaking according to *rule*. Formalism is the way in which rules achieve their ‘ruleness’: precisely by doing what is supposed to be the failing of formalism: screening off from a decisionmaker factors that a sensitive decisionmaker would otherwise take into account.”).

recklessness, or perhaps only negligence¹⁶¹—for the strict-liability element. When that is true given the nature of a particular crime, the normative rationale for strict liability improves. Strict liability, in the context of such offenses, does not signal a rejection of culpability's justifying role; instead it represents a trade-off of the costs for proof of culpability that is inferable in most such cases even without that proof requirement.

IV. WHY COURTS CIRCUMVENT CULPABILITY PRESUMPTIONS

A. *Culpability's Limited Significance*

The account just presented provides much of the most plausible explanation for why state courts in the last three to four decades have so frequently circumvented rather than given effect to the culpability presumptions that their legislatures adopted in the era of MPC-inspired criminal-law reform. Key reasons are explicit in the recurrent themes of judicial reasoning on mens rea questions. Courts simply are not persuaded by the normative premise that the MPC offered to state reformers and that the strongest codifications of its model would seem to instantiate: liability should generally and presumptively accord with individual culpability, and distinctions in offense gravity and punishment severity should rest on proof of an actor's fault as well as proof of facts. Instead, courts widely endorse a more limited conception of culpability's function, the otherwise-innocent principle or a principle of threshold culpability.¹⁶² Under that principle, culpability's only task is to separate innocent from guilty actors. Once an actor has placed himself in the latter group, liability and punishment can be adjusted without regard to fault. Courts are explicit on that much. Implicitly and with little direct acknowledgement, the body of strict-liability decisions suggests an additional rationale: strict-liability elements that adjust sanctions for those who cross the threshold of basic culpability are often of a nature that suggests an actor's culpability *even as to those elements*.

It bears emphasis that the scope-of-the-risk rationale is at best implicit, because courts' failure to engage that rationale as a limit on strict liability probably accounts for the rationale's failure to guide courts in all strict-liability decisions. Courts' *explicit* reasons for strict

161. I hold aside here the debate of whether negligence is minimally sufficient for criminal liability.

162. See *supra* note 145 and accompanying text.

liability, by contrast, are predominantly instrumental. In the vast majority of decisions discussed in this Article, courts justify strict-liability punishments—beyond the threshold-culpability rationale—by reference to the deterrence and harm-prevention functions of the offense. After proof shifts an actor’s status from innocent to criminal, judicial attention shifts to victim and public interests in safety, with no recognition of any defendant or public interest in punishment graded by culpability. If a statute’s purpose is to protect minors, any further culpability requirement is counterproductive to a policy of achieving additional protection by additional punishment. Proof requirements (of any sort) always make the state’s case harder to win and thus punishment harder to impose.¹⁶³ An Illinois court offered a typical observation on this point: “Requiring proof of defendant’s knowledge of the victim’s age would nullify much of the protection the legislature intended because a person’s age may not be readily ascertainable.”¹⁶⁴ In the offense of endangering a child’s welfare, a New Jersey court refused “to require proof that a defendant knew his conduct would impair or debauch the child’s morals, as such a construction would weaken the very protection of children that the Legislature has for decades striven to achieve.”¹⁶⁵ Similarly for drug offenses near a school: “[T]he legislature intended to protect children from drug use [R]equiring a knowing mental state with regard to the distance element would work against the obvious legislative purpose”¹⁶⁶ The category of reasons for justifying liability and punishment simply shifts to entirely different grounds. For actors at fault of a basic offense, culpability no longer enters the discussion for why a mens rea requirement might be required. Judicial focus becomes overwhelmingly utilitarian.

B. Judicial Roles and Political Consensus

Taking the search for explanations one step further, consider why courts so consistently limit themselves to instrumentalist

163. *Cf., e.g., Gorman v. People*, 19 P.3d 662, 668 (Colo. 2000) (explaining that the prosecution bears the burden of proving “all elements of the offense,” which in that case meant that the state must prove that “the person whom the defendant knowingly induced . . . to violate a law . . . was a minor at the time of the offense,” but not “that the defendant knew the person was a minor”).

164. *People v. Gramo*, 623 N.E.2d 926, 934 (Ill. App. Ct. 1993).

165. *State v. Bryant*, 15 A.3d 865, 872 (N.J. Super. Ct. App. Div. 2011) (discussing an eighteen-year-old convicted of having sex with a fourteen-year-old).

166. *State v. Rutley*, 171 P.3d 361, 365 (Or. 2007).

rationales as tools for interpreting mens rea requirements. Why doesn't culpability's role in apportioning punishment—inherent in the presumptions by which these courts are bound—resonate more often as a counterweight argument, even if not the predominate one? A likely reason is the one sketched in the Introduction: at the same time that the MPC was prompting legislatures to reform their criminal codes and adopt (in many cases) strong presumptions for mens rea requirements, legislatures were also reforming criminal law in an entirely different direction. Beginning roughly in the early 1970s, federal and state governments expanded their catalogues of criminal offenses, sharply increased sentences, reduced parole possibilities and judicial discretion in sentencing, and generally expanded the capacity of criminal-justice system, especially the prison system.¹⁶⁷ American incarceration rates for the several decades through the 1960s roughly tracked European rates, imprisoning about one hundred to 150 residents per 100,000.¹⁶⁸ Between the 1970s and the 2000s, those rates have approximately quintupled to more than 600 per 100,000—rates unprecedented in American history and in other advanced nations, and in virtually all nations of any developmental or political status.¹⁶⁹

This put state courts—at least courts in states that adopted strong MPC culpability rules—in a bind. Those new code provisions called for a substantial change in courts' analytical methods and tools for interpreting criminal statutes, and they also suggested a substantive shift away from common-law traditions of inferring strict-liability elements in many offense elements. That revision is hard enough to implement. But at the same time, everything else in legislative decision making about criminal law seemed to point in the other direction, the direction of increasing punishment and efficiently

167. See *supra* note 6 and accompanying text.

168. See, e.g., JUSTICE POL'Y INST., *THE PUNISHING DECADE: PRISON AND JAIL ESTIMATES AT THE MILLENNIUM 1* (2000) (charting the rapid rise in U.S. incarceration rates beginning in the 1970s); see also *infra* note 169.

169. See, e.g., PEW CTR. ON THE STATES, *supra* note 6, at 1 (“[A] stunning 1 in every 31 adults [in the United States], or 3.2 percent, is under some form of correctional control.”); PEW CTR. ON THE STATES, *PRISON COUNT 2010*, at 2 (2010), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/Prison_Count_2010.pdf (noting that U.S. prison populations grew 705 percent from 1970 to 2010); ROY WALMSLEY, *WORLD PRISON POPULATION LIST 1* (11th ed. 2011), available at <http://www.idcr.org.uk/wp-content/uploads/2010/09/WPPL-9-22.pdf> (comparing incarceration rates for 218 countries and noting that “[t]he United States has the highest prison population rate in the world, 743 per 100,000,” while “more than half the countries and territories (54%) have rates below 150 per 100,000”).

facilitating convictions. The last four decades have been an unlikely period during which to expect courts to increase mens rea requirements over their pre-MPC traditions, or to hold legislatures to their own, codified commitments to expanded culpability requirements.

Strict and dedicated adherence to MPC-based culpability presumptions, in short, called on courts to take a counter-political role. To infer mens rea requirements is to make crimes harder to prove. At the appellate decision-making level, it means reversing convictions. As a feature of separation of powers, it means requiring legislatures to be very clear in creating exceptions to their own rule that culpability is presumed for every offense element, which means offenses remain harder for prosecutors to prove—after courts read them to contain mens rea requirements—at least until legislatures get around to amending the statute. Most state court judges hold office by virtue of some sort of electoral process; others do so by political appointment, but apparently none, save in Rhode Island, hold life tenure like federal judges.¹⁷⁰ Taking up the task of enforcing mens rea presumptions that seem to counter every other executive- and legislative-branch signal about the criminal law policy preferences was a lot—it turns out, too much—to ask.

V. THE COSTS OF INSTRUMENTAL REASONING AND UNACKNOWLEDGED RATIONALES

If there was ever a struggle between the MPC's principle of proportionate liability and the older, more limited understanding of the "guilty mind" that must accompany a wrongful act, the proportionality idea lost. Overwhelmingly, the express rationales that govern mens rea interpretation even in MPC states are the ideas of threshold culpability and instrumental harm prevention—companion ideas that a guilty individual is eligible for any degree of punishment necessary to achieve the ends of public safety, without regard to his culpability for the offense elements that guide upward, instrumental adjustments in sanctions.

170. Sanford C. Gordon & Gregory A. Huber, *The Effect of Electoral Competitiveness on Incumbent Behavior*, 2 Q.J. POL. SCI. 107, 110 (2007) (stating that judges in thirty-nine states face periodic election); Linda Greenhouse, *New Focus on the Effects of Life Tenure*, N.Y. TIMES, Sept. 10, 2007, at A20 ("Most countries place term or age limits on their high-court judges, as do 49 states (all but Rhode Island).").

In the main, I have suggested, the pattern of strict-liability decisions fits a rationale that courts do not acknowledge: strict-liability elements tend to be those within the scope of the risks of the culpable conduct, which commonly raises an inference of culpability even as to those elements for which proof of mens rea is not required. But there is a cost to an implicit premise that courts rarely acknowledge. The cost in this setting is that courts are less likely to apply an unarticulated limit on strict liability consistently, and they are more likely to focus on instrumental functions of punishment and to reach decisions that breach the implicit scope-of-risk premise. Several examples of strict-liability decisions can be understood to violate this parameter. Three examples make the point.

Offenses that punish assault or homicide more severely when the victim was a law enforcement official provide an example. In many such cases, the officer-victim was working undercover, posing as a fellow criminal; the strategy is to prevent the offender from having any suspicion of the officer's true status.¹⁷¹ It is easy to understand the view that *knowingly* assaulting an officer is a more culpable crime than assaulting a civilian, but it is harder to see how assaulting a fellow criminal is less culpable than assaulting one whom an actor reasonably believed to be a fellow criminal but who turned out to be an undercover officer. Yet some state courts (including MPC states) impose strict liability as to a victim's official identity, even when that fact elevates noncapital murder to capital murder.¹⁷²

171. See, e.g., *United States v. Feola*, 420 U.S. 671, 674 (1975) (“[T]he evidence shows that [Defendant] and his confederates arranged for a sale of heroin to buyers who turned out to be undercover agents for the Bureau of Narcotics and Dangerous Drugs.”).

172. Compare *Ex parte Murry*, 455 So. 2d 72, 76 (Ala. 1984), (holding that knowledge of an officer's identity is required in capital murder), *superseded by* Undercover Officers Protection Act of 1987, No. 87-709, 1987 Ala. Laws 1252 (codified as amended at ALA. CODE § 13A-5-40 (LexisNexis 2005)), with *State v. Brown*, 998 P.2d 321, 327 (Wash. 2000) (“[T]he State is not required to charge and prove that a defendant at the time of the assault knew the victim was a law enforcement officer engaged in the performance of official duties.”). The difference is apparent in statutes as well; some contain explicit knowledge or negligence requirements. Compare COLO. REV. STAT. § 18-1.3-1201 (5)(c)(I) (2012) (requiring that the “defendant knew or should have known” that the victim was an officer); OHIO REV. CODE ANN. § 2929.04(A)(6) (West 2006) (same); TEX. PENAL CODE ANN. § 19.03(a)(1) (West 2011) (same); and UTAH CODE ANN. § 76-5-202(1)(m) (LexisNexis 2008 & Supp. 2012) (same), with MO. ANN. STAT. § 565.032(2)(8) (West 2012) (including no knowledge requirement), and 42 PA. CONS. STAT. ANN. § 9711(d)(1) (West 2007) (same). State courts often cite the U.S. Supreme Court's conclusion for the same federal offense that the purpose of police-protection statutes “could well be frustrated by the imposition of a strict scienter requirement.” *Feola*, 420 U.S. at 678.

Another example is homicide liability for drug sellers when a buyer subsequently dies from voluntarily ingesting the drugs.¹⁷³ One criticism stresses the attenuated causation in such cases: the drug buyer's voluntary choice to ingest drugs would normally be characterized as the primary and proximate cause of death, and thereby also as an intervening cause that bars the seller's liability for the death.¹⁷⁴ A second criticism assesses the drug seller's negligence or lack thereof. One view could be that every reasonable person knows that providing illicit drugs to another creates an undue risk of the buyer's death. It is more plausible to conclude that sellers know from experience that most drug users consume drugs without immediate fatal consequences (otherwise the customer base quickly vanishes); sellers therefore reasonably assess any buyer's risk of death from a single drug sale as minimal. On that view, the death is outside the scope of the risk that made the seller's drug-distribution conduct dangerous, and no inference of even a negligent mental state is justified.

Finally, consider the school-zone drug offenses. It is debatable whether negligence (hold aside recklessness) as to school proximity can be reliably assumed in enough cases to justify strict liability. On the one hand, one might assume that all urban residents know that it is always possible a school can be nearby even when not in view. On the other hand, city schools often are not only several streets away but are also separated by visual and pedestrian barriers like train tracks or interstate highways; even reasonable people, familiar with neighborhoods, may not foresee that a school property comes within one thousand feet. Courts occasionally concede this.¹⁷⁵ On this latter

173. See MICH. COMP. LAWS § 750.317a (2004) (imposing homicide liability for drug sellers whose buyers die from ingesting drugs); N.J. STAT. ANN. § 2C:35-9 (West 2005) (same). Notably, these strict-liability offenses are explicitly imposed by legislatures rather than inferred by courts.

174. For a much more extensive criticism of this offense as “an example of overcriminalization,” see HUSAK, *supra* note 6, at 45–54.

175. See, e.g., *United States v. Falu*, 776 F.2d 46, 49–50 (2d Cir. 1985) (conceding that one might reasonably not know one's distance from a school in “urban areas where schools are not clearly visible from points within the 1,000-foot zone or are not readily identifiable”). A survey of large-city school locations on Google Maps suggests that one can be less than one thousand feet from a school and yet separated by interstate highways, railway lines, rivers, or other pedestrian and sight barriers. A random example from Google Maps is the Philadelphia School in Philadelphia, Pennsylvania. 2501 Lombard Street, Philadelphia, PA 19146, GOOGLE MAPS, <http://maps.google.com> (search “2501 Lombard Street, Philadelphia, PA 19146”).

Skepticism about the normative legitimacy of aggravating punishment upon this fact alone increases if one views the school-distance element as an excessive prophylactic against the

view, at least, inferring an offender's negligence as to school proximity is not justified. If recklessness is the minimal culpable mental state (as most state interpretive presumptions dictate),¹⁷⁶ an inference of culpability is even weaker.

Many examples of courts' strict-liability interpretations, I have argued, rest on the premise that culpability can be assumed for certain classes of offenses in which the offender is usually negligent or reckless as to the strict-liability element, and therefore absence of a proof requirement is not as grave a breach of the correspondence principle as it seems. But for offenses such as these three examples, that assumption is less plausible. A finding of negligence and recklessness requires not merely factual determinations (for example, do reasonable people foresee this risk) but evaluative ones (for example, is the risk *substantial* and disregard of it *unjustifiable*). Reaching the evaluative conclusion about a category of offenders seems more justified for some offenses, such as those defined by the age of minors with whom an offender closely interacted, than in others, such as these three examples (undercover agents, drug deaths, and perhaps school zones). In the sorts of cases that these latter examples represent, strict liability cannot easily (or at all) be justified by the implicit scope-of-the-risk rationale. Most courts seem to recognize this, judging by how widely they rely on instrumental explanations unrelated to culpability in many decisions.¹⁷⁷ But they

underlying interest it serves, in keeping school children from exposure to drug dealers and transactions. (Typically, it does not matter whether school is in session or whether children are in sight of the offense.) For a typical legislative statement of this purpose, see TENN. CODE ANN. § 39-17-432(a) (2010).

176. *E.g.*, DEL. CODE ANN. tit. 11, § 251(b) (2007); HAW. REV. STAT. ANN. § 702-204 (LexisNexis 2007); 720 ILL. COMP. STAT. ANN. 5/4-3(b) (West 2002); KAN. STAT. ANN. § 21-5202(e) (Supp. 2011); TENN. CODE ANN. § 39-11-301(c) (2010); TEX. PENAL CODE ANN. § 6.02(c) (West 2011); UTAH CODE ANN. § 76-2-102 (LexisNexis 2008).

177. Perhaps what makes so many amenable to strict liability in this offense is not simply the assumptions about the probability of the circumstance (school proximity) but also the gravity of that circumstance and the amount of liability and punishment dependent upon it. Even if the odds of having a nearby school are long in some settings such that overlooking it is reasonable, close proximity to a school is in some sense within the nature of an urban drug sale. Put differently, the punishment triggered by its occurrence is not *grossly* out of proportion to what offenders might expect for the basic offense. In comparison, a homicide triggering murder liability from culpably shooting at fowl is much more distinct from the nature of the culpable act, and the sanction is much greater, even if in some scenarios the odds of human injury are not wildly long. Vice President Dick Cheney learned something about those odds. *See* Anne E. Kornblut, *Cheney Shoots Fellow Hunter in Mishap on a Texas Ranch*, N.Y. TIMES, Feb. 13, 2006, at A1 ("Vice President Dick Cheney accidentally shot and wounded a prominent Austin, Tex.,

also are not to be bothered by it, which may represent either the triumph of the threshold culpability principle over the proportionate liability principle or a failure by courts to recognize the limits of the scope-of-the-risk rationale, because it is only an implicit commitment which courts can easily overlook.

CONCLUSION

From this survey of case law and statutes in MPC states, it is hard to doubt the failure of the MPC's culpability principle under which subjective fault is essential to the proportionate assignment of liability and punishment. With some encouragement from legislatures that departed from the MPC in significant respects, courts in MPC states have widely interpreted their criminal statutes in accord with a more limited culpability principle, one which embraces strict-liability elements and rejects the MPC's strong commitment to proportionate punishment for actors found to be blameworthy for some aspect of an offense. Perhaps this is not surprising, given that this view long characterized pre-MPC criminal law.¹⁷⁸ Strict liability remains deeply engrained and accepted in American criminal law,¹⁷⁹ and probably in public opinion.¹⁸⁰ It shares something in common with the larger and

lawyer on Saturday while the two men were quail hunting in South Texas, firing a shotgun at the man while trying to aim for a bird . . .”).

178. See generally, e.g., Jeremy Horder, *Two Histories and Four Hidden Principles of Mens Rea*, 113 L.Q. REV. 95 (1997) (describing the history of mens rea doctrine as inconsistent with and more complicated than the correspondence principle that scholars widely endorsed in the mid-twentieth century).

179. Scholars have likewise noted that for English criminal law, the correspondence principle is an aspirational rather than descriptive claim. See NICOLA LACEY, CELIA WELL & OLIVER QUICK, *RECONSTRUCTING CRIMINAL LAW* 60–61 (3d ed. 2003) (noting prominent statutory exceptions to the correspondence principle); Jeremy Horder, *A Critique of the Correspondence Principle of Criminal Law*, 1995 CRIM. L. REV. 759, 759 (explaining that the correspondence principle “remains very much an ideal, if anything, rather than an accurate descriptive generalisation”). See generally Horder, *supra* note 178 (offering a historical account of English criminal law and finding no tradition of the correspondence principle).

180. Professor Paul Robinson, the leading American scholar of criminal codes, has tested public lay views on comparisons among the grading levels of various offenses, many of which were defined by consequences (for example, the value of property taken in theft or injury resulting from assault). The data suggest that lay judgments about comparative offense severity often differ from those codified in criminal statutes, although grading views turned on results and circumstances as well as state of mind, not always with the former limited by the latter. Robinson et al., *supra* note 112, at 714–15. Robinson and his coauthors argue that correspondence between majoritarian judgments and criminal law values is important to law's legitimacy and efficacy. See *id.* at 715 (“Assessments of proper offense grade are classic expressions of societal values, which are properly set by the most democratic branch of government and the one charged with collectively making such value judgments—the

longstanding problem of “moral luck” that characterizes even core criminal offenses, some of which hold an actor responsible for events beyond his control.¹⁸¹ Evidence for this view lies not only in mens rea requirements but in sentencing statutes and guidelines as well, which adjust sentences based on results and circumstances without regard to a defendant’s intent or awareness.¹⁸² If broader sentiment and legislative policy do not suggest a consistent endorsement of a strong role for culpability in punishment allocation, it is easier to understand why courts have not moved to strengthen culpability requirements despite the seeming commands of presumptions in many state codes.

legislature.”); *id.* at 717 n.3 (“[N]on-uniformity of sentences [due to reliance on judicial discretion instead of legislative command] may . . . negatively affect compliance with the law by reducing the public perception of the legal system as legitimate”); *id.* at 717 (“[I]mproper grading of offenses can lead to inefficient spending.”).

181. See Dana K. Nelkin, *Moral Luck*, STANFORD ENCYC. OF PHILOSOPHY (June 3, 2008), <http://plato.stanford.edu/archives/fall2008/entries/moral-luck> (“Moral luck occurs when an agent can be correctly treated as an object of moral judgment despite the fact that a significant aspect of what she is assessed for depends on factors beyond her control The problem of moral luck arises because we seem to be committed to the general principle that we are morally assessable only to the extent that what we are assessed for depends on factors under our control. . . . At the same time, when it comes to countless particular cases, we morally assess agents for things that depend on factors that are not in their control. . . . [I]f we accept the Control Principle in unqualified form, and deny the existence of moral circumstantial, character, and causal luck, then it seems that no actual punishment could be justified on the basis of moral desert.”); see also GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 473–74 (1978) (calling the role that results should play in offense definitions a “deep, unresolved issue in criminal liability”). For a comprehensive discussion of moral luck theory, see generally BERNARD WILLIAMS, *MORAL LUCK* (1981).

182. See, e.g., MINN. SENTENCING GUIDELINES & COMMENTARY § 2.B.503 (2012) (noting offense severity distinctions based on drug weight); *id.* § 2.G (incorporating offense severity distinctions based on consequences in an Offense Severity Reference Table, *id.* § 5.A); OR. ADMIN. R. 213-019-0008 (2004) (outlining drug offense aggravators); 204 PA. CODE §§ 303.9, 303.10 (2012) (including offense results and circumstances as sentence-enhancement criteria).